

THE PROTECTION OF HUMAN RIGHTS IN SOUTHEAST ASIA: IMPROVING THE EFFECTIVENESS OF CIVIL SOCIETY

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1. Introduction

A nascent human rights regime is emerging in Southeast Asia, one equipped with an institutional body, the ASEAN Inter-governmental Commission on Human Rights (AICHR) and a normative framework enshrined in the *ASEAN Human Rights Declaration* (AHRD). While advocacy Civil Society Organizations (CSOs) are playing a vital shadowing role that confronts ASEAN governments with the need to craft a credible protection mechanism, the lack of formal consultation with the current legal frameworks reflects the marginalization of CSOs within the member states. Beyond marginalization of CSOs in crafting the AICHR, States have sought to limit the impact of CSOs' advocacy activities through selective engagement of government approved CSOs. The adoption of the AHRD on 18 November 2012 and the inability of civil society to effectively influence its drafting is the latest phase in the human rights story in Southeast Asia. It is symptomatic of the tension that has existed between civil society and States in this region since the end of the Cold War.

CSOs, who were sparingly consulted in the process of creation of the ASEAN Inter-Governmental Commission on Human Rights, have early on criticized its *Terms of Reference* (TORs) which provided for a 'toothless' mechanism that failed to provide for real 'protection'. After much criticism in the run up to AHRD's release in November 2012, the AICHR held on 22 June 2012 its first formal consultation on the AHRD in Kuala Lumpur, but did not release a working draft. The Fédération internationale des

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droits de l'Homme (FIDH) has noted that the "AICHR has failed to release any documents it has adopted since its establishment two years ago, including its guidelines of operations, annual work plans, and annual report for 2011. AICHR justified such secrecy on the ground that the documents sought are all 'internal working documents'."¹ When an early draft text of the AHRD was leaked however, CSOs used it to raise serious questions about ASEAN's commitment to upholding universal standards under the *Universal Declaration of Human Rights* (UDHR) and international human rights conventions. This led to some last minute token consultations, and in July 2012 ASEAN foreign ministers agreed to release 'key elements' of the draft but kept the full draft a secret.

A one-day regional consultation on the AHRD was held on 12 September. However, as FIDH has noted, AICHR selectively limited the participation of civil society in this consultation and continued to bar some organisations from participating.² Overall, CSOs have had no direct input via formal engagement mechanisms into the drafting of the ASEAN Human Rights Declaration (AHRD) which was adopted on 18 November 2012.

This article reviews and analyses the role of civil society in shaping this emerging human rights regime. Thus far the crafting of both of the institutional and normative frameworks of this emerging has been fraught with a lack of transparency and inclusiveness. This has resulted in both AICHR and AHRD falling short of international human rights standards, ultimately resulting in the absence of a capacity to protect the basic human rights of the peoples of ASEAN. It is also argued that although CSOs have been actively advocating for a protection mechanism in ASEAN's human rights regime, the absence of appropriate engagement mechanisms, and the strategy of national governments to engage selectively only with approved NGOs, have made this advocacy less than effective. There is thus an ongoing tension between civil society and national governments that stands to determine the eventual tone of the human rights regime in Southeast Asia. This continuing tension significantly contributes to the ineffectiveness of CSOs in advancing the protection of human rights to date. Unless appropriate engagement and equitable mechanisms are put in place, civil society will be not be in a position to advocate effectively for human rights protection in the region.

¹ FIDH submission to the European Parliament Sub-committee on Human Rights (DROI) on AICHR, 18 September 2012. Available at http://www.fidh.org/IMG/article_PDF/article_a12186.pdf

² Ibid.

2. CSOs and the Protection of Human Rights in Southeast Asia

While a progressive role for CSOs in the advancement of the promotion and protection of human rights in other parts of the world is well documented, their role thus far in crafting the nascent human rights regime in Southeast Asia leaves room for a less flattering account.

Inter-state cooperation on human rights issues between Asian States, beyond coordination within the UN, has emerged grudgingly. In preparation for the World Conference on Human Rights in Vienna, Austria, in 1993, Asian countries held a regional meeting from 29 March to 2 April 1993. In concluding this meeting, they issued the *Bangkok Declaration* in which they “welcomed the increased attention being paid to human rights in the international community” and reaffirmed their commitment to the principles of the UN *Charter* and the *Universal Declaration of Human Rights*.

They also called for the ‘democratization’ of the UN system, “a positive, balanced and non-confrontational approach in addressing and realizing all aspects of human rights” and respect for national sovereignty and non-interference. They reaffirmed their view of the indivisibility of all human rights and called attention, in the preamble to the *Declaration*, to their concern that international human rights mechanisms “relate mainly to one category of rights.” They called for recognition of their view that “while human rights are universal, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.”³ Significant tensions existed between States, many (notably East Asian States) of whom questioned the universality of human rights and the *legitimacy* of addressing human rights situations against the will of States. Echoing contemporary arguments about the Responsibility to Protect, States challenged interferences based on their criticism of the selectivity and politicization of organs such as the former UN Commission on Human Rights in addressing situations in only a limited number of countries.

