



The New ASEAN Intergovernmental Commission on Human Rights: Toothless Tiger or Tentative First Step?

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I S S U E S

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S U M M A R Y In late 2008 the Association of Southeast Asian Nations (ASEAN) committed to creating a human rights body, which emerged as the Intergovernmental Commission on Human Rights (ICHR), the terms of reference (TOR) for which have since been adopted. Although the TOR for the commission currently outlines a primarily advisory rather than an enforcement role, the very existence of the ICHR has the potential to act as a trigger to further discussion on human rights issues in member states and open avenues for further action. To take maximum advantage of this opportunity to further the human rights agenda in ASEAN member states, it is essential that critical early decisions are made carefully so as to leave the most latitude for future action. While some observers are concerned that the ICHR lacks teeth, the fact that all ten ASEAN governments have agreed to implement a human rights commission is remarkable and is an essential first step toward ASEAN's stated goal of respecting and protecting human rights.

Introduction

The Association of Southeast Asian Nations (ASEAN) has reached a historic moment in its journey towards establishing a regional human rights mechanism. After fifteen years of discussion, dialogue, and debate about its utility and significance for Southeast Asia, ASEAN member states have committed themselves to establishing the Intergovernmental Commission on Human Rights (ICHR).¹ The secretary general of ASEAN, Surin Pitsuwan, has hailed the ICHR as an important step in implementing the letter and spirit of the newly adopted ASEAN Charter, as well as in paving the way for the growth of democracy and human rights in the region.²

Yet, just how significant a step this is for the people of Southeast Asia remains open to debate. Disappointingly, the terms of reference (TOR) for the Intergovernmental Commission on Human Rights mandate that it focus predominantly on the promotion of human rights, and limits its role to an advisory body for the ASEAN Secretariat and member states, rather than giving the commission independent enforcement powers. While several key players see the TOR as a welcome sign that human rights are now squarely part of the ASEAN agenda, there has also been some backlash from leading advocates who had hoped for a more robust and independent mechanism for achieving human rights. Compounding the concerns surrounding this lack of independence is the fact that the terms of reference emphasize a consensus-based approach to any decision-making authority invested in the intergovernmental commission. Given the gamut of the political spectrum represented by ASEAN's ten member governments, reaching agreement on how to approach *any* human rights issue is far from guaranteed. As one human rights advocate put it in a recent statement to the press, "I could never see how this group could ever agree on anything with teeth."³

At this nascent stage in its development, and despite these early criticisms, it is worth considering some of the initial challenges the Intergovernmental Commission on Human Rights is likely to face, and how these challenges might be overcome. Member states'

obligations under the ASEAN Charter and the ICHR's TOR also should be considered in the context of ASEAN's historical trajectory, including its promises and pitfalls, that has brought these governments to the establishment of this new commission. There are different roles and functions that the ICHR might consider, now and in the future. And while the ICHR is likely to serve primarily as an advisory, coordinating, and consultative body, it can nevertheless have an important catalytic effect on human rights advocacy and reform in Southeast Asia. As such, both civil society activists and reform-minded government ministers should apply a pragmatic approach to the ICHR, utilizing it to promote further strategic coordination on human rights issues, rather than simply mourning its various shortfalls.

Building Consensus: 'Constructive Engagement' and Human Rights

The Association of Southeast Asian Nations has traditionally adopted a policy of "constructive engagement" when addressing the human rights practices of its member states. Singaporean law professor Li-ann Thio points out that this policy "seeks not to embarrass the object of engagement through isolation or condemnation," but, rather, to ensure that "change is induced through peer pressure."⁴ The action (and inaction) of ASEAN's constructive engagement policy has generally been met with criticism from civil society groups, many of whom view ASEAN's human rights stance with mistrust. These groups argue that the policy has been used to allow the association and its various subcommittees to ignore pervasive human rights abuses being committed against the peoples it purports to represent. Similarly, several non-ASEAN governments have also criticized the approach as being largely weak and ineffectual, particularly in relation to ASEAN's position on the military regime in Burma.⁵

Such criticism, though, implies that ASEAN is a monolithic whole, rather than acknowledging the complex, multifaceted relationships that exist among its parts. Additionally, the criticism fails to adequately weigh the historical context through which ASEAN

