

Northwestern Journal of International Human Rights

Volume 11 | Issue 1

Article 1

Fall 2012

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Recommended Citation

Gerard Clarke, *The Evolving ASEAN Human Rights System: The ASEAN Human Rights Declaration of 2012*, 11 Nw. J. INT'L HUM. RTS. 1 (2012).
<http://scholarlycommons.law.northwestern.edu/njihr/vol11/iss1/1>

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The Evolving ASEAN Human Rights System: The ASEAN Human Rights Declaration of 2012

Gerard Clarke*

I. INTRODUCTION

¶1 On November 18, 2012, heads of state of the Association of Southeast Asian Nations (hereinafter “ASEAN”) met in the Cambodian capital of Phnom Penh and adopted the ASEAN Human Rights Declaration (hereinafter “the Declaration”).¹ The adoption represents an important stage in the development of the ASEAN human rights system first envisaged by ASEAN foreign ministers in 1993. During the 14 years from 1993 to 2007, the system developed slowly, but since the adoption of the ASEAN Charter in 2007, the pace has picked up significantly. An institutionally and normatively-plural system now exists and the adoption of the Declaration adds momentum to the process and offers insights into the current thinking of ASEAN leaders. As Steiner, Alston and Goodman argue, regional human rights systems have been encouraged by the United Nations since the late 1960s, especially in General Assembly Resolution 32/127 of 1977,² and the systems have an important role to play in the international promotion and protection of human rights in a tiered and mutually-dependent structure of national, regional and global institutions. The ASEAN human rights system is the fourth regional human rights system and the first to be established since 1981 globally; it followed the establishment of European, Inter-American and African systems from 1950, 1969 and 1981 respectively.³ Through an exploration of the Declaration and the wider regional system of which it is now a part, this article seeks to contribute to the debate about regional human rights systems and the conditions under which they emerge and evolve in

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¹ *ASEAN Human Rights Declaration*, ASSOCIATION OF SOUTHEAST ASIAN NATIONS (Nov. 18, 2012), <http://www.asean.org/news/asean-statement-communicues/item/asean-human-rights-declaration> (hereinafter “Declaration”).

² PHILIP ALSTON & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS AND MORALS* 926 (Henry J. Steiner ed., 3d ed. 2007).

³ For an overview of these regional systems, *see id.* at 925. On the legal instruments underpinning them, *see* BLACKSTONE’S STATUTES: INTERNATIONAL HUMAN RIGHTS DOCUMENTS (P.R. Gandhi ed., 4th ed. 2004). In addition, tentative systems exist in the Middle East, South Asia and the former Soviet Union, centered on the revised Arab Charter of Human Rights of 2004, *Arab Charter of Human Rights of 2004*, 24 B.U. INT’L L.J. 147 (Susan M. Akram ed., Mohammed Amin Al-Midani & Mathilde Cabanettes trans., 2006), human rights conventions adopted by the South Asia Association for Regional Cooperation (hereinafter “SAARC”), *SAARC Conventions*, SAARC, <http://www.saarc-sec.org/SAARC-Conventions/63/>, and the Commonwealth of Independent States Convention on Human Rights of 1995, *Convention on Human Rights & Fundamental Freedoms*, COMMONWEALTH OF INDEPENDENT STATES (May 26, 1995), <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=country&category=&publisher=&type=MULTILATERALTREATY&coi=BLR&rid=&docid=49997ae32c&skip=0>.

the context of global norms and institutions. Shelton, for instance, argues that regional human rights systems are positively correlated to their global peers:

As the systems have evolved, the universal framework within which they began, together with their own interactions, have had surprisingly strong influence, leading to converging norms and procedures in an overarching interdependent and dynamic system. In many respects, they are thinking globally and acting locally.⁴

¶2 Contrarily in an earlier argument, when regional systems other than the European one were tentative or non-existent, Vasak cautions that:

The experience of the European Convention of Human Rights . . . tends to show that the regional protection of human rights can achieve full success only if it constitutes an element in a policy of integration on the part of the States of a given region. Only at this price is it possible to permit the blow struck by regionalism in the matter of human rights against the necessary universalism which springs from the intrinsically identical nature of all human beings.⁵

¶3 In light of these arguments, this article reflects on the role of processes of regional integration in the construction of regional human rights systems and the place of converging norms among interdependent national, regional and global human rights systems.

¶4 The sections below first sketch out the background to the Association of Southeast Asian Nations and the ASEAN human rights system. The ASEAN Human Rights Declaration, which now represents an important component of that system, consists of three constitutive parts and in the next three sections following ASEAN background, each is examined in turn. First, it consists of politics, or a political context, in which changing political conditions in ASEAN, including its commitment to human rights, provide an enabling environment for the development of the system and its most significant achievement to date: the Declaration. Second, it consists of a process in which different stakeholders compete to exert influence over the system, including the Declaration. Rather than capturing the drafting history of the Declaration, the article explores the political process that led to its adoption. Third, it consists of a product: the Declaration itself.

¶5 Within the politics, process, and product sections, this article also substantively explores the final Declaration and its earlier iterations to capture the key fault lines within the ASEAN human rights system and the key debates in ASEAN with respect to the relationship between democracy and human rights. It also compares the Declaration to other international human rights instruments, including the benchmark Universal Declaration of Human Rights (1948). The conclusion provides a summative assessment

⁴ Dinah Shelton, *The Promise of Regional Human Rights Systems*, in *THE FUTURE OF INTERNATIONAL HUMAN RIGHTS* 351, 356 (Burns H. Weston & Stephen P. Marks eds., 1999).

⁵ *THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS* 455 (Karel Vasak & Philip Alston eds., 1982).

of the ASEAN human rights system and maps out key lines along which it may continue to evolve in the context of ASEAN's wider ambitions.

II. BACKGROUND: ASEAN AND ITS HUMAN RIGHTS SYSTEM

¶6 ASEAN was established by five states (Thailand, Indonesia, the Philippines, Malaysia and Singapore) in 1967, amid the escalation of the Vietnam War and border disputes among the founding states.⁶ Brunei joined in January 1984, and the Association again grew substantially in the late 1990s with the end of the Cold War when four countries joined in rapid succession (Vietnam in July 1995, Laos and Myanmar (Burma) in July 1997 and Cambodia in April 1999). Timor Leste (East Timor) is the only Southeast Asian nation outside the ASEAN fold, but commentators expect it to join within five years.⁷ With a combined nominal Gross Domestic Product of US \$1.5 trillion in 2011,⁸ ASEAN would be the ninth largest economy in the world if it was a single political entity, making it an increasingly important actor in the global economy.

¶7 As well as a larger membership, ASEAN has embraced novel and deeper forms of supra-national cooperation.⁹ In 2003, for instance, ASEAN leaders resolved to establish an ASEAN community by 2020, based on a closer integration, including a single free-trade area and supra-national decision-making bodies.¹⁰ This new Community, they resolved, will rest on three distinct pillars (or communities): economic, political and security, and socio-cultural.¹¹ In 2007, they brought the target date forward to 2015,¹² accelerating the task of assembling the constituent parts.

¶8 Building the ASEAN human rights system first envisaged by ASEAN foreign ministers in 1993 therefore remains a significant political task. The system, for instance, is distinctively plural. A *de jure* account of it might be limited to the four inter-governmental bodies in Figure 1, below, but a *de facto* account must include the real range of institutions that animate the system and help explain its political dynamics. As in

⁶ The founding document is the 1967 ASEAN Declaration. *ASEAN Declaration*, ASEAN (Aug. 8, 1967), <http://www.asean.org/news/item/the-asean-declaration-bangkok-declaration> (hereinafter "Bangkok Declaration").

⁷ Timor Leste became independent in 2002 and submitted an application for membership of ASEAN in February 2011. *See Prime Minister of Timor-Leste Visits ASEAN Secretariat*, ASEAN (March 23, 2011), <http://www.asean.org/news/asean-secretariat-news/item/prime-minister-of-timor-leste-visits-asean-secretariat>; *see also Timor-Leste Continues to Pursue Cooperation with ASEAN*, ASEAN (Oct. 4, 2012), <http://www.asean.org/news/asean-secretariat-news/item/timor-leste-continues-to-pursue-cooperation-with-asean>. It will be some time, however, before it meets the membership criteria, including trade liberalization.

⁸ *Association of South East Asian Nations*, EUROPEAN COMMISSION, <http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/regions/asean/>.

⁹ ASEAN has tentative supra-national bodies. The ASEAN Coordinating Council, for instance, undertakes tasks provided for in the ASEAN Charter, including functions assigned to it by the ASEAN Summit (of Heads of State). *Cf. Charter of the Association of Southeast Asian Nations*, ASEAN (Nov. 20, 2007), <http://www.asean.org/archive/publications/ASEAN-Charter.pdf> (hereinafter "ASEAN Charter").

¹⁰ *2003 Declaration of ASEAN Concord II*, ASEAN (Oct. 7 2003), <http://cil.nus.edu.sg/rp/pdf/2003%20Declaration%20of%20ASEAN%20Concord%20II-pdf.pdf> (hereinafter "Bali Concord").

¹¹ *Id.*

¹² *Cebu Declaration on the Acceleration of the Establishment of an ASEAN Community by 2015*, ASEAN (Jan. 13, 2007), <http://www.asean.org/news/item/cebu-declaration-on-the-acceleration-of-the-establishment-of-an-asean-community-by-2015>.

some other multi-lateral organizations, the language of ASEAN diplomacy refers to three distinct “tracks” or institutional layers¹³: Track One covers governmental and inter-governmental bodies; Track Two, non-governmental bodies enjoying official ASEAN recognition; and Track Three, independent bodies, including civil society organizations, which interact with ASEAN organs. Figure 1 captures the principal bodies that constitute the ASEAN human rights system from each of these tracks.¹⁴

¶9 Further below, I examine the relationships between these institutions, but one key political task worth noting from the outset is to manage a range of alignment issues that will enable the system to evolve and function effectively in line with ASEAN’s aspirations. These include the relationships between the AICHR, the ACWC and the ACMW; between the three intergovernmental bodies (AICHR, ACWC and ACMW) and the six national human rights institutions; and between institutions from Track Three and the other two tracks (in the context of ASEAN’s commitment to a “people-oriented” community).¹⁵

¹³ Multi-track diplomacy is an established approach or perspective in international relations, which champions broad-based or inclusive diplomacy. *See generally* LOUISE DIAMOND & JOHN MCDONALD, MULTI-TRACK DIPLOMACY: A SYSTEMS APPROACH TO PEACE (1993).