³ *Report of the Regional Meeting for Asia of the World Conference on Human Rights*, Bangkok, 29 March - 2 April 1993. UN Doc. A/conf.157/asrm/8; a/conf.157/pc/59.

A parallel *NGO Bangkok Declaration* was issued on the non-governmental side, however, reflecting CSOs commitment to universalism “encompassing the richness and wisdom of Asia-Pacific cultures.” Some 240 NGOs advanced the argument that “[t]here is emerging a new understanding of universalism encompassing the richness and wisdom of Asia-Pacific cultures. The human rights are of universal concern and are universal in value, the advocacy of human rights cannot be considered to be an encroachment upon national sovereignty.”⁴

Activism by Asian CSOs was the most powerful rebuttal to arguments against universalism. They affirmed their commitment to the indivisibility and interdependence of human rights, be they economic, social and cultural, or civil and political rights, as well as to “a holistic and integrated approach to human rights. One, set of rights cannot not be used to bargain for another.”⁵ Around 1,000 international, regional and local NGOs from all over the world participated in an NGO-Forum that preceded the Vienna World Conference on Human Rights. The theme of their meeting was ‘All human rights for all’. After significant debates and input from CSOs, the Vienna Conference recognised the universality of human rights, their indivisibility and the interdependence between democracy, development and human rights.⁶ The early nineties marked the timeline when civil society in the region began to actively organise themselves,⁷ and started advocating and monitoring the human rights regime that will take the next two decades to unfold.

Since then, wider regional institutions have been conspicuously absent in East and Southeast Asia, up to the creation of the AICHR. Herman Kraft has pointed to “track three” human rights ‘diplomacy’ involving transnational non-governmental advocacy groups in Southeast Asia. In addition to formal governmental (Track 1) and informal governmental diplomacy involving non-state actors such as think tanks ((Track 2), Kraft argues that Track 3 diplomacy through the Asia Pacific Coalition for East Timor (APCET) was instrumental in raising public awareness of human

⁴ *NGO Bangkok Declaration on Human Rights*, World Conference on Human Rights, 19 April 1993, UN Doc. A Conf.157/PC/83,

⁵ *Ibid.* See also Human Rights Watch reports on this period: *Asia Watch*, available at <http://www.hrw.org/reports/pdfs/worldreports/world.94/asia.pdf>.

⁶ See OHCHR, *World Conference on Human Rights, 14-25 June 1993, Vienna, Austria*, Available at <http://www.ohchr.org/EN/ABOUTUS/Pages/ViennaWC.aspx>

⁷ The Asian Forum for Human Rights and Development was founded in 1991 and remains one of the most active regional NGOs advocating for the promotion and protection of human rights.

rights issues in East Timor. Within ASEAN, Track 1 (ASEAN Governments) and Track 2 (ASEAN Institutes of Strategic and International Studies) diplomacy have been commonplace at ASEAN ministerial meetings, which have regularly addressed economic, political, security and social issues. Track 3 networks, according to Kraft, have been most active in the area of human rights. In December 1991, Track 3 networks created the Asian Forum for Human Rights and Development (Forum Asia) in Bangkok, which facilitated sharing of information on human rights in Asia. In 1996, human rights lawyers and activists from Indonesia, Malaysia, the Philippines and Thailand met to establish the Working Group for an ASEAN Human Rights Mechanism. This marked a continuation of the efforts of East and Southeast Asian NGOs that began in the lead-up to the Vienna World Conference.

In an assessment of the contribution of CSOs to advancing human rights in the region, Dinah PoKempner argued in 1997, that “NGOs are likely to play a key role in coming years, not only in monitoring and exposing abuses, but in standard-setting as well. This is due to Asia’s unique position as the only region of the world without a regional intergovernmental mechanism for the protection of human rights.”⁸

This momentum continued into the next decade when the *ASEAN Charter* first included a mention that the regional group would establish a human rights body. Since then CSOs both at the national and regional level have been actively monitoring and attempting to advocate that this movement towards a human rights mechanism will speak to international human rights standards. The work of CSOs with regards to the AICHR and AHRD are discussed in detail in Section 5.

3. Discourse on Human Rights Advocacy in Southeast Asia

Literature on human rights in Southeast Asia in general is of relatively recent vintage, reflective of the gradual engagement of States in the region with human rights discourse/debate. Scholarly work on human rights in East and Southeast Asia specifically have addressed not only the relativist debate,⁹ but also human rights amidst the emerging political economy of

⁸ Dinah PoKempner, *Asia’s Activists and the Future of Human Rights*, 66 *Fordham L. Rev.* 677 (1997), p. 685, available at: <http://ir.lawnet.fordham.edu/flr/vol66/iss2/14>, p.

