


shift is called for if its operation is to continue to be relevant and effective. The knowledge and skills required of officers and staff must likewise be adjusted, upgraded and updated. This is the one big challenge that must be met if human rights in this country is to be respected, promoted, protected, and fulfilled. Human rights advocates and practitioners must join in this reform for the system to work. All stakeholders both duty-holders and rights-claimants will have to be informed of this expanded legal basis for human rights enforcement and implementation. In short, the rights-based approach to governance and human development is a formula worthy of further discussion maybe in succeeding volumes.

It is in this context that I say this issue of the *Ateneo Law Journal* is very timely indeed. It has succeeded in projecting the importance of international law and current human rights issues. It makes clear that there is an urgent necessity of giving special attention to the challenges facing the existing legal human rights mechanisms in view of the emergence of new forms of global threats to human rights and human security. I therefore take this occasion to congratulate the authors, as well as the editors of the *Ateneo Law Journal* for putting together this thought provoking volume. Human rights practitioners, advocates, academics, and decision makers will find this very helpful.

More power!


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Proposing an ASEAN Human Rights Commission: A Critical Analysis*

Sarah Lou Y. Arriola **

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I. INTRODUCTION

Europe,¹ the Americas² and Africa,³ have all set examples for the creation and establishment of regional human rights systems. Despite the existence of these regional human rights mechanisms, however, none notably exists in the Asia-Pacific region where the only existing inter-governmental arrangements for human rights are political, social and economic in nature.⁴

A number of reasons have been advanced for this lack of an Asia-Pacific human rights mechanism. First, many Asian States consider human rights as internal affairs. Second, while States accept the concept of universality of human rights, it is argued that substantial differences exist between international human rights norms and the customs and practices within the region. Third, many States believe that individual rights must give way to the demands of national security and economic growth, or that human rights can be realized only after a certain level of economic advancement has been achieved. Finally, some argue that any human rights mechanism cannot

1. See generally [European] Convention for the Protection of Human Rights and Fundamental Freedoms, (E.T.S. No. 5), 213 U.N.T.S. 222, entered into force Sept. 3, 1953 (as amended by Protocols Nos. 3, 5, 8, and 11 which entered into force on Sept. 21, 1970; Dec. 20, 1971, Jan. 1, 1990; and Nov. 1, 1998 respectively); Statute of the Council of Europe, (E.T.S. No. 001), entered into force Aug. 3, 1949; Conference on Security and Cooperation in Europe, Final Act (1975) available at <http://www1.umn.edu/humanrts/osce/basics/finact75.htm>; Charter of the Fundamental Rights of the European Union, 2000 O.J. (C 364) I, entered into force Dec. 7, 2000.
2. See generally Statute of the Inter-American Commission on Human Rights, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, 3 May 1996, OEA/Ser.L/V/II.92, doc. 31 rev. 3, at 121.
3. See generally Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III).
4. Working Group for an ASEAN Human Rights Mechanism, *Towards an ASEAN Human Rights Mechanism Proposals, Declarations and Related Document* (Manila, Working Group for an ASEAN Human Rights Mechanism, 1999) [hereinafter Working Group].

possibly encompass the entire range of diversity among States within the region in terms of historical background, cultures and traditions, religions, and levels of economic and political development.⁵

Yet there is a pressing need for some form of regional human rights mechanism especially in a region where massive violations of human rights abound. Such a mechanism will lead to a deeper understanding and more sensitive treatment of human rights issues among governments and peoples in the region. It can also provide greater access to remedies for human rights violations. Moreover, it will complement the United Nations (UN) Human Rights system and bring the mechanism closer to the State level.⁶

As early as 1979, the United Nations has already supported the proposal for the establishment of some form of regional arrangements for the promotion and protection of human rights in the Asia-Pacific region. Resolution 34/171 of 17 December 1979 of the UN General Assembly, "appeals to states in areas where regional arrangements in the field of human rights do not exist to consider arrangements with a view to establish within their respective regions suitable arrangements for the promotion and protection of human rights."⁷

Consequently, the United Nations has consistently promoted regional cooperation in the Asia-Pacific for the achievement of this objective. Through the UN-supported Asia-Pacific Workshops held in Colombo (1982), Manila (1990), Jakarta (1993), Seoul (1994), Kathmandu (1996), Amman (1997), Tehran (1998) and New Delhi (1999), a consensus has been reached to follow a step-by-step "building-blocks" approach involving extensive consultation among governments of the region, concerning the possible establishment of regional arrangements.⁸ The ASEAN constituents has likewise agreed that "regional arrangements must emerge from and be directed to the needs and priorities set by Governments of the region, with roles, functions, tasks, outcomes and achievements determined by consensus."⁹

5. *Id.*

6. *Id.*

7. United Nations Resolution 34/171 of Dec. 17 1979, available at <http://www.un.org/documents/ga/res/34/a34res171.pdf> (last visited Aug. 28, 2003).

