

**ASEAN'S HUMAN RIGHTS COMMISSION:  
POLICY CONSIDERATIONS FOR ENHANCING ITS CAPACITY  
TO PROTECT HUMAN RIGHTS**

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**I. INTRODUCTION**

The Association of Southeast Asian Nations (ASEAN)<sup>1</sup> has embarked on a new phase of its human rights policy. ASEAN was created in 1967, to manage the relations between members who had significant domestic security problems, which tended to be compounded by territorial and other political disputes between them. Historically ASEAN was cautious about discussing human rights issues among its member states because it believed in confidence building and quiet diplomacy – the ‘ASEAN Way’. However, in situations occasioning widespread international concern it has been ready to take a stance as it did in the cases of Cambodia and Myanmar.<sup>2</sup> To the extent that the ASEAN Regional Forum (‘ARF’) dealt with situations of concern from the point of view of regional peace and security, it also addressed humanitarian and human rights issues that were an integral part of such situations.<sup>3</sup> But its concern with human rights was more indirect than direct.

With the adoption of the Charter of the Association of Southeast Asian Nations in Singapore in 2007, and the launch of the ASEAN Inter-governmental Commission on Human Rights (‘AICHR’) in October 2009, ASEAN set new goals and orientations in the human rights field. Its decision to establish a specifically ASEAN machinery on human rights invites consideration of the policy considerations that

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<sup>1</sup> ASEAN members include Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam.

<sup>2</sup> See M Antolik, *ASEAN and the Diplomacy of Accommodation* (M.E Sharpe, Inc., Armonk 1990); A Acharya, ‘A New Regional Order in South-East Asia: ASEAN in the Post Cold-War Era’ (1993) 33(279) *Adelphi Paper* 3; R Ramcharan, ‘ASEAN and Non-Interference: A Principle Maintained’ 22 *Contemporary Southeast Asia* 60.

<sup>3</sup> On the ARF see generally R Ramcharan, *The ASEAN Regional Forum and Conflict Prevention in Southeast Asia*, in *Conflict Prevention in Practice* (Martinus Nijhoff Publishers, Leiden 2005) 75-90.

should inspire the establishment and future operations of this human rights body. An examination of regional human rights mechanisms in other parts of the world points to a number of features that might contribute to an effective ASEAN human rights body.

The purpose of this essay is to identify the policy considerations that might be kept in mind now and in the future. This paper will firstly, consider human rights cooperation in East and Southeast Asia, secondly look at the outcry over the recently adopted Terms of Reference of the AICHR, and thirdly examine the principal goals and institutions in the ASEAN Charter related to human rights as they are relevant to the type of human rights body that was envisaged. Thereafter, this essay will survey key elements of other regional mechanisms in Europe, the Americas, Africa, and the Arab region with a view to identifying recommendations aimed at enhancing the protection of human rights in the region.

## **II. HUMAN RIGHTS IN EAST AND SOUTHEAST ASIA: A BRIEF REVIEW**

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 for Asia 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 on Human Rights.<sup>4</sup> They also called for the 'democratisation' 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.<sup>5</sup> 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

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<sup>4</sup> 'Report of the Regional Meeting for Asia of the World Conference on Human Rights' A/conf.157/asrm/8 a/conf.157/pc/59 (Bangkok, 29 March - 2 April 1993).

<sup>5</sup> *ibid.*

evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.<sup>6</sup>

This latter point underscores the key elements of the ensuing debate between advocates of the universality of human rights and advocates of the 'relativist' position that calls for recognition of differing value systems. The 'relativist' position was embraced by East Asian governments in the midst of tremendous economic dynamism as they forged ahead with their spectacular development and industrialization programs.<sup>7</sup> Ambassador Tommy Koh of Singapore was by then a prominent spokesperson for Asian values that supposedly underpinned Asia's success: family, education, high savings, hard work, home ownership and clean living. *The Economist*, however, echoing the sentiment of many in the human rights community, wrote that these kinds of arguments made some westerners 'smell a rat.'<sup>8</sup> They suspected that the real point of Asian values was 'to give Asian authoritarians who do not want to surrender power, or even to entertain the possibility of western-like alternation of parties in government, a respectable cloak for their personal ambitions.'<sup>9</sup> Much academic writing ensued that sought not only to refute but also to dissect the nature of the relativist challenge and to ponder the plausibility of universal moral standards.<sup>10</sup> For Kausikan, a Singaporean Foreign Service Officer in the post Cold War era, as East Asian and other powers assert their presence on the international stage and contribute to norm creation at the international level, there was a need for a 'balance between the pretentious and unrealistic universalism and a paralyzing cultural relativism.'<sup>11</sup> Perry calls attention to the fact that since the Second World War, there has emerged a transcultural dialogue nurtured by the United Nations, which has

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<sup>6</sup> 'Report of the Regional Meeting for Asia of the World Conference on Human Rights' (n 4).

<sup>7</sup> See 'Asian Values' *The Economist*, 28 May 1994, 13.

<sup>8</sup> *ibid.*

<sup>9</sup> *ibid.*

<sup>10</sup> See MJ Perry, 'Are Human Rights Universal? The Relativist Challenge and Related Matters' (1997) 19 *Human Rights Quarterly* 461.

<sup>11</sup> B Kausikan, 'East and Southeast Asia and the Post-Cold War International Politics of Human Rights' (1993) 16(4) *Studies in Conflict and Terrorism* 241, 258.

resulted in ‘widespread transcultural agreement about what many of the rights are that all human beings have.’<sup>12</sup>

Scholarly works on human rights in East and Southeast Asia specifically, have addressed not only the relativist debate,<sup>13</sup> but also human rights amidst the emerging political economy of East Asia,<sup>14</sup> labour rights in East Asia,<sup>15</sup> and the politics (domestic and international) of human rights in Southeast Asia.<sup>16</sup> Human rights institutions and processes in East and Southeast Asia have been featured in a few recent works. Sonia Cardenas points to a number of National Human Rights Commissions in Asia (India, Indonesia and the Philippines) that emerged due to significant international pressures as well as domestic pressures.<sup>17</sup> National Human Rights Commissions (NHRCs) have been established in Australia, Fiji, India, Indonesia, Malaysia, Mongolia, Nepal, New Zealand, Philippines, Republic of Korea, Sri Lanka and Thailand.<sup>18</sup> Another work, by C. Evans, although noting their inability to enforce their decisions, called attention to their constructive role in the promotion and protection of human rights.<sup>19</sup> Evans has chronicled the record of human rights commissions in relation to religious conflict in the Asia-Pacific region and the possibility of NHRCs contributing to the emergence of a culture of rights. Hao Duy Phan offered a ‘blueprint’ for

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<sup>12</sup> *ibid* 497.

<sup>13</sup> WT de Bary, *Asian Values and Human Rights: A Confucian Communitarian Perspective* (Harvard University Press, Cambridge 1998); JC Hsuing, *Human Rights in East Asia: A Cultural Perspective* (Paragon Publishers, New York 1986); and M Jacobsen and O Brunn (eds), *Human Rights and Asian Values: Contesting National Identities and Cultural Representation in Asia* (Nordic Institute of Asia Studies, Democracy in Asia Series, Routledge, London 2000).

<sup>14</sup> C Apodaca, ‘The Globalization of Capital in East and Southeast Asia: Measuring the Impact on Human Rights Standards’ (2002) 42 *Asian Survey* 883; P Close and D Askew *Asia Pacific and Human Rights: A Global Political Economy Perspective* (Ashgate Publishing Limited, Aldershot 2004).

<sup>15</sup> A Woodiwiss, *Globalisation, Human Rights, and Labour Law in Pacific Asia* (CUP, New York 1998).

<sup>16</sup> PJ Eldridge, *The Politics of Human Rights in Southeast Asia* (Routledge, London 2000); and AJ Langlois, *The Politics of Justice and Human Rights: Southeast Asia and Universalist Theory* (CUP, Cambridge 2001).

<sup>17</sup> S Cardenas, ‘National Human Rights Commissions in Asia’ (2002) 4 *Human Rights in Review* 30.

<sup>18</sup> *ibid* 30.

<sup>19</sup> C Evans, ‘Human Rights Commissions and Religious Conflict in the Asia-Pacific Region’ (2004) 53 *International and Comparative Law Quarterly* 713.

a Southeast Asian court of human rights that will 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.'<sup>20</sup>

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.<sup>21</sup> 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 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.