⁹ W. T. de Bary, *Asian Values and Human Rights: A Confucian Communitarian Perspective*, Cambridge: Cambridge University Press, 1998; J.C. Hsuing, *Human Rights in East Asia: A Cultural Perspective*, New York: Paragon Publishers, 1986; M. Jacobsen and O. Brunn, Eds., *Human Rights and Asian Values: Contesting National Identities and*

East Asia,¹⁰ labour rights in East Asia,¹¹ and the politics (domestic and international) of human rights in Southeast Asia.¹² Human rights institutions and processes in East and Southeast Asia have featured in a few recent works.¹³ Another work by Evans, while noting their inability to enforce their decisions, called attention to their constructive roles in the promotion and protection of human rights.¹⁴ Andrea Durbach, Catherine Renshaw and Andrew Byrnes, have attempted to identify the functions that a regional mechanism might play that are distinct from national institutions and regional networks, suggesting that while such mechanisms are important, the protection of human rights still requires the accompanying political will.¹⁵

Some authors have questioned the capacity of the new ASEAN Inter-Governmental Commission on Human Rights to protect human rights and have suggested steps for improvement.¹⁶ Hao Duy Phan has offered a 'blueprint' for a Southeast Asian court of human rights that would offer robust protection, "given that it is unlikely that an ASEAN human rights body to be established by the *ASEAN Charter* will adequately and effectively respond to human rights problems in the region."¹⁷

Cultural Representation in Asia, Nordic Institute of Asia Studies: Democracy in Asia Series, no. 6, 2000; and Tu Weiming, "Implications of the Rise of 'Confucian' East Asia", *Daedalus*, Winter 2000, 129, pp. 195-218.

¹⁰ C. Apodaca, "The Globalization of Capital in East and Southeast Asia: Measuring the Impact on Human Rights Standards," *Asian Survey*, Vol. 42, no. 6, Nov-Dec. 2002, pp. 883-905; P. Close and D. Askew, *Asia Pacific and Human Rights: A Global Political Economy Perspective*, Aldershot, Ashgate Publishing Limited, 2004.

¹¹ Anthony Woodiwiss, *Globalisation, Human Rights, and Labour Law in Pacific Asia*, New York: Cambridge University Press, 1998.

¹² P. J. Eldridge, *The Politics of Human Rights in Southeast Asia*, London, Routledge, 2000, and A. J. Langlois, *The Politics of Justice and Human Rights: Southeast Asia and Universalist Theory*, Cambridge: Cambridge University Press, 2001.

¹³ P. Eldridge, "Emerging Roles of National Human Rights Institutions in Southeast Asia," *Pacifica Review: Peace, Security & Global Change*, Volume 14, Issue 3, 2002.

¹⁴ C. Evans, "Human Rights Commissions and Religious Conflict in the Asia-Pacific Region," *International and Comparative Law Quarterly*, v. 53, July 2004, pp. 713-729.

¹⁵ Andrea Durbach, Catherine Renshaw and Andrew Byrnes, "'A tongue but no teeth?': The emergence of a regional human rights mechanism in the Asia Pacific region," *Sydney Law Review*. VOL 31:211-238.

¹⁶ M.S. Kelsall, "The New ASEAN Inter-Governmental Commission on Human Rights: Toothless Tiger or Tentative First Step," *Asia-Pacific Issues*, No. 90, East West Centre, at <http://scholarspace.manoa.hawaii.edu/bitstream/handle/10125/12873/api090.pdf?sequence=1>; and R. Robin Ramcharan, "ASEAN's Human Rights Commission: Policy Considerations For Enhancing Its Capacity To Protect Human Rights", *UCL Human Rights Review*, Vol.3, 2010, pp. 199-235.

¹⁷ Hao Duy Phan, "A Blueprint for a Southeast Asian Court of Human Rights," *Asia Pacific Law and Policy Journal*, Vol. 10, No. 2, pp. 385-433. See also Phan, "Evolution

In the wake of the 1997 Asian financial crisis, Maznah Mohamad noted the “modest progress” in the discourse on human rights and democracy throughout the region” of Southeast Asia.¹⁸ The modest progress was perhaps related to the fact that the very identities of modern States in the region were predicated on their ability to deliver economic welfare. The subsequent terrorist attacks in New York on 11 September 2001 and their global ramifications threatened to place human rights far in the background as security concerns trumped human rights considerations. Writing in 2002, Mohamad noted ASEAN governments’ continuing reservations about adherence to international human rights treaties. Mohamad called attention to low levels of adherence to international human rights treaties: no ASEAN country had ratified all twenty-six international human rights instruments and only two had ratified all six major treaties; only the *Convention on the Rights of the Child* had been ratified by all ten countries, and the *Convention Against Torture* was the “most avoided” as only three ASEAN countries were signatories at that time. Finally, ASEAN went so far as to provide organizational support for a Working Group for an ASEAN Human Rights Commission or Mechanism.¹⁹ Southeast Asian governments have thus gradually and cautiously crafted a consensus on human rights issues within ASEAN, culminating in the *ASEAN Charter* of 2007.²⁰

Scholarship on the role of CSOs in terms of Track 3 involvement is also an emerging one.²¹ A theme arising in the literature is the effectiveness of

towards an Asean Human Rights Body, 9 *Asia-Pacific Journal on Human Rights and the Law* 1 (2008).

