

People's Empowerment

มูลนิธิศักยภาพชุมชน

Empowering People for a Strong Civil Society

Background Paper

ASEAN Human Rights Body:

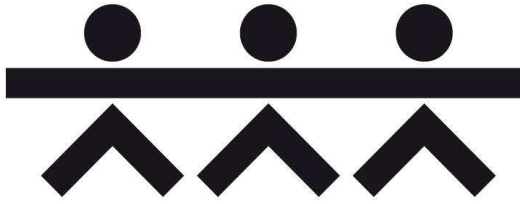
To Serve & Protect

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Introduction

Forty years after its establishment, the Association of South East Asian Nations (ASEAN) is about to constitute a functioning and binding Charter. The ASEAN Charter sets forth the core principles guiding Southeast Asia into the 21st century, establishing the structures, relationships, and objectives of the various bodies and mechanisms that unite this complex regional association. Once the Charter enters into force, it will bind all member states to the principles and values set forth.

Human rights, in its various forms and wording, hold a central place in the ASEAN Charter. In addition to establishing the norms and objectives guiding ASEAN policies, the Charter also sets forth the mechanism, specifically calling for the establishment of a “human rights body”.¹ A significant achievement in itself, ASEAN must be held to act on this promise, providing the people of Southeast Asia with a robust human rights body.

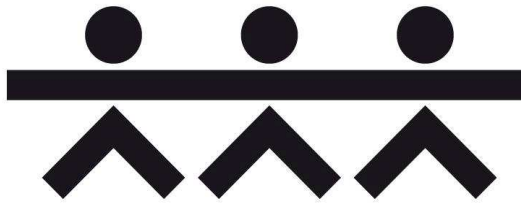
Recognizing the need for civil society input in the establishment of the ASEAN human rights body, the Asian Forum for Human Rights and Development (FORUM-ASIA) encouraged local civil society actors throughout Southeast Asia to conduct consultation sessions on this body. These sessions served as a forum for domestic actors to learn about the processes taking place at the regional ASEAN level, and to highlight key elements which they wish to see in a future ASEAN human rights body. People's Empowerment coordinated this effort in Thailand, which served as the catalyst for the drafting of this paper.

Civil society across Southeast Asia is now at a critical crossroads for the future of human rights, as the terms of reference and mandate of the ASEAN human rights body area currently being devised and formulated. This paper sets out to establish both the international norms and grassroots desires that must guide the establishment of the ASEAN human rights body. The paper begins with a historic review of ASEAN and the processes that led up to the drafting of the ASEAN Charter. We then continue to elaborate the specific developments that have occurred with respect to the ASEAN human rights body up until July 2008.

In the next section we highlight key elements whose inclusion is critical for the successful operation of the ASEAN human rights body. These include input from both international standards and from domestic consultations carried out with various Thai civil society members. These are presented briefly, highlighting core concerns for policy makers to address later on. These are summarized in the final section into clear recommendations for all parties involved in the process of creating the ASEAN human rights body.

This paper illuminates issues that have yet to be fully addressed by ASEAN, escalating the concerns and aspirations from the community level upwards. We hope it serves all those interested in the future success of the ASEAN human rights body and the realization of human rights across Southeast Asia.

¹ ASEAN Secretariat (2007), *Charter of the Association of Southeast Asian Nations* (hereafter ‘ASEAN Charter’), Art. 14. Available online at (accessed July 2008): <http://www.aseansec.org/21069.pdf>.



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1.1

ASEAN & the ASEAN Charter

The Association of South East Asian Nations is a grouping of ten sovereign nation-states: Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Burma (Myanmar), Philippines, Singapore, Thailand and Vietnam. ASEAN serves as a forum for representatives of member-states to meet and discuss regional issues and develop joint regional policies for the region.²

The group was founded in August 1967 by Indonesia, Malaysia, Philippines, Singapore and Thailand. Its official aims and purposes then included the promotion of regional peace and stability on the one hand, and the acceleration of economic growth, social progress and cultural development on the other.³ Since ASEAN members hold a spectrum of political, legal, and cultural norms, ASEAN has adopted non-interference in the internal affairs of member-states and consensus decision making as key guiding principles in its actions. Combined, these two principles have stood as central obstructions to integrating and enforcing human rights norms among ASEAN member-states.

