THE ASEAN HUMAN RIGHTS DECLARATION AND THE IMPLICATIONS OF RECENT SOUTHEAST ASIAN INITIATIVES IN HUMAN RIGHTS INSTITUTION-BUILDING AND STANDARD-SETTING

NICHOLAS DOYLE*

Abstract On 18 November 2012 the 'Association of Southeast Asian Nations' (ASEAN) adopted the ASEAN Human Rights Declaration (AHRD). ASEAN has existed since 1967 and as a result allows Southeast Asia to be identified as a 'region' comparable with other regions such as Africa, the Americas and Europe which have been seen as such in human rights terms for over 40 years. However, until recently Southeast Asia has not been involved in a process of regional human rights institutionalization which in other regions has been an important means of implementing international human rights treaty commitments adopted by their member-States in global forums. Furthermore, the ten States of ASEAN as a group are parties to relatively few of the principal international human rights standard-setting and monitoring regimes. Hence vesting ASEAN with a human rights mandate would seem to present an opportunity to enhance the range of human rights commitments to which ASEAN States are subject. However, after reviewing the 'ASEAN human rights mechanism' it is concluded that much recent ASEAN activity amounts either to political rhetoric or has potential to fragment the human rights norms recognized by those ASEAN States which are committed to international human rights treaties. For the ASEAN States which are relatively uncommitted to international human rights treaty regimes, participating in the ASEAN mechanism may reduce pressure to recognize international norms.

Keywords: ASEAN, ASEAN Human Rights Declaration, ASEAN Human Rights Mechanism, ASEAN Intergovernmental Commission on Human Rights, international human rights treaties, regional human rights, Southeast Asia, the 'ASEAN way'.

I. INTRODUCTION

On 18 November 2012 at the twenty-first ASEAN[1] Summit in Phnom Penh the ASEAN Human Rights Declaration (AHRD)[2] was adopted by the ASEAN

* LLM Barrister, nickdoyle77@googlemail.com. With sincere thanks to Dr Antonios Tzanakopoulos of St Anne's College, University of Oxford and Dr Douglas Guilfoyle of the Faculty of Laws, University College London. Errors and omissions are mine.

[1] The 'Association of Southeast Asian Nations' includes Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam.

[2] The ASEAN Human Rights Declaration <http://www.asean.org/news/asean-statement-communiques/item/asean-human-rights-declaration?category_id=26> accessed November 2012.

[*ICLQ* vol 63, January 2014 pp 67–101] doi:10.1017/S0020589313000390

https://doi.org/10.1017/S0020589313000390 Published online by Cambridge University Press

Heads of State/Government. This event was a milestone in the development of international human rights in Southeast Asia (SEA) and followed a period of institution-building and of policy rhetoric by ASEAN in which it professed an intention to establish a regional human rights mechanism in a part of the world which historically had largely absented itself from, and which was potentially hostile to, international cooperation in the field of human rights.[3] There would seem to be much to celebrate in ASEAN establishing its own approach to safeguarding the rights of those subject to member-States' jurisdiction. However, this article concludes that these new initiatives may in fact be a distraction and a retrograde step in human rights protection in SEA since while appearing to address international and national bodies' concerns regarding human rights in ASEAN States they in fact amount to political rhetoric, or, indeed, risk fragmenting those human rights norms which are currently recognized by ASEAN States.

This article considers the potential role of regional initiatives in international human rights cooperation before considering SEA specifically. It then considers the institutional reflection of human rights cooperation in SEA: the ASEAN Intergovernmental Commission on Human Rights (AICHR), before turning to consider the participation of individual ASEAN member-States in international human rights treaty regimes, in order to put their participation in the ASEAN human rights mechanism in some context. Particular attention is given both to the participation of Singapore and Malaysia in the global human rights discourse (since, at least in terms of ratification of the principal global human rights treaties, these are the least committed ASEAN States) and to the practice of ASEAN as a whole in the area of the protection of women's and children's rights, since it is in this respect that ASEAN and ASEAN member-States purport to be most actively engaged. This leads to the final sections which review the text of the AHRD and reflect on the implications of this ASEAN initiative.

II. HUMAN RIGHTS IN A REGIONAL CONTEXT: WHY HUMAN RIGHTS PROTECTION MIGHT BE SEEN AS A ROLE FOR ASEAN

The existence of the African, American and European human rights institutions makes regional inter-State cooperation appear to be an inherently effective way of establishing and implementing international human rights norms. The fact that States should dedicate time and diplomatic resources to their establishment creates the impression that States regard this as desirable. One reason for this may be that such institutions are facilitative, and are of assistance to States in meeting their commitments under international human rights law. If this is the

[3] <http://www.asean.org/news/asean-statement-communiques/item/phnom-penh-statement-on-the-adoption-of-the-asean-human-rights-declaration-ahrd?category_id=26> accessed November 2012.

https://doi.org/10.1017/S0020589313000390 Published online by Cambridge University Press

case, regional mechanisms have the potential to make important contributions to international human rights law by securing member-State compliance with global commitments (which in turn may strengthen their standing as norms of international law) and by recognizing and giving legal force to region-specific rights. At the United Nations (UN) level, the value of regional human rights cooperation in Asia has been specifically recognized by the UN General Assembly, which has led to a series of annual workshops in the region.[4]

There is a body of literature which characterizes regional human rights mechanisms as positive responses by States to the implementation of international human rights commitments. For example, Shelton has said that regional human rights systems are:

> indispensible to achieving effective compliance with international human rights law, performing as they do a necessary *intermediary function* between State domestic institutions that violate or fail to enforce human rights and the global system.[5]

And Hashimoto has written that:

> Regional human rights mechanisms have proved to be more effective and useful in promoting and protecting human rights than the global . . . mechanisms available at the UN . . . because they cannot only be complementary to the UN system but can *also* reflect regional particularities (e.g. the needs, priorities and conditions of the regions). Regional human rights treaties are usually justified as essential elements in any successful international human rights system in a diverse, conflicted world.[6]

Both Shelton and Hashimoto see regional human rights mechanisms as effecting a local–global reconciliation; 'reconciliation' suggesting a process which is both *innovative* (describing new rights which address these 'regional peculiarities') and which is also *accepting* of international norms. This reconciliatory process is to be contrasted with a *selective* process which rejects international norms in order to consolidate a more conservative regional normative framework, presumably in the interests of avoiding the challenges to sovereignty presented by cooperating in international standard-setting and monitoring regimes. This study of the ASEAN human rights mechanism takes the Shelton/Hashimoto model as its starting point, and poses the question of what these regional responses to the international human rights commitments of States actually achieve. This article considers the nascent ASEAN human rights mechanism with this model in mind.

[4] See, *inter alia*, 'Regional Arrangements for the Promotion and Protection of Human Rights in the Asia and Pacific Region', UNGA Res A/RES/43/140 (1988) which recognized that 'regional arrangements make a major contribution to the promotion and protection of human rights'.

[5] D Shelton, 'The Promise of Regional Human Rights Systems' in BH Weston and SP Marks (eds), *The Future of International Human Rights* (Transnational 1999) 353; emphasis added.

[6] H Hashimoto, *The Prospects for a Regional Human Rights Mechanism in East Asia* (Routledge 2004) 1; emphasis added.

https://doi.org/10.1017/S0020589313000390 Published online by Cambridge University Press

III. A CONFLICT OF NORMS? SOUTHEAST ASIA AND HUMAN RIGHTS

When considering the architecture of the international human rights system, Asia seems to be something of a 'black hole'. As far as SEA is concerned, there are at least two reasons for this. First, SEA is identifiable as a regional subunit of the global order with relatively distinct borders.[7] Second, the institutional architecture of the system for the elaboration and protection of international human rights is stratified, with regional regimes playing a significant implementing role at an institutional 'meso-level' as regards the international human rights treaty commitments undertaken by States-parties. The existence of this regional meso-level is exemplified by the institutions of the European, African and American human rights regimes, the existence of which highlights the historical absence of an equivalent or even comparable system for the Asian region.

In addition, the ASEAN States as a group have a poor commitment to international human rights treaties.[8] While nearly 90 per cent of all 193 UN member-States[9] are parties to the ICCPR, only six of the ASEAN-ten are parties.[10] The same is true of the ICESCR to which over 80 per cent of the general UN membership are parties.[11] The CEDAW, with 187 States-parties, reflects a broad global consensus on the rights of women, but the Optional Protocol which provides the CEDAW Committee with competence to receive individual and group communications is under-supported among the ASEAN States with only three parties as compared to over 50 per cent

[7] In the sense that ASEAN is the institutional embodiment of the Southeast Asian politico-legal self-imaging—see ASEAN Charter para 1 Preamble and art 4 which limit ASEAN membership to the Southeast Asian States of the ASEAN-ten.

[8] Annex I herein shows the ASEAN States' pattern of signature, ratification and accession to eight principal international human rights treaties: the International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; the International Covenant on Economic, Social and Cultural Rights (ICESCR) (adopted 16 December 1966, entered into force January 1976) 993 UNTS 3; the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13; the Convention on the Rights of the Child (CRC) (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3; the International Covenant on the Elimination of all forms of Racial Discrimination (CERD) (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195; the Convention on the Prevention and Punishment of the Crime of Genocide (GC) (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (adopted 10 December 1989, entered into force 26 June 1987) 1465 UNTS 85; the International Convention on the Protection of the Rights of All Migrant Workers and their Families (CMW) (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3.

[9] <http://www.un.org/en/members/index.shtml> accessed 8 August 2012.

[10] <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en> accessed 8 August 2012.

[11] <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en> accessed 8 August 2012.

https://doi.org/10.1017/S0020589313000390 Published online by Cambridge University Press

of UN member-States generally.[12] Similarly, the CAT, to which nearly 80 per cent of UN members are States-parties, has only four ASEAN States parties, of which only the Philippines and Cambodia are parties to the Optional Protocol establishing national and international visiting mechanism to places of detention.[13] It is clear that there is much which ASEAN could do to improve member-States' commitment to international human rights norms by having an expanded mandate as a regional human rights institution.

ASEAN was created in 1967 principally for security reasons and, as a diplomatic forum for building trust between sometimes hostile governments, was ambiguously described as an 'Association'.[14] ASEAN is perhaps best known for its long-standing regional diplomatic practice of what has become known as the 'ASEAN way', as reflected in Article 2 of the ASEAN Treaty of Amity and Cooperation, 1976 (TAC).[15] Established at a time of great regional tension regarding competing territorial claims to Sabah, and in the wake of the *Konfrontasi* era of Sukarno's Indonesia,[16] the role of ASEAN was very much that of a security community and domestic matters were rigorously excluded from ASEAN's mandate lest these should give rise to tension.[17] For over 50 years this practice was entrenched by differences in political and religious ideology, ethnic tensions and the 'push and pull' of big power interests projected into the region from

[12] <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&lang=en> accessed 8 August 2012.

[13] <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9-b&chapter=4&lang=en> accessed 22 July 2012.

[14] The Treaty of Amity and Cooperation in Southeast Asia (TAC) (signed on 24 February 1976, entered into force 21 June 1976) 27 ILM (1988) 610 sets out the core principles and purposes of ASEAN and describes itself as a 'treaty', expressed in imperative language. The founding of ASEAN on 8 August 1967 was achieved by the 'Bangkok Declaration' 6 ILM (1967) 1233 (hereinafter 'the ASEAN Declaration') para 2.1 of which described the purpose of ASEAN as concerned with 'economic growth, social progress and cultural development'.