¹⁴ The system, however, is not limited to these institutions. AICHR, for instance, reports to the bi-annual ASEAN Foreign Ministers Meeting, while ACWC and ACMW report to the Committee of Permanent Representatives to ASEAN.

¹⁵ ASEAN Charter art. 1, § 13 requires parties 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.”

Figure 1: The Institutions of the Evolving ASEAN Human Rights System

Track One (inter-governmental & governmental bodies)	<p>Inter-governmental ASEAN Inter-Governmental Commission on Human Rights (AICHR); ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC); ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW); The ASEAN Secretariat.</p> <p>Governmental National Human Rights Institutions in Indonesia, the Philippines, Thailand, Malaysia and Myanmar, and the South-East Asia National Human Rights Institutions' Forum (SEANF)</p>
Track Two (autonomous bodies enjoying ASEAN recognition)	<p>Working Group on the ASEAN Human Rights Mechanism (WG-AHRM) and national affiliates in the Philippines, Indonesia, Thailand, Malaysia and Singapore. ASEAN Institutes of Strategic and International Studies Colloquium on Human Rights (AICOHR) and national affiliates in the Philippines, Indonesia, Thailand, Malaysia and Singapore.</p>
Track Three (independent bodies, including civil society organizations)	<p>Principal Civil Society Networks Solidarity for Asian People's Advocacy - Task Force on ASEAN and Human Rights (SAPA-TFAHR); Asian Forum for Human Rights and Development (Forum Asia); The ASEAN Peoples' Forum (APF); Southeast Asian Women's Caucus on ASEAN (SEAWCA).</p>

¶31 Constituent parts of the ASEAN human rights system and its history have been explored in other literature to date,¹⁶ with caution or concern the dominant response. In

¹⁶ Yuval Ginbar, *Human Rights in ASEAN: Setting Sail or Treading Water*, 10 HUM. RTS. L. REV. 504 (2010); Robin Ramcharan, *ASEAN's Human Rights Commission: Policy Considerations for Enhancing its Capacity to Protect Human Rights*, 3 UCLA HUM. RTS. REV. 1999 (2010); TAN HSEIN-LI, THE ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS: INSTITUTIONALIZING HUMAN RIGHTS IN ASIA (2011); Anthony J. Langlois, *Asian Regionalism and Human Rights: The Case of the ASEAN Intergovernmental Commission on Human Rights*, in ROUTLEDGE HANDBOOK OF ASIAN REGIONALISM 216 (Mark Beeson & Richard Stubbs eds., 2011); John D. Ciorciari, *Institutionalizing Human Rights in Southeast Asia*, 34 HUM. RTS. Q. 696 (2012); ALAN COLLINS, BUILDING A PEOPLE-ORIENTED SECURITY COMMUNITY THE ASEAN WAY 79 (2013). Each of these sources welcomes developments in the ASEAN Human Rights System, including the establishment of the ASEAN Inter-governmental Commission on Human Rights. Ramcharan suggests what AICHR could do differently or in different circumstances. Viewing things from a long-term perspective (i.e. the long term development of ASEAN), most of the others see developments to date in largely positive terms, with Ciorciari the most skeptical or critical.

July 2009, for instance, *The Wall Street Journal* labeled AICHR as ASEAN’s Toothless Council,¹⁷ while in March 2010, Amnesty International labeled it as a “disappointment” because of its lack of investigatory powers, echoing the views of SAPA-TFAHR.¹⁸ Academics have been less dismissive, although nevertheless cautious. According to Ciorciari, for instance:

[i]n its current form, AICHR is unlikely to have a major effect on political and civil liberties in ASEAN member states. Its structure and decision-making rules essentially foreclose “top-down” organizational mandates and impose serious constraints on “lateral” peer pressure or ‘bottom-up’ challenges from civil society and the public.¹⁹

¶32 To understand the basis of this caution, it is important to explore the political context to ASEAN concern with human rights and the political dynamics of the ASEAN human rights system.

III. POLITICS: THE POLITICAL CONTEXT TO THE DECLARATION

¶33 ASEAN’s composition as a disparate group of countries creates distinct political challenges in the development of the ASEAN human rights system—differences that are evident in the subsidiary Declaration of 2012. These political challenges arose particularly from the expansion in membership in the late 1990s, with the accession of poorer and more authoritarian states. As Table 1, below, reveals, ASEAN member-states vary enormously in terms of population size, levels of economic or social well-being and in their political systems, including their commitment to democracy. According to Freedom House, for instance, Indonesia is the only country in ASEAN which can be labeled as “free”; four (Malaysia, the Philippines, Singapore and Thailand) are “partly free,” with weak provision of civil liberties or protection of political rights; while five countries or 50% of ASEAN’s membership (Brunei, Cambodia, Laos, Myanmar and Vietnam), are “not free.”²⁰

¹⁷ *ASEAN’s Toothless Council*, THE WALL STREET JOURNAL (July 22, 2009), <http://online.wsj.com/article/SB10001424052970203517304574303592053848748.html>. According to the piece, “ASEAN’s commission will make decisions by consensus—meaning authoritarian regimes like Burma, Laos and Vietnam can wield veto power. Individual governments can appoint or remove commissioners as they see fit. Independent observers aren’t included in the commission. It wouldn’t be surprising to see ASEAN’s misfits use the group as an excuse to whitewash their own human rights violations—as China has done at the U.N.”

¹⁸ *ASEAN human rights commission stumbles at first hurdle*, AMNESTY INTERNATIONAL (Mar. 31, 2010), <http://www.amnesty.org.au/news/comments/22792/>.

¹⁹ Ciorciari, *supra* note 16, at 723.

²⁰ *Freedom in the World 2011*, FREEDOM HOUSE, <http://www.freedomhouse.org/report/freedom-world/freedom-world-2011>.

Table 1: Socio-Economic & Political Indicators for ASEAN Member States²¹

	Population , Millions, 2009	Gross National Income <i>per capita</i> (PPP, US\$, 2005)	Human Developmen t Index score (2011)	Political System
Singapore	5	52,569	0.866	Restricted democracy
Brunei	0.4	45,753	0.838	Constitutional monarchy
Malaysia	27	13,685	0.761	Restricted democracy
Thailand	68	7,694	0.682	Democracy, constitutional monarchy
The Philippine s	92	3,478	0.644	Democracy
Indonesia	230	3,716	0.617	Democracy
Vietnam	87	2,805	0.593	Socialist republic
Lao PDR	5	2,242	0.524	Socialist republic
Cambodia	5	1,848	0.523	Democracy
Myanmar	50	1,535	0.483	Military dictatorship

Note: The Human Development Index aggregates data from three separate socio-economic measures: life expectancy at birth, mean years in school, and expected years of schooling.

¶34 While threatened by a global economic slump, however, prospects for democracy in the region have been strengthened by political reform in Myanmar in the eighteen months prior to the adoption of the Declaration, with the release of political prisoners, the legalization of peaceful protest, the agreement of ceasefires with ethnic rebel groups, and the conduct of elections in which the opposition made inroads. Speaking at the UN in September 2012, President Thein Sein noted that democratic reforms in Myanmar were “irreversible,”²² placing pressure on countries such as Vietnam and Laos to institute their own reforms.

¶35 Indonesia and Thailand exert significant influence within ASEAN because of their population size and their comparative economic success, while their commitment to democracy exerts significant sway with other member-states. The Philippines is an ambivalent ally of Indonesia and Thailand, although the three countries together account for almost 70% of ASEAN’s population, making them a powerful alliance when they work together.²³ One key cleavage in ASEAN divides the “ASEAN Six” (Indonesia,

²¹ WORLD BANK, WORLD DEVELOPMENT REPORT 2011 (2011), <http://web.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/EXTWDRS/0,,contentMDK:23256432~pagePK:478093~piPK:477627~theSitePK:477624,00.html>; United Nations Development Programme, Human Rights Development Report 2011 (2011), http://hdr.undp.org/en/media/HDR_2011_EN_Complete.pdf.

²² *Burma leader Thein Sein pays tribute to Aung San Suu Kyi*, BBC NEWS (Sept. 27, 2012), <http://www.bbc.co.uk/news/world-asia-19744596>.

²³ See Table 1.

Thailand, the Philippines, Malaysia, Singapore and Brunei) from the “CMLV countries” (Cambodia, Myanmar, Laos and Vietnam) or the more economically-prosperous states from their poorer, and historically conflict-ravaged, neighbors. As ASEAN Secretary-General Surin Pitsuwan explains:

In ASEAN, we are committed to the principles of democracy and human rights. But we have found out that different states have different ways of interpreting and promoting both ideals. Some are doing better than others while some are still going through a debate about how to translate these ideals in the ASEAN Charter into their laws and institutions.²⁴

¶36 These cleavages, however, are by no means set in stone and alliances vary from issue to issue. In the case of human rights, therefore, the “ASEAN Six” versus the “CLMV” split, and variations of it, can make it difficult to reach agreement within ASEAN, hindering the development of new initiatives.