¹⁸ M. Mohamad, “Towards a Human Rights Regime in Southeast Asia: Charting the Course of State Commitment,” *Contemporary Southeast Asia*, Vol. 24, No. 2, August 2002.

¹⁹ See the website of the Working Group for an ASEAN Human Rights Mechanism, which has organized a number of workshops and high-level ASEAN roundtables on human rights, at <http://www.aseanhrmech.org/>.

²⁰ On the general issue of consensus over human rights norms, see A. J. Langlois, *The Politics of Justice and Human Rights: Southeast Asia and Universalist Theory*, Cambridge, CUP, 2004. Langlois has argued that “The discourse about human rights is a discourse about justice. The contributors to the discourse come from traditions which have criteria for judging just behavior. The issue is not whether any behaviour at all can be described as just, but is one of different criteria. Differences in ways of being and behaving exist: what is crucial to understand is that their self-descriptions and descriptions by others are not arbitrary. It is this which allows the negotiations of these differences to proceed in “good faith”, p. 151.

²¹ Amitav Acharya et.al, *Democracy, Human Rights, and Civil Society in South East Asia*, Joint Centre for Asia Pacific Studies, 2001. This work features contributors are from Australia, Canada and the UK, and one from the region. See generally Claire Mercer, “NGOs, Civil Society and Democratization: A Critical Review of the Literature,” *Progress*

CSOs in advancing the protection of human rights. According to Thi Thu Huong Duan in 2008, a more effective role for civil society in ASEAN community-building required ASEAN opening up space for civil society participation in decision-making.²² Echoing this concern at the same time was Donald Weatherbee who argued that the crucial issue for ASEAN civil society was “whether the Charter and Community are simply devices to more effectively manage intra-ASEAN state-to-state relations rather than provide a new region-wide framework of reference for how a state manages its relations with its own population.”²³

Contributions specifically on the role of CSOs in crafting the AICHR is in its infancy, and this article purports to be a pioneering effort in assessing their role and effectiveness in this process in the context of other literature that discuss the emerging human rights regime in Southeast Asia. Mely Caballero-Anthony has noted in his study of the lead-up to the establishment of the *ASEAN Charter* that announced the subsequently-created AICHR, that despite some consultations with CSOs, the latter had already criticized a ‘weak’ charter and proposed to elaborate their own more “people-centred” instrument. CSOs lamented even then their absence in decision-making processes.²⁴ A brief survey of the attempts by CSOs to influence the crafting of the human rights mechanism since reveals that while they had many substantive contributions to make, they were simply by-passed in their efforts. CSOs had virtually no direct impact on the process.

4. Civil Society and the Crafting of the AICHR and AHRD

With the adoption of the *ASEAN Charter* in 2007, ASEAN states embarked on a process of crafting a regional ASEAN Intergovernmental Commission on Human Rights (AICHR), eighteen years after the World Conference on Human Rights in Vienna. While the World Conference had reaffirmed the universality of human rights, ASEAN states have moved grudgingly and gradually, egged on by greater global concern for human

in Development Studies, January 2002 Vol. 2 no. 1, 5-22. Mercer calls for a more complex view of civil society and their role in the politics of development.

²² Thi Thu Huong Duan, “Examining the engagement between civil society in Southeast Asia and ASEAN Community Building,” Essay, Grin Verlag, 2008, available at <http://www.grin.com>.

²³ Donald Weatherbee, “ASEAN’s Identity Crisis,” in *Legacy of Engagement in Southeast Asia*, Ann Marie Murphy, Bridget Welsh (Eds), Singapore, ISEAS, 2008, p. 364.

²⁴ Mely Caballero-Anthony, “The ASEAN Charter: An Opportunity Missed or One that Cannot Be Missed?”, *Southeast Asian Affairs*, Volume 2008, pp. 71-85.

rights and by the pressures of globalization, towards the protection of human rights.