[15] Tan describes art 2 of the TAC as the crystallization of the 'regional ideology' of the 'ASEAN Way'; the normative content on this account being the art 2 'fundamental principles:

a Mutual respect for the independence, sovereignty, equality, territorial integrity, and national identity of all nations;
b The right of every State to lead its national existence free from external interference, subversion or coercion;
c non-interference in the internal affairs of one another;
d settlement of differences and disputes by peaceful means;
e renunciation of the threat or use of force;
f effective cooperation among themselves'.

See HL Tan, *The ASEAN Intergovernmental Commission on Human Rights* (Cambridge 2011) 145.

[16] The period of military intervention and diplomatic confrontation between Indonesia and Malaysia precipitated by President Sukarno's opposition to the formation of Malaysia (1963–66).

[17] Tan (n 15) 144–5.

https://doi.org/10.1017/S0020589313000390 Published online by Cambridge University Press

outside.[18] Vast disparities in wealth, governance and political orientation still remain within ASEAN.

The 'ASEAN way' emphasizes that decision making by consensus and non-interference—including in the form of criticism—in the internal affairs of fellow ASEAN States-parties are paramount principles of intra-ASEAN relations.[19] As such, the culture of Southeast Asian foreign relations does not easily facilitate the establishment of cooperative approaches and mechanisms having the potential to reach deep into member-States' sovereignty and this explains the absence of an international human rights 'meso-level' in SEA.

However, the rhetoric of ASEAN has increasingly espoused a commitment to building a Southeast Asian 'community' based on three 'pillars', these being 'Political-Security', 'Economic' and 'Socio-Cultural' each accompanied by a 'blueprint' and programmes for the realization of this community.[20] The 'Political and Security Community' pillar of this rhetoric/process includes a new mandate for ASEAN to protect human rights in the region by establishing an 'ASEAN human rights body'.[21] This resulted in the creation of the 'ASEAN Intergovernmental Commission on Human Rights' (AICHR) in 2009. Furthermore, under Article 4·2 of its Terms of Reference (ToR), the AICHR was tasked with drafting the AHRD.[22] Hence whatever ASEAN was, and may still be, it is now also an institution which purports to exercise some role in the relations between the ten Southeast Asian States with regard to human rights.[23]

[18] Tensions which competing Sino-ASEAN and intra-ASEAN territorial claims in the South China Sea continue to express. 'Divided We Stagger: ASEAN in Crisis' *Economist* (18 August 2012).

[19] A Acharya, *Constructing a Security Community in Southeast Asia* (Routledge 2009) 72. However, it would be wrong to suggest that ASEAN States never engage in open criticism of each other outside ASEAN. The *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)* Merits [1962] ICJ Rep 4 was the first intra-Asian case referred to the International Court of Justice (ICJ). More recently Singapore and Malaysia referred one of a number of territorial disputes to the ICJ: *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* Judgment, ICJ Rep 2008 12. The Philippines and Cambodia have accepted ICJ compulsory jurisdiction under art 36(2) Statute.

[20] 'Declaration of ASEAN Concorde II' (Bali Concorde II) (signed 7 October 2003) 43 ILM 18 (2004).

[21] ASEAN Political-Security Community Blueprint, Thailand, 1 March 2009 (2008) 12 SYBIL 281. <http://www.aseansec.org/5187-18.pdf> accessed 1 June 2012.

[22] Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights (20 July 2009) 48 ILM 1165 (2009).

[23] Chesterman considered ASEAN to be an institution, in the sense of being a constraining and facilitating feature of its member-States' relations, but in the pre-Charter era more in the manner of a 'standing diplomatic conference' (at 210). Chesterman considered ASEAN as 'perhaps the most important regional organization in Asia' but considered its objective legal personality at time of writing to be questionable (at 200). S Chesterman, 'Does ASEAN Exist? The Association of Southeast Asian Nations as an International Legal Person' (2008) 12 SYBIL 199–211.

https://doi.org/10.1017/S0020589313000390 Published online by Cambridge University Press

At the thirteenth ASEAN Summit in Singapore in 2007 the 'ASEAN Charter'[24] was adopted, Article 14 of which provides:

1 In conformity with the principles and purposes of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN human rights body.
2 This ASEAN human rights body shall operate in accordance with the terms of reference to be determined.

The Charter entered force on 15 December 2008 and the ToR of the AICHR —the ASEAN Human Rights Body envisaged by Article 14 Charter—were endorsed at the forty-second ASEAN Foreign Ministers' Meeting in Phuket on 20 July 2009. The AICHR is 'the overarching human rights institution in ASEAN with overall responsibility for the promotion and protection of human rights in ASEAN'.[25] In addition to developing the draft AHRD, the AICHR is to 'promote and protect the human rights of the people of ASEAN'.[26] However, the ToR do not envisage the AICHR having any judicial mandate nor providing any legal channel for the receiving and considering of complaints concerning alleged violations of human rights by member-States. Article 1·4 ToR emphasizes 'the regional context' of human rights, 'bearing in mind national and regional peculiarities' and emphasizes a balance between rights and responsibilities—principles reminiscent of the Bangkok Declaration.[27] Article 6·1 ToR provides that decision-making shall be based on consultation and consensus consistent with the 'evolutionary approach' common to ASEAN diplomatic rhetoric.[28] Nevertheless, the AICHR appears to be intended to close the 'black hole' by vesting competence for the protection of human rights in a supranational regional body; the first 'meso-level' institution for the SEA region, albeit one of very limited competence. In a sense, the AICHR makes possible a new imagining of SEA as a 'human rights region', for the first time comparable with the other 'human rights regions' of Africa, the Americas and Europe.

However, recalling Shelton's description of the 'intermediary function' of regional human rights regimes, it is far from clear what the AICHR's competence *ratione materiae* actually is. The AICHR is to enhance regional

[24] ASEAN Charter (signed on 20 November 2007, entered into force 15 December 2008) <http://www.aseansec.org/publications/ASEAN-Charter.pdf> accessed 1 June 2012.

[25] Art 6.8 ToR AICHR.

[26] Art 1.1 ToR AICHR.

[27] 'Final Declaration of the regional meeting for Asia of the World Conference on Human Rights (The Bangkok Declaration)' (Bangkok 29 March–2 April 1993) (2 April 1993) UN Doc A/CONF.157/ASRM/8. The Bangkok Declaration crystallized the seemingly ambiguous position of Asian States: an affirmation of 'universality' but a laying of emphasis on 'regional peculiarities' and, like the ToR AICHR at art 2.2, emphasizing in its preamble the indivisibility, interdependence and interrelatedness of human rights. The Bangkok Declaration reflected the high water mark of ASEAN States' promotion of the regional and rejection of the global. The ASEAN Inter-Parliamentary Organization 'Kuala Lumpur Declaration on Human Rights' (October 1993) 3 Asian YBIL 496 appeared to further reflect this approach.

[28] eg art 2.5 ToR AICHR.

https://doi.org/10.1017/S0020589313000390 Published online by Cambridge University Press

cooperation with a view to complementing national and international efforts,[29] but within the 'regional context'. The only sources of international human rights law expressly referenced by the ToR are the Universal Declaration on Human Rights (UDHR),[30] the Vienna Declaration and Programme of Action[31] 'and international human rights instruments to which ASEAN member-States are parties'.[32] The AICHR identifies no source of uniform and unambiguous international human rights standards applicable across ASEAN. The AHRD of November 2012 (considered further in section VI) is declaratory of certain rights but contains no binding undertakings that ASEAN member-States respect them. Even if the AHRD has the potential to set common human rights standards, the Commission has no mandate in respect of it. It does not appear from the AICHR ToR that the AHRD is expected to be an ASEAN benchmark for human rights standards and, even if it is, it will derive little institutional support from the AICHR given its current mandate. Furthermore, Article 2(2) Charter and Article 2 'Principles' of the AICHR ToR continue to reflect the normative elements of the 'ASEAN way', derived from TAC 1976.[33]

In light of this tension between the 'ASEAN way' and these recent initiatives aimed towards establishing a human rights mechanism in SEA, it is instructive to reconsider assertions concerning the effectiveness of regional human rights mechanisms in the ASEAN context.

IV. ASEAN STATES' INTERNATIONAL HUMAN RIGHTS COMMITMENTS AND PRACTICE

Whatever function ASEAN may purport to exercise in the field of human rights cooperation, it does not act in a legal vacuum. All ASEAN member-States have assumed some human rights treaty commitments in international law. If ASEAN is to exercise an 'intermediary function' it must complement and may augment the performance of individual States' human rights obligations in international law. Since AICHR ToR Article 1·6 refers to 'international human rights standards to which ASEAN member-States are parties', it is legitimate to ask what these are and to consider whether they are capable of setting meaningful normative standards across ASEAN.

[29] ToR AICHR art 1.5.

[30] Universal Declaration on Human Rights UNGA Res A/217(III)[A-E].

[31] Vienna Declaration and Programme of Action (Vienna 14 June–25 June 1993) A/CONF/157/23.

[32] ToR AICHR art 1.6.

[33] Both art 2(2)(e) Charter and art 2.1(b) AICHR ToR provide 'non-interference in the internal affairs of ASEAN Member-States' as, respectively, a principle 'States shall act in accordance with' and a principle the AICHR 'shall be guided by' in respecting the principles of the Charter. In April 2010 the AICHR held its first meeting to deal specifically with the drafting of the AHRD and to set a timetable for its completion in 2012. However, Cabalerro-Anthony reports ASEAN's 'Seniors' rejected a more ambitious approach envisioned for the ASEAN human rights mechanism by the Eminent Persons Group (EPG) tasked with drafting proposals for the ASEAN human rights mechanism. The EPG's original proposal included compliance mechanisms, to include a commission and a court. M Caballero-Anthony, 'The ASEAN Charter: An Opportunity Missed or One That Cannot Be Missed?' (2008) Southeast Asian Affairs 71, 75.

https://doi.org/10.1017/S0020589313000390 Published online by Cambridge University Press

A. ASEAN States and UN Human Rights Monitoring

As Annex I shows, Thailand is the only ASEAN state which has registered with the UN Office of the High Commissioner for Human Rights (OHCHR) a standing invitation to the 'special procedures' established by the UN Human Rights Council to undertake visits to the country, and this was as recently as November 2011.[34] However, ASEAN States have permitted country visits under the special procedures thematic mandates on an ad hoc basis. Moreover, Myanmar and Cambodia are both subjects of long-standing country-specific mandates which have undertaken visits and Myanmar has also received a Special Mission.[35]

Pursuant to UNGA Res 60/251 paragraph 5(e)[36] all ASEAN States participated in the first cycle of Universal Periodic Review (UPR) which ended in 2011. In their National Reports all ten States cited their involvement in the ASEAN human rights dialogue and institution-building process as evidence of their commitment to fundamental human rights.[37] Indonesia has recently expressed a belief in the importance of continued regional human rights protection through ASEAN.[38]

B. ASEAN States' Treaty-Based Monitoring Obligations

As already noted, ASEAN States show various degrees of support for the monitoring mechanisms established by the principal international human rights treaties, with 'standard-setting' treaties being better supported than protocols enabling individual applications to their various monitoring committees (see Annex I). In addition to their limited participation in the principal human rights treaties, a core of ASEAN States continues to maintain reservations to the human rights treaties to which they are parties. While all ASEAN States are parties to the CEDAW and the CRC, Brunei, Malaysia, Singapore and, until recently, Thailand[39] have maintained significant and sweeping reservations to

[34] <http://www.ohchr.org/EN/HRBodies/SP/Pages/Invitations.aspx> accessed December 2012.