In November 2004, as part of the **Vientiane Action Programme (VAP)**, the challenge of creating an ASEAN Charter was first put forth. The VAP stated that “We recognise the need to strengthen ASEAN and shall work towards the development of an ASEAN Charter.”⁴ The following December, ASEAN leaders issued the **Kuala Lumpur Declaration on the Establishment of the ASEAN Charter**, wherein they committed themselves to establishing a Charter “to serve as a legal and institutional framework of ASEAN to support the realization of its goals and objectives.”⁵ This declaration inter alia stated that the Charter would reaffirm the “Promotion of democracy, human rights and obligations, transparency and good governance and strengthening democratic institutions”⁶.

The ASEAN Charter serves two functions. First, it gives ASEAN a legal personality under international law, which will facilitate in its engagement with external organizations and non-member states. Second, the Charter defines the functions and areas of competence of key ASEAN bodies and their relationship with one another in the overall ASEAN structure.⁷

The ASEAN Charter was signed by the leaders of all ten ASEAN member states during the 13th ASEAN Summit in Singapore in November 2007.⁸ The ASEAN Charter now awaits ratification by each of the individual ASEAN member-states. While ASEAN hopes that the instruments of ratification of all ten member states will be deposited with the Secretary-General of ASEAN within one year of signature (the

² ASEAN, *Civil Society and Human Rights: Knowing the Basics*, Asian Forum for Human Rights and Development (Forum Asia), November 2007, section I - ASEAN in General.

³ Ibid.

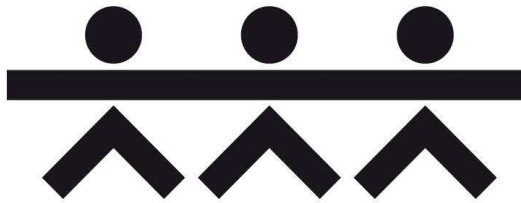
⁴ ASEAN Secretariat (2004), *Vientiane Action Programme*, pg.4, available online at (accessed July 2008): <http://www.aseansec.org/VAP-10th%20ASEAN%20Summit.pdf>.

⁵ ASEAN Secretariat (2005), *Kuala Lumpur Declaration on the Establishment of the ASEAN Charter*, available online at (accessed July 2008): <http://www.aseansec.org/18030.htm>.

⁶ Ibid.

⁷ ASEAN, *Civil Society and Human Rights: Knowing the Basics*, Section I-5.

⁸ Ibid.



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Charter will enter into force on the thirtieth day following the deposit of the tenth instrument of ratification), it is by no means a fore-gone conclusion.⁹ At present seven member states have fully ratified the ASEAN Charter: Singapore, Brunei Darussalam, Malaysia, Lao PDR, Cambodia, Burma (Myanmar) and Vietnam.

1.2

ASEAN Charter Article 14. and the Human Rights Body

The ASEAN Charter represents a significant step forward in the integration of many positive trends into the ASEAN community. These include alleviation of poverty (Art. 1.6), strengthening of democracy and good governance (Art. 1.7), promotion of sustainable development (Art. 1.9), and support of a “people oriented ASEAN in which all sectors of society are encouraged to participate in, and benefit from, the process of ASEAN integration and community building” (Art. 1.13). The repeated mention of human rights in an official ASEAN document, is perhaps the most significant development put forward by the Charter.

Human rights are explicitly mentioned five times throughout the Charter, and in various other forms throughout the document.¹⁰ It may well be understood that the promotion and protection of human rights are a central part of the ASEAN community as it moves forward into the 21st century. Well beyond symbolic mention alone, any violation of rights and freedoms set forth would constitute a breach of the Charter by member states.