In the drafting phase of the *Terms of Reference* (TORs) of the AICHR concluded in July 2009, the general requirements of an ASEAN regional human rights body were highlighted by the national human rights institutions (NHRIs) of Indonesia, Malaysia, Philippines and Thailand. They had posted a 2008 position paper on the draft terms of reference of the eventual ASEAN human rights body, available through the National Human Rights Commission of Indonesia's website.²⁵ It had noted that the TORs should provide for an "independent deliberative body," that provides "an effective level of promotion, protection and monitoring of human rights throughout the ASEAN region." Formation of the human rights body had to be undertaken in a transparent and participatory manner, as well as an inclusive process of consultation with all stakeholders, including the NHRIs and the civil society. The human rights body required both promotion and protection functions. It also had to have, at the initial phase, a role in monitoring the implementation of international human rights obligations and the respective treaty bodies' recommendations at national level of ASEAN member states. The protection function of the human rights body should have included human rights situation analysis of the ASEAN sub-region, which could have been undertaken through country visits and the assessment of the impacts of the ASEAN *Community Blueprints*, i.e. political and security, economic and socio-cultural. The human rights body needed to be adequately funded and supported by staff members and facilities.

The TORs were widely criticised for favouring promotion rather than protection of human rights. Many CSOs rightly criticised the TORs for having provided for a "toothless council",²⁶ a concern voiced by the ATFHR and Rafendi Djamin.²⁷ On the other hand, Dr. Termsak Chalermphanupap, ASEAN's Director of Political and Security Directorate, countered that the new ASEAN human rights body was "not supposed to have teeth" but was to generate consensus.²⁸ Mr. Termsak,

²⁵ *Position paper of the national human rights institutions of Indonesia, Malaysia, Philippines, and Thailand on terms of reference of The ASEAN human rights body. Submitted at the meeting with the HLP on 10 September 2008*, available at <http://www.komnasham.go.id/portal/en>.

²⁶ "ASEAN's Toothless Council", *Wall Street Journal*, 22 July, 2009, available at <http://online.wsj.com>.

²⁷ Casey, Canadian Press, Op. cit.

²⁸ Leila Salaveria, "Toothless rights body would hurt ASEAN group," *Philippine Daily Inquirer*, 30 June 30 2009, available at <http://newsinfo.inquirer.net>.

who felt it necessary to issue a document dispelling “misinformation” by the media, had noted that ASEAN human rights body was to be “an organ inside the organization structure of ASEAN.” The direct mandate for its establishment was in Article 14 of the *ASEAN Charter*’s Chapter IV, “Organs”. As such, the human rights body was “never intended to be any ‘independent watchdog’. To moan on the human rights body’s “lack of teeth” is to bark up the wrong tree”, according to some.²⁹ Nevertheless commentators have offered useful suggestions on the enhancement of the protection of human rights in the region.³⁰

Given the initial experience of ASEAN over the criticism generated by CSOs with regards to AICHR’s TOR, the subsequent drafting by the government-appointed AICHR Permanent Representatives of the *ASEAN Human Rights Declaration* (AHRD), which began in July 2012, has excluded civil society stakeholders, most notably human rights CSOs, from the process. Trenchant criticisms have plagued the closed-door approach to its drafting, with stakeholders across the region left to beg AICHR Permanent Representatives and to scour the Internet for scraps of information related to the substantive rights being discussed. Regional and global civil society organisations have used their respective online platforms and social media to disseminate incisive and biting critiques on the lack of transparency, and to offer advice on substantive rights that should be included.³¹ A rare glimpse of a draft declaration was afforded to the public and CSOs when, in January 2012, a working draft was leaked and made available online via sites such as Scribd.com.³²

²⁹ Termsak Chalermpananupap, *Facts About ASEAN’s Human Rights Cooperation*, ASEAN Secretariat, available at <http://www.aseansec.org/HLP-OtherDoc-1.pdf>

³⁰ Robin Ramcharan, Op.cit.

³¹ A joint open letter dated 8 July 2012 to ASEAN Foreign Ministers on the AHRD by reputable international human rights CSOs, urged ASEAN Ministers to remove any provision purporting to impose limitations or restrictions on all rights in general, to remove any provision subjecting the rights in the *Declaration* to “national and regional peculiarities” which could be used by States to weaken protection of human rights, to remove any interference to the balancing of rights and responsibilities given that human rights are inalienable, to include a provision explicitly guaranteeing that no part of the *Declaration* shall be interpreted or interpreted in a manner inconsistent with international standards, and to ensure that specific rights are in line with international human rights standards. See *Joint Open Letter to ASEAN Foreign Ministers on the Draft ASEAN Human Rights Declaration*, 7 July 2012, by the International Commission of Jurists, FIDH, Amnesty International, Article 19 and Dignity International. Available at <http://fidh.org/joint-open-letter-to-ASEAN-foreign>. See also American Bar Association, *Expert’s Note on the ASEAN Human Rights Declaration*, Rule of Law Initiative, May 2012.

³² This working draft of the future *ASEAN Human Rights Declaration* as of January 2012 was uploaded onto Scribd.Com by Joey Oliveros Dimaandal http://www.scribd.com/joey_dimaandal.