¶37 This complexity is illustrated in Table 2, below. The table suggests that the split between the “ASEAN Six” and the “CMLV” countries is not readily evident in their comparative support for the key instruments of international human rights law. It shows that ASEAN member-states subscribe to universal human rights standards in a tentative manner. All ASEAN member-states are party to both the Convention on the Rights of the Child and the Convention on the Elimination of Discrimination Against Women, while eight of the ten have signed and/or ratified the 2006 Convention on the Rights of Persons with Disabilities. This suggests significant support for the principle of universal human rights standards. The table, however, points to barely fifty cases where a treaty has been signed and/or ratified from a possible ninety (ten countries, nine instruments), or a commitment rate of fifty-five percent. Only four member-states, for instance, are party to the International Covenant on Civil and Political Rights, and only three to the Convention Against Torture,²⁵ with both cases a distinct legacy of authoritarian patterns of rule in the region.

²⁴ Dr. Surin Pitsuwan, Keynote Speech at the Second International Conference on Human Rights and Peace & Conflict in Southeast Asia (Oct. 17, 2012) (hereinafter “Jakarta conference”).

²⁵ All ASEAN member states are prohibited from engaging in acts of torture under customary international law.

Table 2: ASEAN Member-State Commitment to International Human Rights Law, 2012²⁶

	Bru	Cam	Ind	Lao	Mal	Mya	Phi	Sin	Tha	Vie
ICCPR (1966)	N	Y	N	N	N	N	Y	N	Y	Y
ICESCR (1966)	N	Y	N	N	N	N	Y	N	Y	Y
ICERD (1966)	N	Y	Y	Y	N	N	Y	N	N	Y
CEDAW (1979)	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
CAT (1984)	N	Y	Y	N	N	N	Y	N	N	N
CRC (1989)	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
CPRMW (1990)	N	S	Y	N	N	N	Y	N	N	N
CRPD (2006)	S	S	Y	Y	Y	N	Y	N	Y	S
CPPED (2006)	N	N	S	S	N	N	N	N	N	N

Key: N(o): Neither Signed nor ratified. S(igned but not ratified). Y(es): signed and ratified.

Horizontal axis: Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam.

Vertical axis: International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; International Convention on the Elimination of Racial Discrimination, Convention on the Elimination of Discrimination Against Women; Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; Convention on the Protection of the Rights of Migrant Workers, Convention on the Rights of Persons with Disabilities and Convention on the Protection of all Persons from Enforced Disappearances.

¶38 Support for universal human rights standards among ASEAN member-states, however, does not correlate directly with levels of socio-economic development or type of political system. In Table 2, for instance, Cambodia and Vietnam appear to be significantly more committed to universal human rights standards than Singapore or Malaysia, where governments still subscribe to elements of the “Asian Values” discourse that posit an opposition between Confucianist and communitarian norms in East and Southeast Asia and “Western” conceptions of human rights.²⁷ Data in Table 2 confirms Hathaway’s finding that states that ratify international human rights treaties are more likely, on average, to violate them, in contrast to countries with relatively robust domestic human rights bodies which are less likely to ratify them where they feel they will be unable to meet their obligations.²⁸

¶39 Despite these differences between member-states and the cleavages to which they give rise, plans for an ASEAN Community were crystallized in the ASEAN Charter

²⁶ *Treaty Collection*, United Nations, <http://treaties.un.org>.

²⁷ See Diane Mauzy, *The Human Rights and ‘Asian Values’ Debate in Southeast Asia: Trying to Clarify the Key Issues*, 10 THE PAC. REV. 210 (1997).

²⁸ Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 11 YALE L.J. 1935, 1940 (2002). In contrast to Cambodia and Vietnam, for instance, Indonesia, Thailand, and Malaysia have national human rights institutions compatible with the Principles Relating to the Status of National Institutions (hereinafter “Paris Principles”). See G.A. Res. 48/134, U.N. Doc. A/RES/48/134 (Dec. 20, 1993).

adopted on November 20, 2007. The Charter, which entered into force on December 15, 2008, provides the legal underpinnings for the activities of ASEAN organs, forty-one years after its birth.²⁹ The Charter confirms plans for the inauguration of an ASEAN Community,³⁰ as well as its three distinct pillars, each underpinned by a new Council.³¹ As a core principle, the Charter calls for “respect for fundamental freedoms, the promotion and protection of human rights and the promotion of social justice”, giving rise to political and legal obligations on the part of member-states.³² The Charter, however, also upholds the principle of non-interference by members in the internal affairs of other member-states,³³ and provides that decision-making will be based on the traditional ASEAN principles of consultation and consensus.³⁴

¶40

One of the most distinctive features of the ASEAN Charter is the provision for an ASEAN human rights body.³⁵ This represents a concrete commitment to an initiative first mooted officially in 1993 when ASEAN Foreign Ministers agreed that ASEAN should consider the establishment of a regional human rights “mechanism.”³⁶ Little happened for 10 years, however, until the ASEAN Concord II of 2003,³⁷ a detailed political agreement that provided for a new, multi-stranded, ASEAN Community. Progress in the elaboration of the ASEAN human rights “mechanism” picked up noticeably following the new Concord.³⁸ In June 2004, ASEAN Foreign Ministers adopted the “Declaration on the Elimination of Violence Against Women in the ASEAN Region.” Five months later, Heads of State adopted the “ASEAN Declaration Against Trafficking in Persons Particularly Women and Children,” and on the same day (November 29, 2003), adopted the Vientiane Action Programme (VAP) (2004), setting out more detailed principles of the political-security, social-cultural and economic pillars of the proposed ASEAN

²⁹ The ASEAN Declaration of 1967 was barely two pages long and provided a thin legal cover for cooperation among member states and the development of ASEAN bodies and agreements. *See generally* ASEAN Declaration.

³⁰ *See generally* ASEAN Charter.

³¹ *Cf.* ASEAN Charter, art. 9.

³² ASEAN Charter, art. 2 (2)(i).

³³ *Id.* at art. 2 (2)(e). The principle of non-interference in the affairs of other member-states, however, is being redefined and, effectively, eroded. ASEAN humanitarian intervention in Myanmar after Cyclone Nargis in 2008, the participation of other ASEAN member-states as observers in peace talks between the Indonesian government and the Free Aceh Movement (GAM) and the participation of the Malaysia government in peace talks between the Government of the Philippines and the Moro Islamic Liberation Front represent significant examples since 2005.

³⁴ *Id.* at art. 20.

³⁵ *Id.* at art. 14 (ASEAN human rights body shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting). The Charter states that “ASEAN shall establish an ASEAN human rights body, with terms of reference to be decided by the Foreign Ministers of ASEAN.” *Id.*

³⁶ *Joint Communique of the Twenty-Sixth ASEAN Ministerial Meeting, Singapore, 23-24 July 1993*, ¶ 18, ASEAN (July 24, 1993), <http://www.asean.org/communities/asean-political-security-community/item/joint-communique-of-the-twenty-sixth-asean-ministerial-meeting-singapore-23-24-july-1993>. The Vienna Declaration and Programme of Action also called for the establishment of new regional human rights bodies.

³⁷ Bali Concord, *supra* note 10.

³⁸ On the growing interest of ASEAN member states in human rights concerns during the 1990s (and an articulate call for an ASEAN human rights system), *see* Li-Ann. Thio, *Implementing Human Rights in ASEAN Countries: Promises to Keep and Miles to Go Before I Sleep*, 2 YALE HUM. RTS. & DEV. L.J. 1 (1999).

community. The VAP notes the need to implement collaborative programs consistent with UN and/or ASEAN declarations or conventions on the rights of women, children and migrant workers,³⁹ pointing to emerging foci.

¶41 Commitment to the establishment of an ASEAN human rights body in the 2007 Charter, however, was a significant step for ASEAN Heads of State. According to governmental representatives on the Charter drafting panel and to academics tracking its progress, the proposed body was the most divisive issue that it faced,⁴⁰ and almost brought down the proposed Charter. According to Collins, the Indonesian and Philippine foreign ministers negotiated a compromise with Vietnam, Laos and Myanmar in which provision for the body was inserted at the expense of provisions for majority voting in ASEAN Foreign Ministers Meetings.⁴¹ According to the Burmese representative, the negotiations were so heated that “at times we almost came to blows—literally speaking.”⁴² Debate concerned not only the establishment of the body, but the detailed provisions to be contained in its Terms of Reference (TOR). According to Collins,

On one side . . . was the Philippines, Indonesia, Malaysia and Thailand who argued that the TOR would be established after the Charter and [that] the [ASEAN Human Rights Body] would have a monitoring function while for the CMLV members . . . the TOR should be completed by the [Charter drafting panel] and the AHRB should only have consultative status.⁴³

¶42 At one point in the negotiations, he notes, the split was so bad that the opposing groups occupied different rooms, with the Chair shuttling between them.⁴⁴ Another variable, pressure from non-governmental organizations (NGOs), was significant, if not critical. According to the Vietnamese representative,

[d]uring the process of drafting the ASEAN Charter, the call from regional NGOs for the human rights issue to be duly reflected in the Charter was strongly voiced. What was the reply of the Charter drafters?

. . . [They] finally came up with a formulation of the enabling provision in the Charter that was considered the best balanced option that may satisfy both those advocating for the establishment of an ASEAN human rights body and those who still have reservations about the idea.⁴⁵

³⁹ 2004 Vientiane Action Programme 2004-2010, ASEAN (Nov. 29, 2004),

<http://cil.nus.edu.sg/rp/pdf/2004%20Vientiane%20Action%20Programme%202004-2010-pdf.pdf>.

⁴⁰ According to the Brunei representative, the proposed AHRB was “the most explosive and tense of all” considered by the drafting panel. PENGIRAN DATO PADUKA OSMAN PATRA, *THE MAKING OF THE ASEAN CHARTER* 7 (T. Koh, R. G. Manalo & W. Woon eds., 2009). *See also* Collins, *supra* note 16, at 93.

⁴¹ Collins, *supra* note 16, at 95.

⁴² Patra, *supra* note 40, at 33; Collins, *supra* note 16, at 93.