8. Office of the High Commissioner on Human Rights, *Regional Arrangements for the Promotion and Protection of Human Rights in the Asian and Pacific Region*, available at <http://www.unhcr.ch/html/menu6/apw.htm> (last visited Aug. 28, 2003).

9. *Id.*

Present circumstances, however, show pronounced regional diversity in terms of history, culture, religion, economics and politics. Moreover, the region's attitude of making regional particularities take precedence over the universality, indivisibility, interrelatedness, and interdependence of human rights is daunting. The establishment of an Asia-Pacific-wide human rights arrangement is thus seen as unrealistic while a sub-regional mechanism, particularly within Southeast Asia is widely held to be attainable.¹⁰

In 1993, the Association of Southeast Asian Nations (ASEAN)¹¹ Foreign Ministers broached the possibility of establishing an intergovernmental mechanism on human rights. The Joint Communiqué of the 26th ASEAN Ministerial Meeting in Singapore states:

The Foreign Ministers reviewed with satisfaction the considerable and continuing progress of ASEAN in freeing its people from fear and want, enabling them to live in dignity. They stressed that the violations of basic human rights must be redressed and should not be tolerated under any pretext. They further stressed the importance of strengthening international cooperation on all aspects of human rights and that all governments should uphold humane standards and respect human dignity. In this regard and in support of the Vienna Declaration and Programme of Action of 25 June 1993,¹² they agreed that ASEAN should also consider the establishment of an appropriate regional mechanism on human rights.¹³

Subsequently, ASEAN parliamentarians adopted the ASEAN Inter-Parliamentary Organization (AIPO) Declaration on Human Rights in 1993, Article 21 of which states: "It is likewise the task and responsibility of member states to establish an appropriate regional mechanism on human rights."¹⁴

10. Working Group, *supra* note 4.
11. ASEAN consists of ten countries: Brunei Darussalam, Cambodia, Indonesia, Lao People's Democratic Republic (PDR), Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam.
12. The pertinent part of the Vienna Declaration and Programme of Action explicitly recognizes "[t]he need to consider the possibility of establishing regional and sub-regional arrangements for the promotion and protection of human rights where they do not already exist." Vienna Declaration and Programme of Action, U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993).
13. Joint Communiqué of the 26th ASEAN Ministerial Meeting, Singapore (July 23-24, 1993) (for text see Working Group, *supra* note 4) (emphasis supplied).
14. Human Rights Declaration by the ASEAN Inter-Parliamentary Organization (AIPO), 14th AIPO General Assembly, Kuala Lumpur, Malaysia (1993) (for text see Working Group, *supra* note 4, at 58.)

With these developments, a Working Group for an ASEAN Human Rights Mechanism (Working Group)¹⁵ was formed to lobby for the establishment of an appropriate Southeast Asian human rights mechanism. Subsequently, the Working Group proposed to ASEAN the creation of an ASEAN Human Rights Commission endowed with monitoring, investigative and recommendatory powers.¹⁶

Muntarbhorn outlines six indicators suggesting ASEAN's openness to human rights and possibly a human rights mechanism. First, ASEAN countries are increasingly becoming parties to the universal human rights treaties. All ASEAN countries ratified the Convention on the Rights of the Child (CRC),¹⁷ while all except Brunei ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).¹⁸ More ASEAN states have signed or acceded to the International Covenant on Civil and Political Rights (ICCPR)¹⁹ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).²⁰ Very recently, Thailand acceded to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).²¹ Moreover, a number of ASEAN countries have also signed or ratified the Rome Statute of the International Criminal Court (ICC).²²

15. The Working Group for an ASEAN Human Rights Mechanism (Working Group) is an informal coalition of individuals and groups within the region who are working with government institutions and non-governmental organizations in the field of human rights. Its primary objective is the establishment of an inter-governmental human rights mechanism in Southeast Asia.
16. Working Group for an ASEAN Human Rights Mechanism 2003 Brochure.
17. G.A. Res. 44/25, Annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989).
18. G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46 (1979).
19. G.A. Res. 2200A (XXI) 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171. Cambodia, Lao PDR, the Philippines, and Vietnam have either signed or ratified the Convention.
20. G.A. Res. 2200A (XXVI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3. Cambodia, Lao PDR, the Philippines, Thailand and Vietnam have either signed or ratified the Convention.
21. G.A. Res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force Jan. 4, 1969.
22. Viti Muntarbhorn, *Roadmap for An ASEAN Human Rights Mechanism*, Paper Delivered Before the 3rd Workshop on the ASEAN Regional Mechanism on Human Rights, Bangkok, Thailand (May 27-29, 2003) (manuscript on file with author) [hereinafter Muntarbhorn, *Roadmap*]. See Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (1998).