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emerged to become the ten-member political entity it is today. Until the mid-1990s, ASEAN comprised only its five original member countries (Indonesia, Malaysia, the Philippines, Singapore, and Thailand) and Brunei Darussalam. These nations were largely bound by their desire to promote regional economic growth and prosperity, rather than by any shared governance values. Political scientist Maria-Gabriela Manea notes that “the interests and preferences of ASEAN member states were derived primarily from a corporate need to pursue further economic development as a means of increasing national autonomy and greater international status,” rather than from a human rights need.⁶

While there is some evidence to suggest that ASEAN has taken a uniform approach to human rights accountability when faced with a common opponent, it would be wrong to assume from this alone that ASEAN member states have a uniform approach to interpreting human rights norms. Indonesia and the Philippines, for instance, have largely been seen as having the most vocal and proactive governments when it comes to implementing human rights legislation, but this has not necessarily translated into a widespread respect for human rights norms. The Vietnamese government prefers to refer to “human security,” linking human rights to economic development, and Laotian representatives in ASEAN meetings tend to speak about human rights exclusively in relation to gender issues.

A recent study of human rights accountability mechanisms in Malaysia and Singapore shows that the political dynamics in each country have greatly impacted governmental decisions to promote human rights, let alone enforce them. Intra-elite conflicts in Malaysia have given rise to the institutionalization of national human rights as a bastion against the consolidation of state power, and have given greater space for nongovernmental organizations to criticize the government’s track record on human rights issues. Conversely, the uniformity with which Singapore’s political elite governs has enabled its ruling People’s Action Party to stifle discussions about the government’s human rights record by espousing the virtues of its prevailing meritocracy and its internal checks

on abuses. Senior government officials have resisted the influence of what they argue are human rights “fanatics” who “assume that when they define what are human rights, that decision is the decision of the rest of humanity.”⁷

The constructive engagement stance has traditionally been used to accommodate these differing agendas. Yet ratification of the ASEAN Charter in late 2008 and implementation of the new ICHR in 2009 suggest that a new litmus test for this policy is emerging. The charter can be thought of as a coming-of-age, conferring legal personality on ASEAN and binding member states to an agreed set of objectives. Alongside the commitment to creating an ASEAN human rights body under Article 14, the charter specifically identifies “respect for and protection of human rights” as one of its core purposes under Article 1 and “respect for fundamental freedoms, the promotion and protection of human rights, and the promotion and protection of social justice” as a core principle under Article 2.⁸

However, in addition to creating a binding obligation on member states to protect and promote human rights, Article 2 of the charter contains a non-interference clause.⁹ Much like the United Nations Charter, this clause prohibits member states from intervening in the domestic affairs of other member states. Yet, unlike the United Nations Charter, which creates an exception to the principle when the enforcement powers of the Security Council are invoked, the ASEAN Charter does not clearly define how such a provision would affect the establishment of inter-regional committees or groups, including the Intergovernmental Commission on Human Rights. There is no explicit attempt to allow for intervention or interference, for instance, even at the political level, when gross human rights violations—such as torture, forced labor, or extermination—are committed.

The inclusion of the noninterference clause bifurcates the object and purpose of the ASEAN Charter, evincing the divisions and schisms that exist among member states, as well as their common understanding of human rights. Similarly, the terms of reference for the ICHR adopt this bifurcated approach in outlining its principles and purpose, and add further

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ambiguity as to whether agreement on its object and purpose has been reached.

Yet ambiguity can be as much a friend as a foe when interpreting legal instruments. One of the core functions of the ICHR is “to develop an ASEAN Human Rights Declaration with a view to establishing a framework for human rights cooperation” through various ASEAN conventions and human rights instruments.¹⁰ Although the declaration is a political statement that does not have any binding authority, when combined with the charter and the TOR, it may provide ICHR members with an important avenue for advocating within the ASEAN Secretariat and its various committees that they adopt a more robust stance on human rights violations—particularly toward internal armed conflicts in the region.

**Establishing Complementarity and Compliance:
The Need for an ASEAN Convention on Human Rights**

A secondary issue that the ASEAN ICHR will need to confront is how best to ensure that its work complements, rather than duplicates, both the work of international human rights treaty-monitoring bodies and national human rights institutions already established (or being considered) by ASEAN member states. Similarly, the ICHR should complement the efforts of nongovernmental organizations that are already actively promoting and protecting human rights in the region, rather than diminishing those efforts.