The framers of the Charter did not suffice with the repeated and explicit mention of human rights. They decided on the creation of an ASEAN human rights body, set forth in Art. 14 of the Charter, declaring that “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.**”¹¹

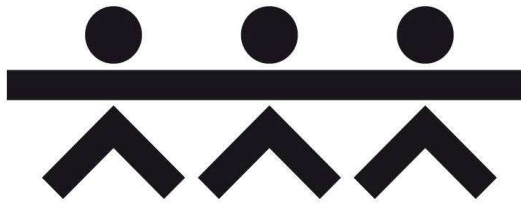
While the call for an ASEAN human rights body is indeed a positive development, the Charter fails to provide details regarding the powers, mandate, or character of such a body, not to mention a time-frame for its establishment. In March 2007, at the ASEAN Ministerial Meeting Retreat in Siem Reap Cambodia, the ASEAN Foreign Ministers decided that a High Level Task Force (HLTF) draft an enabling provision in the Charter to create a Human Rights Commission as an organ of ASEAN, and requested that the HLTF draw up its terms of reference (ToR). This was followed by the foreign ministers of ASEAN agreeing on the creation of a regional human rights “body”, during the 40th ASEAN Ministerial Meeting held in Manila in late July 2007.

In February 2008, the ASEAN Foreign Ministers decided to establish a High Level Panel (HLP) to draft the terms of reference for the future ASEAN human rights body. The HLP held its first meeting during the 41st

⁹ During the 13th ASEAN Summit, President Gloria Arroyo of the Philippines suggested that the Philippine Congress will delay ratification the ASEAN Charter until Burma commits itself to restoring democracy, protecting human rights, and releasing Aung San Suu Kyi. BBC World News, *Burma warned over Asean charter*, available online at (accessed July 2008): <http://news.bbc.co.uk/go/pr/fr/-/2/hi/asia-pacific/7101239.stm>

¹⁰ The term “human rights” appears in the preamble, and again in Art. 1.7, Art. 2.2(i), Art. 14.1, and Art. 14.2, in *ASEAN Charter*.

¹¹ ASEAN Secretariat (2007), *Charter of the Association of Southeast Asian Nations*, Art. 14.1.



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ASEAN Ministerial Meeting in Singapore during July 2008. The Chairman of the HLP, Mr Bilahari Kausikan, said: "Our discussions were held in a cordial and cooperative spirit. We aim to achieve a result that is realistic, balanced and credible, and which would be in the best collective interest of ASEAN. We all agreed that we are not starting on a blank page. ASEAN has a history of discussing human rights and the High Level Task Force (HLTF) on the ASEAN Charter had already achieved a fair degree of consensus on several issues. We will build upon the work of the HLTF, as well as ASEAN's previous agreements and declarations on human rights."¹² Currently, we await the first draft proposal of the ToR, which is most likely to be presented at the December 2008 ASEAN Summit in Thailand.¹³

1.3

A Human Rights Body

As mentioned, the ASEAN Charter fails to provide a clear idea of the exact character of the human rights body. This leaves a spectrum of possibilities and models for ASEAN to pursue.¹⁴ Yet whatever form this body takes, it must concede to some basic principles. This paper suggests that for an ASEAN human rights body to be effective it must meet both international standards and the aspirations of ASEAN peoples.

The Office of the United Nations High Commissioner for Human Rights has stated that there are six "effectiveness factors" generally applicable to all national human rights institutions. For our purposes, these may be adopted to regional human rights bodies as well. The "effectiveness factors" are: independence, defined jurisdiction, adequate powers, accessibility, cooperation, and accountability.¹⁵ As a more detailed exploration of these elements is beyond the scope of this paper, it is sufficient to conclude the following points:¹⁶

1. **Independence:** To succeed, the ASEAN human rights body must be able to act independently of political pressures. A successful ASEAN human rights body must maintain political independence and the ability to actively pursue human rights issues among member states.
2. **Adequate powers:** The ASEAN human rights body must possess the resources, authority, and official access in order to promote and protect human rights among member states.
3. **Jurisdiction:** The ASEAN human rights body should be given broad jurisdiction and powers that will allow it to effectively fulfill its mandate. The HLP must clearly define the jurisdiction of the ASEAN human rights body in order to avoid jurisdictional conflicts with member state institutions. At the same time, the jurisdiction must remain as wide as possible in order to ensure the indivisibility and interdependence of all human rights.