Second, ASEAN has adopted ASEAN Vision 2020 in 1997 which envisions "vibrant and open ASEAN societies consistent with their respective national identities, where all people enjoy equitable access to opportunities for total human development."²³ To note, this document reinforces the need for human rights protection and promotion in the sub-region.²⁴

Third, ASEAN has likewise adopted the Hanoi Plan of Action²⁵ in 1998 at the Heads of Government Summit in Hanoi, Vietnam. This Plan of Action committed ASEAN countries to human rights activities for the first time. It also mentioned the enhancement of information exchange in the field of human rights and fundamental freedoms of all peoples in accordance with the United Nations Charter, the Universal Declaration of Human Rights (UDHR),²⁶ and the Vienna Declaration and Programme of Action of the World Conference of Human Rights.²⁷ Moreover, ASEAN governments were tasked to work towards the full implementation of the CRC, CEDAW and other international instruments on women and children.²⁸

Fourth, all ASEAN countries actively participate in UN-supported annual workshops on human rights in the Asia-Pacific region, the most recent of which was held in Islamabad in 2003. Despite cultural, religious and ideological differences, the ASEAN countries have agreed to take part in the "building blocks" approach supported by the Office of the UN High Commissioner for Human Rights (OHCHR) based upon four key activities: promotion of national human rights action plans; support for setting up national human rights institutions, such as national human rights commissions; fostering of national human rights education; and realisation of economic, social and cultural rights and the right to development.²⁹

Fifth, there are now four National Human Rights Institutions (NHRIs) in the ASEAN region, which can be found in the Philippines, Indonesia, Malaysia, and Thailand. These institutions provide a check and balance mechanism against abuse of power. All four NHRIs are members of the

23. ASEAN Vision 2020, Kuala Lumpur, Malaysia (December 14-16, 1997). For text, see Working Group, *supra* note 4, at 59.

24. Muntarbhorn, *Roadmap*, *supra* note 22, at 2.

25. Available at <http://www.aseansec.org/687.htm>.

26. G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948).

27. Vienna Declaration, *supra* note 12.

28. Muntarbhorn, *Roadmap*, *supra* note 22, at 2.

29. *Id.*

Asia-Pacific Forum on National Human Rights Institutions,³⁰ which provides a joint forum for these institutions to meet annually with other national commissions from the Asia-Pacific region and address issues of common concern. This Asia-Pacific Forum has an Advisory Council of Jurists, with a representative from each NHRI, to provide guidance on the development of human rights related law and practice.³¹ The Council has provided advice on the death penalty,³² child pornography on the Internet³³ and trafficking in women and children.³⁴ The Council is also considering the issues of the Rule of Law and the impact of terrorism.³⁵

Sixth, while Track I process of diplomacy in the ASEAN concerns governmental cooperation, Track II cooperation has also emerged between governments and various think-tanks in the region. Now, with the strong lobby for an ASEAN human rights mechanism, an informal Track III process is also progressing where dialogue is among governments, think-tanks and civil society such as through the now annual ASEAN People's Assembly and the initiatives of the Working Group for an ASEAN Human Rights Mechanism.³⁶

In spite of these indicators, however, it is worth stressing that the ASEAN region still views human rights from the relativist Asian standpoint, marked by ambivalence.³⁷

[T]he word "ambivalence" is most apt to describe the physiognomy of human rights in ASEAN. The list of ASEAN countries... speak for itself: it ranges from democratic countries to less-than-democratic countries, from

30. The Asia Pacific Forum on National Human Rights Institutions available at http://www.asiapacificforum.net/jurists/jurists_ref.html (last visited Aug. 20, 2003).

31. *Id.*

32. The Asia Pacific Forum on National Human Rights, *Human Rights Issues: Death Penalty*, available at http://www.asiapacificforum.net/human/issues/death_penalty.htm.

33. The Asia Pacific Forum on National Human Rights, *Human Rights Issues: Child Pornography*, available at http://www.asiapacificforum.net/human/issues/child_porn.htm.

34. The Asia Pacific Forum on National Human Rights, *Human Rights Issues: Trafficking*, available at <http://www.asiapacificforum.net/human/issues/trafficking.htm>.

35. Muntarbhorn, *Roadmap*, *supra* note 22, at 2-3.

36. *Id.* at 3.

37. Viti Muntarbhorn, *Human Rights and A Human Rights Mechanism for ASEAN: A Constructively Engaging Challenge?*, Paper Delivered in the Seminar on Human Rights in ASEAN: Progress and Prospects, Bangkok, Thailand (Jan. 18, 2002) (manuscript on file with author) [hereinafter Muntarbhorn, *Engaging Challenge*].

relatively developed countries to relatively underdeveloped countries, from countries with an openness to human rights to countries cloaked with a general syndrome towards (some) aspects of human rights. In discussing the outlook for human rights in the region, it is worth remembering that the political culture of each country is different. Intriguingly, while a favourite maxim for many ASEAN policy makers has been "Unity in Diversity," the scenario for human rights is perhaps best described as "Diversity in Unity." There is room for both pluralism and eclecticism – good and bad.³⁸

In view of the existing indicators for ASEAN's readiness for a human rights mechanism, along side its ambivalent stance towards human rights, this article shall critically evaluate the feasibility of the proposed ASEAN Human Rights Commission.