[35] See A/HRC/RES/19/21, Resolution of the Human Rights Council: 'Situation of Human Rights in Myanmar', 26 April 2012 and A/HRC/RES/18/25, Resolution of the Human Rights Council: 'Advisory Services and Technical Assistance for Cambodia' 17 October 2011, available at <http://www.ohchr.org/EN/HRBodies/SP/Pages/Countries.aspx> accessed December 2012.

[36] UNGA Res 60/251 (3 April 2006) A/RES/60/251 at para 5(e).

[37] See the UPRs of Brunei Darussalam at para 27 A/HRC/WG.6/6/BRN/1, Cambodia at para 23 A/HRC/WG.6/6/KHM/1, Indonesia at para 38 A/HRC/WG.6/13/IDN/1, Laos at para 21 A/HRC/WG.6/8/LAO/1, Malaysia at para 26 A/HRC/WG.6/4/MYS/1/Rev.1, Myanmar at para 117 A/HRC/WG.6/10/MMR/1, Philippines at paras 16, 17 and 19 A/HRC/WG.6/13/PHL/1 , Singapore at para 31 A/HRC/WG.6/11/SGP/1, Thailand at para 16 A/HRC/WG.6/12/THA/1, and of Viet Nam at para 16 A/HRC/WG.6/5/VNM/1.

[38] Indonesian voluntary pledge <http://www.upr-info.org/IMG/pdf/hrc_pledge_indonesia_2011.pdf> accessed 12 August 2012 at 4.

[39] Thailand's reservation to art 7 CRC having been withdrawn in 2010 and to art 16 CEDAW in July 2012.

https://doi.org/10.1017/S0020589313000390 Published online by Cambridge University Press

both treaties. The most significant reservations to the CEDAW and the CRC are those maintained by Singapore and Malaysia.

1. Singapore and the CEDAW

Prior to its partial withdrawal in June 2011,[40] Singapore maintained a sweeping reservation to the entirety of Articles 2 and 16 CEDAW. At present Singapore maintains a reservation to, *inter alia*, most of the content of those articles:

> In the context of Singapore's multiracial and multi-religious society and the need to respect the freedom of minorities to practice their religious and personal laws, [Singapore] reserves the right not to apply the provisions of articles 2, paragraph (a) to (f), and article 16, paragraphs 1(a), 1(c), 1(h), and article 16, paragraph 2, where compliance with these provisions would be contrary to their religious or personal laws.[41]

Article 2 CEDAW consists of a chapeau paragraph in which parties 'condemn discrimination against women', and seven sub-paragraphs (a)–(g) where parties undertake to embody gender equality in constitutional and legislative instruments, to provide legal protection for gender equality; to abolish existing discriminatory laws and to refrain from acts and practices of discrimination. Article 16 CEDAW concerns discrimination against women in the marriage and family context. Singapore's reservation as it now stands purports to reserve Singapore's obligation to take measures to eliminate discrimination in relation to rights concerning entry into marriage, during marriage, at its dissolution and in respect of matrimonial property, to the extent that realization of these rights in national law and practice would be contrary to 'their' (minorities') religious and personal laws. As Linton has noted, a number of the States which have objected to Singapore's reservation have done so on the basis that reservations to Articles 2 and 16 are contrary to the object and purpose of the CEDAW.[42] The CEDAW Committee gave full consideration to Singapore's fourth periodic report in July 2011 and considered the reservations described above to be impermissible.[43]

[40] <http://treaties.un.org/doc/Publication/CN/2011/CN.610.2011-Eng.pdf> accessed 24 Aug 2012.

[41] <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en#55> accessed 24 Aug 2012.

[42] S Linton, 'ASEAN States, Their Reservations to Human Rights Treaties and the Proposed ASEAN Commission on Women and Children' (2008) 30 HRQ 436, 468. While Finland, Denmark and Sweden severed the reservation, no State opposed the entry into force of CEDAW as between itself and Singapore and Singapore has cooperated with the CEDAW Committee reporting process as a State-party.

[43] CEDAW Concluding Observations CEDAW/C/SGP/CO/4 at para 13. As a general comment on reservations to art 2 CEDAW, the CEDAW Committee in 2010 urged that all States-parties maintaining such reservations should have 'the goal of withdrawing them as soon as possible', General Recommendation no 28, para 41, CEDAW/C/GC/28.

https://doi.org/10.1017/S0020589313000390 Published online by Cambridge University Press

2. Singapore and the CRC

Singapore has maintained substantial reservations and a 'declaration' in respect of the CRC since its accession; these are both sweeping and affect some of the core rights of the treaty. The first of four reservations asserts that the Constitution and laws of Singapore are adequate to protect the rights of the child and that Singapore's accession does not imply the assumption of further obligations by Singapore. The first paragraph of the 'declaration' describes Articles 12 to 17 CRC, and indeed the whole Convention, as subject to, *inter alia*, 'the customs, values and religions of Singapore's multi-racial and multi-religious society regarding the place of the child within and outside the family'.[44] Articles 12 to 17 enumerate the core civil and political rights of the child and Singapore's 'declaration' has attracted objections from Sweden and Portugal which consider reservations invoking national law and which go to the object and purpose of the treaty to cast doubt on Singapore's commitment to it.[45] For its part, the CRC Committee has expressed 'serious concerns' about the extent and number of reservations but the standing of Singapore as a State-party has not been seriously questioned.[46]

3. Malaysia and the CEDAW

Malaysia maintains reservations to, *inter alia*, Articles 9(2), 16(1)(a), 16(1)(f) and (g) CEDAW, having withdrawn further reservations to Articles 5(a) on social and customary discriminatory practices and Article 16(2) on minimum marriageable age in July 2010. Article 9(2) concerns equality as regards the nationality rights of children as between men and women. Malaysia's commitments to Article 16, concerning women and the family, are purported to be limited in respect of equal rights to enter a marriage, of adoption and wardship of children and in respect of 'personal rights' as husband and wife (choice of family name, profession, etc). Before making these reservations, Malaysia made a 'declaration' that its accession to the CEDAW 'is subject to the understanding that the provisions of [CEDAW] do not conflict with the provisions of the Islamic *Sharia'* law and the [Constitution]'.[47]

Denmark lodged the same objections as it had made in relation to Singapore's reservations to the CEDAW, and Sweden likewise condemned the reservations and 'declaration' as contrary to the object and purpose of

[44] <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en> accessed 24 Aug 2012.

[45] <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4& lang=en#49> accessed 24 Aug 2012. Linton notes that Finland, Belgium and Norway severed the reservations, but again no State expressed the view openly that Singapore was not a State-party to the CRC. Linton (n 42) 476.

[46] CRC Committee Concluding Observations CRC/C/SGP/CO/2-3 at para 6.

[47] <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en> accessed 24 Aug 2012.

https://doi.org/10.1017/S0020589313000390 Published online by Cambridge University Press

the CEDAW. However, neither State took the view that Malaysia should not be regarded as a State-party; the reservations were treated as severed.[48] In its Concluding Comments to Malaysia's 2006 periodic review, the CEDAW Committee reacted likewise: that reservations to Article 16 CEDAW are contrary to the object and purpose and ought to be withdrawn.[49] Nevertheless, the reservations have been maintained.

4. Malaysia and the CRC

Malaysia has progressively withdrawn its very substantial reservations to the CRC since 1999: it was only in July 2010 that Malaysia withdrew reservations to Articles 13 and 15 of the CRC concerning core civil and political rights of the child (freedoms of expression, association and assembly). Important reservations to children's rights regarding discrimination (Article 2), acquisition of, *inter alia*, nationality (Article 7), freedom of thought, conscience and religion (Article 14), free primary education (Article 28(1)(a)) and from torture and other cruel treatments and punishments remain.[50] Again, States objected, including objections on the basis that the reservations went to the object and purpose of the CRC and were therefore 'not permitted' under Article 51(2) CRC,[51] an assessment with which the CRC Committee has concurred.[52] Article 51(2) CRC is couched in the same terms as Article 28(2) CEDAW and establishes a reservations regime which Linton describes as 'permissive' and which she blames, in part, for ASEAN States' 'cherry-picking' their international human rights commitments.[53] As regards its reservations to Articles 14 and 37, in its report to the CRC Committee in 2006, Malaysia cited Constitutional safeguards for the freedom of religion.[54] However, according to Article 11(4) of the Constitution of Malaysia, State and federal law may 'control or restrict the propagation of any religious doctrine or belief amongst persons professing the religion of Islam'.[55]

No objections were raised by ASEAN States to reservations or 'declarations' made by other ASEAN States. The pattern of reservations, their dubious legality under the object and purpose test and the reaction to them by non-ASEAN State-parties and the treaty body committees leaves Singapore and Malaysia with an ambiguous relationship with the CRC and CEDAW regimes;

[48] Linton (n 42) 467.

[49] CEDAW Committee Concluding Observations CEDAW/C/MYS/CO2 at para 10.

[50] <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en> accessed 24 Aug 2012.

[51] <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en#37> at n 37 accessed 24 Aug 2012.

[52] CRC/C/MYS/CO/1 para 12.

[53] Linton (n 42) 480.

[54] CRC/C/MYS/1 paras 161 and 172.

[55] Art 11(4) Constitution of Malaysia available at <http://confinder.richmond.edu/admin/docs/malaysia.pdf> accessed 25 Aug 2012. Under art 3(1) Constitution of Malaysia, Islam is enshrined as the religion of the Federation.

https://doi.org/10.1017/S0020589313000390 Published online by Cambridge University Press

and, as Linton observed, as a result ASEAN as a whole is without a common normative standard.[56]

V. The Failure of ASEAN's 'Intermediary Function': The Absence of Common Standards in the Protection of Women's and Children's Rights

The CEDAW and the CRC are the only international human rights treaties to which all ASEAN States are party. The consideration of the reservations still made by some ASEAN States to the CEDAW and CRC treaties is instructive because it emphasizes the very different approaches taken by ASEAN States to international human rights commitments, even *within* a single treaty regime such as CEDAW or CRC. So what function is ASEAN able to discharge with its newly acquired human rights competence in the face of such diversity of participation?

The ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) was created to act as a 'precursor' to the AICHR.[57] While the AICHR is the 'overarching human rights institution for ASEAN',[58] Article 6·9 ToR AICHR creates an institutional link between the AICHR and the ACWC: 'the AICHR shall closely consult, coordinate and collaborate with [ASEAN sectoral bodies]'. In its 2011 Concluding Observations the CRC Committee urged Singapore to participate in the ACWC in order to implement the CRC at home and in other ASEAN States.[59]

At the time of her writing (2008), Linton could not have known the outcome of ASEAN's negotiations on the establishment of the ACWC. However, Linton did foresee two potential outcomes. The first was that the ACWC would become an 'excuse', either for ASEAN's failure to make further advances regarding a wider regional human rights mechanism, or for those States which still had significant reservations to the CEDAW and the CRC to continue to maintain them.[60] Alternatively, Linton speculated that the ACWC had the potential to create a 'drag-up' dynamic within ASEAN by which the reserving States were encouraged to drop their reservations and give full expression to the entire normative content of the CEDAW and the CRC as the benchmark for the ACWC.[61] In addition, the ACWC might take a role in enhancing the capacity of the less developed States to realize the rights of the CEDAW and the CRC through cooperation.[62]

[56] Linton (n 42) 480.

[57] V Muntarbhorn, 'Roadmap for an ASEAN Human Rights Mechanism', 28 May–29 May 2003, quoted in Tan (n 15) 169.

[58] Art 6.8 ToR AICHR.

[59] CRC/C/SGP/CO/2-3 para 73.

[60] Linton (n 42) 493.

[61] Linton also suggested that the ACWC might also promote the well-being of women and children in particular ASEAN region-specific contexts: cooperation against trafficking of women and children, sex tourism/pornography/prostitution and adoption at (n 42) 493.