Criticism by Amnesty International and Human Rights Watch focused on the lack of consultation on the proposed declaration and the “deeply flawed” and “closed door” approach to the drafting process which began in July 2011 in Vientiane, Laos. Human Rights Watch’s Deputy Asia Director was cited in this piece as calling for the “immediate release” of a copy of the draft to the public, given that a leaked earlier version was “quite worrisome”.³³ As ASEAN’s AICHR was about to submit a draft to the ASEAN Ministerial Meeting in Phnom Penh in July 2012, there were calls by the UN High Commissioner for Human Rights, Navi Pillai, for a meaningful consultation on the draft with the widest possible spectrum of people from the region. There was also criticism from the Indonesia-based Human Rights Working Group (HRWG) which deplored the “blocked access to information relating to the draft, which is so important and which will affect millions of people in Southeast Asia.”³⁴ An online letter to interested civil society titled *ASEAN Human Rights Declaration* was posted containing contact details, including e-mails of the AICHR members, so that they could reach them directly.

A concern expressed was that the Drafting Team (DT) had “no authority to consult with stakeholders,” and that only “Indonesia and Thailand’s DT members confirmed that they want to talk to civil society.”³⁵ On 2 May 2012, some 136 CSOs, most of them based in the region, petitioned the AICHR through an open letter for a genuine consultation process. A planned consultation for late June 2012 towards the end of the drafting process would not be considered consultative and transparent.³⁶ Following a consultation on 22 June 2012 with 48 civil society organisations, a Fédération internationale des droits de l’Homme (FIDH) statement reiterated the impression of a flawed consultation process and that their “procedural concerns were compounded by the lack of transparency and organization of today’s Consultation itself”. Moreover, a number of international and regional organisations were barred from participating as “there was no consensus” over allowing them to participate. The statement

³³ “Global Watchdogs slam ASEAN Secrecy on Rights Pact,” *AsiaOne*, 8 July 2012, available at <http://www.asiaone.com>.

³⁴ Ririhena Yoyanna, “Maintaining Transparency Key to ASEAN Human Rights Declaration,” *Jakarta Post*, 28 June 2012.

³⁵ Yuyun Wahyuningrum, letter to civil society entitled *ASEAN Human Rights Declaration*, available at <http://www.dtp.unsw.edu.au/documents/ASEANHUMANRIGHTSDECLARATION.pdf>

³⁶ FIDH, *The ASEAN Human Rights Declaration: Drafts must be published and subject to meaningful consultations with local, national and regional civil society and human rights defenders* 2 May 2012, available on FIDH website.

noted their major concern: to ensure that the level of human rights protections in the AHRD “does not fall below that of international standards.”³⁷ Debbie Stothard of FIDH argued that it was “crunch time for ASEAN” as it could “make the right decision to publish the draft declaration and then conduct broad based consultations” or it could “continue tumbling towards irrelevance and becoming a laughing stock in the international community.”³⁸ The Southeast Asia Press Alliance (SEAPA) in Bangkok has argued that in advancing human rights protection “the media has a critical role to play” and in preparing a list of 10 questions to ask regional governments, SEAPA “urge[d] friends in the media to use every opportunity to pose these questions to [the] national representatives and ASEAN officials.”³⁹

The Indonesian Permanent Representative to the AICHR, I Gede Ngurah Swajaya, sought to reassure civil society that “[w]e have come to decide that the ADHR must not be less powerful than the Universal Declaration on Human Rights... the Declaration will also have added values to it.” The representative noted that “Indonesia hopes that ASEAN will be a community that uses universal values and norms as the basis of its cooperation and emphasizes the protection of human rights.”⁴⁰ Marzuki Darusman, Chairman of the Human Rights Resource Centre for ASEAN, sought to reassure civil society that the declaration would not water-down international standards along the lines of the ‘Asian values discourse’ that emerged from the region in the early 1990s, as it referred to the *Universal Declaration of Human Rights* as the main source for the declaration, though he did acknowledge that some phrases in the declaration were “debatable”.⁴¹ Darusman noted the desirability of including in the declaration a statement to the effect that a treaty would be subsequently elaborated leading to binding undertakings, and that an explicit statement

³⁷ FIDH, *Civil Society Organizations meet ASEAN Intergovernmental Commission on Human Rights on the ASEAN Human Rights Declaration, call for universal Standards to be upheld*, 22 June 2012, Kuala Lumpur, available at <http://www.fidh.org/Civil-society-organisations-meet>.

³⁸ Debbie Stothard, “ASEAN: Chartering Human Rights”, *Jakarta Post*, 25 July 2012. Also on FIDH website at www.fidh.org

³⁹ SEAPA, *Uncovering the Draft ASEAN Human Rights Declaration*, Phnom Penh 18 September 2012, available at <http://seapabkk.org>. Questions concerned, *inter alia*, transparency, public participation, meeting international standards and freedom of expression.