II. ASIAN VALUES AND HUMAN RIGHTS

A. *The Asian Values Debate*

Many scholars believe that the Asian challenge to the idea of universality of human rights is anchored on the concept of Asian values. Although the concept of Asian values has become an important force in international relations, its nature and very existence is still subject to much confusion.³⁹

The concept of Asian values is in itself quite misleading. Asia is masked by enormous religious, political and economic differences; at the same time, it forms an integral part of a rapidly changing global order.⁴⁰ De Bary assents:

[I]n historical fact, while the diverse cultures of Asia are each to some degree multicultural (that is, the products of long cultural interactions), there was, until modern times, no consciousness among them of shared Asian identity. Even as a defensive reaction to pressures from the West in the nineteenth and twentieth centuries, Pan-Asianism has mostly been adjunct to modern nationalism and instrumentally subservient to it, rather than constituting anything like an Asian people's cultural bedrock. Traditionally the distinct civilizations of Asia did not identify themselves with a common continental culture, whatever the religious bonds they have shared with other Asian peoples. Even Samuel Huntington, that adept descrier of clashing civilizations on the contemporary power scene, has found no common "Asian culture" or "Asian Civilization," but only – up to this point, at least – irreducible differences among the major Asian civilizations.

Such being the case, one naturally suspects that the expression Asian values, a relatively recent construct, is meant to suit other ideological purposes, as

38. *Id.*

39. Michael Freeman, *Human Rights, Democracy and "Asian Values,"* 9 PACIFIC REV. 352 n. 3 (1996).

40. *Id.* at 362.

was the case in pre-World War II Japan, with its proclamation of a "Greater East Asian Co-Prosperity Sphere," imagining that other Asian peoples would identify with this Japanese formulation of a hybrid Asian ideology resistant to Western domination.⁴¹

Nevertheless, the Asian values debate continues to be a major setback for the human rights movement in Asia, particularly the ASEAN region. The debate has precipitated the publication of a considerable quantity of political speeches and apologia: official state documentation, submissions to international conferences from governments, non-governmental organizations (NGOs) and other bodies, media coverage, a considerable number of academic books, articles, theses and essays, and so on.⁴²

Much of what has been written has focused on the claims of the elite political class within Asia. The staunch proponents of the Asian values discourse are Prime Minister Mahathir of Malaysia, former President Suharto of Indonesia, and former Prime Minister, now Senior Minister, Lee Kuan Yew of Singapore, as well as their deputies and public relations officers.⁴³

Langlois divides the Asian values arguments of Malaysia, Indonesia and Singapore into three broad arenas of discourse: culture, economics and the role of the State. It is to be noted that through the years, these arguments have been used in justifying status quo, particularly power relations.⁴⁴

First, based on the culture argument, it is held that Asia has, or specific regions of Asia have, distinctive cultural traditions which are different from, or even opposed to those of the West. Thus, Langlois states:

These traditions legitimate a soft-authoritarian style of leadership in which the individual is subservient to the good of the community, and the good of the community is determined through various mechanisms of consensus by the elders (in practice, almost invariably men) of society. It is claimed that these cultural traditions have been authentically maintained and have thus not fallen into the decadence and moral bankruptcy in the West.⁴⁵

The proponents further argue that the nations of Asia have the right to choose to maintain the cultural values they see fit, in the process preserving and building on their cultural heritage.⁴⁶

41. WM. T. DE BARY, *ASIAN VALUES AND HUMAN RIGHTS* 28 (1998).

42. A. LANGLOIS, *THE POLITICS OF JUSTICE AND HUMAN RIGHTS SOUTHEAST ASIA AND THE UNIVERSALITY THEORY* 3 (2001).

43. *Id.*

44. *Id.* at 25.

45. *Id.* at 24.

46. *Id.*

One of the strongest criticisms to this argument, however, is the fact that the State elite simply uses "culture" as a means to maintain political power. The proponents of the package deal of Asian values reduce culture to the State, and then proceed to use this "state culture" or set of values as a device for "de-legitimizing" internal or indigenous critics of the regimes in question while using draconian legislation, such as the Internal Security Act (ISA) of Malaysia and Singapore. The fact that the State elite has to impose their interpretation of Asian culture on the population through means moving incrementally from speeches to ISA laws ironically suggests that the cultural construct they are using is, in fact, neither universal nor representative of a homogenous culture.⁴⁷

Second, based on the economics argument, the model for the achievement of human rights is sequential. It is argued that the realization of civil and political rights is dependent upon the degree of economic development. Thus, priority is given to economic and cultural rights over civil and political rights. Within this argument, Western countries are exhorted to give aid for development and to be patient since as their own history attests, industrialisation and economic development precede the full realization of democracy. Similarly, it is argued that strong and paternalistic government is needed to provide the right environment for economic development, to ensure law and order, and to be able to make the economy attractive to foreign investors and developers.⁴⁸

Nevertheless, when viewed critically, one would see the irony of the subordination of civil and political rights to economic development. The State elite would often use the argument of indivisibility of rights whenever they advocate economic and cultural rights. Since all rights come as a whole, their usual argument is that the West should equally support economic, social and cultural rights in the same way that they support civil and political rights. They thus champion the doctrine of the indivisibility of rights only when it appears useful, then clearly disown it in practice by the abrogation of other rights when it threatens their political and social status quo.⁴⁹

An additional problem with the economic development argument is that there is no threshold level. Put simply, how developed is developed enough?⁵⁰

Langlois goes further in debunking the economic argument claim. He comments:

47. *Id.* at 28.