⁴³ Collins, *supra* note 16, at 95.

⁴⁴ *Id.*

⁴⁵ Nguyen Trung Thanh, *The Making of the ASEAN Charter in My Fresh Memories*, in *THE MAKING OF THE ASEAN CHARTER* 102-03 (Tommy Tong Bee Koh et al. eds., 2009).

¶43 The final provision for an ASEAN Human Rights Body in the 2007 ASEAN Charter was, therefore, the result of a multi-actor political battle, one of the most significant in ASEAN's recent history.

¶44 These same political differences, with almost the same intensity, help animate the ASEAN human rights system today. The system, at present, centers on the ASEAN Intergovernmental Commission on Human Rights (AICHR), the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC), and the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW). All three, in turn, are supported by the ASEAN Secretariat. Of the three, AICHR is the most important, defined by ASEAN as the "overarching institution responsible for the protection and promotion of human rights in ASEAN."⁴⁶ Significantly, AICHR is conceived as an "intergovernmental" and "consultative" body, charged with operating in a "constructive and non-confrontational" manner, limiting its independence and supra-national character.⁴⁷ At heart, it consists of ten "Representatives," one per country, each accountable to their "appointing government."⁴⁸ As in all ASEAN organs, decision-making must be "based on consultation and consensus."⁴⁹

¶45 On paper, ACWC and ACMW share many of these characteristics. Like AICHR, each is defined as inter-governmental and consultative.⁵⁰ But in subtle respects, they differ. In contrast to AICHR, where governments, in all but two cases, have appointed trusted diplomats or civil servants as representatives, ACWC and ACMW are characterized by more independent representatives, especially those from Thailand, Indonesia and the Philippines. Additionally, ACWC and ACMW also differ from each other. ACWC, for instance, benefits from the fact, noted above, that every ASEAN member state has ratified both the CRC and CEDAW, underpinning a consensus on the substantive rights in both conventions.⁵¹ ACMW, however, is a Committee rather than a Commission and tackles a much more contentious issue in the context of intra-ASEAN politics, pitting migrant-receiving against migrant-sending countries. Although it hasn't been active to date, ACWC is a potentially significant body. While AICHR's powers are carefully circumscribed, for instance,⁵² ACWC has a mandate to act as a supra-national "advocate on behalf of women and children, especially the most vulnerable and marginalized" and to "encourage ASEAN member states to improve their situation."⁵³

⁴⁶ ASEAN, Cha-Am Hua Hin Declaration on the Intergovernmental Commission on Human Rights § 8 (2009); *see also* ASEAN Intergovernmental Commission on Human Rights, Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights § 6.8 (2009) (hereinafter "AICHR ToR").

⁴⁷ AICHR ToR, *supra* note 46, at § 3, § 2.4.

⁴⁸ *Id.* at § 5.2.

⁴⁹ *Id.* at § 6.1; *see also* ASEAN Charter, § 20.

⁵⁰ *See, e.g.,* ASEAN Commission on the Promotion and Protection of the Rights of Women and Children, Terms of Reference of the ASEAN Commission for the Promotion and Protection of the Rights of Women and Children § 4, § 3.6 (2009) (hereinafter "ACWC ToR").

⁵¹ Although tensions nevertheless exist, including Islamic laws in Brunei which set the age of criminal responsibility at seven and allow for marriage at the age of fourteen and in some cases lower, outside standards set in the Convention on the Rights of the Child. Brunei is a party to the Convention but has entered reservations in the case of relevant provisions. *See Brunei Darussalam: National Laws*, CHILD RIGHTS INFORMATION NETWORK, <http://www.crin.org/resources/infodetail.asp?id=27116>.

⁵² *Cf. Ciorciari, supra* note 16, at 705-07.

⁵³ ACWC ToR § 5.4.

¶46 National human rights institutions (NHRIs) in the Philippines, Indonesia, Thailand, Malaysia and Myanmar, and their regional network, the Southeast Asian National Human Rights Institutions Forum (SEANF), occupy an ambiguous position in the ASEAN human rights system.⁵⁴ AICHR’s terms of reference oblige it simply to “consult” with “other national, regional and international institutions . . . concerned with . . . human rights”.⁵⁵ Interviews with senior representatives of the NHRIs in Thailand, the Philippines, and Malaysia in mid-2011, however, highlighted frustration at the apparent refusal of AICHR representatives to engage with them, although relations with ACWC were more cordial.⁵⁶ The official status of the NHRIs, however, obliges both AICHR and ACWC to establish a *modus vivendi* with them. The existence of an NHRI in Timor Leste, the establishment of one in Myanmar in 2012, and the expected establishment of a NHRI in Cambodia in the near future all put pressure on AICHR, although the adherence of the NHRIs to the Paris Principles (with the current exception of Myanmar) complicates the task significantly, since it draws attention to AICHR’s lack of independence.⁵⁷

¶47 Ironically, perhaps, “Track Two” institutions, autonomous bodies that enjoy formal ASEAN recognition, occupy a clearer position in the ASEAN human rights system than the NHRIs, marking the system out from its regional peers. Both Track Two institutions captured in Figure 1 are officially recognized as “entities associated with ASEAN” under Article 16 of the ASEAN Charter (2007),⁵⁸ and AICHR’s terms of reference oblige it to engage with these entities,⁵⁹ providing both with special status in the context of the system. The Working Group on the ASEAN Human Rights Mechanism (WG-AHRM) and the ASEAN Institutes of Strategic and International Studies Colloquium on Human Rights (AICOHR) have been instrumental in the evolution of the ASEAN human rights system to date.⁶⁰ They have generated pressure for the establishment of the system and its subsidiary parts, drafted position papers that fleshed them out, acted as sounding boards and informal think-tanks for ASEAN foreign ministers, especially those of the “ASEAN Six,” and facilitated dialogue between ASEAN ministers and trusted experts. They have also engaged with NHRIs and civil society networks, compensating for ASEAN deficiencies in this regard and kept the media, academics and the broader public abreast of developments through workshops, newsletters, and media briefings, again compensating for ASEAN’s penchant for secrecy.

¶48 “Track Three” institutions, independent organizations that are not formally recognized by ASEAN, occupy the most ambiguous place in the ASEAN human rights system, but an important one, in the context of ASEAN’s ambition to establish a “people-

⁵⁴ On the activities of the NHRIs in ASEAN (excluding Myanmar) and their network, see PHILLIP J. ELDRIGE, *THE POLITICS OF HUMAN RIGHTS IN SOUTHEAST ASIA* (2002).

⁵⁵ AICHR ToR § 4.9.

⁵⁶ Senior representatives of these three NHRIs all argued that AICHR representatives had refused to engage with them. Letters to AICHR representatives, they claimed, remained unanswered and none had been consulted on AICHR’s operational guidelines or rules of procedure. In an interview in September 2013, the representatives of one of these NHRIs argued that AICHR representatives continued in their refusal to engage with the NHRIs individually or collectively. NHRIs, for instance, had not been invited to the regional consultations with Track 2 and Track 3 institutions.

⁵⁷ On the Paris Principles, see *supra* note 28.

⁵⁸ Both are listed in Annex 2 of the Charter, identifying entities covered by Article 16.

⁵⁹ AICHR ToR § 4.8.

⁶⁰ See Collins, *supra* note 17, at 83-90.

oriented” community by 2015. Calibrating their exact role in the system is therefore an important but difficult political task; by November 2012, when the Declaration was adopted, AICHR’s representatives were unable to agree on the draft “Guidelines on Engagement with Civil Society” document which they had considered over many months. Terms of reference for both AICHR and ACWC, however, oblige them to relate to a range of stakeholders, including civil society organizations (CSOs).⁶¹ Two influential first-term AICHR representatives,⁶² Sriprapha Petcheramesree (Thailand) and Rafendi Djamin (Indonesia), came from an activist civil society background (with the WG-AHRM and SAPA-TFAHR respectively) and actively engaged with CSOs, including networks critical of AICHR, although other representatives are more reluctant. CSOs have not always been interested in ASEAN. Since the mid-1990s, however, human rights-focused CSOs have become important political actors in ASEAN, through a combination of street-based militancy, focused advocacy campaigns, civil society networking and shrewd lobbying in the corridors of power.⁶³ They have become a significant bell-weather of growing democratization in the ASEAN region since the late 1980s and are increasingly influential at the ASEAN level as cross-national intra-ASEAN ties among CSOs increase, bolstered by new communication technologies and funding from Western donors.

¶49 Each of the CSO networks mentioned in Figure 1 has been active in the context of the development of the ASEAN human rights system, convening workshops and conferences, drafting position papers and lobbying meetings of ASEAN Foreign Ministers and Heads of State. SAPA-TFAHR, a loose, horizontal network, works closely with Forum Asia, an orthodox NGO with paid staff and permanent offices, to underpin an effective social movement. With foreign partners such as Amnesty International and Human Rights Watch, SAPA-TFAHR and Forum Asia can trenchantly criticize initiatives associated with the system, exerting pressure on official (Track One) entities.⁶⁴ APF is a more moderate alliance of CSOs committed to working constructively with ASEAN bodies, while the Southeast Asian Women’s Caucus is a significant interlocutor of the ACWC. All four, however, seek a robust ASEAN human rights system, including an ASEAN Court of Human Rights.⁶⁵ They exert influence within the ASEAN human rights system, in part through their constructive ties to the Track Two bodies (WG-AHRM and AICOHR) as well as to the NHRIs. Many NGOs affiliated to national chapters of the WG-AHRM, for instance, are also members of SAPA-TFAHR. This allows national human rights and other NGOs to pursue a twin-track approach to engagement with the ASEAN human rights system: activism through SAPA-TFAHR and

⁶¹ AICHR ToR § 4.8; ACWC ToR § 5.5.