[62] Linton (n 42) 492.

https://doi.org/10.1017/S0020589313000390 Published online by Cambridge University Press

Speaking at the inauguration ceremony of the ACWC in 2010 the ASEAN Secretary-General made the dubious observation that 'there are two groups that ASEAN likes to see have their rights and privileges protected and promoted and they are women and children'.[63] With the benefit of the passage of three years it is possible to consider whether it is in fact *ASEAN*, rather than its members, that has a gap-filling or 'drag-up' potential, despite the diversity of approach of member-States to the CEDAW and the CRC as evidenced by their reservations and their reactions to criticism before the Committees.

The constitutional document of the ACWC, its Terms of Reference (ToR),[64] describes the purposes of the Commission at paragraph 2·1 as being, *inter alia,* the promotion and protection of the human rights and fundamental freedoms of women and children in ASEAN 'taking into consideration the different historical, political, socio-cultural, religious and economic context [sic] in the region' and reiterates the 'balances between rights and responsibilities' reminiscent of Singapore's reservations to Articles 12–17 CRC. While the ToR also describes the ACWC's purpose as being to uphold human rights as prescribed by various sources of human rights law and principles, including the CEDAW, the CRC and the Vienna Declaration, it remains the case that neither the CRC nor the CEDAW are firmly entrenched in the ACWC ToR as a definitive statement of women's and children's rights in ASEAN, and elsewhere are described as being merely 'guiding principles'.[65]

Furthermore, the ACWC's mandate is firmly rooted in the 'old' ASEAN context by the first of the ToR's 'Principles': to respect those of Article 2 of the ASEAN Charter (the normative content of the 'ASEAN way', dating back to the TAC of 1976).[66] The mandate and functions of the Commission comprise the familiar 'evolutionary approach' of 'consult', 'share', 'collaborate' and 'encourage'; certainly no provision is made for the ACWC to receive individual applications or for it to exercise any judicial function. Apart from paragraph 5·7, which provides for ASEAN States to assist each other in implementing the CEDAW and CRC Committees' Concluding Observations (which could include measures necessary for the elevated compliance resulting from the withdrawal of reservations), no obvious 'drag-up' dynamic is to be found within the ACWC's mandate. Nor is any institutional link envisaged by the ACWC ToR between the member-States of ASEAN and the CEDAW and CRC regimes by which the ACWC might be responsive to the dissemination of principles and jurisprudence from those treaty bodies. For these reasons, the ACWC does not appear to act as an 'intermediary' for the realization of international human rights obligations at the regional level at all. The ACWC places no meaningful legal obligation on the 'sceptical' States (such as

[63] S Pitsuwan, ASEAN Bulletin 2010, 'Inaugurated: ASEAN Commission for the Promotion and Protection of the Rights of Women and Children', Ha Noi, 7 April 2010 <http://www.asean.org/news/item/asean-bulletin-april-2010#Article-2> accessed 24 Aug 2012.

[64] <http://www.aseansec.org/publications/TOR-ACWC.pdf> accessed 16 Aug 2012.

[65] ACWC ToR para 3.2.

[66] ACWC ToR 3.1.

https://doi.org/10.1017/S0020589313000390 Published online by Cambridge University Press

Malaysia and Singapore) to adhere to international standards: indeed, it has the potential to relieve those States from pressure to do so.[67]

By virtue of paragraph 2·1 ToR, the ACWC cannot address the arguments which ASEAN's human rights 'sceptical' States use to justify their sweeping reservations to the CEDAW and the CRC—for example the reconciliation of *Sharia'*-derived elements of their domestic law with international human rights norms.[68] Furthermore, the ACWC has done nothing to clarify the ambiguous relationship of Malaysia and Singapore with the international human rights regimes in which they claim to be participants but in respect of which their consent to be bound appears to be founded on reservations of dubious legitimacy. In the meantime, the ACWC allows 'Asian values' justifications for reservations to important international human rights norms to go unchallenged.

At the beginning of this article Shelton's and Hashimoto's models of the regional human rights mechanism as a means of reconciling global and local human rights priorities were introduced. To date, such human rights mandate as ASEAN has acquired is a lowest common denominator approach to standard-setting. It is against this background that the remainder of this article will turn to the newly promulgated ASEAN Human Rights Declaration.

VI. THE ASEAN HUMAN RIGHTS DECLARATION

The form chosen for the AHRD was that of a 'declaration'. The AHRD does not contain a commitment binding on ASEAN States that the rights recognized in the text shall be assured to those subject to their jurisdiction. However, the AHRD may prove to be a significant development for human rights in SEA as a source of 'soft law'. It purports to recognize certain human rights norms and is expressed in specific and precise language. Much of the role of ASEAN has been established through non-binding instruments (not least the ASEAN Declaration that constituted ASEAN). However, obviously it is highly significant to the architecture of the ASEAN human rights mechanism that the AHRD be non-binding.

The AHRD was adopted by the ASEAN-ten Heads of State/Government at the twenty-first ASEAN Summit in Phnom Penh on 18 November 2012.[69] In the Heads of State/Government adoption statement the AICHR, the ASEAN

[67] This assertion is discussed further in section VII.

[68] A recurring theme of the justifications offered by Malaysia and Singapore for their reservations to the CEDAW and CRC was the accommodation of minority interests, particularly those of Malay Muslims in Singapore and Islamist majorities in certain Malaysian states, and the supposedly conflicting doctrines of *Sharia'* law and international human rights. HP Lee, 'Human Rights in Malaysia' in R Peerenboom, C Petersen and A Chen (eds), *Human Rights in Asia* (Routledge 2008) 193–7.

[69] <http://www.asean.org/news/asean-statement-communiques/item/phnom-penh-statement-on-the-adoption-of-the-asean-human-rights-declaration-ahrd?category_id=26> accessed November 2012.

https://doi.org/10.1017/S0020589313000390 Published online by Cambridge University Press

Sectoral Bodies and other relevant stakeholders were commended for their work in the development of the draft[70] and the role of the AICHR as the 'overarching institution for the promotion and protection of human rights in ASEAN' was reaffirmed.[71] The statement of adoption also purported to 'reiterate' the commitment of 'ASEAN and its Member States' to, *inter alia*, 'international human rights instruments to which ASEAN Member States are parties'.[72] This statement is curious since it appears to reflect a standard-setting commitment of *ASEAN itself* to the human rights treaty regimes in respect of which its member-States individually exhibit such a diversity of approach. Furthermore, the statement of adoption does not directly reference the 'ASEAN way' principles of the TAC-era, beyond a reference in the Preamble to the purposes and principles of the ASEAN Charter.[73]

A. Preamble

The Declaration[74] itself is arranged in six substantive Parts preceded by a short Preamble. The AHRD's Preamble seats the AHRD more firmly in the context of 'adherence to the purposes and principles of ASEAN as enshrined in the ASEAN Charter'[75] than the Heads of State/Government adoption statement, yet here again the tenets of the 'ASEAN way' are not directly referenced. Like the adoption statement, the AHRD Preamble refers to 'other international human rights instruments of which ASEAN Member States are parties' as a source of legal commitment, but in the AHRD Preamble it is less clear that this commitment vests in ASEAN, the Preamble chapeau paragraph being expressed as a commitment of the Heads of State/Government of the ASEAN member-States, rather than of ASEAN itself.

B. 'General Principles'

The first Part of the AHRD, entitled 'General Principles', commences at Article 1 with an assertion of the inherent freedom of all persons and their equality in dignity and rights. Unlike the Kuala Lumpur Declaration of Human Rights (KLDHR)[76]—which might be considered the AHRD's nearest

[70] ibid paras 4 and 5 Preamble, Statement of Adoption.
[71] ibid para 3.
[72] ibid para 2; emphasis added. The UN Charter, the UDHR and the Vienna Declaration and Programme of Action are the only other sources of commitment. Hence, like the AHRD itself, no direct reference is made to the international human rights treaties, only to 'other international human rights instruments of which ASEAN Member States are parties'.
[73] ibid para 1 Preamble, Statement of Adoption.
[74] The ASEAN Human Rights Declaration <http://www.asean.org/news/asean-statement-communiques/item/asean-human-rights-declaration?category_id=26> accessed November 2012.
[75] ibid Preamble para 2.
[76] Kuala Lumpur Declaration on Human Rights, adopted by the fourteenth General Assembly of the ASEAN Inter-Parliamentary Organization, October 1993, (1993) 3 Asian YBIL, 496.

https://doi.org/10.1017/S0020589313000390 Published online by Cambridge University Press

ancestor[77]—the AHRD does not locate the inherency of human worth in their creation by 'the Almighty'.[78]

Article 2 holds that every person is entitled to equality in respect of the rights set out in the AHRD without distinction as to status. An open list follows. Article 3 asserts every person's right to recognition by, equality before, and entitlement to protection of, the law. Article 5 states that every person has the right to an effective and enforceable remedy, to be determined by competent authorities 'for acts violating the rights granted to that person by the constitution or by law', not rights granted under international law.

Article 4 identifies particular social groups ('women, children, the elderly, persons with disabilities, migrant workers, and vulnerable and marginalised groups') and makes the opaque statement that their rights are 'an inalienable, integral and indivisible part of human rights and fundamental freedoms'.

According to Article 6 the enjoyment of human rights 'must be balanced with the performance of corresponding duties as every person has responsibilities to all other individuals, the community and . . . society'—a feature with potential for oppressive effect by acting as a source of justification for derogation by the State invoking the norm.[79] However, the emphasis placed on duties and the responsibilities of the individual towards his community may reflect the Southeast Asian context. Okere ascribes the prominence given to 'duties' in the African Convention on Human and Peoples' Rights (ACHPR) as a special characteristic flowing from an African conception of human rights.[80]

The remaining three articles of the 'General Principles' Part (Articles 7–9) reintroduce concepts familiar from earlier ASEAN pronouncements on human rights, such as the KLDHR, and from the Bangkok Declaration on Human Rights in Asia. Article 7 reintroduces two concepts from the Bangkok Declaration era: the concept of 'indivisibility'[81] of rights and that of regional or

[77] The Kuala Lumpur Declaration on Human Rights (KLDHR) was drafted by the ASEAN Inter-Parliamentary Assembly (AIPA), a cooperative assembly of parliamentary representatives from ASEAN member-States. The KLDHR represented an early initiative to include human rights in the agenda of ASEAN. On Acharya's account, the AIPA considered that in light of the 'ASEAN Way' and 'Asian values' justifications for ASEAN leaders' rejection of the human rights standards crystallizing in international law as a result of UN and treaty practice, an autochthonous instrument enumerating 'ASEAN human rights' was necessary. A Acharya, 'How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism' International Organization 58(2) (2004) 239. The KLDHR is the only comprehensive enumeration of human rights emanating from ASEAN prior to the AHRD. The KLDHR is a non-binding declaration using either hortatory language or obligatory language in respect of obligations of conduct. Only three substantive 'Fundamental Human Rights' are described in the KLDHR.

[78] Para 1 KLDHR Preamble.

[79] See comments by L Thio, 'Implementing Human Rights in ASEAN Countries: ''Promises to Keep and Miles to Go before I Sleep''' (1999) 2 YaleHumRts&DevLJ 1, 35, 66.

[80] BO Okere, 'The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems' (1984) 6 HRQ 141, 146.