48. *Id.* at 24-25.

49. *Id.* at 33.

50. *Id.* at 34.

[E]mpirical counter-examples to the economic development claim are numerous: Marcos' rule over the Philippines, the State Law and Order Restoration Council's repressive regime in Burma, and the former Soviet Union, to name the most well known... Amartya Sen's research demonstrates that there has never been a substantial famine in a country that is democratic and has a "relatively" free press. This is because the civil and political rights of a democratic system enable citizens - lay and specialist alike - to publicise social, economic and environmental problems and precipitate political response and intervention. The denial of such civil and political rights is then at great cost and can only result in "a deeply unbalanced set of ground rules". An example here is Malaysia's suppression of political discussion of logging in Borneo's state of Sarawak, with the detention without trial of indigenous residents in order to prevent them speaking out. This is the dark side of Malaysia's "consensus seeking" style of government.⁵¹

Finally, based on the role of the State in society, the Asian values proponents defend a soft-authoritarian mode of government since without such authoritarianism, the internal centrifugal forces of religion, race, ethnicity, and economic disparity, if not controlled, would tear countries apart. It is further argued that national integrity compels governments to use authoritarian means to preserve unity. Furthermore, according to the principles of the international system as exported by the West, States are sovereign and have rights of self-determination and non-intervention with respect to their internal affairs. "Western states assume these rights for themselves subservient, in practice, if not in the rhetoric of international politics. The West should be consistent and respect the integrity and competence of Asia's states."⁵²

Ghai succinctly explains the opposition to this need for a soft-authoritarian mode of government following the Asian values principle. He opines:

[T]he pervasive use of draconian legislation like administrative detentions, disestablishment of societies, press censorship, sedition, etc. belies claims to respect alternative views, promote a dialogue, and seek consensus. The contemporary state intolerance of opposition is inconsistent with traditional communal values and processes. I fear that the contemporary state processes in Asia are worse than the much-derided adversarial process of the West, which at least ensures that all parties get a fair hearing.⁵³

51. *Id.* at 35.

52. *Id.* at 25.

53. Yash Ghai, *Asian Perspectives on Human Rights*, in HUMAN RIGHTS AND INTERNATIONAL RELATIONS IN THE ASIA-PACIFIC REGION 62 (James Tang ed. 1995).

Critics of this argument further say that the State elite use sovereignty only by selective appropriation. Sovereignty is a Western concept and the State elite have always been critical of the West. Nevertheless, it is considered a dubious intellectual practice to accept the Western tradition of State without also accepting the same tradition's restraints on the State, including the doctrine of human rights.⁵⁴

B. Asian Values, Universality of Human Rights and the Bangkok Declarations

Perhaps the strongest expression of Asian values can be found in the Bangkok (Governmental) Declaration which recognizes the universality of human rights, yet adopts the relativist position.

The Bangkok (Governmental) Human Rights Declaration⁵⁵ was adopted in Bangkok, Thailand in 1993 prior to the Vienna World Conference on Human Rights. It provides that Asia-Pacific Governments:

[r]ecognize that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.⁵⁶

While the Bangkok (Governmental) Declaration is a product of Asia-Pacific government consensus, there is also a parallel declaration affirming the universality of human rights written by Non-Governmental Organizations in the Asia-Pacific. Thus, the relativist governmental position was rebutted by Non-Governmental Organizations which met in Bangkok prior to the governmental meeting. The Bangkok (Non-Governmental) Declaration on Human Rights⁵⁷ position on universality is as follows:

Universality. We can learn from the different cultures in a pluralistic perspective and draw lessons from the humanity of these cultures to deepen respect for human rights. There is emerging a new understanding of universalism encompassing the richness and wisdom of Asia-Pacific cultures.

Universal human rights standards are rooted in many cultures. We affirm the basis of universality of human rights which afford protection to all of humanity, including special groups such as women, children, minorities and indigenous peoples, workers, refugees and displaced persons, the disabled and the elderly. While advocating cultural pluralism, those cultural

54. LANGLOIS, *supra* note 42, at 40.

55. For text see ASIAN CULTURAL FORUM ON HUMAN RIGHTS, OUR VOICE: BANGKOK NGO DECLARATION ON HUMAN RIGHTS, 242, 244 (1993) [hereinafter OUR VOICE].

56. Bangkok (Governmental) Declaration, art. 8.

57. For text see OUR VOICE, *supra* note 55, at 198-199.

practices which derogate from universally accepted human rights, including women's rights, must not be tolerated.