In the wake of the 1997 Asian financial crisis, Maznah Mohamad noted the 'modest progress' towards the proliferation of discourse on human rights and democracy throughout the region of Southeast Asia.<sup>22</sup> The modest progress was perhaps related to the fact that the very identities of modern nation-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

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<sup>20</sup> HD Phan, 'A Blueprint for a Southeast Asian Court of Human Rights' (2009) 10 *Asia-Pacific Law and Policy Journal* 385.

<sup>21</sup> H Kraft, 'Track three diplomacy and human rights in Southeast Asia: the Asia Pacific Coalition for East Timor' (2002) 2 *Global Networks: A Journal of Transnational Affairs* 49.

<sup>22</sup> M Mohamad, 'Towards a Human Rights Regime in Southeast Asia: Charting the Course of State Commitment' (2002) 24 *Contemporary Southeast Asia* 230.

adherence to international human rights conventions.<sup>23</sup> 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 conventions; 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 by then.<sup>24</sup> Finally, ASEAN went so far as to provide organizational support for a working group for an ASEAN Human Rights Commission or Mechanism.<sup>25</sup> Southeast Asian governments have thus gradually and cautiously crafted a consensus on human rights issues within ASEAN, culminating in the ASEAN Charter of 2007.

### III. THE TERMS OF REFERENCE OF THE ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS (AICHR)

In July 2009, ASEAN adopted the Terms of Reference (‘TORs’) for the AICHR that was formally launched in October 2009.<sup>26</sup> The TORs were heavily criticized from outside and within the region, in which many governments have been keen to preserve the principle of non-interference in internal affairs of a state.<sup>27</sup>

Critics pointed to the ‘toothless’ character of the new body, pointing to the absence of investigative powers for the AICHR.<sup>28</sup> States

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<sup>23</sup> *ibid.*

<sup>24</sup> *ibid.*

<sup>25</sup> 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 <<http://www.aseanhrmech.org/>> accessed 21 October 2010.

<sup>26</sup> ASEAN Secretariat, ‘Terms of Reference’ <<http://www.aseansec.org/DOC-TOR-AHRB.pdf>> accessed 21 October 2010.

<sup>27</sup> International Federation of Human Rights, ‘ASEAN Human rights body: weak mandate, weak protection’ (28 July 2009) <[http://www.fidh.org/IMG/article\\_PDF/article\\_a6836.pdf](http://www.fidh.org/IMG/article_PDF/article_a6836.pdf)> accessed 21 October 2010. See also R Ramcharan, ‘A Human Rights Commission with Teeth’ *The Mark News* (August 2009) <<http://www.themarknews.com/articles/438-a-human-rights-commission-with-teeth>> accessed 21 October 2010.

<sup>28</sup> See for example, *Wall Street Journal*, ‘ASEAN’s Toothless Council’ (22 July 2009) <<http://online.wsj.com>> accessed 21 October 2010; L Salaveria, ‘Toothless rights body would hurt ASEAN group’ *Philippine Daily Inquirer* (30 June 2009) <<http://newsinfo.inquirer.net>> accessed 21 October 2010; and K Percy, Australia Broadcasting Corporation (ABC) interview with Rafendi Djamin, ‘Critics Dismiss

members were required to submit annual reports to an annual meeting of foreign ministers but any follow-up action was unspecified. The Commission was set to have government appointed representatives as opposed to independent experts. Those representatives will not be able to investigate allegations of human rights violations. In a region where non-interference in internal affairs of states has been a key inter-state norm, which has championed relativist arguments that place more stress on social and economic rights rather than civil and political rights, there have been increasing calls for more constructive engagement when dealing with recalcitrant regimes like the generals in Myanmar who routinely violate the human rights of their own citizens. The AICHR's inability to do so prompted human rights activists to argue that it actually represents a threat to the citizens of the ten countries of Southeast Asia. Myanmar, which is run by a regime that is widely viewed as a pariah on its own people, is a case in point.<sup>29</sup>

Concern for the AICHR has continued amidst recent initiatives to draft the rules of procedure of the AIHRC. In late March 2010, the AIHRC, under Vietnamese rotating chairmanship, denied the civil society's request to discuss these rules of procedure with them.<sup>30</sup> In view of the anticipated adoption of the rules of procedure by July 2010, civil society groups have publicized their own draft rules of procedure emphasizing, *inter alia*, the need for independence and for a credible petitions system.<sup>31</sup>

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ASEAN Human Rights Charter' (21 July 2009) <<http://www.radioaustralia.net.au>> accessed 21 October 2010.

<sup>29</sup> Myanmar has experienced political instability for much of its history since achieving self-rule from India in 1937, and since achieving independence after the Second World War. General elections in 1989 saw Daw Aung San Kyi win the majority of votes, but the uriling military refused to recognise the results and has kept Aung San Su Kyi under house arrest since. The United Nations Special Rapporteur on the Human Rights Situation in Myanmar has reported annually since the early 1990s on serious human rights violations committed by the ruling junta against its own people. For further details see <<http://www2.ohchr.org/english/countries/mm/mandate/index.htm>> accessed 21 October 2010.

<sup>30</sup> A Ashayagachat 'ASEAN Rights Commission to Meet Sunday' *The Bangkok Post* (27 March 2010) <<http://www.bangkokpost.com/news/local/172945/aichr-body-to-meet-tomorrow>> accessed 21 October 2010.

<sup>31</sup> SAPA Task Force on ASEAN Human Rights, *A Proposal of the Rules of Procedure of the ASEAN Intergovernmental Commission on Human Rights* (Forum Asia, 17 March 2010) <<http://www.forum-asia.org>> accessed 21 October 2010. See also International Federation for Human Rights, 'First session of the ASEAN Intergovernmental

Those defending the new Commission suggest that its present state is the best they could do at present. Others have argued, that criticisms of the AICHR are misplaced given that it was created *within* ASEAN, which has traditionally adhered to the principle of non-interference.<sup>32</sup> ASEAN's newer member states – Cambodia, Laos, Myanmar and Vietnam – are especially nervous about allegations of human rights abuse within their borders, seeing these as disguised attempts by outsiders to pursue their own interests. Non-interference, it should be said, has served ASEAN well as it served to prevent the domination of weaker members by more powerful members. Consequently, the AICHR has chosen a modest set of priority areas to focus on including raising awareness, starting the process of drafting an ASEAN Declaration on Human Rights, and undertaking two studies: one on corporate social responsibility and one on migration.<sup>33</sup> At the fifth Roundtable Discussion on Human Rights in ASEAN in Bangkok, 15 to 16 December 2009, Professor Vitit Muntarbhorn, a long-time scholar and advocate for human rights, called attention to the fact that ASEAN was a political entity, not a human rights organization.<sup>34</sup> The general recommendations of the participants at the Roundtable Discussion included 'strengthening the complementary role of the AICHR' since 'the AICHR has to be seen in the context of the ASEAN Charter.'<sup>35</sup>

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Commission on Human Rights (AICHR): Transparency, dialogue with civil society and tools to address the protection gap in the AICHR's mandate should be on the agenda' (26 March 2010) <<http://www.fidh.org/First-session-of-the-ASEAN-Intergovernmental>> accessed 21 October 2010.

<sup>32</sup> T Chalermphanupap, '10 Facts About ASEAN's Human Rights Cooperation', ASEAN Secretariat <<http://www.aseansec.org/HLP-OtherDoc-1.pdf>> accessed 21 October 2010.

<sup>33</sup> Asia Pacific Forum, 'ASEAN Human Rights Body Sets Priorities' <<http://www.asiapacificforum.net/news/asean-rights-body-sets-out-priority-areas.html>> accessed 21 October 2010.

<sup>34</sup> See 'Summary of Proceedings' *Fifth Roundtable Discussion on Human Rights in ASEAN - Towards an ASEAN Human Rights System: Role of Institutions and Related Activities* (Bangkok, Thailand, 15-16 December 2009) 2 <<http://www.aseanhrmech.org/downloads/5th%20RTD%20Summary%20of%20Proceedings%20%28Final%29.pdf>> accessed 21 October 2010.