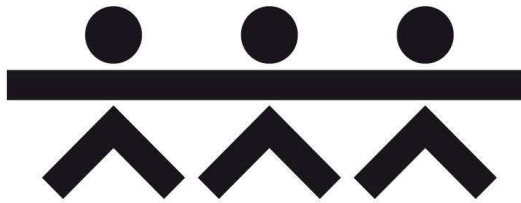
¹² Press Comments by the Chairman of the High Level Panel (HLP) on the Establishment of an ASEAN Human Rights Body, available online at (accessed July 2008): http://app.mfa.gov.sg/2006/press/view_press.asp?post_id=4201

¹³ Ibid.

¹⁴ Models include, but are not limited to, Human Rights Commissions, a Human Rights Ombudsman, and specialized legal courts.

¹⁵ United Nations Centre for Human Rights, *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights*, Professional Training Series No. 4 at 4–6, U.N. Doc. HR/P/PT/4, U.N. Sales No. E.95.XIV.2 (1995) [hereinafter *National Human Rights Institutions: A Handbook*].

¹⁶ Linda C. Reif, *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection*, Harvard Human Rights Journal, Spring 2000, Vol. 1.



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4. **Accessibility:** The ASEAN human rights body must be accessible to both individuals and groups, allowing for direct communication between the body and victims, devoid of state mediation. Special attention must be given to the diversity of languages spoken by ASEAN peoples, and provisions made so that individuals and groups may approach the human rights body in their own language.
5. **Cooperation:** The ASEAN human rights body must seek out and develop relationships with various civil society actors, at the national, regional, and international level. This, in order to realize the Charter's desire for increased "people participation" in ASEAN institutions and providing the smooth transfer of information.
6. **Accountability:** The ASEAN human rights body must be transparent in all of its activities, reports made public, and actors held accountable on the public stage.

1.4

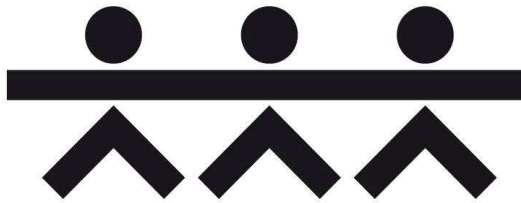
Thai Civil Society aspirations for the ASEAN Human Rights Body

In early July 2008, representatives from 14 various Thai civil society organizations¹⁷ meet in Bangkok, under the auspice of People's Empowerment, to discuss the proposed ASEAN human rights body, current trends within ASEAN, and the role community based organizations (CBO) can play in ASEAN. Participants discussed in detail the ASEAN human rights body, concluding that Thai civil society wishes to ensure the existence of four key elements within the ASEAN human rights body:

1. **Promotion** of international human rights standards, and not the restricted so-called "Asian Values" standards.
2. **Protection** – The ASEAN human rights body must be able to conduct public investigations into human rights conditions among ASEAN member states, providing voice to victims of human rights violations.
3. **Public access** – Individuals and organization must be able to approach the ASEAN human rights body and take part in its activities, hearings, and public outreach efforts. Cooperation and engagement with civil society is essential to the fulfillment of ASEAN's promise to be "people-oriented".¹⁸
4. **Independence** – The ASEAN human rights body must be composed of individuals who can act independently of political and external pressures, promoting and protecting human rights in an unbiased manner.

¹⁷ Participants included representatives from Rangsit Area Labor Union group, UNI-Thailand, Slum Women Network, Farmers Network, Bangkok Women Foundation, People Media Foundation, Political Student Working Group, Peace Student Group - Southern Thailand, Thai-Burmese People's Friendship Initiative, Rohingya Labor Group, Khmer Krom refugee representatives, Grassroots Human Rights Education and Development Committee, Shan Women Network, and faculty from Mahidol University.