As yet, the only two conventions that have been ratified by all ten ASEAN member states are the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women. Even then, four ASEAN countries have entered reservations to these conventions, which have significantly impacted their applicability within the states concerned. Singapore, for instance, has made it clear that accession to these conventions “does not imply the acceptance of obligations going beyond the limits prescribed by its domestic constitution,” whereas Malaysia and Brunei Darussalam have made their obligations secondary

to both Islamic and domestic law.¹¹ Although other member states have not entered reservations, this does not mean that they have a greater commitment toward implementing legislation to enforce the provisions of the treaties. As with other issues relating to human rights, there still appears to be no common position on reservations in human rights treaties. Each state deals with the issue on its own terms.

While the terms of reference for the ASEAN ICHR envisage that it will have an external monitoring and reporting function, this role seems somewhat limited. While the ICHR has been given “overarching” powers to protect and promote human rights within the ASEAN community, this responsibility is predominantly defined as encouraging intergovernmental coordination and collaboration. The ICHR is tasked with “building synergy and coherence in ASEAN’s promotion and protection of human rights,” while, at the same time, adopting an evolutionary approach to the development of human rights norms and standards. The dialogue, however, should include the views of “civil society and other stakeholders,” providing some room for the ICHR to act as an intermediary between advocacy groups and governments.¹²

What clearly needs to be determined within the first few years of the ICHR’s establishment is what the legal basis for its agenda will be. Will the ICHR be limited to coordinating the promotion and protection of human rights only in the context of the treaties and instruments that all ten ASEAN members have ratified? If so, how will the issue of reservations be dealt with? If the mandate of the ICHR extends beyond this, to more general human rights concerns, how will these issues be identified and agreed upon, and what will be the basis for ensuring greater coordination and compliance among states?

Although not currently anticipated by the TOR, one way to resolve these issues would be for the ICHR to establish a regional human rights convention, which would clearly delineate a framework for human rights promotion and protection that is feasible, realistic, and agreed upon by member states. This step would also be in keeping with the historical trend of regional human rights bodies being created throughout the world. Regional commissions and courts in Europe,

Africa, and the Americas have all established legally binding instruments for this purpose. Additionally, the League of Arab States has most recently ratified the Arab Charter on Human Rights, an instrument that may provide a useful framework for comparison given the need to consider the interaction between human rights and Islamic law in several ASEAN countries.

There has been some resistance to an ASEAN human rights convention from civil society groups, which believe that focusing the ICHR's energies on convention drafting could provoke a return to the "Asian values" debate at the ministerial level. During the TOR drafting stage, for example, the minister for Laos tried to return to this debate, much to the chagrin of civil society. This debate, already well-known to those working within the field of human rights in Asia, can broadly be summarized as the argument that human rights are inherently "Western" and individualistic in origin, and, therefore, simply not suited to Asian societies, where communitarian beliefs and communal actions are prized. While it is undoubtedly correct to say that the human rights discourse does have its roots in Western moral and political philosophy, the debate has tended to oversimplify the position from both sides. As has already been discussed, a panoply of perspectives concerning human rights can be evidenced within Southeast Asia alone.

In addition, Western values are not inherently individualistic, as obligations to the family, community, and society are priorities for Western governments as much as they are for Asian ones. As human rights expert Anthony Langlois usefully asserts, the point is not to reject the notion of human rights because they derive their legitimacy from a Western tradition, but to reconceptualize those rights as "an international political-legal tool developed through an international political process agreed on the importance of justice and its expression in social and political institutions."¹³ In other words, the issue of "human rights becomes less threatening if it is perceived as a proposal for how people of different cultures and backgrounds might live together, as opposed to a doctrine or ideology forced onto people in an authoritarian manner."¹⁴ Further focus on the African Charter on Human and

Regional Human Rights Systems

African Commission and Court of Human and Peoples' Rights. The African Commission of Human and Peoples' Rights is a quasi-judicial body tasked with promoting and protecting human rights and collective (peoples') rights throughout the African continent, as well as interpreting the African Charter on Human and Peoples' Rights. It was followed by an African Court on Human and Peoples' Rights that came into being on January 25, 2004, with the ratification by 15 member states of the Protocol to the African Charter on Human and Peoples' Rights. The court is located in Arusha, Tanzania.

European Court of Human Rights. The oldest regional human rights system, the European Court of Human Rights was established by the Council of Europe in the immediate aftermath of World War II. The admissibility of applications to the court was originally assessed by the European Commission of Human Rights, but this was replaced by committees within the court in the late 1990s. The court is mandated to apply the European Convention on Human Rights, which was ratified in 1954. The seat of the court is in Strasbourg, France.