<sup>35</sup> *ibid.*

#### IV. HUMAN RIGHTS AND RELATED PROVISIONS IN THE ASEAN CHARTER

In the context of ASEAN's historical adherence to the principle of non-interference, the inclusion of human rights on the agenda of ASEAN is nevertheless reflective of the Association's willingness and ability to adapt gradually, to meet new challenges and to move towards higher levels of cooperation since its foundation in 1967. ASEAN's Eminent Persons Group ('EPG'), mandated by ASEAN leaders to provide guidance on the impending ASEAN Charter, argued in a report in December 2006<sup>36</sup> that the foundation principles that had served ASEAN well since 1967, nevertheless needed to be updated and brought 'in line with the new realities confronting ASEAN, and to strengthen regional solidarity and resilience.'<sup>37</sup> These principles and objectives were to be covered in the Charter which include, *inter alia*, the '[p]romotion of ASEAN's peace and stability through the active strengthening of democratic values, good governance, rejection of unconstitutional and undemocratic changes of government, the rule of law including international humanitarian law, and respect for human rights and fundamental freedoms.'<sup>38</sup>

The EPG recommended essentially that ASEAN needed 'to shed its image of being an elitist organization comprising exclusively diplomats and government officials'<sup>39</sup> and that it had to become a more people-centered organization. It therefore had to develop channels of communication with all ASEAN institutions, parliamentarians and people across all sectors of society. Indeed, civil society organizations, the private business sector, human rights groups, academic institutions and other stakeholders in ASEAN had to strengthen their 'sense of ownership and belonging' to ASEAN.<sup>40</sup> Moreover, the credibility of ASEAN rested on the enhancement of the dispute settlement mechanism for ASEAN and the development within ASEAN of 'a culture of honoring and implementing its decisions and agreements, and carrying them out on time.'<sup>41</sup> Of particular relevance was its suggestion

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<sup>36</sup> 'Report of the Eminent Persons Group on the ASEAN Charter' (December 2006) 2 <<http://www.aseansec.org/19247.pdf>> accessed 21 October 2010.

<sup>37</sup> *ibid.*

<sup>38</sup> 'Report of the Eminent Persons Group on the ASEAN Charter' (n 36).

<sup>39</sup> *ibid.* 6.

<sup>40</sup> *ibid.*

<sup>41</sup> *ibid.* 21.

that, as ASEAN stepped up its integration efforts, appropriate monitoring, compliance and dispute settlement mechanisms should be established.<sup>42</sup> It therefore recommended:

‘that Dispute Settlement Mechanisms (DSM) be established in all fields of ASEAN cooperation, which should include compliance monitoring, advisory, consultation as well as enforcement mechanisms. Failure to comply with decisions of the DSM should be referred to the ASEAN Council for possible measures to redress non-compliance. The Secretary-General should be entrusted with the role of monitoring and reporting cases of non-compliance.’<sup>43</sup>

The ASEAN Charter of November 2007 reflects many of the EPGs recommendations, and in particular its emphasis on moving towards a people-oriented organization. The purposes of ASEAN enumerated in Article 1 of the ASEAN Charter include, *inter alia*, the strengthening of peace-oriented values in the region; the alleviation of poverty and narrowing of the development gap within ASEAN through mutual assistance and cooperation; the strengthening of democracy, enhancing good governance and the rule of law; the promotion and protection of human rights and fundamental freedoms with due regard to the rights and responsibilities of the member states of ASEAN; and the provision of equitable access to opportunities for human development, social welfare and justice.

With these goals in mind, the ASEAN Charter enumerated a number of key principles in Article 2 governing their relations, which include, *inter alia*, respect for Member’s sovereignty, national identity; non-interference in the internal affairs of ASEAN member states, adherence to the rule of law, good governance, the principles of democracy and constitutional government; respect for fundamental freedoms the promotion and protection of human rights, and the promotion of social justice; and upholding the UN Charter and

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<sup>42</sup> *ibid.*

<sup>43</sup> *ibid.*

international law, including international humanitarian law, subscribed to by ASEAN member states.<sup>44</sup>

The most important provision for the present discussion is Article 14 of the ASEAN Charter, which called for the establishment of an 'ASEAN human rights body'. This body was to 'operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers meeting'.<sup>45</sup>

Other institutional structures of ASEAN that are relevant here include the ASEAN Coordinating Council which was announced in Article 8, comprising the ASEAN Foreign Ministers who are to meet at least twice a year. The Charter also provides for, in Article 9, ASEAN Community Councils that comprise the ASEAN Political-Security Community Council, the ASEAN Economic Community Council and the ASEAN Socio-Cultural Community Council. Article 10 provides for ASEAN Sectoral Ministerial bodies.

Each ASEAN member state is required to appoint a Permanent Representative (PR) with the rank of Ambassador based in Jakarta. Article 14 states that the Permanent Representatives will collectively constitute a Committee of PRs. Each ASEAN Member state is required, under Article 13, to establish an ASEAN national secretariat that shall serve as the national focal point and contribute to ASEAN community building.

There are other parts of the Charter that would seem to have clear relevance to the nature and future functioning of the human rights body. The Charter states that, as a basic principle, decision making in ASEAN shall be based on consultation and consensus. Where consensus cannot be achieved the ASEAN Summit may decide how a specific decision can be made. In the case of a serious breach of the ASEAN Charter, or non-compliance, the matter shall be referred to the ASEAN Summit for decision.<sup>46</sup>

The Charter requires, under Article 22, that member states shall endeavor to resolve peacefully all disputes in a timely manner through dialogue, consultation and negotiation. Member states that are party to dispute may at any time agree to resort to good offices, conciliation or

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<sup>44</sup> Article 2, Charter of the Association of Southeast Asian Nations <<http://www.aseansec.org/21069.pdf>> accessed 21 October 2010.

<sup>45</sup> Article 14, ASEAN Charter.

<sup>46</sup> Article 20, ASEAN Charter.

mediation in order to resolve the dispute within an agreed time limit. Parties to a dispute may, under Article 23, request the Chairman of ASEAN or the Secretary General of ASEAN acting in an *ex-officio* capacity to provide good offices, conciliation or mediation. Disputes relating to specific ASEAN instruments shall be settled through the mechanisms and procedures provided for in such instruments.<sup>47</sup>

The Secretary General of ASEAN, assisted by the ASEAN secretariat or any other designated ASEAN body, is given a mandate to monitor the compliance with the findings recommendations or decisions resulting from an ASEAN dispute settlement mechanism, and to submit a report to the ASEAN Summit. Any member state affected by non-compliance with the findings, recommendations or decisions resulting from an ASEAN dispute settlement mechanism may refer the matter to the ASEAN Summit for a decision.<sup>48</sup> As a matter of principle, member states have the right of recourse to the modes of peaceful settlement contained in Article 33 (1) of the UN Charter.<sup>49</sup>

The Charter provides for the position of Chairman of ASEAN. The chairmanship, under Article 31, shall rotate annually, based on the alphabetical order of English names of member states. The Chairmanship of ASEAN shall, among other things, 'ensure an effective and timely response to urgent issues or crises situations affecting ASEAN, including providing its good offices and such other arrangements to immediately address these concerns'.<sup>50</sup>

## V. MODELS OF REGIONAL MACHINERY IN OTHER PARTS OF THE WORLD

Keeping in mind the foregoing provisions of the new ASEAN Charter and having regard to the need to enhance the capacity of the AICHR to protect human rights, it would be helpful to take note of the models of regional and sub-regional human rights machineries in other parts of the world with a view to seeing ways in which ASEAN might draw upon them in the future in order to improve its capacity to move towards the protection of human rights.

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<sup>47</sup> Article 24, ASEAN Charter.

<sup>48</sup> Article 27, ASEAN Charter.

<sup>49</sup> Article 28, ASEAN Charter.

<sup>50</sup> Article 32 (c), ASEAN Charter.

*A. Europe*

The oldest of these machineries, established under the European Convention on Human Rights and Fundamental Freedoms in 1951 and through related political processes within Europe, historically provided for a European Court of Human Rights and a European Commission. These two institutions have since been replaced by one single European Court of Human Rights whose task it is to consider petitions from individuals who claim non-respect of their human rights. The European Court may consider such petitions provided the applicant shows that he or she has exhausted available domestic remedies, where available, beforehand. The European Court of Human Rights may also consider inter-state complaints claiming non-respect of human rights in a member-State. Beyond the European Convention on Human Rights, the Council of Europe has two other bodies that may be kept in mind. Under the European Social Charter 1961, which was revised by the Charter of 1996, there is a reporting procedure and a complaints procedure monitored by an expert committee. The European Committee of Social Rights ('ECSR') monitors these procedures.