⁶² AICHR Representatives serve for three years in the first instance. At the end of October 2012, Dr. Sriprapha stepped down as Thailand’s AICHR Representative.

⁶³ These and other tactics are discussed in ASIAN FORUM FOR HUMAN RIGHTS AND DEVELOPMENT, RIGHTS NOW: A TRAINING MANUAL ON ASEAN HUMAN RIGHTS MECHANISMS (2001).

⁶⁴ See e.g., SOLIDARITY FOR ASIAN PEOPLES’ ADVOCACIES (SAPA) TASK FORCE ON ASEAN AND HUMAN RIGHTS, HIDING BEHIND ITS LIMITS: A PERFORMANCE REPORT ON THE FIRST YEAR OF THE ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS (2010). This calls, in particular, for AICHR Rules of Procedures which allow it to receive and investigate complaints regarding human rights abuses in ASEAN member states and criticizes AICHR Representatives for their refusal to meet formally with SAPA-TFAHR.

⁶⁵ Cf. *Joint Statement of the ASEAN Civil Society Conference* §§ 21-22, ASIAN FORUM FOR HUMAN RIGHTS AND DEVELOPMENT (April 17, 2013), <http://www.forum-asia.org/?p=16149>.

Forum Asia and diplomacy through engagement with the NHRIs and national branches of WG-AHRM.⁶⁶

¶50 The drafting of the ASEAN Human Rights Declaration therefore took place against a tumultuous political back-drop in which ASEAN member states varied significantly in their commitment to binding international human rights standards and to the broader objectives of democratic reform and ASEAN community building. In particular, it pitted the “ASEAN Six” (Indonesia, Thailand, the Philippines, Malaysia, Singapore and Brunei) against the “CMLV” countries (Cambodia, Myanmar/Burma, Laos and Vietnam) in significant political competition over human rights standards and institutions in ASEAN. But it also pitted ASEAN states against other stakeholders, especially independent-minded human rights NGOs who sought commitment to binding international human rights standards and new organs, including an ASEAN Human Rights Court. As such, it raised questions about ASEAN’s ability to evolve from a narrowly-conceived inter-governmental organization to a multi-stakeholder community in which governments increasingly involved non-governmental organizations and other actors in ASEAN governance. Both of these cleavages proved significant in the process of drafting the AHRD.

IV. PROCESS: DRAFTING THE DECLARATION

¶51 The process that led to the adoption of the Declaration underlines not only the evolving and plural nature of the ASEAN human rights system but the political struggles that shape it. It began in September 2010, when AICHR agreed to a two-stage process in which a Drafting Group would prepare an initial draft and AICHR representatives would then revise it. In April 2011, Terms of Reference for the Drafting Group were adopted by AICHR. The Terms asked the Group to uphold international human rights standards. Alongside international standards, the group was also required to take account of “national and regional particularities and mutual respect for different political, historical, cultural and religious backgrounds within ASEAN,” as well as “the balance between rights and responsibilities.”⁶⁷ These provisions of the Terms delineated key fault lines that characterized the whole drafting process and shaped the final declaration.

¶52 In July 2011, the Drafting Group held its first meeting in the Laos capital, Vientiane, and it met another six times before a 20-page draft of 100 articles was submitted to AICHR in January 2012. Throughout the six months, the Drafting Group worked in secrecy, attracting criticism from human rights CSOs and from the U.N. High Commissioner for Human Rights, Navi Pillay.⁶⁸ According to the Drafting Group Chair, the process was difficult: it took four meetings, for instance, to agree to a Preamble while members from the CMLV countries often observed, but refused to participate in

⁶⁶ Interview with Sr. C. Lucero, Co-Chairperson, Task Force Detainees of the Philippines, in Manila, The Philippines (May 31, 2011).

⁶⁷ Excerpts from the Drafting Group’s Terms of Reference are provided in SOLIDARITY FOR ASIAN PEOPLE’S ADVOCACY TASK FORCE ON ASEAN AND HUMAN RIGHTS, *A COMMISSION SHROUDED IN SECRECY: A PERFORMANCE REPORT ON THE ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS 2010-2011* 12 (2012), http://www.crin.org/docs/acsis_final-online-version.pdf.

⁶⁸ *CSOs call for transparent, participatory process in drafting HR Declaration*, HUMAN RIGHTS HERALD (Apr. 2012), http://issuu.com/aseanhumanrights/docs/humanrights_herald_april_2012.

discussions.⁶⁹ Working against a dominant (conservative) axis within the Drafting Group (and ASEAN’s proclivity for consensus), representatives from Indonesia, Thailand and the Philippines could only produce a first full draft in time for the Group’s final meeting.⁷⁰ Despite completion, however, the draft revealed profound debates within the Drafting Group. Sixty-three footnotes, for instance, captured caveats from particular countries or the liberal alliance of the Philippines, Thailand and Indonesia. The influence of the conservative faction was evident. Even the titles and relative number of articles in the various sections made the conservative influence evident. A section headed “The Limitation of Rights,” for instance, contained eighteen articles, the same as the section on “Civil and Political Rights,” while a section on the “Duties and Responsibilities” of individuals contained an additional seven.

¶53 During the first five months of 2012, AICHR worked on the draft in secrecy. Representatives met with ASEAN sectorial bodies on May 10, 2012, while the Indonesian and Thai representatives held an informal meeting with CSOs in Bangkok on May 26, but otherwise there was little engagement with other stakeholders. The secrecy provoked disquiet and in a statement on May 11, 2012, Navi Pillay called for “meaningful consultations with people from all walks of life, in every country across the South-East Asia region.”⁷¹ As a result of criticisms, between June and September 2012 the process partially opened up. A working draft (the Myanmar draft) was agreed upon during AICHR’s sixth meeting on the Declaration in Yangon between June 3 and 6, 2012. Thereafter, AICHR Representatives from Thailand, Indonesia, the Philippines and Malaysia held public consultations in their respective capitals in mid-June. On June 22, 2012, in the Malaysian capital Kuala Lumpur, and as part of its seventh meeting on the Declaration, AICHR held its first formal consultation on the draft Declaration with invited CSOs. Those perceived as critical of AICHR such as Forum Asia and SAPA-TFAHR were excluded,⁷² but those CSOs present—including representatives of the WG-AHRM national chapters—were alarmed by the Myanmar draft, which had been leaked surreptitiously to the CSOs rather than released formally to them by AICHR.⁷³

¶54 The following day, June 23, 2012, AICHR agreed to a revised draft (the Malaysia draft) and after it quickly leaked this provided the basis for debate over the next three months. Despite requests from CSOs, however, the draft was never formally released by AICHR.⁷⁴ Human rights NGOs engaged in the system argued that the draft fell below the standards set out in the 1948 UDHR.⁷⁵ The Malaysia draft was considered by ASEAN

⁶⁹ Harkristuti Harkrisnowo, Director-General of Human Rights, Indonesian Ministry of Law and Human Rights, Plenary Address at Jakarta conference.

⁷⁰ *Id.*

⁷¹ *Pillay Urges ASEAN to Set the High Bar with its Regional Human Rights Declaration*, UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (May 11, 2012), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12142&LangID=E>.

⁷² Interview with J. Liu, East Asia Programme Officer, Forum Asia, in Bangkok, Thailand (October 10, 2012).

⁷³ Anonymous interview with a CSO representative present at the meeting, in Kuala Lumpur, Malaysia (June 22, 2012).

⁷⁴ According to Asian Forum on Human Rights and Development, the Drafting Group’s Terms of Reference stated that “AICHR is to consult with other ASEAN bodies [and] national, regional and international, including civil society, organizations,” as provided in Chapter V of the ASEAN Charter and Article 4.9 of AICHR’s ToR. The Drafting Group must “be guided by the outcome” of these consultations.

⁷⁵ Liu, *supra* note 72.

Foreign Ministers on July 8, during the 45th ASEAN Ministerial Meeting (July 8-13), but in a letter to them ahead of the meeting, representatives of six international human rights NGOs, including Human Rights Watch and Amnesty International, condemned the draft and the process that produced it.⁷⁶

¶55 AICHR Representatives met again with invited CSOs in Manila on September 12. They again refused to release the draft Declaration, although CSOs criticized specific provisions from the leaked Malaysia draft, adding substance to the discussions. CSO representatives saw few changes between the Myanmar and Malaysia drafts,⁷⁷ suggesting AICHR unwillingness to make concessions to CSO concerns. On September 13, at AICHR's eighth meeting on the Declaration, another draft (the Philippines draft) was confirmed, then considered by ASEAN Foreign Ministers in New York on September 27. The New York discussions took place against a background of divisions within AICHR and vocal opposition from CSO networks. Poore, for instance, notes the divisions within AICHR ahead of the Foreign Ministers' meeting:

[a]ccording to the summary record of the Commission's [meeting with CSOs] in the Philippines on September [12, 2012] . . . Thailand's representative gave assurances that if consensus was not possible, [AICHR Representatives] would use the formulation of the Universal Declaration of Human Rights (UDHR). "We will not go lower than the Universal Declaration," she said. In contrast . . . the representative from Lao, insisted that [AICHR] "should not simply copy the Universal Declaration but take into consideration the diversity and realities of the ten ASEAN member-countries."⁷⁸

¶56 AICHR, this suggests, was split between a liberal wing, composed primarily of Indonesia, Thailand and, on some issues, the Philippines, and a conservative wing, led by Vietnam and Laos, but supported on an issue-by-issue basis by Singapore, Malaysia, Brunei, Myanmar and Cambodia. Internal divisions were magnified by high profile opposition to the draft from human rights networks. On September 25, for instance, representatives of Forum Asia and SAPA-TFAHR delivered a statement before the UN Human Rights Council in Geneva, labeling the draft Declaration as discriminatory and in violation of the principle of the inalienability of human rights.⁷⁹

¶57 Divided and unable to confirm the draft, ASEAN Foreign Ministers passed it to senior foreign ministry officials to revise, triggering seven weeks of diplomatic

⁷⁶ Letter from the Amnesty International, Human Rights Watch, Article 19, Federation Internationale des Droits de l'Homme (FIDH) & the International Commission of Jurists and Dignity to the ASEAN Foreign Ministers (July 7, 2012), http://www.hrw.org/sites/default/files/related_material/2012_ASEAN_Final_ASEAN%20Letter%20to%20AMM_07July2012F.pdf.