⁴⁰ Tassia Sipahutar, Yohanna Ririhena, “ASEAN Declaration Should be ‘Equally powerful’ to UN’s”, *Jakarta Post*, 28 June 2012.

⁴¹ “Maintaining Transparency Key to ASEAN Human Rights Declaration”, *Jakarta Post*, 28 June 2012.

of states' responsibilities to fulfil these rights was needed as opposed to merely "promoting and protecting."⁴²

A draft *ASEAN Declaration of Human Rights* was then submitted to ASEAN foreign ministers on 31 October 2012.⁴³ CSOs complained they have had no formal access to the process of elaborating this draft, though some CSOs had seen an earlier leaked version. Despite calls by the UN High Commissioner for Human Rights for ASEAN to "set the bar high"⁴⁴ reactions by regional and international CSOS in the run-up to the declaration's adoption foretold that the draft would provide no legal basis to guarantee protection of human rights in the region. CSOs were already pre-empting the release by calling out the weak regime that was emerging and which would fall below international standards. The International Commission of Jurists and the Fédération internationale des droits de l'Homme jointly requested the postponement of the adoption of the declaration, citing the charge that it "falls short of existing international standards and risks creating a sub-standard level of rights protection in the region."⁴⁵ For example, General Principles 6, 7 and 8 stipulated that the enjoyment of rights would be "balanced with the performance of duties" and subject to "national and regional contexts". Rights could be restricted on a wide range of grounds, including "national security" and "public morality". Moreover, the Human Rights Working Group of Indonesia noted that in reality the declaration would only enable the AICHR to ask for information on human rights conditions from members. As an HRWG representative noted: "the commission can demand a report on how far the country has implemented the protection of human rights, as stipulated in the declaration. However, it is non-binding, meaning it doesn't include

⁴² Ibid.

⁴³ "Singapore's New Representative to ASEAN Human Rights Commission," *Channelnewsasia*, 31 October 2012, at <http://www.channelnewsasia.com/stories/singaporelocalnews/view/1234582/1/.html>; see also http://www.rttnews.com/2001347/un-rights-chief-calls-for-review-of-asean-draft-human-rights-declaration.aspx?type=gn&utm_source=google&utm_campaign=sitemap; and <http://phuketwan.com/tourism/asean-human-rights-declaration-falls-short-standards-16996/>

⁴⁴ UNHCHR Navi Pillai, *High Commissioner for Human Rights Urges ASEAN to Set the Bar High with Its Regional Human Rights Declaration*, 11 May 2012, available at <http://www.ohchr.org>

⁴⁵ Emerlynne Gill (International Commission of Jurists) and Shiwei Ye (Intl Federation for Human Rights), "Rights Declaration Sub-Standard," *The Nation*, 6 November 2012, available at <http://www.nationmultimedia.com/opinion/Rights-declaration-sub-standard-30193696.html>.

responsibilities.”⁴⁶ Maruah, a Singaporean CSO, raised the same concerns and in addition noted that the impending declaration had “clear exclusions of certain communities in ASEAN”. These were “people who are indigenous to the country, people with diverse sexual orientations and gender identities and undocumented workers.” They argued that this “lack of protection in the AHRD is unacceptable as a human rights document as instead of embracing universality, it marginalised certain communities through exclusions.”⁴⁷ For Michael Bochenek, Director of Amnesty International's Law and Policy Program, “[u]nless significant changes are made to the text, ASEAN will be adopting in 2012 a Human Rights Declaration that grants ASEAN Member-States additional powers to violate human rights instead of providing the region's people with additional safeguards against such violations.”⁴⁸

The final draft which was adopted on 18 November 2012 in Cambodia was once again heavily criticized. Primarily criticisms point to AHRD's failure to meet existing international standards and the risks of creating a sub-standard level of rights protection in the region. For instance, ASEAN governments want the enjoyment of rights to be balanced with the “performance of duties” and be subject to “national and regional contexts”. Under the AHRD, rights in the region therefore stand to be restricted on a wide range of grounds, including “national security” and “public morality”. The declaration is further criticised for having too many loopholes that may permit states to bypass international standards. Even Surin Pitsuwan, speaking at the ASEAN Summit in Phnom Penh, admitted: “This document can be improved upon.” Thus, on the adoption of the ADHR in Phnom Penh, CSO criticisms of the document continued unabated. Some 60 CSOs wrote to ASEAN leaders requesting the postponement of the signing, given the serious flaws in the document. Echoing strongly their comments, the UN High Commissioner for Human Rights, Navi Pillay, also called for the same and stated: “I am surprised and disappointed that the draft declaration has not been made public and that civil society has not been consulted in the drafting of the document.”

⁴⁶ “ASEAN Declaration Won't Guarantee Protection,” *The Jakarta Post*, 30 October 2012, at <http://www.thejakartapost.com/news/2012/10/30/asean-declaration-won-t-guarantee-protection.html>

⁴⁷ MARUAH, *Maruah Statement on the ASEAN Human Rights Declaration*, 10 November 2012, available at <http://maruah.org/2012/11/10/maruah-statement-on-the-asean-human-rights-declaration>.