The ECSR is the monitoring arm of the European Social Charter, which ascertains whether countries have honoured the undertakings set out in the Charter. The Council of Europe's Committee of Ministers elects its fifteen independent impartial members for a period of six years; this term is renewable once. The Committee is tasked with determining whether the national laws and practices of States Parties are in conformity with the Charter.<sup>51</sup> Every year the States Parties are required to submit a report indicating measures to implement the Charter in law and in practice. The Committee examines the reports and decides whether or not the situations in the countries concerned are in conformity with the Charter. Its decisions, known as 'conclusions', are published every year. Where a state fails to take action on a Committee decision and to comply with the Charter, the Committee of Ministers addresses a recommendation to that state, asking it to change the situation in law and/or in practice. The Committee of Ministers' work is prepared by a Governmental Committee comprising representatives of the governments of the States Parties to the Charter. Observers representing European employers' organizations and trade unions provide assistance. Under a protocol opened for signature in 1995, which

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<sup>51</sup> Article 24 of the Charter, as amended by the 1991 Turin Protocol.

came into force in 1998, complaints of violations of the Charter may be lodged with the European Committee of Social Rights.<sup>52</sup> In the case of all states that have accepted the Procedure, complaints may be addressed by the following entities: the European Trade Union Confederation ('ETUC'), BUSINESSEUROPE, and the International Organisation of Employers ('IOE'); non-governmental organisations ('NGOs') with participative status with the Council of Europe which are on a list drawn up for this purpose by the Governmental Committee; employers' organizations and trade unions in the country concerned; and, with an additional agreement of individual states, national NGOs.

Under the European Convention for the Prevention of Torture 1987, the European Committee for the Prevention of Torture makes regular visits to places of detention within member states that have subscribed to the Convention. In addition, under the European Convention on Human Rights the Committee of Ministers have been assigned functions to follow up on decisions of the European Court of Human Rights. The Council of Europe maintains a Directorate of Monitoring comprising the Secretariats of the independent mechanisms outlined above, as well as the Department for the Execution of Judgments of the European Court of Human Rights, which assists the Committee of Ministers in its function of supervising the execution of these judgments by member states.<sup>53</sup>

Within the European Union there is a Charter of Fundamental Rights of the European Union. Pursuant to this Charter, the EU has established European Agency for Fundamental Rights in March 2007 in its Regulation No 168/2007.<sup>54</sup> The Agency was built on the pre-existing European Monitoring Centre on Racism and Xenophobia and was to continue to cover the phenomena of racism, xenophobia and anti-Semitism, the protection of rights of persons belonging to minorities, as well as gender equality, as essential elements for the protection of fundamental rights. The Regulation entrusted the Agency with the following:

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<sup>52</sup> See DJ Harris and J Darcy, *The European Social Charter* (Transnational Publishers, 2001).

<sup>53</sup> See website of European Social Charter at <[http://www.coe.int/t/dghl/monitoring/default\\_en.asp](http://www.coe.int/t/dghl/monitoring/default_en.asp)>.

<sup>54</sup> European Council Regulation (EC) No 168/2007 of 15 February 2007.

- Under Article 12, it 'should collect objective, reliable and comparable information on the development of the situation of fundamental rights, analyse this information in terms of causes of disrespect, consequences and effects and examine examples of good practice in dealing with these matters.'
- The right of the Agency, under Article 13, 'to formulate opinions to the Union institutions and to the member states when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the Commission, without interference with the legislative and judicial procedures established in the Treaty.' Nevertheless, the institutions should be able to request opinions on their legislative proposals or positions taken in the course of legislative procedures as far as their compatibility with fundamental rights are concerned.
- The Agency, under Article 14, 'should present an annual report on fundamental rights issues covered by the areas of the Agency's activity, also highlighting examples of good practice'; it should produce thematic reports on topics of particular importance to the Union's policies.<sup>55</sup>
- The Agency should take measures, under Article 15, to raise the awareness of the general public about their fundamental rights, and about possibilities and different mechanisms for enforcing them in general, without, however, dealing itself with individual complaints.
- The Agency should work as closely as possible with all relevant Union institutions as well as the bodies, offices and agencies of the Community and the Union in order to avoid

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<sup>55</sup> The thematic areas decided upon in February 2008, under a Multi-Annual Framework include a) racism, xenophobia and related intolerance; b) discrimination based on sex, race or ethnic origin, religion or belief, disability, age or sexual orientation and against persons belonging to minorities and any combination of these grounds (multiple discrimination); c) compensation of victims; d) the rights of the child, including the protection of children; e) asylum, immigration and integration of migrants; f) visa and border control; g) participation of the EU citizens in the Union's democratic functioning; h) information society and, in particular, respect for private life and protection of personal data; and i) access to efficient and independent justice.

duplication, in particular as regards the future European Institute for Gender Equality under Article 16.

- The Agency, following Article 17, would cooperate closely with the member states through its different bodies, for the purpose of which the member states should nominate National Liaison Officers, as primary contact points for the Agency in the member states.
- The Agency should collaborate closely with the Council of Europe under Article 18. Such cooperation should guarantee that any overlap between the activities of the Agency and those of the Council of Europe is avoided, in particular by elaborating mechanisms to ensure complementarity and added-value, such as the conclusion of a bilateral cooperation agreement and the participation of an independent person appointed by the Council of Europe in the management structures of the Agency with appropriately defined voting rights.
- Recognising the important role of civil society in the protection of fundamental rights, the Agency should, under Article 19, promote dialogue with civil society and work closely with non-governmental organisations and with institutions of civil society active in the field of fundamental rights. It should set up a cooperation network called the 'Fundamental Rights Platform' with a view to creating a structured and fruitful dialogue and close cooperation with all relevant stakeholders.

In essence, the Agency is entrusted with three main tasks: information and data collection, research and analysis; advice to EU institutions and member states; and co-operation with civil society and awareness-raising. It does not hear individual complaints.

The Organization for Security and Cooperation in Europe's ('OSCE') 'human dimension' to security places 'respect for human rights and fundamental freedoms, democracy, and the rule of law' at the core of the OSCE's comprehensive concept of security. Within the OSCE there are three noteworthy models of human rights machinery. First, the OSCE has an Office for Democratic Institutions and Human Rights ('ODIHR') based in Warsaw, Poland. ODIHR is the specialized

institution of the OSCE dealing with elections, human rights, and democratisation. Its wide range of tasks to assist OSCE states include the promotion of democratic election processes through in-depth observation of elections and election assistance projects, technical assistance with the implementation of human dimension commitments and assistance with compliance with international human-rights standards.<sup>56</sup> Second, the OSCE also has a High Commissioner on National Minorities which provides early warnings and, as appropriate, early action at the earliest possible stage in connection with tensions involving national minority issues that have the potential to develop into a conflict within the OSCE area and that require the attention of, and action by the Council or the Committee of Senior Officials ('CSO'). By way of early warning, the High Commissioner was mandated to:

- Collect and receive information regarding national minority issues from sources specified in the mandate.
- Assess at the earliest practicable stage the role of the parties directly concerned, the nature of the tensions and recent developments therein and, where possible, the potential consequences for peace and stability within the CSCE area.
- To this end, he/she is able to pay a visit to any participating State and communicate in person with the parties directly concerned to obtain first-hand information about the situation of national minorities. Some procedural requirements have been put down for the exercise of parts of these functions.
- The High Commissioner may during a visit to a participating State, while obtaining first-hand information from all parties directly involved, discuss the questions with the parties, and where appropriate promote dialogue, confidence and cooperation between them.

If on the basis of exchanges of communications and contacts with relevant parties, the High Commissioner concludes that there is a *prima facie* risk of potential conflict, he/she may issue an early warning, which will be communicated promptly by the Chairman-in-Office to the

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<sup>56</sup> See the basic functions of the ODIHR at <<http://www.osce.org/odihhr/13421.html>> accessed 21 October 2010.

CSO. The High Commissioner may recommend that he/she be authorised to enter into further contact and closer consultations with the parties concerned with a view to possible solutions, according to a mandate to be decided by the CSO.

Third, the OSCE assigns a role to the Committee of Senior Officials and to the Secretary General of the OSCE in dealing with situations of concern.

### B. *Americas*

The next regional machinery to be established was in the Organization of American States.<sup>57</sup> Under a resolution passed by the General Assembly of the OAS an Inter-American Commission on Human Rights in 1959, an organ of the OAS Charter, considered individual complaints from 1961 onward and made country visits to member states in situations of concern. The American Convention on Human Rights 1969 continued these procedures and also provided for a procedure according to which the Inter-American Court of Human Rights may deliver advisory opinions at the request of the of member states.

Under the American Convention (Articles 41 to 51), the Commission is tasked with receiving, analysing and investigating individual petitions which allege human rights violations. Under Article 44, '[a]ny person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.'

If the Court finds that there has been a violation of a right or freedom protected by this Convention, 'the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.'<sup>58</sup> In cases of extreme gravity and urgency, and when necessary to avoid

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<sup>57</sup> On the Inter-American Human Rights system see T Buergenthal, R E Norris and D Shelton, *Protecting Human Rights in the Americas* (N.P. Engel, 1990); M Pasqualucci and T Buergenthal, *The Practice and Procedure of the Inter-American Court of Human Rights* (CUP, Cambridge 2003); and TJ Farer, 'The Rise of the Inter American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox' (1997) 19 *Human Rights Quarterly* 510.