⁷⁷ Interview with M. K. Merginio, Working Group on the ASEAN Human Rights Mechanism, in Manila, The Philippines (October 15, 2012).

⁷⁸ Grace Poore, *Time to Get It Right: Southeast Asian Nations Human Rights Declaration*, THE HUFFINGTON POST (Sept. 26, 2012), http://www.huffingtonpost.com/grace-poore/time-to-get-it-right-sout_b_1914604.html?view=print&comm_ref=false.

⁷⁹ *Id.* Reasons for this position are explored in the next section.

negotiations before the Declaration's adoption on November 18.⁸⁰ More conservative in many instances than the AICHR Representatives, the senior officials made small but critical changes to the draft, for instance, removing reference to a right of association, a right upheld in UDHR Article 20, and vital to the functioning of an autonomous civil society.⁸¹ Speaking at a conference in Jakarta on October 17, a month before its adoption, the outgoing Thailand Representative to AICHR noted her concerns about the draft Declaration:

[s]o far, the [Declaration] in my opinion . . . falls below international human rights standards. At least in AICHR, we have said repeatedly that the [Declaration] will not go below international standards but rather add value to human rights standards but still . . . the [Declaration] has room for improvement and I really hope that it will be improved before its adoption.⁸²

¶58 And beyond the Declaration itself, she argued, the drafting process pointed to weaknesses in the broader ASEAN human rights system:

It is now for ASEAN to prove that it can sincerely deal with the issue of people's rights. However, as long as human rights is perceived to be intrusive, there will be no guarantee that the ASEAN human rights bodies will be equipped with soul. A body needs a soul to function properly. Its human rights [system] will lack relevance if ASEAN continues to be inhibited by the principles of non-interference and consensus. They will not be able to function properly until the sovereignty of the state is balanced by the sovereignty of the people. It will be hypocritical if ASEAN allows human rights bodies to exist but deprives them of the power to effectively protect its people.⁸³

¶59 While speaking in a personal capacity, Sriprapha echoed the views of a liberal alliance, composed of AICHR representatives, Drafting Group members, diplomats, academics and CSO activists who have worked to build an ASEAN human rights system compatible with international standards, but they still represent a minority, albeit active, position within ASEAN.

⁸⁰ A Thai foreign ministry press release hinted at the impasse, noting that the New York meeting "considered the Draft [Declaration] . . . and directed the senior officials to consider the said draft before being adopted by the ASEAN leaders at the upcoming ASEAN Summit . . . To note, the consideration of senior officials would not change the content of the said draft, but would follow the normal procedure of the outcome document before submitting it to the leaders for their approval." *Informal ASEAN Ministerial Meeting in New York*, THAI MINISTRY OF FOREIGN AFFAIRS (Sept. 28, 2012), www.mfa.gov.th/main/en/media-center/.

⁸¹ Article 24 of the draft Declaration provided that "[e]veryone has the right to freedom of assembly and association" but the final two words were removed at a late stage, after the New York meeting of ASEAN foreign ministers.

⁸² Dr Sriprapha Petcharamesree, Plenary Address at Jakarta conference.

⁸³ *Id.*

¶60 Although radically different from the Draft Group’s version of January 2012, the Declaration adopted on November 18, 2012, was little different than the Myanmar, Malaysia or the Philippines drafts of May, June or September 2012, suggesting remarkable continuity during the drafting process. Echoing the story of the ASEAN Charter of 2007, the political struggle to draft the Declaration was fought on two main fronts. First, key members of the “ASEAN Six,” mainly Thailand and Indonesia (supported by WG-AHRM), championed a progressive Declaration that embraced universal human rights standards, in opposition to the “CMLV” countries (sometimes in alliance with Singapore, Malaysia and Brunei) which sought a more conservative document, limiting the application of these standards in ASEAN. Second, ASEAN foreign ministers and AICHR representatives, seeking a consensus within ASEAN and to contain expectations, battled against the activist civil society networks keen to dramatically expand the reach of universal human rights standards in ASEAN. Like the 2007 ASEAN Charter, the Declaration represents a victory for ASEAN’s liberals and conservatives alike. The ASEAN human rights system continues to evolve and these two political cleavages, and the manner in which they are calibrated, will continue to influence its development in coming years. The final product from this process, the 2012 ASEAN Declaration on Human Rights, provides further evidence of these cleavages, yet the AHRD is a stage in a journey rather than a destination and evidence suggests that these cleavages may well be managed productively and creatively in the years ahead.

V. PRODUCT: THE CONTENT OF THE DECLARATION

¶61 The ASEAN human rights system consists of norms as well as institutions, giving it a cognitive or normative as well as a structural dimension.⁸⁴ The ASEAN Human Rights Declaration is, therefore, a critical component of the system. It is the fourth human rights declaration adopted by ASEAN member-states to date,⁸⁵ but by far the most important. The Declaration must be viewed in the context of ASEAN’s ambition to establish an ASEAN Community based on three distinct pillars: economic, political-security and socio-cultural. First, the Declaration contributes to the process of norm generation, especially in the political-security pillar, which promotes democracy, human rights and good governance in ASEAN.⁸⁶ In particular, it promotes the elaboration of political entitlements in the specific plans for each pillar. Second, the Declaration will help to balance the three pillars, for instance by helping to ensure that the relatively-advanced economic pillar is balanced by substantive political-security and socio-cultural pillars. In conjunction with the embryonic entitlements set out in the political-security and socio-cultural community blueprints, it supports the political claims of individuals seeking to avail of their human and citizenship rights and the organizations working to

⁸⁴ The text of the ASEAN Human Rights Declaration is available at <http://www.asean.org/news/asean-statement-communicues/item/asean-human-rights-declaration>.

⁸⁵ The other three are the Declaration on the Elimination of Violence Against Women in the ASEAN Region (adopted June 13, 2004), the ASEAN Declaration Against Trafficking in Persons Particularly Women and Children (adopted November 29, 2004); and the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (adopted January 13, 2007).

⁸⁶ ASEAN, ASEAN POLITICAL-SECURITY COMMUNITY BLUEPRINT § II(7) (2009), <http://www.asean.org/archive/5187-18.pdf>.

support them. As a result, it will support a significant process of political claim-making, in the context of efforts to create a “people-oriented” ASEAN community.

¶62 The Declaration underlines the *plural* as well as the *evolutionary* nature of the ASEAN human rights system, its normative plurality echoing the institutional plurality explored above. This plurality is evident in the range of human rights and other instruments from which it draws most of its provisions: the U.N. Charter (1945), the Universal Declaration of Human Rights (UDHR) (1948), the UN Declaration on the Right to Development (DRD) (1986), the Vienna Declaration and Programme of Action (VDPOA) (1993), the Bangkok Declaration (1993), the joint communiqué from the ASEAN Ministerial Meeting of July 23-24 (JCAMM)(1993) and the 2007 ASEAN Charter.⁸⁷ The Declaration champions many norms embedded in international human rights instruments, including respect for individual human rights and contains a clear enunciation of the duties of ASEAN member-states to respect, promote and fulfill the human rights and freedoms which it sets out. It counter-balances this elaboration of individual rights and freedoms, however, through an elaboration of the duties of individuals to larger communities and to their institutional embodiment in the form of the state. And in addition to the first and second generation rights typically promoted in international human rights instruments, the Declaration sets out third generation rights, building on provisions in the UN DRD (1986) and other instruments.⁸⁸

¶63 Inevitably, the elaboration of individual duties and of third generation rights will provoke concerns that it supports a “cultural-relativist” approach to international human rights law, rooted in the “Asian Values” discourse of the 1990s. Such labels, however, largely negate the remarkable changes in the politics of member-states and to consequent efforts to build an ASEAN human rights system. The system represents an effort by certain member-states to create a buffer between global bodies such as the U.N. Human Rights Council and national institutions,⁸⁹ or in the case of Singapore and Brunei, to circumvent the need for national human rights institutions.⁹⁰

¶64 The first nine articles (arts. 1-9) of the Declaration cover “General Principles” and are the most controversial. Four are drawn from the 1948 UDHR,⁹¹ linking the Declaration to universal principles, one from the JCAMM 1993,⁹² and one from the

⁸⁷ Some of these instruments and documents are mentioned in the Preamble to the Declaration but not others.

⁸⁸ CHRISTIAN TOMUCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM 24-57 (2003). First generation rights date to the 18th century, cover traditional civil liberties such as the right to freedom of assembly and are also known as negative rights, because they require the state to refrain from patterns of behavior which infringe on such rights. Second generation rights date to the early twentieth century and cover rights such as the right to education or to an adequate standard of living. They are also known as positive rights because they oblige the state to be proactive in the provision of public goods and services or in the design of public policy. Third generation rights move beyond the individual rights of the first and second generation and promote collective rights such as the right to peace. Third generation rights are controversial, not least because it is unclear which collective entities can avail of them and on whom they place obligations.

⁸⁹ Some of which object to the intrusive scrutiny of the Universal Periodic Review process over-seen by the UN Human Rights Council.

⁹⁰ Anonymous interview with the representatives of one Southeast Asian NHR (May 2011).

⁹¹ Articles 1, 2, 3, 5 echo UDHR Articles 1, 2, 6 and 7, 8, respectively.

⁹² Article 6 draws on JCAMM 1993 § 17.