As human rights are of universal concern and are universal in value, the advocacy of human rights cannot be considered to be an encroachment upon national sovereignty.⁵⁸

These two Bangkok Declarations strengthen the assertions of the critics of Asian values. While ASEAN governments are quite resistant in accepting the universality of human rights, the very ASEAN peoples as represented by the NGOs affirm this universality. This demonstrates how many ASEAN governments hide behind "national and regional particularities and various historical, cultural and religious backgrounds," otherwise known as Asian values, simply to try to justify their "soft-authoritarian" regimes in the region. ASEAN peoples, however, see culture not as a hindrance to the acceptance of human rights, but as a tool to deepen their understanding of human rights.

A document that clearly breaks the stalemate between the two Bangkok Declarations is the Declaration of the 1993 World Conference on Human Rights. The Vienna Declaration implies that the universality of human rights should prevail over national and regional particularities. It provides:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.⁵⁹

It is to be noted, however, that under the principles of public international law, a declaration such as this is only deemed as "soft law," with no direct binding effect on the State.⁶⁰

But a declaration is not without any importance. Malanczuk mentions that States usually enter into declarations when States in agreement do not, as yet, wish to bind themselves legally, but nevertheless wish to adopt and test certain rules and principles before they become law. In such a case, declarations often facilitate consensus, which is difficult to adopt if States were to resort to "hard law" instruments like conventions and treaties. Even if declarations by themselves are not strictly binding norms of law, they are thus not completely irrelevant political maxims for they, just like other forms

58. Bangkok (Non-Governmental) Declaration, art. 2.

59. Vienna Declaration, art. 5.

60. PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 54 (7d. 1997).

of "soft law," operate in a grey area between law and politics, thereby embodying a special characteristic in the dynamics of international law.⁶¹

Furthermore, ASEAN countries were in fact represented in the World Conference on Human Rights and deemed part of the Vienna Declaration's affirmation of universality of human rights. At the very least, while these countries may not be legally bound by the Vienna Declaration, they are still politically tied to its principles.

C. ASEAN and the ASEAN Way

1. A Story of Diversity: ASEAN and Its History

Since its inception, the ASEAN has been marked by diversity. This diversity not only stems from economics, politics and religion, but also from the region's colonial past.

Some decades ago, Southeast Asia was divided into five areas: French Indochina, British Malaya, Brunei, Burma and Borneo, American Philippines, the Dutch East Indies, and the one sole independent State, Thailand. Later, after several trials and internal struggles, there became two Southeast Asias: the non-communist (Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore, and Thailand), and the communist (Vietnam, Laos, Cambodia, and Burma/Myanmar).⁶²

On 8 August 1967, the ASEAN was founded by the ASEAN Declaration, also known as the 1967 Bangkok Declaration.⁶³ Its original members were Indonesia, Malaysia, Singapore, Thailand, and the Philippines. Brunei joined in 1984. Vietnam became a member in 1995 followed by Laos and Burma/Myanmar in 1997. In 1998, Cambodia became the tenth member of ASEAN.⁶⁴

The original aims of the ASEAN are found in the 1967 Bangkok Declaration.⁶⁵ These include "the acceleration of economic growth, cultural development and the promotion of regional peace and stability, coupled

61. *Id.*

62. J. Bañas, *Prospects for a Subregional Human Rights Arrangement in the ASEAN*, 7 HUMAN RIGHTS FORUM 69 n. 1 (1997).

63. 6 I.L.M. 1233 (1967). See Vitit Muntarbhorn, *Towards an ASEAN Human Rights Mechanism? A Concept Paper*, in TOWARDS AN ASEAN HUMAN RIGHTS MECHANISM PROPOSALS, DECLARATIONS AND RELATED DOCUMENTS 6 (Carlos P. Medina et al. eds. 1999) [hereinafter Muntarbhorn, *Human Rights Mechanism*].

64. *Id.*

65. Available at <http://www.aseansec.org/3628.htm>.

with respect for justice and the rule of law."⁶⁶ It is notable that the words "politics" and "human rights" are not mentioned in the Declaration although issues like justice and law would have some bearing on politics and human rights and vice versa.⁶⁷

ASEAN has played a major role in the sub-region in the last 36 years of its existence. It has, for example, been a major catalyst in fostering peaceful relations among its original members, despite historical conflicts and continuing disputes over territory and other issues.⁶⁸ In the post Cold War era, it has played a major role in the peace process in Cambodia, and has succeeded in bringing its former adversary, Vietnam, into its membership on friendly terms. Moreover, ASEAN Member States, prior to the Asian financial crisis of 1997, were seen as part of the "Asian miracle" due in part to the stability fostered by ASEAN.⁶⁹

Closer economic cooperation and integration have also been seen with some success in the ASEAN Free Trade Area (AFTA).⁷⁰ These habits of cooperation and dialogue in security and economic matters were carried on by ASEAN into larger groupings, such as the ASEAN Regional Forum⁷¹ and the Asia Pacific Economic Cooperation.⁷²

Tay mentions, "[i]n many respects, political security and economic matters have been foremost on the ASEAN agenda. ASEAN dialogue and cooperative schemes have been initiated in many other sectors, such as education, science and technology, and tourism. Human rights, in comparison, have not been the subject of focus in ASEAN."⁷³

2. ASEAN Way of Diplomacy

If Asian values are seen as the major challenge to the universality of human rights, it could be said that the ASEAN Way is the major stumbling block in setting up a human rights mechanism in Southeast Asia.