<sup>58</sup> Article 63, American Convention on Human Rights <<http://www.oas.org/juridico/english/treaties/b-32.html>> accessed 21 October 2010.

irreparable damage to persons, under Article 63, 'the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.'

Member states of the OAS may consult the Court regarding the interpretation of the Convention or of other treaties concerning the protection of human rights in the American states. Under Article 64, the Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments.

Within the Inter-American Commission on Human Rights system there is an arrangement whereby Special Rapporteurs may be appointed on thematic issues. Over the last decade a system of Special Rapporteurs has become a key part of the work of the Commission under Article 15 of its Rules of Procedure. This article, pending ongoing revisions, provides that:

‘1. The Commission may create rapporteurships to better fulfill its functions. The rapporteurs shall be designated by the vote of an absolute majority of the members of the Commission and may be Commission members or other persons. The Commission shall determine the characteristics of the mandate entrusted to each rapporteurship. The rapporteurs shall periodically present their work plans to the plenary of the Commission.

2. The Commission may also create working groups or committees to prepare its periods of sessions or to carry out special programs or projects. The Commission shall constitute working groups as it sees fit.’<sup>59</sup>

The practice thus far has been to appoint a commissioner of the IACHR, elected by the States of the OAS, to serve as a thematic rapporteur. Rapporteurships have been developed on the following themes: freedom of expression, the rights of women, migrant workers

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<sup>59</sup> Article 15, Rules of Procedure of the Inter-American Commission on Human Rights. This article and draft revisions may be consulted at <<http://www.cidh.org/consultareglamento.eng.htm>> accessed 21 October 2010.

and their families, the rights of the child, human rights defenders, rights of indigenous peoples, the rights of persons deprived of liberty, and the rights of Afro-descendants and racial discrimination.

### C. Africa

In the African Region there is the African Commission on Human and Peoples Rights 1987 that provides for an African Commission, which considers reports from member states, individual petitions, and may receive directly, under Article 49, inter-state complaints.<sup>60</sup> Each state party to the African Charter undertakes through Article 62, to 'submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken, with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter.'

The Commission also is empowered in Article 49 to receive and consider communications submitted by one State claiming that another State party to the Charter has violated one or more of the provisions in the Charter, and under Article 55 communications from individuals and organisations alleging that a State party to the Charter has violated one or more of the rights guaranteed therein.

Subsequent to the African Charter, an agreement was concluded providing for an African Court of Human Rights but the commencement of operations of this court has been held back in the aftermath of the establishment of the African Union, whose Charter provides for an African Court of Justice and Human Rights. The discussions are under way to coordinate these two institutions.<sup>61</sup>

Within the African Commission on Human Rights there is an arrangement whereby Special Rapporteurs may be appointed on thematic issues. Special Rapporteurs are part of a range of special mechanisms of the Commission adopted to enhance its capacity to give effect to the

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<sup>60</sup> On the African human rights system and the African Commission on Human Rights see M Evans and R Murray (eds), *The African Charter on Human and Peoples Rights: The System in Practice 1986-2000* (CUP, Cambridge 2002) and M Hansungule, 'The African Charter on Human and Peoples Rights: a Critical Review' (2000) 8 *African Yearbook of International Law* 288. African Charter available at <<http://www1.umn.edu/humanrts/instreet/z1afchar.htm>> accessed 21 October 2010.

<sup>61</sup> See S Sceats, 'Africa's New Human Rights Court: Whistling in the Wind?' (2009) *Chatham House Briefing Paper* IL BP 09/01 <<http://www.chathamhouse.org.uk/publications/papers/view/-/id/721/>> accessed 21 October 2010.

Charter. Thus far there have been special rapporteurs on the following themes: freedom of expression in Africa; prison and detention; human rights defenders; the rights of women in Africa; refugees, asylum seekers, migrants and internally displaced persons; summary, arbitrary and extra judicial executions in Africa; indigenous populations/communities in Africa; and the death penalty in Africa

Under the Peer Review process of the New Partnership for Africa's Development ('NEPAD'), experts undertake periodic visits to member states for the purpose of pursuing a human rights dialogue with the governments and offering advice and recommendations where needed.<sup>62</sup>

#### *D. Arab Region*

In the Arab Region, the recently revised 2004 version of the Arab Charter on Human Rights, which entered into force in 2008, provides for the following functions for the Arab Human Rights Committee (Article 45 – 48).<sup>63</sup> The Charter provides for the election by secret ballot of seven members to an Arab Human Rights Committee. It stipulates that states undertake to present to the Secretary General of the Arab League reports on the measures that they have taken to give effect to the rights enumerated under the Charter and on the progress in realizing those rights. The Secretary General then transmits the report to the Arab Human Rights Committee. States must present an initial report to the Committee within a year of the entry into force of the Arab Charter. The Committee may request member states to provide supplementary information with regard to the implementation of the charter. The Committee was mandated to study the reports in a public hearing, with the representative of the member State concerned. The Committee may

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<sup>62</sup> See the NEPAD Peer Review Mechanism at <<http://www.nepad.org/2005/files/documents/49.pdf>>. On the NEPAD PRM see J Cilliers, 'NEPAD's Peer Review Mechanism' Occasional Paper No. 64, Institute of Security Studies (South Africa) <<http://www.iss.co.za/Pubs/Papers/64/Paper64.html>> accessed 21 October 2010 and A Kajee, 'NEPAD's APRM: A Progress Report, Practical Limitations and Challenges' (2003-4) South African Yearbook of International Affairs 243 <[http://www.sarpn.org.za/documents/d0000954/P1073-Kajee-2004\\_NEPADs\\_APRM.pdf](http://www.sarpn.org.za/documents/d0000954/P1073-Kajee-2004_NEPADs_APRM.pdf)> accessed 21 October 2010.

<sup>63</sup> The Charter, adopted by the League of Arab States, was revised in September 1994 and modernized in 2004, following decision 6302/119 (Part II) of 24 March 2003 of the League of Arab States. Charter available at <<http://www1.umn.edu/humanrts/instree/loas2005.html>> accessed 21 October 2010.

make observations and recommendations in conformity with the Charter, and makes an annual report containing its observations and recommendations to the Council of the League through the Secretary General. The reports, observations and recommendations are public documents which the Committee may distribute widely.

From the foregoing concise review of regional machineries in other parts of the world one can see that, taken together, they provide for the following models of action: the development of norms; state-reporting; individual petitions; inter-state complaints; special rapporteurships; advisory opinions; and visits to places of detention. Homayoun Alizadeh, regional representative of the Office of United Nations High Commissioner for Human Rights Regional Office for Southeast Asia, has noted that the regional human rights mechanisms described above, despite their diverse paths, today share certain common features. Firstly, they comprise regional human rights instruments that reflect international standards. Secondly, they provide for independent commissioners and impartial human rights experts. Thirdly their mandates have enabled these mechanisms to do both promotion and *protection* work. Fourthly, they have competent and full-time secretariats with adequate resources. Fifthly, their rules of procedure provide for interaction with both civil society and national human rights institutions; and cooperation with international human rights mechanisms.<sup>64</sup>

## VI. RELEVANT MACHINERIES AT THE UNITED NATIONS

At the United Nations, ASEAN member states participate in the following treaty-based or Charter based human rights machineries: under specific human rights conventions ASEAN member states submit reports, may subscribe to individual petition procedures and inter-State complaints procedures, and may subscribe to procedures of country visits to places of detention under the Convention against Torture, and the Optional Protocol to the Convention.<sup>65</sup>

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<sup>64</sup> H Alizadeh, *The Nation* (22 October 2009) <<http://www.asianewsnet.net/print.php?id=8350>> accessed 21 October 2010.