VDPOA.⁹³ Parts of other provisions can be traced to the Bangkok Declaration 1993 and the JCAMM 1993.⁹⁴ Article 6 provides, in part, that:

The enjoyment of human rights and fundamental freedoms must be balanced with the performance of corresponding duties as every person has responsibilities to all other individuals, the community and the society where one lives.

¶65 Furthermore, article 8 provides that “[t]he human rights and fundamental freedoms of every person shall be exercised with due regard to the human rights and fundamental freedoms of others” and that “[t]he exercise of human rights and fundamental freedoms shall be subject only to such limitations as are determined by law . . . and to meet the just requirements of national security, public order, public health, public safety, public morality as well as the general welfare of the peoples in a democratic society.”

¶66 These provisions echo Article 29(1) of the UDHR, which provides that “everyone has duties to the community in which alone the free and full development [of] his personality is possible.” They also echo provisions in regional instruments, including the African Charter of Human and Peoples’ Rights (ACHPR) (1981), Article 27(1) of which provides that “Every individual shall have duties towards his family and society, the State and other legally-recognized communities . . .” Nevertheless, in Article 7, the Declaration seeks to distinguish regional human rights standards from universal standards and from those in other regional systems, providing that “the realisation of human rights must be considered in the regional and national context and bearing in mind different political, economic, legal, social-cultural, historical and religious backgrounds.”

¶67 These provisions generated controversy prior to the adoption of the Declaration, with regional and international human rights CSOs seeking changes to them.⁹⁵ On November 5, 2012, two weeks before the Declaration’s adoption, for instance, Amnesty International sought a postponement, arguing that Articles 6, 7 and 8, in particular, pushed the Declaration below international standards by eroding individual rights.⁹⁶ Regional CSOs, for instance, objected to the reference to “public morality” in Article 8. Addressing their criticism at the AICHR consultation with CSOs on September 12, Malaysia’s AICHR Representative argued that “[b]ecause Malaysia, Singapore and Brunei have similar legal systems which include [provisions for] public morality, the term . . . cannot be taken out of the [Declaration].”⁹⁷ This provoked criticism from groups campaigning for the rights of gay, lesbian, bisexual and transgender people, leading to a response from Indonesia’s AICHR representative that “these issues are still problematic

⁹³ Article 7 draws on VDPOA 1993 art. 5.

⁹⁴ Including Articles 6 and 9.

⁹⁵ See, e.g., *Civil Groups Reject ‘Flawed’ Human Rights Declaration Draft*, BANGKOK POST (Sept. 25, 2012), <http://www.bangkokpost.com/news/local/313856/civil-groups-reject-flawed-human-rights-declaration-draft>.

⁹⁶ *Postpone Deeply Flawed ASEAN Human Rights Declaration*, AMNESTY INTERNATIONAL (Nov. 5, 2012), <http://www.amnesty.org/en/for-media/press-releases/postpone-deeply-flawed-asean-human-rights-declaration-2012-11-05>

⁹⁷ *AHRD is Hijacked by Narrow-Minded National Interests*, 12 CIVIL SOCIETY ORGANIZATIONS (Sept. 13, 2012), <http://www.burmapartnership.org/2012/09/ahrd-is-hijacked-by-narrow-minded-national-interests/>.

in almost all ASEAN countries, including Indonesia.”⁹⁸ This explains the absence of reference to such rights in the Declaration. In support of Malaysia’s position, it can be pointed out that the Declaration provides a counter-balancing right to privacy (in Article 21); and that claw-backs on the grounds of “morality” feature in other Declarations or Conventions, including the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights.⁹⁹ Nevertheless, these caveats and restrictions under “General Principles” frame the individual rights that follow, suggesting a hierarchy in which the rights of individuals are subsidiary to those of states.

¶68 These provisions represent continuity in the thinking of ASEAN leaders over the last 20 years (the JCMM 1993 called for a “balance between the rights of the individual and those of the community”) but also a departure, since the catch-all provision that the exercise of human rights can be limited by the “requirements” of the “general welfare of [people]” (as well as the more specific caveats that accompany it) goes beyond that in previous ASEAN documents.¹⁰⁰ This may be a concession to conservative states to secure their support for universalist provisions in the Declaration. Article 9 refers to a need to avoid “double standards” and “politicization” in the realization of human rights and freedoms, repeating language used in the 1993 Bangkok Declaration, and firing a shot across the bows of Western states perceived as meddling in the affairs of ASEAN member-states using human rights conditionality.¹⁰¹

¶69 In the first substantive part, the next sixteen articles (Articles 10-25) set out civil and political rights. Significantly, they speak of the rights of “persons” rather than “individuals,” reflecting antipathy to the putative Western emphasis on individual rights.¹⁰² Each derives from the UDHR Article 10 provisions for civil and political rights but omits reference to the ICCPR.¹⁰³ The provisions, mark a relatively minor departure from the rights set out in UDHR 1948, the absence of reference to a right of association notwithstanding. Provision for capital punishment in article 11, for instance, is controversial with regional human rights networks but largely compatible with Article 6 of the ICCPR. Nevertheless, as noted above, Articles 10-25 are significantly weakened by the provisions in Articles 6-8.

¶70 In the second part, Articles 26-34 set out economic, social and cultural rights, maintaining and arguably reinforcing an unhelpful binary distinction from the Cold War between first (civil and political) and second (economic, social and cultural) generation rights in the ICCPR and the International Covenant on Economic, Social and Cultural

⁹⁸ Bagus BT Saragih, *AHRD Won’t Be Perfect, Says Marty*, THE JAKARTA POST (Sept. 20, 2012), <http://www.thejakartapost.com/news/2012/09/20/ahrd-won-t-be-perfect-says-marty.html>.

⁹⁹ See, e.g., International Covenant on Civil and Political Rights, Dec. 16, 1966, Art. 12, 999 U.N.T.S. 171 (1967); European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, Art. 9, Eur. TS No. 5, 213 UNTS 221.

¹⁰⁰ Again, this echoes the ACHR (1981), including art. 27 (2) which provides that that “[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.”

¹⁰¹ This may be a concession to CMLV countries, in particular, concerned about Western use of human rights discourse to exert pressure on the former military junta in Myanmar.

¹⁰² This antipathy can be traced back to the Bangkok Declaration 1993 which “express[ed] concern that [international human rights] mechanisms relate mainly to one category of rights,” i.e. civil and political rights.

¹⁰³ This may be because of plans that the Declaration will make way in time for a full convention, a point to which I return in the conclusion.

Rights (ICESCR) (1966). Again, the articles draw on and reaffirm the UDHR, but not the ICESCR. The articles set out rights to education (including universal and free access to primary education),¹⁰⁴ to “adequate and affordable food, freedom from hunger and access to safe and nutritious food,”¹⁰⁵ and to clothing, housing, medical care and social services, safe drinking water and sanitation, and a safe, clean and sustainable environment.¹⁰⁶ In a significant caveat, however, Article 34 provides that member-states may determine the extent to which non-nationals may avail of these rights, raising questions about the rights of migrant workers, refugees and trans-border ethnic minorities under the Declaration.¹⁰⁷ Article 34 also represents a significant departure from the principle of non-discrimination in international human rights law, including UDHR Article 2.¹⁰⁸

¶71 While Articles 10-25 and 26-34 set out first and second generation rights, Articles 35-38 set out third generation rights,¹⁰⁹ including collective rights to development and to peace, a significant iteration of the demand of many developing countries that Western peers acknowledge claims arising from third generation rights.¹¹⁰ Other third generation rights, however, are omitted, for instance reference to the rights of indigenous peoples,¹¹¹ suggesting their partial or selective promotion.¹¹² Significantly, the Declaration does not set out a collective right to self-determination, nor identify distinct threats such as colonialism or neo-colonialism, distinguishing the Declaration from the ACHPR (1981) and from the Bangkok Declaration (1993).¹¹³ This suggests a new, more constructive generation in relations between ASEAN and Western states today.

¶72 In the third substantive part of the Declaration, articles 35-37 set out a right to development to be enjoyed by “every human person and the peoples of ASEAN.” This echoes Article 22 in the 1981 ACHPR,¹¹⁴ and distinguishes the two from the European

¹⁰⁴ ASEAN Declaration, *supra* note 1, at art. 31.

¹⁰⁵ *Id.* at art. 28.

¹⁰⁶ *Id.*

¹⁰⁷ This article is partially in tension with provisions in the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (2007), including Article 5, which calls on ASEAN states to “[i]ntensify efforts to protect the fundamental human rights, promote the welfare and uphold the dignity, of migrant workers.”

¹⁰⁸ Universal Declaration of Human Rights, G.A. Res. 217, Art. 2, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948).

¹⁰⁹ “Third generation” rights, also known as group or solidarity rights, are distinct from individual human rights in advancing claims to collective rights. They are controversial, in part, because the collective entity to which a putative right applies, e.g. states or a “peoples,” is contested.

¹¹⁰ Many Western countries voted against, or abstained from, the UN General Assembly vote on the Declaration on the Right to Development (1986) and continue to oppose some or all of its provisions.

¹¹¹ There is no reference in the Declaration, for instance, to the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992), nor of the substantive norms contained in it.

¹¹² The issue is politically sensitive in ASEAN. Vietnam, for instances, refuses to recognize distinct “indigenous peoples,” regarding particular claimants as “ethnic minorities,” even where they have a historical association with territory predating that of settler populations.

¹¹³ See African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, Preamble, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986 (hereinafter “ACHPR”); Bangkok Declaration, *supra* note 6, at § 12 (1993), *available at* <http://www1.umn.edu/humanrts/instreet/z1afchar.htm>.

¹¹⁴ ACHPR, *supra* note 113, at Art. 22.

and Inter-American Conventions which predate the 1986 UN DRD.¹¹⁵ This right is primarily asserted vis-à-vis ASEAN member-states: Article 35, for instance, provides that “the lack of development may not be invoked to justify the violations of internationally recognised rights,” an assertion on the part of “ASEAN Six” countries vis-à-vis the “CLMV” countries. The fourth part, in Article 38, sets out a right to peace, providing that “[e]very person and the peoples of ASEAN have the right to enjoy peace within an ASEAN framework of security and stability, neutrality and freedom, such that the rights set forth in this declaration can be fully realized.”