[81] The Bangkok Declaration, recalling as it did the UNGA Declaration on the Right to Development (UNGA 41/128 (4 December 1986), expressed Asian/developing States' concerns that economic, social and cultural rights were assuming a second place to civil and political rights

https://doi.org/10.1017/S0020589313000390 Published online by Cambridge University Press

national context or 'peculiarity'.[82] That these concepts should persist in a modern statement on human rights may reflect both an enduring uncertainty in ASEAN as to the relationship between human rights and economic development and the desire of ASEAN States to reserve a space in the global human rights order for such 'regional and national context[s]' as they may choose to nominate. Only time will tell whether this space achieves Shelton's 'intermediary function' reconciling the regional with the global.

Article 8 describes the human rights and fundamental freedoms of every person as being exercisable 'with due regard' to the human rights and fundamental freedoms of others. The second sentence of Article 8 presents a challenge of interpretation when considered in light of the inherency statement in Article 1, since it asserts that the 'exercise' of human rights shall be subject to such limitations as are determined by law for the purpose of, *inter alia*, meeting 'the just requirements of national security, public order, public health, public safety, public morality, as well as the general welfare of the peoples in a democratic society'. The use of the phrase 'just requirements' in the second sentence of Article 8 appears to subject the realization of human rights and fundamental freedoms in the ASEAN region to an indeterminate and potentially wide class of *ex post* justifications for derogation. Six ASEAN States are parties to the ICCPR and when compared with Article 4(1) ICCPR, which requires, *inter alia*, a 'public emergency which threatens the life of the nation . . . the existence of which is officially proclaimed' before States may derogate from the obligations of the Covenant 'to the extent strictly required by

in the international discourse on human rights and laid much emphasis on the 'indivisibility' of these schools of rights—see, *inter alia*, Bangkok Declaration para 10: '*Reaffirm* the interdependence and indivisibility of economic, social, cultural, civil and political rights, and the need to give equal emphasis to all categories of human rights'. This reflected a deeper theoretical debate at the time on the relationship between the human rights movement and economic development which emerged as a justification for some Asian leaders' rejection of human rights, parallel to the 'Asian values'-based justifications. For the advocates of 'indivisibility', to vouchsafe certain human rights is to fetter economic development, human rights reflecting a form of economic 'drag' on the streamlined hull of the developing State. See for example Lee Kuan Yew, *From Third World to First: Singapore and the Asian Economic Boom* (Harper Collins 2000) and also F Zakaria, 'Culture is Destiny: A Conversation with Lee Kuan Yew' (1994) 73 Foreign Affairs 109. Sen is critical of the 'Lee thesis' model as tending to downplay the role of 'helpful policies' (openness to competition, high standards of education and policies which attract foreign investment) by which States like South Korea and Singapore achieved rapid economic growth. Sen finds no evidence to suggest that the realization of civil and political rights is inimical to these policies; rather civil and political rights are not just a means to development but also an end. The freedom to participate in the political discourse of the nation by exercising civil and political rights and to hold government to account are not merely negotiable elements of the means by which some developed state might be achieved. A Sen, *Development as Freedom* (Anchor Books 2000), chs 2 and 10, esp 148.

[82] On the 'Asian values' discourse in the 1990s, of which the Bangkok Declaration and the KLDHR were an expression, see KD Jung, 'A Response to Lee Kuan Yew: Is Culture Destiny? The Myth of Asia's Anti-Democratic Values' (1994) 73 Foreign Affairs 189 and A Sen, 'Human Rights and Asian Values: What Lee Kuan Yew and Le Peng Don't Understand about Asia' (14 July 1997) 217(2/3) The New Republic 33(8).

https://doi.org/10.1017/S0020589313000390 Published online by Cambridge University Press

the exigencies of the situation', Article 8 AHRD has the potential to reverse the modality of human rights on a regional basis. According to the AHRD, human rights may not be exercised unless a 'just requirement' does not apply, whereas under the ICCPR States are obliged to respect human rights in the absence of a public emergency threatening the life of the nation. Furthermore, Article 8 AHRD is capable of providing a justification for any derogation; contrast with Article 4(1) ICCPR where no measure taken in derogation maybe discriminatory and Article 4(2) which has the effect of 'ring-fencing' certain of the Covenant's core rights.

Article 9 reflects an awkward negotiation of the competing interests of describing human rights standards while limiting the sovereignty costs of doing so. Whereas Article 7 is worded for both inter- and intra-ASEAN application (it conditions the realization of the rights described according to regional or national context with their own historical and cultural implications), Article 9 appears to address the potential of the AHRD as a source of disputes within ASEAN. In anticipating an intra-ASEAN discourse on the commitments of the AHRD, Article 9 references familiar tenets of the ASEAN diplomatic process such as 'non-confrontation' but also anticipates 'politicization' by purporting to set out as principles 'impartiality', 'objectivity' and 'non-selectivity'. It is revealing that ASEAN should choose to enshrine such principles as these in the final draft of its human rights Declaration. The diplomatic culture of ASEAN remains as suspicious of the sovereignty costs of human rights standard-setting as it is of enforcement. Neither the text of the African Charter on Human and Peoples' Rights (ACHPR)[83] nor that of the American Convention on Human Rights (ACHR)[84] suggests these kinds of preoccupations on the part of their draftspersons.

C. 'Civil and Political Rights' and 'Economic, Social and Cultural Rights'

The second and third substantive Parts of the AHRD respectively describe 'civil and political rights' and 'economic social and cultural rights', although neither Part makes reference to the ICCPR or the ICESCR as sources of law.[85]

[83] The African Charter on Human and Peoples' Rights (The Banjul Charter) (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM (1982) 59.

[84] The American Convention on Human Rights (Pact of San José) (signed on 22 November 1969, entered into force 18 July 1978) 9 ILM (1970) 99.

[85] The second substantive Part of the AHRD consists of 16 articles and is entitled 'Civil and Political Rights'. Art 10, the first article of the Part, affirms 'all the civil and political rights of the [Universal Declaration on Human Rights]'. Art 10 implies that the subsequent 15 articles of the Part are specific affirmations of the UDHR. This conclusion is fortified by the observation that art 10 makes no reference to any other source of human rights law. It is noteworthy that despite the words of para 3 Preamble and the title of the second Part, no reference is made to the ICCPR and hence the opportunity to adopt the ICCPR as a basic standard relevant to civil and political rights in SEA is eschewed. Art 26—the first article of the third substantive Part of the AHRD consisting of nine articles and entitled 'Economic, Social and Cultural Rights'—is in the same terms, *mutatis mutandis*, as art 10. Hence, the opportunity to locate the AHRD in the context of the ICESCR is

https://doi.org/10.1017/S0020589313000390 Published online by Cambridge University Press

Annexes II and III attempt a comparison of the rights recognized in the second and third Parts of the AHRD with the 1966 Covenants. Annexes II and III also attempt to identify where the rights expressed in the second and third Parts of the AHRD appear to either 'enlarge' or 'restrict' the rights they describe relative to the expression of apparently corresponding rights in the Covenants. Finally, Annexes II and III indicate where rights are described in the AHRD which appear to be the result of innovation—novel rights with no obvious precedent or analogue in either the ICCPR or the ICESCR.[86]

With reference to Annexes II and III two features of the AHRD are noteworthy: first, much of the text of both the second and third Parts of the AHRD appears to have been influenced by the Covenants; indeed, significant tracts of the text of the AHRD reproduce the text of equivalent articles of either the ICCPR or the ICESCR giving a strong sense of correspondence between the relevant Part of the AHRD and the relevant Covenant. Second, very little of the normative content of either Part is 'novel' as expressing 'new' rights which can be considered to reflect innovative reactions to Southeast Asian experience or regional priorities with no precedent in the Covenants.

1. Articles of the AHRD restricting the scope of Covenant rights

The AHRD's more significant departures from the corresponding rights described in the Covenants are discussed below. Where a right described in AHRD is considered in Annex II or III to be more restricted than a corresponding right in one of the Covenants, it is most often because of either a 'claw back' provision in the AHRD making the right subject to national law, or because the right described corresponds with a basic expression of that right in the relevant Covenant but is unaccompanied by further paragraphs describing the content of the right.

Article 11 AHRD affirms the inherent right of people to life and includes a positive obligation to protect life 'by law'.[87] However, Article 11 does not address use of the death penalty. Since only the Philippines is a State-party

eschewed and instead the Part is said to affirm the economic, social and cultural rights of the UDHR.

[86] This attempt to classify and compare rights is not a precise science. The interpretation of the scope of any given right is highly elastic; where complex concepts such as human rights are reduced to writing some ambiguity may persist and the reader may be free to enlist interpretive concepts from elsewhere in the text. Rights may also be subject to provisions in the national law of States-parties. Given the declaratory nature of the AHRD the emphasis of this comparison exercise has been placed on the actual rights each text purports to recognize, rather than on any commitments expressed to realize those rights. Rights of an economic, social and cultural class are particularly resistant to comparison since while a 'right' of extensive scope may be described by one text, that text may omit to describe the means by which such a right is to be realized, whereas a corresponding 'right' in another text may be drafted more narrowly but with a fulsome account of the practical steps which a State-party should take in order to realize it.

[87] Whereas the AHRD's predecessor, the KLDHR, included no positive obligation to protect life (only recognizing an abstract right to life at its art 7).

https://doi.org/10.1017/S0020589313000390 Published online by Cambridge University Press

to the Second Optional Protocol to the ICCPR[88]—indeed four ASEAN States are not party to the ICCPR—Article 11 represents an important opportunity missed.

Article 12 AHRD refers to a right of 'personal liberty and security', rather than liberty and security of person, as per Article 9(1) ICCPR. However, Article 12 expresses no positive obligations in circumstances of non-arbitrary arrest, search or detention of persons.

Like Article 23 ICCPR, Article 19 AHRD identifies the family as the 'natural and fundamental unit of society' (the phrase used in the ICCPR is 'group unit'). However, while Article 19 identifies the right of men and women to freely marry, found a family and to dissolve a marriage (reflecting a potential expansion of the right described in Article 23 ICCPR—see Annex II), it does not provide for equal rights between the sexes in those instances (contrast Article 23(4) ICCPR).

Read together with Article 3, Article 20 is an analogue of Article 14 ICCPR on individual rights during the judicial process, albeit limited to criminal proceedings. Article 20(1) provides for the presumption of innocence and a fair trial before an independent, impartial tribunal before which the accused is guaranteed the rather anaemic 'right to defence', with none of the trial process content of Article 14(3)(a)–(g) ICCPR. Article 20 AHRD does not provide for a right to appeal, compensation for wrongful conviction or the safeguards accorded to juveniles in the criminal justice process found in Article 14 ICCPR.

At first glance Article 21 AHRD appears to substantially reproduce Article 17 ICCPR concerning interference with privacy, family, home and correspondence (with the inclusion in the AHRD of 'personal data'). However, Article 21 AHRD is expressed as a 'right to be free from . . . interference', whereas the Article 17 ICCPR is expressed as the more obligatory language of 'no one shall be subjected to . . . interference'. Further, the AHRD text does not extend to the ICCPR's protection against 'arbitrary *or* unlawful' interference with privacy, family, home or correspondence (Article 17(1)), but only to 'arbitrary' interference. The second part of the first sentence of Article 21 AHRD suffers from an apparent drafting error making it difficult to interpret, however Article 21 appears to provide a right to be free from *any* 'attacks upon . . . honour or reputation'. The equivalent part of the ICCPR (Article 17(1) first sentence, second part) limits protection for honour and reputation to a right not to be subjected to '*unlawful* attacks'. Considered in comparison with Article 17 ICCPR, Article 21 AHRD extends narrow protection to a wide class of 'privacy rights', while providing an unlimited right to individuals to be free from interferences with their 'honour and reputation'. Article 21 AHRD may be seen to strike a very different

[88] Second Optional Protocol to the International Covenant on Civil and Political Rights (adopted 15 December 1989, entered into force 11 July 1991) 1642 UNTS 414.

https://doi.org/10.1017/S0020589313000390 Published online by Cambridge University Press

balance between free speech and the protection of individual reputations as a result.