<sup>65</sup> On the universal (UN) human rights system and regional human rights systems, see HJ Steiner and P Alston (eds), *International Human Rights in Context: Law, Politics, Morals* (OUP, Oxford 2000). See also BG Ramcharan, *Contemporary Human Rights Ideas* (Routledge, London 2008) for a discussion of the key human rights ideas; D Forsythe, *Human Rights in International Relations* (CUP, Cambridge 2000); and T Buerghental, D Shelton and DP

Going beyond conventional procedures, ASEAN governments cooperate in the Human Rights Council under the system of Universal Periodic Reviews ('UPR') whereby member states, approximately once every five years, submit reports and participate in a dialogue with the Human Rights Council on their efforts to promote and protect human rights.<sup>66</sup> ASEAN member states also cooperate with thematic global rapporteurs or working groups looking into the state of respect for different rights, economic and social as well as civil and political, and some ASEAN member states have also cooperated with rapporteurs examining particular country situations, Myanmar being a case in point. A Special rapporteur on the Human Rights Situation in Myanmar has reported on human rights violations in that State since the early 1990s.<sup>67</sup>

### VII. WHAT DOES ASEAN NEED IN A HUMAN RIGHTS MACHINERY?

Keeping in mind the foregoing review of regional and UN arrangements one may pose the following policy questions:

*Does ASEAN need a reporting procedure?* Keeping in mind that, once every five years or so, every ASEAN member state will submit a report under the UPR, should ASEAN's human rights body require regular reports from participating states? There would not seem to be a need for such a reporting system within the ASEAN machinery but one could provide for two functions of the ASEAN machinery in this area: First, ASEAN member states could be required to submit copies of their reports under the UPR to the ASEAN human rights body, which could follow-up on observations, conclusions or recommendations of the Human Rights Council. Second, ASEAN's human rights body could be given the competence to request urgent reports when there are situations or issues of concern presented.

*Should the ASEAN human rights body have a role with regard to the right to development and to economic, social and cultural rights?* The purposes of ASEAN, provided in Article 1, include the alleviation of poverty and narrowing the development gap within ASEAN through mutual assistance and cooperation; to promote sustainable development and to

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Stewart (eds), *International Human Rights in a Nutshell* (West Group, St. Paul Minnesota 2002).

<sup>66</sup> See L Muller (ed), *The First 365 Days of the United Nations Human Rights Council* (Government of Switzerland, 2008).

<sup>67</sup> See n 29.

preserve the cultural heritage and high quality of life of its people; to develop human resources, through closer cooperation in education and lifelong learning and in science and technology; to enhance the well-being and livelihood of the peoples of ASEAN by providing them with equitable access to opportunities for human development, social welfare and justice; and 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. It would seem essential for the ASEAN human rights body to be given a role in promoting these rights and in watching over their realization.

*Should ASEAN's human rights body provide for periodic visits by the machinery to member states?* In the spirit that guides the African Peer Review mechanism, it would seem advisable for ASEAN's machinery to be given the competence to make similar visits and engage in similar dialogue with member states in a cooperative spirit.

*Should ASEAN's human rights body provide for an individual petition system?* As a matter of policy, if a member State of ASEAN wishes to subscribe to an individual petition system, it should be free to do so. At the same time, given ASEAN's history and historical juncture, it may be wise to make a petition procedure optional rather than compulsory for all ASEAN member States. One could therefore envisage an optional petitions procedure along the lines of the Optional Protocol to the International Covenant on Civil and Political Rights.

*Should ASEAN's human rights machinery provide for an inter-state complaints procedure?* Having regard to the approach of dialogue and confidence building that has characterized the history of ASEAN from the beginning, and mindful of the new organs and procedures established by the ASEAN Charter to deal with disputes, and keeping in mind also the functioning of the ARF, it may not seem necessary or advisable to provide initially for an inter-state complaint procedure.

*Should ASEAN's human rights body provide for a system of special rapporteurs?* Given the issues of children and women's rights, issues of economic and social rights and issues regarding the treatment of migrant workers, as well as mindful of similar issues of special concern in ASEAN, it would seem advisable for the human rights body to be able to avail itself of a system of thematic special rapporteurs or working groups.

*Should the ASEAN machinery be able to visit places of detention within ASEAN member-states?* The same approach to individual petitions could

be taken here, namely, that if an ASEAN member state wishes to avail itself of this option it should be free to do so. An optional procedure of visits to places of detention could thus be provided for.

*Should the ASEAN machinery provide for an ASEAN Commission as well as an ASEAN Court?* Given the texture of cooperation among ASEAN member states it may be advisable to begin with an ASEAN Commission and to leave open the possibility of establishing an ASEAN court at some stage in the future.<sup>68</sup> However, if the willingness is there on the part of member states, an ASEAN court could be established from the outset to provide advisory opinions at the request of the ASEAN human rights body or of member states.

*Should the ASEAN machinery be given a mandate to provide advisory services and technical assistance to member states at their request?* This would seem to be eminently desirable and reasonable.

### VIII. COOPERATION BETWEEN THE ASEAN HUMAN RIGHTS MACHINERY AND RELATED ASEAN MACHINERIES.

With the foregoing policy considerations in mind one may now turn to cooperation between the ASEAN body and existing ASEAN entities dealing with human rights related matters. The ASEAN Machinery on Migrant Workers and the Rights of Women and Children, the ASEAN Regional Forum and the ASEAN Interparliamentary Assembly are machineries with areas of competence and procedures that may complement the work of the AICHR. These specialized machineries deal with the human rights challenges of particular groups or communities and thereby raise the level of protection of human rights. It would seem important for the AICHR to institutionalize appropriate channels of communication between itself and these institutions.

#### *A. The ASEAN Machinery on Migrant Workers and on the Rights of Women and Children*

ASEAN made an important move to address the issue of migrant workers on 13 January 2007, when its leaders signed the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers. The Declaration mandates ASEAN countries to promote fair and appropriate employment protection, payment of wages, and adequate access to decent working and living conditions for migrant

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<sup>68</sup> See HD Phan (n 20).

workers. An ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers was established in July 2007.

In setting out obligations for states that send and receive migrant workers, the Declaration recalled member states obligations under the Universal Declaration on Human Rights adopted and proclaimed by General Assembly Resolution 217(A)(III) of 10 December 1948, ‘as well as other appropriate international instruments which all the ASEAN Member Countries have acceded to, in order to safeguard the human rights and fundamental freedoms of individuals such as the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child.’ The Declaration set out the following General Principles:

- Both the receiving states and sending states shall strengthen the political, economic and social pillars of the ASEAN Community by promoting the full potential and dignity of migrant workers in a climate of freedom, equity, and stability in accordance with the laws, regulations, and policies of respective ASEAN member countries.
- The receiving states and the sending states shall, for humanitarian reasons, closely cooperate to resolve the cases of migrant workers who, through no fault of their own, have subsequently become undocumented.
- The receiving states and the sending states shall take into account the fundamental rights and dignity of migrant workers and family members already residing with them without undermining the application by the receiving states of their laws, regulations and policies.
- Nothing in the present Declaration shall be interpreted as implying the regularization of the situation of migrant workers who are undocumented.

Receiving and sending states agreed, pursuant to their prevailing laws, regulations and policies, to measures aimed at the intensification of their efforts to protect the fundamental human rights, welfare and dignity of migrant workers. Such efforts include promoting fair and appropriate

employment protection, fair wages, adequate access to legal and judicial systems, legal practices to regulate recruitment of migrant workers and the elimination of recruitment malpractices. They also include facilitating access to consular or diplomatic authorities of states of origin when a migrant worker is arrested or committed to prison or custody or detained in any other manner.

ASEAN members committed to tasking the relevant ASEAN bodies to follow up on the Declaration and to develop an ASEAN instrument on the protection and promotion of the rights of migrant workers and to directing the Secretary-General of ASEAN to submit an annual report on the progress of the implementation of the Declaration to the Summit through the ASEAN Ministerial Meeting. It would seem important for the AICHR to take a strong interest in and support the drafting of such an instrument. Furthermore, the Secretary General of ASEAN could adopt the practice of formally submitting his or her annual report to the AICHR for deliberation and recommendations. The work of the machinery for Migrant Workers, Women and Children could constitute a thematic area which the AICHR could follow and complement.

### B. *The ARF*

It would seem advisable as a policy proposition for the ASEAN human rights body to be able to refer situations to the ARF for its consideration and vice-versa. It may be recalled that the ARF is the longest running regional experiment in preventive diplomacy in the Asia-Pacific region. The emphasis is precisely on the diplomacy of prevention, which is relevant to the protection of human rights in ASEAN. As the Chairperson of the High Level Panel on an ASEAN Human Rights Body noted at the fifth Roundtable in Bangkok, AICHR is a reflection of 'the changing notion of security in ASEAN as it shifts its focus from conventional security to human security.'<sup>69</sup>

The ARF emphasizes the concept of preventive diplomacy. It is particularly interesting because it has sought to draw upon preventive

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<sup>69</sup> S Phuanketkeow, Chairperson of the High Level Panel on an ASEAN Human Rights Body at the Fifth Roundtable Discussion on Human Rights in ASEAN – 'Towards an ASEAN Human Rights System: Role of Institutions and Related Activities' (Bangkok, Thailand, 15-16 December 2009) 3 <<http://www.aseanhrmech.org/downloads/5th%20RTD%20Summary%20of%20Proceedings%20%28Final%29.pdf>> accessed 21 October 2010.

diplomacy in a part of the world that has been and remains sensitive to intrusions upon internal affairs. The ASEAN experience thus has particular significance for the practice of preventive diplomacy elsewhere and we therefore look at it in somewhat greater detail.