¶73 The article reinforces other important ASEAN instruments,¹¹⁶ and arises from the particular history of the region as a theatre of super-power rivalry since the establishment of ASEAN in 1967. The final part, Article 39, provides for cooperation among ASEAN member-states in the promotion and protection of human rights and with other national, regional and international entities, in accordance with the ASEAN Charter.

VI. CONCLUSION

¶74 The ASEAN human rights system is the fourth regional human rights system, complementing the European, Inter-American and African systems, and the first established both in Asia and since 1981. Of the other systems, it is closest in character to the African system. Like its African counterpart, for instance, the ASEAN system is institutionally weak and normatively distinctive, marking both out from the European and Inter-American systems with their powerful Court and Commission respectively and their clear assertion of the primacy of individual human rights. The Declaration adopted on November 18, 2012, reinforces these characteristics. It is duty-oriented, counter-balancing the rights of individuals with corresponding duties to states and wider communities. It sets out substantive “positive” rights (especially economic and social rights), and more tentative “negative” rights (or civil liberties), framed by support for government intrusions such as the use of capital punishment and limitations on the grounds of “general welfare,” “public morality” and other criteria. It promotes controversial third generation rights, including collective rights to development and to peace.

¶75 These features may suggest that it espouses a cultural-relativist position, in opposition to the universalist norms of international human rights law, and therefore outside the interdependent structure of regional and global human rights systems, proposed by Sheldon (*see* Section 1, above). But this argument is flawed on two main grounds. First, despite notable victories for conservative forces during the drafting process, the declaration represents a delicate balance between universalist and cultural-relativist norms, representing inevitable (and necessary) debate and political contestation within AICHR and the ASEAN human rights system about the role of human rights and democracy in the ASEAN integration process. The Declaration represents partial victory for both positions and a delineation of a key fault line as the system continues to evolve,

¹¹⁵ For the text of the European Convention, *see* <http://www.echr.coe.int/ECHR>. For the text of the Declaration on the Right to Development, *see* <http://untreaty.un.org/cod/avl/ha/drd/drd.html>.

¹¹⁶ Including the ASEAN Zone of Peace, Freedom and Neutrality Declaration (1971), ASEAN Treaty of Amity and Cooperation in Southeast Asia (1976), the Declaration of ASEAN Concord (1976) and the Southeast Asia Nuclear Weapons Free Zone Treaty (1995).

albeit one likely to change over time. Second, the Declaration represents regional support for, rather than a radical departure from, international human rights law, with its clear reaffirmation of the main provisions of the UDHR. This includes respect for individual human rights and a clear enunciation of the duties of ASEAN member states to respect, promote and fulfill the rights and freedoms which it sets out.

¶76 Adoption of the Declaration represents a significant milestone in the development of the ASEAN human rights system and underlines both its current significance and future possibilities. The product, the Declaration itself, however, is less important than the process that led to it and the political context that framed it, as they have a critical bearing on the continuing evolution of the ASEAN human rights system, of which the Declaration is a subsidiary and, in some respects, temporary part. AICHR's Five-Year Work-Plan 2010-15 requires it to "[w]ork towards the ASEAN Convention on Human Rights upon adoption of the [Declaration],"¹¹⁷ suggesting that a Convention may be adopted in a few years time, marginalizing the Declaration. Not all ASEAN member-states may sign or ratify such a Convention, ensuring that the Declaration remains relevant. Nevertheless the political context and process that led to the Declaration will shift as AICHR works to draft a Convention.

¶77 Regional human rights systems are not fixed products, established at particular points in history, but rather are works-in-progress, evolving over time. The European Convention on Human Rights, for instance, was adopted in 1950 and came into force in 1953, but it evolved slowly over the next sixty years with the cumulative addition of substantive protocols. It reached an important milestone in 1998, for instance, when Protocol 11 abolished the European Commission on Human Rights, eliminating its filtering of cases sent to the European Court of Human Rights and subjecting national parties to the compulsory jurisdiction of the Court by eliminating optional derogations. What began as a political construct, therefore, evolved gradually to become a powerful judicial mechanism.

¶78 The ASEAN human rights system is on a similar road, in many respects, starting out as a political project, but evolving along the path to becoming, potentially, an authoritative law-making and law-enforcing body. Criticism of the ASEAN human rights system from some academics and human rights organizations implies it is a fixed and static product, but in reality, significant progress is already evident in its short life. The evolutionary nature of the system is both discernible to independent social scientists and jurists tracking its progress and programmed into its architecture. In an important study, reflecting on the establishment of AICHR in 2009, Hsein-Li outlines an incremental process that reflects the thinking of a liberal alliance, composed of the WG-AHRM and of some ASEAN foreign ministers, AICHR representatives, and civil society activists:

[t]his would entail the formalization of the ASEAN Declaration on Human Rights into the ASEAN Convention on Human Rights, the ASEAN Intergovernmental Commission on Human Rights into the ASEAN Commission on Human Rights and the establishment of the ASEAN Court

¹¹⁷ AICHR, FIVE-YEAR WORK PLAN OF THE ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS (2010 – 2015) § 4.2.3 (2010).

of Human Rights such that international human rights law is firmly established within ASEAN.¹¹⁸

¶79 For this to happen, a tipping point must be reached where progressive states such as Indonesia and Thailand receive more committed support from ambivalent member-states such as the Philippines and Malaysia. But this seems a distinct possibility as member-states focus on the ASEAN Community in the run up to 2015 and beyond and as political reform in Myanmar reduces tension between the “ASEAN Six” and the “CMLV” countries.

¶80 The evolutionary approach is also incorporated into the architecture of the ASEAN human rights system. AICHR’s terms of reference provide that it shall be guided by the “adoption of an evolutionary approach that would contribute to the development of human rights norms and standards.”¹¹⁹ In addition, the Cha-Am Hua Hin Declaration on the ASEAN Intergovernmental Commission on Human Rights and the AICHR ToR provide for a review of the Commission’s activities after five years, creating an important opportunity for a reappraisal of the system in 2014. This will take place roughly a year ahead of the planned establishment of an ASEAN Community in 2015 (although this latter target date may slip). In return for its support of the AICHR ToR, Indonesia secured agreement from other ASEAN member-states in 2009 that AICHR will acquire a substantive “protect” mandate as a result of this review.¹²⁰ Given that the ASEAN Community is anticipated to have new authoritative, supra-national organs, it is possible that the ASEAN human rights system will become such an organ in 2014, 2015 or soon after, especially in light of the provision for the commencement of work towards an ASEAN Human Rights Convention. In the context of Vasak’s concern that regional human rights systems be locked into a process of regional integration (*see* Section 1, above), the ASEAN human rights system is directly linked to a unfurling process of ASEAN integration, giving it substance and significant potential. The road ahead seems reasonably clear, with the process locked-in in key respects. The Declaration notes its origins in the ASEAN Charter, “in particular the respect for and promotion and protection of human rights and fundamental freedoms, as well as the principles of democracy, the rule of law and good governance.”¹²¹ Furthermore, the Charter itself, and the blueprints for the institutional pillars on which the ASEAN community will be built, envelope the ASEAN human rights system, providing a fertile environment in which it can develop.

¶81 Some academics have been cautious in their assessment of the system to date. According to Ciorciari, for instance, the system will institutionalize human rights deliberations in ASEAN “in the sense of confining them to a controlled bureaucratic environment.”¹²² The evolving ASEAN human rights system, however, is too plural in institutional and normative terms to serve this purpose, with control of it no longer confined to ASEAN Foreign Ministers or to AICHR but shared in important senses with Track Two and Track Three institutions in a process of political bargaining, of

¹¹⁸ Hsein-Li, *supra* note 16, at 254.

¹¹⁹ AICHR ToR § 2.5.

¹²⁰ Dr Nur Hassan Wirajuda, Foreign Minister of Indonesia 2001-2009, Keynote Speech at Jakarta conference. AICHR at present has a limited mandate to promote, but not protect, human rights in ASEAN.

¹²¹ ASEAN Declaration, *supra* note 1, at Preliminaries.

¹²² Ciorciari, *supra* note 16, at 697.

“governance” in place of “government.” A good example of this plurality is the coexistence of AICHR and the ACWC (see Figure 1, above). AICHR, for instance, serves as a lightning rod for support and criticism alike of the system, its “overarching” role encouraging supporters, its “inter-governmental” (rather than supra-national) character encouraging its critics. But in contrast to AICHR, and the close scrutiny which it receives, ACWC operates below the radar, building on prior agreements and consensus with respect to women and children to develop a potentially substantive “protect” mandate, in comparison to AICHR’s more tentative “promote” mandate. This twin-track approach holds significant potential to separate controversial aspects of the system, the “high-politics,” from productive opportunities, or the “low politics” of developing institutional working practices.

¶82 Asian leaders set out an important principle in the elaboration of regional human rights systems in the Bangkok Declaration of 1993:

[we] [r]ecognize that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of norm-setting, bearing in mind the significance of national and regional particularities and the various historical, cultural and religious backgrounds.¹²³

¶83 The ASEAN Human Rights Declaration of 2012 represents a practical expression of this principle. Almost 20 years on from the Bangkok Declaration, it symbolizes an important continuity in the thinking of Asian leaders and a commitment over time to delivering on promises, suggesting a reasonably predictable pattern of change. Far from a cultural-relativist body, it is a tangible step in a structured, inclusive and evolutionary process to build an ASEAN human rights system that promotes and protects the rights of 570 million people in South-East Asia, and helps to ensure their security, well-being and distinctive cultural identities.

¹²³ Bangkok Declaration, *supra* note 6, at §8.