The first sentence of Article 22 AHRD substantially recites Article 18(1) ICCPR on the right to freedom of thought, conscience and religion. As we have seen, some ASEAN States have avowed commitments to accord certain religions a privileged position reflected in their national constitutions and influencing their approach to international human rights treaties; as a result, the absence from Article 22 of a right to 'have or adopt a religion' (which is expressly provided for in Article 18(1) ICCPR) is not surprising. Further, the second sentence of Article 22 provides no positive obligation on the State to ensure the free observation, manifestation and practice of a particular religion.

Article 23 expresses a 'right to freedom of opinion and expression, including freedom to hold opinions without interference and to seek, receive and impart information'.[89] This article is not subject to any self-contained limitations as with Article 19(3) ICCPR which limits restrictions to the ICCPR's opinion and expression rights to those provided by law and necessary for the protection of the reputations of others (Article 19(3)(a)), national security and the *ordre public* (Article 19(3)(b)). Since it is not in the protected class of core rights under the ICCPR Article 4(2), Article 19 ICCPR is also subject to the Article 4 general 'public emergency' derogation provision described above. However, Article 4 ICCPR is narrowly drafted. Since Article 23 AHRD includes no internal limitations, it may be understood to be subject to the general limitations applicable to all rights under the AHRD as described in the 'General Principles' Part. These are more widely cast than either Article 4 or Article 19(3)(a) and (b) ICCPR and in particular are subject to every person's 'responsibilities to all other individuals, the community and the society where one lives', *per* Article 6 AHRD.

As can be seen from Annex III, a number of the rights described as 'economic, social and cultural' in the AHRD may be considered restricted relative to apparently corresponding rights expressed in the ICESCR. In some cases this is because while the third substantive Part of the AHRD purports to state a 'right', no practical measures follow which (in a legally-binding instrument) might form the basis of positive commitments by States to realize said 'right'. However, Article 33 AHRD is worded very similarly to Article 2(1) ICESCR by which economic, social and cultural rights are to be realized 'progressively' and 'to the maximum of [Member States'] available resources'.[90]

Article 27(1) AHRD expresses a right to work, although no positive obligation to safeguard that right (as with Article 6(1) ICESCR) is expressed, nor are the kinds of measures necessary to achieve realization of the right described (as with Article 6(2) ICESCR). Article 27(1) AHRD continues with

[89] 'Information' but not 'ideas'—an important omission; compare art 19(2) ICCPR.
[90] Although unlike art 2(1) ICESCR, art 33 AHRD is not expressed as an undertaking.

https://doi.org/10.1017/S0020589313000390 Published online by Cambridge University Press

the assertion of a somewhat opaque right to the 'free choice of employment' and to 'just, decent and favourable working conditions'.[91] However, the single sentence of Article 27(1) AHRD provides none of the content of Article 7 ICESCR. Article 27(2) AHRD asserts a right to form and join trades unions in accordance with national law but without the requirement that such laws should be as 'necessary in a democratic society' or in the interests of national security, public order or the exercise of rights by others, as with Article 8 ICESCR. Article 27(3) AHRD brings certain rights of children out of the family context in which they are found in the ICESCR (at Article 10(3)) and into the work context: Article 27(3) AHRD draws on the language of Article 10(3) ICESCR, potentially strengthening it with the assertion that 'no child . . . shall be subjected to economic and social exploitation'.[92]

2. Articles of the AHRD expanding the scope of Covenant rights

Few of the rights described in the AHRD—either 'civil and political', or 'economic, social and cultural'—may be said to obviously expand the scope of the protection afforded to the interests of individuals in SEA from those described in the international Covenants. As we have seen, Article 19 AHRD appears to describe a right to 'dissolve a marriage'. Article 23(3) ICCPR does not expressly describe such a right, but such marital rights as the ICCPR does describe are on the basis of equality between the parties to the marriage.

3. 'Novel' civil, political, economic, social and cultural rights

Before going on to consider the fourth and fifth Parts of the AHRD which describe 'rights' absent from the Covenants (the 'Right to Development' and the 'Right to Peace') the AHRD may be considered to characterize 'civil and political' and 'economic, social and cultural' rights which are not to be found in the 1966 Covenants (see Annexes II and III).

In the context of a right not to be held in servitude or slavery, Article 13 ADHR adds that persons shall not be subject to 'human smuggling or trafficking in persons, including for the purpose of trafficking in human organs'.[93] Article 17 includes a right of every person to 'own, use, dispose of and give' lawfully acquired 'possessions' and provides that 'no person shall be arbitrarily deprived of such property'. Neither the ICCPR not the ICESCR includes such

[91] These last three adjectives may have been inspired by the text of art 7 ICESCR: 'decent' is to be found in art 7(a)(ii) ICESCR where the phrase 'a decent living' forms part of the content of the right to 'just and favourable conditions of work' (art 7 chapeau), along with fair wages and equal pay for equal work (art 7(a)(i) ICESCR).

[92] Article 10(3) ICESCR provides that 'children . . . *should* be protected from economic and social exploitation'; (emphasis added).

[93] Article 8 ICCPR describes, *inter alia*, a right not to be held in slavery but does not address trafficking.

https://doi.org/10.1017/S0020589313000390 Published online by Cambridge University Press

a right.[94] Article 18 asserts that every person has a right to a nationality 'as prescribed by law'. While purporting to express a right, the import of Article 18 is as a norm of non-arbitrary or *sine lege* deprivation of nationality or the right to change nationality. Nevertheless, the ICCPR does not describe a general right to a nationality.[95] Articles 28(e) and (f) AHRD describe rights to safe drinking water and sanitation and the right to a 'safe, clean and sustainable environment'; these are not specifically addressed by ICESCR Articles 11 and 12.[96] As an entreaty for all ASEAN States to 'create a positive environment in overcoming stigma, silence, denial and discrimination in the prevention, treatment, care and support of people suffering communicable diseases, including HIV/AIDS', Article 29(2) AHRD could be interpreted as a reflection of a particular regional concern for Southeast Asia. Alternatively, the absence of a commitment analogous to Article 29(2) from the ICESCR (and for that matter the African and American Charters) may reflect that Article 29(2) AHRD is chiefly concerned with HIV/AIDS which was not a preoccupation of those drafting those other instruments in the mid-twentieth century.

4. Concluding comments on the AHRD's 'civil and political' and 'economic, social and cultural' rights

While being of a declaratory nature, as a standard-setting initiative the 'Civil and Political Rights' Part of the AHRD is much closer to the ICCPR than the KLDHR. Of particular importance is Article 14 AHRD which reflects the normative position of the ICCPR in respect of torture and cruelty.[97] Yet it is highly significant that the Part, entitled as it is and while clearly drawing on the text of the ICCPR, makes no mention of the ICCPR as a source of law. Furthermore, much of the normative content of the ICCPR is absent from the

[94] However, no mention is made of a right to compensation for non-arbitrary deprivation nor does the article address informal ownership. Indeed, by the phrase 'lawfully acquired' squatter settlements and informal occupation according to minority customary rights or laws may be excluded.

[95] Art 24(3) ICCPR describes the right of children to acquire a nationality. Malaysia retains reservations to art 9(2) CEDAW (equal rights for men and women with respect to the nationality of their children) and art 7 CRC (the right of children to a nationality from birth); art 18 AHRD excises this international standard from the regional regime and so avoids an issue of controversy.

[96] While art 28 is a revealing rhetorical statement of the priorities of some or all ASEAN States it is surely fanciful to describe them as having the immediacy of 'rights' in this way. In respect of ASEAN's poorer States it is submitted that heavy emphasis must be placed on art 33 AHRD in the interpretation of art 28. On reading the AHRD as a whole, art 28 appears all the more strange since it would seem to foreshadow much of the content of the 'right to development' asserted in Part IV (arts 35–37), yet no acknowledgement of any relationship is to be found in the text.

[97] In expressing that 'no person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment', art 14 AHRD achieves textual parity with the first sentence of art 7 ICCPR and reflects a substantial advance from the position of the KLDHR which made no mention of such a norm. It will be interesting to see whether any tension with the practice of corporal punishment in some ASEAN States arises as a result of art 14 since no qualifier as to 'arbitrariness' or 'by law' is included in art 14.

https://doi.org/10.1017/S0020589313000390 Published online by Cambridge University Press

AHRD and as such the AHRD sets lower standards for ASEAN States *inter se* than those to which ASEAN ICCPR States-parties are subject outside of the ASEAN context: Article 4 which buttresses the ICCPR rights by placing tight limits on States' ability to lawfully derogate from the Covenant; Article 9 on the right to liberty and security of person; Article 10 on the treatment of detained persons; Article 21 on the right to assembly; Article 22 on the right to free association;[98] Article 24 providing protections specific to minors and Article 27 providing safeguards for minority groups. Significant qualifications are attached to the exercise of those rights which are provided for in the Part, having the potential to restrain further development of human rights by persistent deference to national law or non-arbitrariness.

The third Part of the AHRD on economic, social and cultural rights is a 'thinner' conception of rights than the ICESCR, having the rhetorical and manifesto quality of an inventory of policy objectives. This Part does not appear to derive any benefit from the inclusion of the fourth Part on 'the right to develop' (see discussion in next section) and it is surely in the third Part where that shadowy concept would have most to contribute.

D. 'Right to Development'

The fourth substantive Part of the AHRD is entitled 'Right to Development' and it consists of three articles. A detailed treatment of the theoretically complex 'right to develop' is outside the scope of this article. However, it is noteworthy that the member-States of ASEAN continue to support the notion of a right to develop. The fourth Part is mainly articulated in declaratory language and contains only three undertakings expressed in quasi-obligatory language; all three are obligations of conduct expressing policy objectives for application within the ASEAN States, between ASEAN member-States and between ASEAN members and non-ASEAN members.

Article 35 expresses the right to development in terms drawing heavily on Article 1(1) of the UNGA Declaration on the Right to Development[99] as:

> an inalienable human right by virtue of which every human person and *the peoples of ASEAN* are entitled to participate in, contribute to, enjoy *and benefit equitably and sustainably from* economic, social, cultural and political development (emphasis added).

The second sentence of Article 35 AHRD inserts a reference to intergenerational needs. The third sentence substantially reproduces the third sentence of paragraph 10 of the Vienna Declaration and Programme of Action, that 'the lack of development may not be invoked to justify the *violations* [sic]

[98] Although a more limited right to trade union membership is provided under art 27(2) AHRD and art 32 recognizes a right to take part in, *inter alia*, 'cultural life' in association with others.

[99] Declaration on the Right to Development, UNGA 41/128 (4 December 1986).

https://doi.org/10.1017/S0020589313000390 Published online by Cambridge University Press

of internationally recognised human rights' ('violations' replacing 'abridgement' in the VDPA).

By Article 36 ASEAN member-States 'should' adopt 'people-oriented and gender responsive' development programmes with the aim of poverty alleviation, the creation of conditions for 'the peoples of ASEAN to enjoy all human rights recognised in this Declaration on an equitable basis' (with a reference to 'the protection and sustainability of the environment') and 'the progressive narrowing of the development gap within ASEAN'.

By Article 37, first sentence, ASEAN members recognize implementation of the right to development as requiring both national policy and 'equitable economic relations, international cooperation and a favourable international economic environment'. The second sentence is replete with community-building jargon and is overwhelmingly a statement of political/policy rhetoric, rather than a statement of rights. The second sentence concludes with an outward-looking obligation on ASEAN States to 'work with the international community to promote equitable and sustainable development, fair trade practices and effective cooperation'.