Conflict prevention has been at the heart of ASEAN diplomacy since the organization was created. ASEAN leaders put forward the idea of an ARF as a forum for preventive diplomacy for the wider Asia Pacific region.<sup>70</sup> The ARF was created in 1992, one year before the Conflict Prevention Mechanism of the OAU, as a means of coping with the multitude of complex post-Cold War conflicts, some inherited from the Cold War era and some new challenges.

The ARF is based on the fundamental principles of ASEAN's Treaty of Amity and Cooperation ("TAC"), concluded in 1976, including:

- Mutual respect for the independence, sovereignty, equality, territorial integrity, and national identity of all nations;
- The right of every state to lead its national existence free from external interference, subversion, or coercion;
- Non-interference in the internal affairs of one another;
- Settlement of differences or disputes by peaceful means;
- Renunciation of the threat or use of force; and
- Effective cooperation among parties.

The ARF follows the ASEAN consultative style of conflict prevention. Through its history ASEAN has developed a framework for intensive discussion, consultation and deliberation of matters of mutual interest in order to foster good relations and cooperation, and constraining the exacerbation of bilateral disputes. The framework consists of annual and *ad hoc* meetings among foreign ministers, meetings among other ministers (finance, economic and environment ministers), and meetings and discussions among officials (the ASEAN Standing Committee and the Senior Officials Meeting). At its first session the ARF Chairman noted that the goals of the ARF were: to foster

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<sup>70</sup> On ASEAN as a security community see A Acharya, *Constructing a Security Community in Southeast Asia: ASEAN and the Problem of Regional Order* (Routledge, London 2001) and R Emmers, *Cooperative Security and the Balance of Power in ASEAN and the ARF* (Routledge, London 2003).

constructive dialogue and consultation on political and security issues of common interest and concern; and to make significant contributions to efforts towards confidence-building and preventive diplomacy in the Asia-Pacific region.<sup>71</sup>

The ARF follows this same consultative and consensual style. Decisions within the ARF are to be taken by consensus. At the second ARF meeting in Brunei in August 1995, ministers agreed that ASEAN should be the driving force, that the process should move at a pace comfortable to all participants and that it should be evolutionary, as such going through three phases: promotion of confidence building, development of preventive diplomacy, and elaboration of approaches to conflicts, with conflict management and resolution as the ARF's ultimate goal.

It has been noted about ASEAN's preventive diplomacy ('PD') that:

- It is about diplomacy. It relies on diplomatic and peaceful methods such as diplomacy, negotiation, enquiry, mediation and conciliation.
- It is non-coercive. Military action or the use of force is not part of preventive diplomacy.
- It should be timely. Action is to be preventive, rather than curative. PD methods are most efficiently deployed at an early stage of a dispute or crisis.
- It requires trust and confidence. PD can only be exercised successfully where there is a strong foundation of trust and confidence among the parties involved and when it is conducted on the basis of neutrality, justice and impartiality.
- It operates on the basis of consultation and consensus. Any PD effort can only be carried out through consensus after careful and extensive consultation among ARF members, with due consideration for the need of timeliness.

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<sup>71</sup> Chairman's Statement, The First Meeting of the ASEAN Regional Forum (Bangkok, 25 July 1994) <<http://www.aseanregionalforum.org>> accessed 21 October 2010.

- It is voluntary. PD practices are to be employed only at the request of all the parties directly involved in the dispute and with their clear consent.
- It applies to conflict between and among states.
- It is conducted in accordance with universally recognized principles of international law and inter-state relations embodied, inter-alia, in the UN Charter, the Five Principles of Peaceful Co-Existence and of the TAC.<sup>72</sup>

ARF Ministers have been responsive to calls for implementing preventive diplomacy measures. At the 9<sup>th</sup> ARF in Brunei, July 2002, Ministers ‘recognized the importance of making further progress on preventive diplomacy.’<sup>73</sup> The paper on the ARF Chair called upon the latter to perform a role in good offices and/or a role in coordination in between ARF meetings, including:

- Promoting confidence building among ARF members by facilitating information exchange and dialogue between and among ARF members, such as holding conferences and workshops.
- Fostering co-operation between ARF members by facilitating co-operation between ARF members and by facilitating discussion on potential areas of cooperation.
- Facilitating discussion on norm building in the ARF to enhance mutual understanding.
- Encouraging exchange of information and highlighting issues that can impact on regional security for consideration by the ARF by serving as a conduit for information sharing between ARF members.
- Serving as focal point for consultations among ARF members on the basis of consensus of all ARF

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<sup>72</sup> ‘Concept and Principles of Preventive Diplomacy’, reproduced in Institute of Defence and Strategic Studies, *A New Agenda for the ASEAN Regional Forum*, Monograph No. 4 (Institute of Defence and Strategic Studies, Singapore 2002) 88-93.

<sup>73</sup> Chairman’s Statement, 9<sup>th</sup> Meeting of the ASEAN Regional Forum <<http://www.aseansec.org/12003.htm>> accessed 21 October 2010.

members. Upon prior consent of directly involved states and the consensus of all ARF members, the ARF Chair may convene an ad hoc meeting of all ARF members at an appropriate level.

- Liaising with external parties, such as heads of international organizations, and Track II organizations on an informal basis and with prior consultation with all ARF members and their consent.<sup>74</sup>

At its 15<sup>th</sup> session in Singapore in July 2008, the ARF's Singapore Declaration pledged to:

‘1. Renew our individual and collective commitment to build upon the achievements of the ARF *and strengthen dialogue and cooperation in existing and new areas to promote and maintain regional peace and security*; [emphasis added]

4. Commit to undertake concrete and practical cooperation to address issues of common interests, with the view to build capacity, develop expertise and enhance coordination in areas that can contribute to the region's collective security objectives.’<sup>75</sup>

The ARF has thus far addressed the political situation in Myanmar, at the heart of which are human rights violations. At its 15<sup>th</sup> Session in July 2008, the ARF ministers

‘[t]ook note of the briefing by Myanmar on the recent developments in the process of national reconciliation and its peaceful transition to democracy, as envisaged in the roadmap to democracy; in particular, the adoption of the State Constitution of 2008 by referendum. The Ministers urged Myanmar to take bolder steps towards a peaceful transition to democracy in the near future, and working towards the holding of free and fair General Elections in

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<sup>74</sup> ‘Enhanced Role of the ARF Chair’ reproduced in Institute of Defence and Strategic Studies, *A New Agenda for the ASEAN Regional Forum*, 94-97.

<sup>75</sup> Singapore Declaration on the 15<sup>th</sup> ARF, 24 July 2008.

2010. While recognizing the steps undertaken by the Government of Myanmar to conduct meetings with all concerned parties, including the NLD leadership, the Ministers reiterated their calls for the release of all political detainees, including Daw Aung San Suu Kyi, to pave the way for meaningful dialogue involving all parties concerned.<sup>76</sup>

They also ‘reaffirmed their commitment to remain constructively engaged with Myanmar as part of building the ASEAN Community’ and urged Myanmar to continue to work closely with the Good Offices of the UN Secretary-General and his Special Advisor Ibrahim Gambari in ensuring an inclusive process towards national reconciliation.<sup>77</sup> In its Track II process, involving regional think tanks (‘CSCAP’), the latter have enriched the ARF’s work through research and policy propositions on a wide range of regional security issues, including on human security and human trafficking.<sup>78</sup>

### C. *ASEAN Inter-Parliamentary Assembly (AIPA)*

It would seem advisable as a policy proposition for the ASEAN machinery to be able to refer issues to the AIPA for its consideration and vice-versa. The AIPA is an ASEAN forum for cooperation among Southeast Asian Parliaments on matters of common interest. At the initiative of Indonesia, ASEAN parliamentarians formed the ASEAN Inter-Parliamentary Organization (‘AIPO’) on 2 September 1977. In an effort towards establishing a more effective and closely integrated institution, AIPO transformed itself from an organization into an assembly in 2007. Its name was changed to the ASEAN Inter-Parliamentary Assembly (‘AIPA’).