66. Muntarbhorn, *Human Rights Mechanism*, *supra* note 63.

67. *Id.*

68. S. Tay, *Comparing Apples with Mangoes and Durian: Human Rights Systems in Europe and South East Asia*, Paper Delivered on the Second Workshop on the ASEAN Human Rights Mechanism on Human Rights, Makati, Philippines 7 (July 13-15, 2002) (manuscript on file with author) [hereinafter Tay].

69. *Id.*

70. 31 I.L.M. 513 (1992), also available at <http://www.aseansec.org/12375.htm>. See generally <http://www.aseansec.org/economic/afta/afta.htm>.

71. See generally <http://www.aseansec.org/arf.htm>.

72. See generally <http://www.aseansec.org/arf.htm>.

73. See generally <http://www.apec.org>.

ASEAN has evolved certain norms and practices that have been known as the ASEAN Way. This includes, among others:

1. Upholding the norm of non-intervention, with practice in many cases even frowning upon comments that one State, or significant actors in one State, may make about situations in another;
2. A preference for political dialogue and declaratory statements, over treaties and legal approaches, especially in areas of difference and conflict;
3. A preference for officials in each Member State to control the inter-State process by a network of meetings and dialogues, rather than giving more initiatives and powers to a regional institution or bureaucracy; and
4. Building up norms of dialogue and peaceful co-existence among all Member States, but leaving many disputes to be decided by Member States at the bilateral level.⁷⁴

The ASEAN Way is more discernable in the Treaty of Amity and Cooperation in Southeast Asia of 1976.⁷⁵ It provides:

In their relations with one another, the High Contracting Parties shall be guided by the following 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 or disputes by peaceful means;
- e. Renunciation of the threat or use of force;
- f. Effective cooperation among themselves.⁷⁶

The ASEAN Way can therefore be summed up in three words: non-intervention, non-interference and dialogue.

Petcharamesree explains that the reluctance of ASEAN to mention human rights and the prospects of having a human rights mechanism is directly related to the non-interference stance of ASEAN. Human rights, in such a situation, are generally considered as internal affairs.⁷⁷

74. Tay, *supra* note 68, at 8.

75. 27 I.L.M. 596 (1988). For text see website < <http://www.asean.or.id/>>; <http://www.aseansec.org/1217.htm> [hereinafter 'Treaty of Amity and Cooperation'].

76. *Id.* art. 2.

77. Stripapha Petcharamesree, *Human Rights Polices, Practices and Mechanisms in the ASEAN Region*, A Paper delivered on the Second Workshop on the ASEAN

It is worthy to note, however, that ASEAN's non-interference stance is rather selective. This has been shown in the Joint Communiqué of the 31st ASEAN Ministerial Meeting when ASEAN tried to interfere with Cambodia's affairs as a pre-condition to its admission to ASEAN.⁷⁸

The Foreign Ministers reiterated their hope for free, fair and credible elections that would facilitate the restoration of peace and political stability in Cambodia. The Foreign Ministers recalled that the ASEAN Heads of State/Government at the Second ASEAN Informal Summit called for the intensification of consultations with Cambodia to facilitate its admission into ASEAN.⁷⁹

Moreover, ASEAN only refuses to deal with human rights issues when it comes to member countries, but has no qualms mentioning it when violations happen in other parts of the world.⁸⁰ Petcharamesree cites instances when the ASEAN as a group made early demands for sanctions against South Africa for apartheid in the early and mid-80's. ASEAN also urged the rest of the world to help stop ethnic cleansing in the former Yugoslavia. Clearly, all these actions called for direct intervention, contrary to the ASEAN Way.⁸¹

Furthermore, the ASEAN Way also works in human rights issues within the region. Take, for instance, the events in the Philippines during the Marcos dictatorship.

[W]hen the events in the Philippines during the Marcos regime worsened after the assassination of Ninoy Aquino, there was an increasing momentum to topple the administration. ASEAN governments refrained from doing or saying anything... In 1987, a year after Corazon Aquino took power, when the government was seriously threatened by a series of coup attempts and when ASEAN Summit was scheduled to be held in Manila, that ASEAN heads of state decided to go and attend the said Summit as an expression of support for the Aquino administration. This is what we call the "ASEAN WAY."⁸²

Similarly in Burma, in 1998, when the military suppressed student demonstrators, ASEAN governments did no more than express concern in carefully worded statements. The same response was true during the 1991

Human Rights Mechanism on Human Rights, Makati, Philippines 4 (July 13-15, 2002) (manuscript on file with author) [hereinafter Petcharamesree].