In substantially adopting the Article 1(1) definition of the right to develop expressed in the 1986 UNGA Declaration, the fourth Part of the AHRD goes further towards the position that the right to development is a right that vests in individuals rather than in States.[100] Nevertheless, such obligations as ASEAN States might be subject to as a result of the fourth Part do not sound in rights vesting in ASEAN citizens. The fourth Part does not say anything of any substance which might facilitate participation in the development process by ASEAN citizens or encourage accountability of decision-makers which might resonate with other rights expressed within the AHRD and arguably this is an 'end' to which development is the means. The relationship (or lack thereof) between Article 28 and the fourth Part is also curious. From a development perspective, Article 28 AHRD identifies specific welfare-enhancing outcomes of the sort that might be measurable and made the subject of intra-ASEAN development assistance. Indeed, one could be forgiven for reading Article 28 as a local expression of the UN-led initiative embodied by the 'Millennium Development Goals'[101], derived from the UN 'Millennium Declaration'.[102] However, Article 28 and the fourth Part do not enjoy any particular connection in the text of the AHRD, nor does the AHRD refer to the UN's attempts to prioritize economic development by expressing tangible objectives. Hence the AHRD is of little assistance to the vexed discourse on the relationship between human rights and development.

[100] Contrast Pt IV AHRD with art 4 KLDHR: 'Each *Member State* has the right to development based on its own objectives'; emphasis added.

[101] Available at <www.un.org/millenniumgoals/>.

[102] United Nations Millennium Declaration, adopted 8 Sept 2000, UNGA Res 55/2 UN GAOR 55th Sess no 49 UN Doc A/RES/55/2 (2000).

https://doi.org/10.1017/S0020589313000390 Published online by Cambridge University Press

E. 'Right to Peace'

The fifth substantive Part expresses a policy objective founded on the assertion of the 'right to peace' of every person expressed in a single article—Article 38. This Part is a curious backward glance to the traditional role of ASEAN of the days of the TAC. Its presence in a human rights Declaration is unfortunate as perhaps lending weight to the view that the foregoing Part (on the 'right to development') is likewise a piece of community-building rhetoric couched in human rights terms and swept up into the closing articles of a human rights instrument.

F. 'Cooperation in the Promotion and Protection of Human Rights'

The sixth and final part of the AHRD consists of two articles. In evoking the importance of cooperation in the field of human rights, Article 39 appears to be a reference to the role of, *inter alia*, national human right institutions of some member-States (Indonesia, Malaysia, Philippines and Thailand) and the NGO community, albeit 'in accordance with the ASEAN Charter'. Article 40 provides: '[n]othing in this Declaration may be interpreted as implying for any State, group or person any right to perform any act aimed at undermining the purposes and principles of ASEAN, or at the destruction of any of the human rights and fundamental freedoms set forth in this Declaration and international human rights instruments to which ASEAN Member States are parties'.

VII. ANALYSIS

The African Charter on Human and Peoples' Rights is often cast as a highly contextualized human rights instrument; that the rights the text recognizes and the ways in which they are characterized are particularly 'African' and Murray cites a body of literature taking this view.[103] For example, according to Okere:

> in many important respects, the African Charter has some specific characteristics whose inspiration is derivable solely from Africa's colonial history, philosophy of law, and conceptions of man.[104]

Okere gives a number of examples: the pre-eminence accorded to non-discrimination between both peoples and individuals; the emphasis placed on solidarity, reflecting struggle against foreign domination; a rights-duties correlation; the emphasis of community and family and the role of the individual within those structures; the 'right to development'; a right to free-movement flowing from concern with mass expulsion; permanent sovereignty

[103] R Murray, *The African Commission on Human and Peoples' Rights and International Law* (Hart Publishing 2000) 10.
[104] Okere (n 80) 141.

https://doi.org/10.1017/S0020589313000390 Published online by Cambridge University Press

over natural resources; the independence of the judiciary and concern with foreign economic exploitation.[105] Okere also cites various elements of the text reflecting an African sense of harmony over individualism.[106] And indeed the text of the ACHPR reveals little evidence of direct influence of either the ICCPR or the ICESCR on its draftspersons.

Murray's work on the ACHPR reminds us of the risk of 'Western chauvinism'.[107] Murray argues powerfully that non-Western approaches to human rights norms and institutions are too often ignored for being outside the 'ruling' Western/European experience. However, on reading the AHRD one encounters 'General Principles', such as those expressed in Articles 7–9, which do not address 'regional particularities' in the sense of drawing on Southeast Asian historic experience in order to characterize novel human rights, but rather are included in order to constrain the role that human rights can be expected to play in the 'ASEAN community' of which the human rights mechanism is intended to be a part. The majority of the rights described in the AHRD appear to have been influenced by the text of the 1966 Covenants, albeit framed in a non-binding declaration with important omissions, replete with 'claw backs', lacking institutional support and drafted with little opportunity for public participation. As a result, in as far as the AHRD reflects 'regional particularities', this is not in the sense that the rights expressed in the text are informed by the past struggles and future aspirations of the peoples of SEA, but rather by the prevailing diplomatic culture among the ASEAN States; a culture encapsulated in the 'ASEAN way'.

When compared with the reservations which Singapore and Malaysia maintain to the CRC and CEDAW (considered in Section IV, above) the AHRD achieves, not a 'reconciliation' of local priorities with international norms, but rather a 'selection' consolidating at ASEAN-level the effect of the those States' reservations to the CEDAW and the CRC. The drafting of the AHRD was surely an opportunity for ASEAN States to consider an informed and textured relationship between international human rights norms and the *Sharia'* elements of their national law, for example. Instead, Article 4 AHRD makes the general assertion that the rights of women and children are an 'indivisible part of human rights' while Article 19 expresses in a single sentence the rights of men and women in marriage—none of which address the 'equality rights' elements of Articles 2, 9 and 16 CEDAW to which Singapore and Malaysia have applied reservations. The 'regional context' is simply the exclusion of certain rights within ASEAN. The same is true in respect of rights recognized by States-parties to the CRC. Both Singapore and Malaysia maintain reservations to Article 14 CRC and are not parties to Article 18

[105] ibid 146.
[106] Reflected in arts 28 and 29 ACHPR.
[107] R Murray, 'International Human Rights: Neglect of Perspectives from African Institutions' (2006) 55 ICLQ 193, 193.

https://doi.org/10.1017/S0020589313000390 Published online by Cambridge University Press

ICCPR, hence the rights of minorities to manifest their religions subject only to proscribed limitations, or the rights of individuals to have or adopt a religion, are reduced to an abstract 'right to freedom of thought, conscience and religion' (per Article 22 AHRD) devoid of practical consequences. As a result the AHRD purports to set lower standards of commitment to human rights for ASEAN States which are parties to the ICCPR and ICESCR in the intra-ASEAN context than are applicable outside the region.

Muntarbhorn describes the establishment of *lower* human rights standards in regional systems than those derived from multilateral treaties and customary international law sources as 'a travesty of good faith,[108] yet that would be the case were ASEAN member-States to draw upon the AHRD as a source of human rights standards. Why are ASEAN States investing time and energy in the process of realizing Article 14 of the ASEAN Charter in this way?

In 2002 Hathaway conducted an empirical study to investigate the relationship between States' ratification of international human rights treaties and their subsequent compliance with the human rights norms derived from them.[109] Hathaway reported an apparent absence of the expected negative correlation between ratification and reports of violations, with many examples of continuing violations after ratification.[110] Furthermore, she reported the presence of a negative correlation between ratification and adherence to human rights norms.[111] Hathaway arrived at the surprising conclusion that ratification of human rights treaties had *caused* violations to increase. This Hathaway ascribed to an epiphenomenal effect of treaty ratification: that States benefit from 'what ratification says to others'.[112] Hathaway argued that ratification serves an expressive function where the reputational costs of non-ratification are appreciable but where sovereignty costs of ratification are minimal. Hathaway argued that this is the case in respect of human rights treaties which include weak monitoring and enforcement mechanisms.[113] She contrasted human rights treaties with treaties establishing trade agreements or territorial delineation as being treaties without substantial monitoring and compliance obligations or the enforcement apparatus of those other kinds of treaties (for example reciprocity flowing from mutual benefits and burdens vesting in the ratifying States, as opposed to individual humans subject to their jurisdiction).[114] By this reasoning, Hathaway drew radical conclusions regarding the effectiveness of international human rights law.

[108] V Muntarbhorn, 'Regional Integration and Human Rights: European and Asian Reflections' in A Petchsiri, JL de Sales Marques and W Roth (eds), *Promoting Human Rights in Asia and Europe: The Role of Regional Integration* (Nomos 2009) 20.

[109] OA Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 YaleLJ 1935.

[110] ibid 1999. [111] ibid. [112] ibid 2002.

[113] ibid 2020. [114] ibid 2006.

https://doi.org/10.1017/S0020589313000390 Published online by Cambridge University Press

Hathaway attributed to the regional context 'political and economic interdependence'[115] that has the effect of amplifying the pressure to commit to regional human rights mechanisms:

> When countries ratify *regional* treaties . . . the falloff in external pressure for real improvement in practices may be greater and the reduction in the pace of real improvement may consequently also be greater.[116]

Hathaway's model may explain the vesting of a human rights mandate in a regional group like ASEAN—one with a strong emphasis on avoiding the sovereignty costs of cooperation. The creation of a human rights mandate for ASEAN sees the greatest dissipation of what Hathaway described as 'pressure' for the human rights 'sceptical' States of ASEAN since they can be expected to derive the greatest reputational payoff from their involvement in the group. The design of ASEAN and the emphasis placed on the 'ASEAN way' by the Charter—being a principle so obviously antithetical to the establishment of meaningful regional human rights monitoring mechanisms—maintains the 'information asymmetry' required by Hathaway's model. This also ensures minimal reputational costs when violations do occur which in turn realizes the maximum reputational benefit from actors outside the region for being seen to participate in a regional human rights mechanism; one which constantly emphasizes slow progress rather than actual accomplishment.[117]

Hathaway's methods and conclusions drew criticism from Goodman and Jinks, not least for the reason that her method assumes that ratification of human rights treaties and the *reporting* of violations are independent events.[118] If ratification is to be understood as a marker of liberalization within a State, then increased reporting of violations might well be expected to be part of that liberalization programme such that an elevated level of post-ratification *reporting* of violations might also be expected to increase, such behaviour having been concealed by the old regime.[119] Furthermore, Goodman and Jinks were critical of the use of ratification as a marker of adherence to normative movements outside the State in any case. As they observed, States are influenced by human rights norms in more subtle ways and indeed often adhere to human rights (and other) treaty regimes even in the absence of formal ratification.[120]

Nevertheless, Hathaway suggested that regional human rights treaties can influence adherence to human rights norms by imposing conditions on applicant States at time of accession to a regional

[115] ibid 2020.

[116] ibid; emphasis added.

[117] As to the kind of 'pressure' exerted from outside the State and the region, Tay and Yen claimed a role for 'conditionalities' attached to foreign aid packages. See S Tay and G Chien Yen, 'Human Rights Revisited in the Asian Crisis' 3 (1999) SJICL 26, 45. Also Tan (n 15) 68–9.

[118] R Goodman and D Jinks, 'Measuring the Effects of Human Rights Treaties' (2003) 14(1) EJIL 171, 175.

[119] Hathaway's response attempted to address this concern: O Hathaway, 'Testing Conventional Wisdom' (2003) 14(1) EJIL 185, 190.