Inter-American Court of Human Rights. The inter-American system of human rights promotion and protection was founded by the Organization of American States in Bogota, Colombia, in 1948. The Inter-American Commission on Human Rights was created in 1959 and held its first session in 1960. It receives independent applications to review human rights situations, as well as observes the general human rights situation in member states. It is complemented by the Inter-American Court of Human Rights, which held its first hearing on June 29–30, 1979. Its seat is in Costa Rica.

League of Arab States: Human Rights Charter. The Council of the League of Arab States created the Arabic Commission for Human Rights in 1968, whose main function was to promote human rights. It has no binding authority on Arab states. The commission subsequently adopted an Arab Charter on Human Rights in 1994, which was superseded by a new charter in 2004. It has been in force since March 15, 2008.

Peoples' Rights and the Arab Charter on Human Rights may again be useful references to consider, given that both treaties incorporate non-Western perspectives, while endeavoring to forge a path for human rights promotion and protection.

Drafting a convention would provide a firm legal basis upon which the ICHR could ground its authority

In keeping with ASEAN's step-by-step approach, drafting a convention would provide a firm legal basis upon which the ICHR could ground its authority, and would ultimately provide greater scope for it to make recommendations to member states. This, in turn, would provide a solid foundation for civil society to call for governmental action in the wake of human rights violations, further strengthening its position vis-à-vis member states and the Association of Southeast Asian Nations.

Creating a Catalyst for Action: Leverage for Further Reform

While nongovernmental organizations may have hoped that the Intergovernmental Commission on Human Rights would be able to revolutionize ASEAN's stance toward human rights, this seems out of kilter with the association's evolutionary approach to achieving its overall mission. In this regard, the significance of the developments of the past three years should not be underestimated; whether they like it or not, all ten member states have committed to an ongoing integration of human rights into the ASEAN agenda. While the ICHR may have fairly limited authority to ensure member states comply with human rights norms, the commission's very existence has the potential to provide civil society groups and independent advocates with an important forum to lobby for their human rights concerns.

In this regard, the experience of the inter-American system may prove a useful and instructive example. Like Southeast Asia, the rule of law is still solidifying in Latin America. In certain countries, members of the military or political parties responsible for massive, state-sponsored violations continue to hold influential positions in government. A recent study of the enforceability of decisions of the Inter-American Court of Human Rights revealed that a mere 11.5 percent of orders issued by the court were fully complied with. Yet, at the same time, the decisions of the court have become an important instrument for nongovernmental organizations and reform-minded independent actors lobbying the governments of the region.¹⁵

Similarly, the ASEAN ICHR has the potential to issue statements and findings that may prove to be important catalysts for reform. While the dialogue-based, evolutionary approach adopted in the TOR will likely limit the role of the ICHR to having only persuasive (rather than binding) authority on ASEAN governments, it has the potential to trigger further discussion on human rights issues, as well as open avenues for further action. The key will be to ensure that the ICHR does not obfuscate or diminish the positions of reform-minded individuals but, rather, strengthens them.

To take a recent example, ASEAN Secretary General Surin Pitsuwan made statements on behalf of the association in July 2009 criticizing the Burmese government's actions against pro-democracy freedom fighter Aung San Suu Kyii. At the time, Daw Suu Kyii faced trial for allegedly violating the terms of her house arrest by allowing an American to stay in her house after he swam across a lake to her home. Pitsuwan's stance was unusually strong for ASEAN, and he has since been criticized in some circles for his remarks. The question then becomes this: would statements like Pitsuwan's be permissible if an ICHR representative from the government being criticized was given overall authority to coordinate ASEAN's approach to human rights issues?

If the ICHR is responsible for ensuring that a coherent diplomatic strategy is adopted within the ASEAN Secretariat, it may have the unwanted effect of weakening the statements of more provocative ministers, rather than strengthening them. This would be a step in the wrong direction for ASEAN, and should be avoided at all costs. As a matter of concern, the terms of reference state that representatives of the ICHR are accountable to their appointing governments, rather than to the ICHR itself or ASEAN, leaving no room for representatives to act independently. This is further reiterated in the provisions regarding the representatives' responsibilities, which only provide for them to act impartially (as opposed to independently and impartially).