The new Statutes of the AIPA were signed on 17<sup>th</sup> April 2007 by the member countries of AIPO, namely, Cambodia, Indonesia, Lao People’s Democratic Republic, Malaysia, Singapore, Thailand, and Vietnam as well as the Special Observer Country of Brunei Darussalam

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<sup>76</sup> Chairman’s Statement, 15th ASEAN Regional Forum (Singapore, 24 July 2008) <<http://www.aseanregionalforum.org>> accessed 21 October 2010.

<sup>77</sup> *ibid.*

<sup>78</sup> See CSCAP study groups on human trafficking at <<http://www.cscap.org/index.php?page=human-trafficking>> accessed 21 October 2010.

during the Extraordinary Meeting of the Executive Committee of AIPO held in Kuala Lumpur from 16<sup>th</sup> to 19<sup>th</sup> April 2007. The Philippines, and Special Observer Country, Myanmar, were due to sign the new Statutes subsequently. A resolution adopted in 2008 concerning the new Statutes of AIPA, provided, *inter alia*, that the aims and purposes of AIPA shall be:

- 1) To promote solidarity, understanding, cooperation and close relations among Parliaments of ASEAN member countries, AIPA Special Observers, Observers and other parliamentary organizations;
- 2) To facilitate the achievement of the goals of the ASEAN as constituted in the ASEAN Declaration of August 1967 made at Bangkok, Thailand as well as the ASEAN Vision 2020 taking into account Bali Concord II 2003 leading to the realization of an ASEAN Community based on three (3) pillars: ASEAN Security Community (ASC), ASEAN Economic Community (AEC) and ASEAN Socio-Cultural Community (ASCC);
- 3) To establish and maintain exchange and dissemination of information as well as coordination, interaction, and consultations with ASEAN to offer parliamentary contributions to ASEAN integration and to familiarise the peoples of Southeast Asia with policies aimed at accelerating the realisation of an ASEAN community;
- 4) To study, discuss and suggest solutions to problems of common interest and express its views on such issues with the aim of bringing about action and timely response by the members of AIPA;
- 5) To keep all AIPA member Parliaments informed of steps taken and progress achieved by each Parliament in realisation of the aims and purposes of AIPA; [and]
- 6) To promote the principles of human rights, democracy, peace, security and prosperity in ASEAN.<sup>79</sup>

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<sup>79</sup> Resolution 27GA/2006/Org/dr01 adopted at the 28<sup>th</sup> AIPO General Assembly in Cebu City, Philippines.

The objective of this transformation as outlined by the Malaysian Prime Minister in 2007, was to make ASEAN more effective in keeping the peace and stability of the region and make ASEAN more dynamic in supporting the efforts of its members to bring greater prosperity to their respective peoples. Moreover, in order to be a true community, the ASEAN Community had to become ‘people-centred’. It was therefore timely that AIPA focus on activities and programs that would bring ASEAN closer to the people.<sup>80</sup>

The AIPO can be helpful in promoting acceptance and understanding of the AICHR and in following up the implementation of its decisions. There would thus seem to be a case for regular consultations and cooperation between the AIPO and the ASEAN Human Rights body. For example, at the 28<sup>th</sup> General Assembly of AIPA resolutions were taken on Cooperation on Migration and Protection of the Rights of Migrant Workers the AIPA General Assembly, on the Elimination of Violence against Women and Children and on Women, Poverty and Economic Development.

At its 29<sup>th</sup> meeting in Singapore in August 2008, the AIPA General Assembly, in a Resolution welcoming the ASEAN Charter and ‘supportive of ASEAN’s purpose to promote a people-oriented ASEAN Community in which all sectors of society are encouraged to participate,’ resolved to:

*Reinforce* the key role of ASEAN Parliamentarians in advancing regional integration for the benefit of the peoples of ASEAN; [and]

*Foster* a rules-based regime in ASEAN under the Charter;

*Uphold* the principles of democracy, human rights and the rule of law.<sup>81</sup>

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<sup>80</sup> The 28<sup>th</sup> AIPA General Assembly, Summary of Statements and Resolutions (Kuala Lumpur, Malaysia, 19 – 24 August 2007) <<http://www.aipasecretariat.org/general-assembly/the-28th-general-assembly/>> accessed 21 October 2010.

<sup>81</sup> AIPA General Assembly, Resolution on AIPA’s Role and Contribution to the ASEAN Charter, Res 29GA/2008/Pol/01 (Singapore, 24-29 August 2008).

The 29<sup>th</sup> AIPA General Assembly stressed the important roles of AIPA Member Parliaments as legitimate representatives of the ASEAN people 'in strengthening democratisation in regional institutions and furthering the promotion and protection of human rights' and *recognized* the importance of 'building the capacity of citizens through democracy and human rights education, as human and social capital are the driving forces and key elements in the democratisation process.' AIPA resolved further that they:

*Endorse* the decision to establish an ASEAN human rights body as stipulated by the ASEAN Charter as well as the establishment of the ASEAN Commission on the promotion and protection of the rights of women and children and the elaboration of an ASEAN instrument on the promotion and protection of the rights of migrant workers;

*Reaffirm* that parliamentary democracy can only be truly meaningful if women are provided equal rights and opportunities to be represented in parliament, and strongly urge ASEAN member countries and AIPA Member Parliaments to ensure that such equality is achieved within the Millennium Development Goals Framework;

*Call on* AIPA Member Parliaments to work for democracy based on the freely expressed will of the people through open, transparent, free and fair elections to choose their own representatives, and in this context, build a knowledge-based society in order to support the practice of democracy;

*Strongly urge* all AIPA Members to extend their full support to work towards the establishment of the ASEAN human rights body, and encourage the contribution of all relevant stakeholders in this regard; [and]

*Recommend* to include the topic on the promotion and protection of Human Rights in ASEAN as part of the Agenda of the 30th AIPA General Assembly.<sup>82</sup>

With regard to women, poverty and economic development, the AIPA General Assembly reaffirmed 'ASEAN's commitment to promote women's participation in economic and social development through the realization of the Declaration of the Advancement of Women in the ASEAN Region (1988) and the objectives of the Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW').<sup>83</sup> The Assembly resolved to:

'Address the manifold effects of economic development on women in terms of education, employment and economic opportunities for advancement, with the aim of eradicating the root causes of the feminization of poverty;

Promote the advancement of women through government commitments and community-led initiatives to improve basic amenities including education, healthcare especially reproductive health of women and sanitation in rural areas;

Support ASEAN Member Countries' initiatives for advancement of women in economic and social development through supporting women-led micro, small and medium-sized enterprises and co-operatives;

Enhance cooperation among ASEAN Member Countries in provision of technical assistance and/or information and knowledge for the empowerment of women.<sup>84</sup>

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<sup>82</sup> AIPA General Assembly, Resolution on Strengthening Democracy, Promotion and Protection of Human Rights, Res 29GA/2008/Pol/02 (Singapore, 24-29 August 2008).

<sup>83</sup> *ibid.*

<sup>84</sup> AIPA General Assembly, Resolution on Women, Poverty and Economic Development Res 29GA/2008/WAIPA/01 (Singapore, 24-29 August 2008).

## IX. CONCLUSION

ASEAN has embarked on a historic event: the first regional human rights body in East and Southeast Asia. This paper has sought to distill from other regional organizations and processes, the elements that would contribute to an effective mechanism for the protection of human rights in the region.

From the foregoing discussion one could conclude that, from a policy perspective, ASEAN's human rights body could in the future be vested with the following competences. First, ASEAN member states could be required to submit copies of their reports under the UPR to the ASEAN machinery which could follow-up on observations, conclusions or recommendations of the Human rights council. Second, ASEAN's body could be given the competence to request urgent reports when there are situations or issues of concern to it. Third, ASEAN's human rights body could play a role in promoting the Purposes and Principles of the ASEAN Charter with regard to reduction of poverty and realization of the right to development. Fourth, the human rights body could be given the competence to make periodic visits and engage in dialogue with member states. Fifth, it could envisage an optional petitions procedure for member states wishing to avail themselves of it. Sixth, it could develop a system of thematic special rapporteurs or working groups. Seventh, it could consider an optional procedure of visits to places of detention. Eighth, it could establish an ASEAN Commission on Human Rights. Ninth, it could establish an ASEAN court with competence to provide advisory opinions at the request of the commission or of member states. Tenth, it could provide advisory services and technical assistance to member states at their request.

Finally, the AICHR could envisage avenues for effective cooperation with the ASEAN mechanism on migrant workers and on the rights of women and children, the preventive diplomacy work of the ARF, and the efforts of AIPA to bring ASEAN closer to its peoples.