[120] Goodman and Jinks (n 118) 173.

https://doi.org/10.1017/S0020589313000390 Published online by Cambridge University Press

arrangement.[121] As Thio observed, this opportunity ASEAN failed to seize at the time of the accession to the TAC by Myanmar[122] and this may have been one of the most important examples of the effect of the 'ASEAN way' on human rights in SEA. The significance of this dynamic in regional relations was well demonstrated by Philippine President Gloria Arroyo's later unilateral decision to delay ratification of the ASEAN Charter on the basis of Myanmar's poor human rights record, drawing attention to the continued house arrest of Daw Aung San Suu Kyi by delaying the entry into force of ASEAN's constitutional document (which required ratification by all States[123]).[124]

While Hathaway described the epiphenomenal effect of ratification of regional treaties as a response to 'pressure' 'external' to the State, in the context of ASEAN Thio identified the role played by domestic 'pressure':

> Since [the Vienna Programme of Action], ASEAN countries that had not previously been party to any human rights treaties have displayed a significant change in practice. Singapore in 1995 . . . acceded to the CEDAW, the [CRC], and the Genocide Convention. Undoubtedly, this type of move not only displays a degree of good will on the part of States that seek to advance human rights . . . It also has a twin legitimating effect. Domestically, it signals to the citizenry that its government is not out of step with international mores[125] . . . Internationally, it illustrates a commitment to the international rule of law.[126]

This article considers the ASEAN human rights mechanism (in the form of the AICHR, the ACWC and the AHRD) to be a response to pressure on ASEAN States; pressure emanating both from other ASEAN States and from outside ASEAN, as well as from civil society within individual ASEAN States. The vesting of a human rights mandate in ASEAN has resulted in the replacement of an *ideological* impediment—that of 'Asian values'—with a *structural* impediment:[127] a regional mechanism purporting to recognise international human rights, yet without legally-binding human rights commitments or an effective monitoring or judicial body and constructed by an elite regional diplomatic community with little opportunity for influence by actors outside that community.[128] For ASEAN's human rights 'sceptical' States the advantages of this approach are as Hathaway proposed and with which Goodman and Jinks found no fault. For ASEAN States more positively disposed towards international human rights commitments the appeal of engagement with the

[121] ibid 2017. [122] Thio (n 79) 43. [123] Article 47(4) ASEAN Charter.

[124] 'Fifth from the right is the party-pooper', *Economist* (22 November 2007) <http://www.economist.com/node/10178014> accessed January 2013.

[125] In a number of ASEAN States the state exercises considerable *de facto* or *de jure* control over media organizations and is able to internally promote foreign policy 'advances'.

[126] Thio (n 79) 28; Thio's footnotes omitted.

[127] Albeit a structure drawing on a residue of 'Asian values' rhetoric.

[128] Complaints were made about the secretive manner in which the Working Group drafted the AHRD with little open NGO or civil society consultation and no draft being made available for public comment until after its adoption. See <http://www.hrw.org/news/2012/07/08/asean-ensure-declaration-meets-rights-standards>.

https://doi.org/10.1017/S0020589313000390 Published online by Cambridge University Press

ASEAN human rights process is the policy objective of improving human rights conditions in neighbouring States.[129]

VIII. CONCLUSION

The relative under-commitment of the ASEAN-ten States to international human rights regimes creates great potential for the post-Charter ASEAN with a human rights mandate to facilitate the realization of Southeast Asia as a 'human rights region'.

However, despite much rhetoric and recent institution-building, there are reasons to believe that ASEAN's human rights initiative, far from facilitating ASEAN States' compliance with treaty and customary human rights obligations, has been, and is likely to remain, ineffective and even antagonistic. No uniform source of human rights standards is available to the AICHR which has no legal mandate to receive individual applications or an adjudicative competence even if it did.

There would appear to be no consensus in ASEAN over women's and children's rights, hence the ACWC fulfils no 'intermediary function'. There is no evidence that the ACWC is able to address concerns that national Islamic and customary laws are at odds with international standards—precisely what such an organization might be expected to do if Shelton's and Hasimoto's propositions were correct.[130]

The AHRD is a declaratory statement which purports to fragment the human rights norms recognized by some ASEAN States between the intra- and extra-ASEAN context. In respect of other ASEAN States, the AHRD does not achieve a local–global reconciliation but rather an ossification of their sceptical position on human rights with little evidence of 'novel' rights reflecting 'regional particularities'. It is difficult to resist the conclusion that at present the ASEAN human rights mechanism is to play little more than a mollifying role in the societies of SEA and beyond.

It is often said of international regimes that they 'are better than nothing' or 'have the merit of existing'. With the possibility that the ASEAN's human rights initiative might not be better than 'nothing', are ASEAN leaders guilty of a Muntarbhorn's 'travesty of good faith'? Clearly the 'ASEAN way' is an acutely obstructive diplomatic principle which retains a significant role in the relations between Southeast Asian States. If the 'ASEAN way' is itself a 'regional particularity', it is a perverse one in the context of a regional human rights initiative. Like any international organization, ASEAN is no more than the sum of its parts and it falls to ASEAN leaders to see that national standards at least achieve parity with international benchmarks. Until they do, the 'black hole' remains.

[129] See Tan (n 15) 150 on Indonesia's human rights assistance foreign policy.
[130] Shelton (n 5); Hashimoto (n 6).

https://doi.org/10.1017/S0020589313000390 Published online by Cambridge University Press

https://doi.org/10.1017/S0020589313000390 Published online by Cambridge University Press

ANNEX I —*International Human Rights Instruments: Participation by the ASEAN States*[1]

ASEAN member-State	ICCPR[2] (167*)	ICCPR 1st OP (114*) Individual comms?	ICESCR (160*)	ICESCR OP (8*) Individual & group comms?	CEDAW (187*)	CEDAW OP (104*) Individual & group comms?	CRC[3] (193*)	CRC 1st OP (147*) Armed conflict	CRC 2nd OP (158*) Child Prostitution etc	CERD[4] (175*)	GC (142*)	CAT (151*)	CAT OP (63*) Visits	MW (46*)	UN HR Council Special Procedures standing invitation?[5]
Brunei	×	×	×	×	a	×	a	×	a	×	×	×	×	×	×
Cambodia	a	s	a	×	a	r	a	r	r	r	a	a	r	s	×
Indonesia	a	×	a	×	r	s	r	×	s	a	×	r	×	r	×
Lao PDR	r	×	r	×	r	×	a	a	a	a	a	s	×	×	×
Malaysia	×	×	×	×	a	×	a	a	a	×	a	×	×	×	×
Myanmar	×	×	×	×	a	×	a	×	a	×	r	×	×	×	×
Philipp's	r	r	r	×	r	r	r	r	r	r	r	a	a	r	×
Singapore	×	×	×	×	a	×	a	r	×	×	a	×	×	×	×
Thailand	a	×	a	×	a	r	a	a	a	a	×	a	×	×	✓
Viet Nam	a	×	a	×	r	×	r	r	r	a	a	×	×	×	×

* Number of States-parties (as of 31 July 2012)

's'=signed; 'a'=acceded to; 'r'=ratified; '✓'=affirmative; '×'=negative or non-State-party

1 Source: <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en> accessed 31 July 2012.

2 The Second Optional Protocol to the ICCPR is not shown here; only Philippines has ratified. The acceptance of competence of the ICCPR Committee under art 41 is not dealt with here either since, as with other inter-State complaint mechanisms of the various treaty bodies, the system has never been used by any State. However, Philippines is the only ASEAN State to have notified of its recognition of the Committee's competence under art 41 ICCPR.

3 The Third Optional Protocol to the CRC on a communications procedure (19 Dec 2011) is not yet in force and has been signed by 25 States and ratified by none. No ASEAN States are among the signatories.

4 No ASEAN States have accepted the competence of the CERD Committee to receive individual complaints under art 14.

5 *United Nations Special Procedures: Facts and Figures 2011* at 13 <http://www.ohchr.org/Documents/HRBodies/SP/Facts_Figures2011.pdf> accessed 31 July 2012. As of 31 December 2011, 90 States have extended such an invitation. Thailand extended its invitation in 2011.

https://doi.org/10.1017/S0020589313000390 Published online by Cambridge University Press

ANNEX II —*Comparison: The civil and political rights of the AHRD and the rights of the ICCPR*

AHRD rights of the *same/similar* scope to an equivalent ICCPR right	'*Novel*' rights—AHRD rights with no equivalent in the ICCPR
Art 14 (cruelty)	Art 13 (human and human organ trafficking/smuggling)
Art 16 (asylum)	Art 17 (right to possessions)
Art 20(2) (no punishment without law); Art 20(3) (double jeopardy)	Art 18 (right to a nationality)[6]

AHRD rights of more *restricted* scope than an equivalent ICCPR right[7]	AHRD rights of *wider* scope than an equivalent ICCPR right
Art 11 (life)	*Art 19 (right to dissolve a marriage)
Art 12 (liberty and security)	
Art 15 (movement and residence)[8]	
Art 19 (gender equality in marriage)*	
Art 20(1) (fair trial rights)	
Art 21 (privacy and reputation)	
Art 22 (religious freedom)	
Art 23 (freedom of expression)[9]	
Art 24 (freedom of assembly)	

* See main text section VI.C.1.

6 ICCPR art 24(3) recognizes a right of the child to acquire a nationality. Art 18 AHRD recognizes the right of 'every person' to a nationality, albeit 'as prescribed by law'.

7 Article 25 AHRD resists unforced classification. Art 25(1) AHRD expresses a right of citizens 'to participate in the government of his or her country' either directly or indirectly but with the caveat 'in accordance with national law' and with no reference to non-discrimination in the application of the right—a norm which art 25 ICCPR establishes in its chapeau para. Art 25 AHRD does not express a right to be elected (as with art 25(b) ICCPR). Nevertheless, art 25(2) AHRD includes the remaining elements of art 25(b) ICCPR on enfranchisement and voting conditions, but again 'in accordance with national law'.

8 The right recognized by art 15 AHRD does not recognize an individual's right to choose his residence (contrast art 12(1) ICCPR).

9 Article 23 AHRD expresses a right in similar terms to art 19 ICCPR but omits 'ideas', recognizing a right to 'seek, receive and impart information'.

https://doi.org/10.1017/S0020589313000390 Published online by Cambridge University Press

ANNEX III —*Comparison: The economic, social and cultural rights of the AHRD and the rights of the ICESCR*

AHRD rights of the *same/similar* scope to an equivalent ICESCR right	'*Novel*' rights—AHRD rights with no equivalent in the ICESCR
Art 27(1) third part (unemployment assistance); Art 27(3) (child labour)	Art 28(e) (safe drinking water); Art 28(f) (environment)
Art 28, 28(a), (b) and (c) (standard of living, food, clothing and housing)	Art 29(2) (AIDS/disease stigma)
Art 30(1) (social insurance); Art 30(2) (maternity leave)	Art 30(3) (special character of 'motherhood')[10]
Art 31(1) (right to education); Art 31(2) (primary education); Art 31(3) (purpose of education)	

AHRD rights of more *restricted* scope than an equivalent ICESCR right	AHRD rights of *wider* scope than an equivalent ICESCR right
Art 27(1) second part (working conditions); Art 27(2) (union membership)	
Art 29(1) (healthcare)[11]	
Art 32 (participation in cultural life)	

10 By art 30(3) AHRD 'motherhood' is entitled to special assistance and equal standards of social protection shall be enjoyed by children born out of 'wedlock'.
11 The 'right' expressed in art 29(1) AHRD is of similar scope to its ICESCR equivalent (art 12) but implementing provisions are absent.