¹⁸ ASEAN Secretariat (2007), *ASEAN Charter*, Art. 13. More recently, ASEAN Sec. Gen. Dr. Surin Pitsuwan, stated "One of the key purposes of ASEAN as stated in Chapter 1 of the Charter, is to promote a people-oriented ASEAN in which all sectors of society are encouraged to participate in, and benefit from, the process of ASEAN integration and community building", Keynote Address by DR. Surin Pitsuwan, Secretary-General of ASEAN at the ASEAN Region Roundtable on ECOSOC's Promotion and Achievement of Millennium Development Goals Through Education and Outreach Bangkok, 24-25 March 2008. Accessed July 2008 at : <http://www.aseansec.org/21434.htm> .



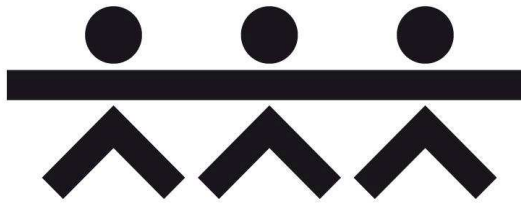
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Thai civil society members share many of the same concerns stated in the previous section of key international standards, in regards to the future ASEAN human rights body. In addition to the four key elements stated above, Thai civil society members noted further elements they wish to see integrated into the ASEAN human rights body:

1. Recognition and cooperation from all ASEAN member states. The ASEAN human rights body must not be relegated to mere symbolic existence, but must enjoy the full cooperation of the governments of all ASEAN member states.
2. Address all human rights violation among ASEAN member states. Human rights transcend state sovereignty and can not be deemed an “internal issue”, but rather are an issue of concern for all ASEAN people.
3. Members of the ASEAN human rights body shall be nominated by each member state following a fair and transparent selection process. While ASEAN governments must take a lead part of the selection process, civil society can not be excluded. Such a process would incorporate:
 - a. Inclusion - Close consultation with a wide spectrum of civil society, non-governmental organizations, and national human rights institutions.
 - b. Participation - ASEAN civil society members should be allowed to put forward candidates for consideration in the ASEAN human rights body.
 - c. Composition - The ASEAN human rights body should include at least 5 to 7 individuals, selected for a 5 year term, providing ample representation of the various religious, ethnic, and gender groups of ASEAN.
4. ASEAN governments and donors must provide sufficient financial support to this body so it may operate effectively.
5. Mandate:
 - a. Monitoring human rights conditions throughout the ASEAN region through various issue-specific subcommittees.
 - b. Preparation of a public ASEAN Human Rights report.
 - c. Advise and comment on ASEAN member states policy, as they impact human rights.
 - d. Serve as a focal point for human rights in ASEAN, providing input and integrating human rights norms in all ASEAN policy.
 - e. Provision of human rights training and education throughout ASEAN, in order to improve human rights knowledge among both the general public and government officers.
 - f. Promote and support People-to-People engagement for better understanding and positive relations among ASEAN peoples.



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1.5 Recommendations

This paper assumes the relevance of international human rights standards for ASEAN, and their key role in ensuring ASEAN's viability and success in the 21st century and beyond. The indivisibility and interdependence of human rights, economic development, human security, and social harmony demand a concentrated and earnest effort to promote and protect human rights among all ASEAN member states. A central instrument in this endeavor is the establishment of an active and effective ASEAN human rights body, as called for in the ASEAN Charter.

After meeting and discussing outlines for the future ASEAN human rights body with representatives from various civil society networks in Thailand, People's Empowerment wishes to make the following recommendations:

To ASEAN Secretariat:

1. Take immediate action to establish a functioning a human rights body.
2. Ensure that the aforementioned human rights body holds the mandate to actively promote and protect human rights.
3. Ensure that the aforementioned human rights body is allocated sufficient resources and authority to function independently in order to promote and protect international human rights across all ASEAN member states.
4. Ensure cooperation and inclusion of all elements of ASEAN civil society.
5. Ensure full transparency and accountability in both the establishment and operation of the future ASEAN human rights body.

To the international and donor community:

1. Advocate ASEAN to establish a functioning a human rights body that both promotes and protects human rights across all ASEAN member states.
2. Support ASEAN in the establishment and operation of said body.
3. Support the active inclusion of ASEAN civil society in said body.
4. Fully cooperate in regional efforts to protect & promote the human rights of ASEAN peoples.