⁴⁸ “Asean Human Rights Declaration ‘Falls Short of International Standards’”, *Phuket Wan*, 6 November 2012, available at <http://phuketwan.com/tourism/asean-human-rights-declaration-falls-short-standards-16996/>

In contrast, Singapore's Representative to the AICHR, Chang Heng Chee, hailed the advent of the "peer-review" mechanism and the ADHR as "the best that could be done" in the social and political context. This is the standard rejoinder by ASEAN governmental representatives when they try to explain that the tone of the current AHRD is what is politically feasible now within the regional grouping. Nevertheless, events to date have shown that the CSO exclusion from the process of crafting a human rights regime remains a blatant omission.

5. Conclusion: Improving Civil Society Advocacy

Civil society reaction to the *ASEAN Declaration on Human Rights* has only confirmed that their voices have not been listened to and that a weak protection mechanism, both from a normative and institutional point of view, has been crafted. This is implicit in the statement by the UN High Commissioner for Human Rights, Navi Pillai, in 2011 that "The number one concern is that AICHR – as a body – is not talking to civil society," and that "No discussion of human rights can be complete or credible without significant input from civil society and national human rights institutions."⁴⁹ However, CSOs have managed to advance, through the media and their own online platforms, important ideas on normative standards and institutional processes that the emerging human rights regime will be judged against. In spite of the lack of formal consultation channels to directly impact on the AICHR and AHRD, civil society organisations, albeit from the sidelines, have endeavoured valiantly to serve the cause of protection of human rights by independently highlighting serious lacuna in the human rights regime, notably on the normative aspects of the regime.

Nevertheless, given the extremely limited interaction between CSOs and AICHR representatives, one cannot say at present that CSOs have played any critical role in influencing the normative and institutional set-up of the human rights regime in the region. The ineffectiveness of CSOs in advancing the protection of human rights in Southeast Asia leaves room for doubt about the emergence of a strong protection regime in the near future.⁵⁰

⁴⁹ UN High Commissioner for Human Rights, *Civil society must play bigger role in human rights in South-East Asia – UN official*, 28 November 2011, at <http://www.un.org/apps/news/story.asp?NewsID=40546>.

⁵⁰ See International Justice Resource Centre, *Civil Society Organizations Worry ASEAN Human Rights Declaration Falls Short of International Standards*, 24 September 2012, at

The key problem is that CSO engagement by ASEAN governments in the process of forging a human rights regime has been selective and limited. The entire human rights project has been pursued purely as an inter-governmental activity. As John Ciorciari has noted in his analysis of the institutionalisation of human rights in Southeast Asia, “Southeast Asia’s illiberal leaders generally see strong civil society pressure as anathema to their short term interests”, resulting in no or little space for civil society.⁵¹ The marginalisation of civil society became particularly pronounced with the accession of the CLMV countries (Cambodia, Laos, Myanmar and Vietnam) to membership in ASEAN⁵², and this has been further reflected in the inability of CSOs to effectively advocate for a stronger human rights regime for the region.

To date, CSO engagement with ASEAN governmental representatives has only taken place on a piecemeal basis, and only because of the tireless advocacy and pressure by regional CSOs. ASEAN’s inter-governmental centred approach is entirely out of step with how inter-governmental organisations such as the UN, the EU and the OAS conduct their own inter-governmental activities. With these latter mechanisms civil society is mainstreamed into the human rights processes. In addition to concern over core substantive dilemmas – the lack of concrete protection of human rights and the failure to meet international standards – the real subtext for the region is the fact that civil society has not been mainstreamed as it should be. Lack of such of mainstreaming undermines ASEAN’s own call for a more people-centred community. Hence, the call for real human rights protection and meeting international standards needs to go hand in hand with a call for a genuine, formal mechanism for CSO engagement with the ASEAN inter-governmental mechanism.

In the interim, civil society organisations, which have historically played a vital role in advancing the protection of human rights globally and the media (traditional and new) must continue and intensify their push for more transparency in the ASEAN human rights regime. They must continue to push for the respect of international commitments already

<http://ihrlaw.org/2012/09/24/civil-society-organizations-worry-asean-human-rights-declaration-falls-short-of-human-rights-standards/>.

⁵¹ John Ciorciari, “Institutionalizing Human Rights in Southeast Asia,” *Human Rights Quarterly*, 34, (2012), p. 718

⁵² This specific point was made to James Gomez by ASEAN human rights representatives at an Informal Regional Consultative Forum on ASEAN HRD in Bangkok on 26 May 2012.

binding upon ASEAN states, for the respect for universal standards under the UN *Charter* and the *Universal Declaration of Human Rights*, and for a real protection of fundamental human rights.