One way to circumvent the obstacle this creates would be for representatives of the Intergovernmental Commission on Human Rights to insist that the

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commission's annual reports and minutes of meetings be made public and accessible. This would seem to be in keeping with the ICHR's mandate to enhance public awareness of human rights. Transparency throughout the process, while not changing outcomes directly, would still potentially have a strong catalytic effect, and may stimulate domestic discussions about the positions taken by individual representatives at the regional level. This, in and of itself, could provide an important avenue for reform.

Conclusion

ASEAN is on the precipice of an exciting new chapter in the implementation of its human rights agenda. Despite the shortcomings facing the current structure of the newly created Intergovernmental Commission on Human Rights, it is a step in the right direction—a fact that has been either openly or tacitly accepted by many civil society advocates. While many activists and activist-minded government ministers had hoped that much more would come out of the TOR drafting process for the ICHR, the fact that all ten ASEAN governments have agreed to implement even the most rudimentary of human rights commissions is more progress than many would have expected

even five years ago. At this early stage of the ICHR's development, the goal should be to use the parameters set for discussing human rights reform to their full advantage, rather than to condemn those parameters and jeopardize future discussion and progress.

The focus now must be on ensuring that the Intergovernmental Commission on Human Rights takes positive steps during its first five years to create a robust structure for dialogue and engagement. At the very least, this will require ICHR representatives to draft some form of binding legal instrument through which member states commit to a particular human rights agenda, even if such an instrument does not give the ICHR enforcement powers. Defining the parameters of the conversation about human rights—and, indeed, reaching consensus on what human rights actually mean for ASEAN members—are important steps that the ICHR can achieve. The road ahead is long, and the journey undoubtedly slow, before human rights norms are fully agreed upon and established in Southeast Asia. But to overburden states at this early stage of the ICHR's development seems counterproductive and somewhat perverse, given how far ASEAN has already come. Instead, progress, however small, should be encouraged and fostered, and hope sustained, even amidst adversity.

*ICHR can define
the parameters
of the conversation
about human rights*

Notes

¹ The terms of reference (TOR) for the ASEAN ICHR were adopted at the 42nd ASEAN Foreign Ministers Meeting in July 2009, and will be formally established at the October 2009 Summit, both held in Phuket, Thailand. The ASEAN member states are Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Burma (Myanmar), Philippines, Singapore, Thailand, and Vietnam.

² ASEAN Secretariat, "Another Step Forward for Regional Human Rights Cooperation," news release, 20 July 2009, available online at www.aseansec.org/4919.htm (Last accessed 27 July 2009).

³ Brad Adams, Asia Director of Human Rights Watch, as quoted in "Criticism of Asian Rights Body Rebuffed," by Tim Johnston, *Financial Times*, 20 July 2009.

⁴ Li-ann Thio, "Implementing Human Rights in ASEAN Countries: Promises to Keep and Miles to Go before I sleep," *Yale Human Rights and Development Law Journal* 2, no. 1 (1999): 45.

⁵ See for example the statements of U.S. Secretary of State Hillary Rodham Clinton during the 42nd ASEAN Ministerial Meeting, 17–24 July 2009.

⁶ Maria-Gabriela Manea, "Human Rights and the Inter-regional Dialogue between Asia and Europe: ASEAN-EU Relations and the ASEM," *The Pacific Review* 21, issue 3 (2008): 376.

⁷ Garry Rodan, "Accountability and Authoritarianism: Human Rights in Malaysia and Singapore," *Journal of Contemporary Asia* 39, issue 2 (2009): 197.

⁸ Charter of the Association of Southeast Asian Nations, ratified by the Association of Southeast Asian Nations on 30 November 2008.

⁹ *Ibid.*, Article 2(e).

¹⁰ See "Terms of Reference of ASEAN Intergovernmental Commission on Human Rights," Article 4.2, available online at www.aseansec.org. (Last accessed 27 July 2009). (Hereafter, TOR).

¹¹ Suzannah Linton, "ASEAN States, Their Reservation to Human Rights Treaties and the Proposed Commission on Women and Children," *Human Rights Quarterly* 30, no. 2 (2008): 440.

¹² TOR, Articles 4, 6.8, and 6.9.

¹³ Anthony Langlois, *The Politics of Justice and Human Rights: Southeast Asia and Universalist Theory* (Cambridge: Cambridge University Press, 2001), 101.

¹⁴ *Ibid.*, 102.

¹⁵ James L. Cavallaro and Stephanie Erin Brewer, "Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court," *American Journal of International Law* 102 (2008): 791.

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