78. *Id.*

79. Joint Communiqué of the 31st ASEAN Ministerial Meeting, Manila, Philippines, ¶ 15 (July 24-25, 1998). (For text see Working Group, *supra* note 4, at 66.)

80. Petcharamesree, *supra* note 77, at 4.

81. *Id.* at 2.

82. *Id.*

shooting of the demonstrators in Dili, East Timor, and the May 1992 demonstrations in Bangkok.⁸³

ASEAN has been quite comfortable with the ASEAN Way until 1997, when the regional financial crisis swept through many Member States.⁸⁴ The ASEAN Way was then blamed for the lack of prompt or sufficient regional responses. Some quarters even suggest, post crisis, that the ASEAN Way should be abandoned all together. Others have sought to suggest ways to develop and reinvent other modes of dialogue and consultation, towards effective cooperation. Such talk has also been heard at the official level, particularly from Ministers of some ASEAN Member States.⁸⁵

After the 1997 regional financial crisis, Tay observed some significant changes in the ASEAN Way:

[I]n economic and financial cooperation, some progress and change may be discerned. Currency swap arrangements and surveillance has been promised. The proposal of economic integration in ASEAN has been largely accepted in terms not just of freer (sic) trade in the ASEAN Free Trade Area, but also in ancillary areas. These include the emphases given to e-ASEAN, and to human resource development and education as a means of closing the gap between the older and generally more developed ASEAN member states and new members of Vietnam, Laos, Myanmar and Cambodia.

There has been a greater regularity and institutionalisation of ASEAN in the response to the environmental problems of the Indonesian fires and haze. More consistent and continuing scrutiny on the issue may be discerned. A treaty, rare in ASEAN circles, has also been negotiated; also signature and ratification are still pending.

The ASEAN Summit of 2001, held in Brunei, also witnessed a greater cogency in reviewing the progress of the Hanoi Plan of Action. The wide ranging agenda of the HPA includes economic, social, political and institutional goals, as well as human rights aims. The ASEAN Summit 2001 marked the mid term review of progress and reassessment of the priorities.⁸⁶

More recently and quite significantly, in the Joint Communiqué of the 36th ASEAN Ministerial Meeting in Phnom Penh, Cambodia on June 2003, ASEAN Ministers of Foreign Affairs asked for the Member State

83. *Id.*

84. Asian Development Bank, *Poverty and Sustainable Development: Everyone's Concern*, available at <http://www.adb.org/Documents/Speeches/1999/ms1999041.asp>.

85. *Supra* note 68, at 8.

86. *Id.*

Myanmar/Burma to release opposition leader Aung San Suu Kyi.⁸⁷ The statement is an unusual departure from the ASEAN Way of non-interference in Member-States' internal affairs. In the carefully worded statement, ASEAN said that they "looked forward to the early lifting of restrictions placed on Daw Aung San Suu Kyi and the NLD members."⁸⁸

In this context, Cambodian Foreign Minister Hor Namhong, who chaired the Ministerial Meeting, said ASEAN's ability to discuss internal issues of a Member State was "a step forward in the relations between ASEAN members."⁸⁹

All these developments demonstrate considerable changes in the attitude of ASEAN. Given this background, has ASEAN finally opened its doors to welcome a human rights mechanism to eventually intervene on each State's sovereignty? Moreover, if ASEAN has opened its doors, is the proposal for an ASEAN Human Rights Commission the appropriate mechanism that is acceptable in the region?

III. TOWARDS AN ASEAN HUMAN RIGHTS MECHANISM

A. Existing Regional Mechanisms: Lessons for ASEAN

The Vienna Declaration and Programme of Action acknowledged the fundamental role of regional arrangements for the protection and promotion of human rights.⁹⁰ It likewise reiterated "the need to consider the possibility of establishing regional and sub-regional arrangements for the promotion and protection of human rights where they do not already exist."⁹¹

Europe, the Americas and Africa are way ahead of Asia when it comes to regional arrangements for the protection and promotion of human rights. These three regions have different forms of human rights mechanisms that came about due to different circumstances. In this context, the article shall examine these three existing regional human rights mechanisms and see how ASEAN can learn from them. The article shall also scrutinize if such regional arrangements would have relevance in ASEAN vis-à-vis the proposed ASEAN Human Rights Commission.

87. Joint Communiqué of the 36th ASEAN Ministerial Meeting, Phnom Penh, Cambodia ¶ 18 (June 16-17, 2003), available at <http://aseansec.org/14833.htm> (last visited Feb. 15, 2004).

88. *Id.*

89. BBC News, *Asean Calls for Suu Kyi Release* (June 17, 2003) available at <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/1/hi/world/asia-pacific/2922> (last visited Aug. 6, 2003).

90. Vienna Declaration, art. 37.

91. *Id.*

1. Europe

a) Origin and Mechanics of the System

The European system of human rights is often said to be the strongest, most developed, and most comprehensive of any human rights system, whether international or regional.⁹²

The system itself is complex and subject to continuing change, whether by the action of the policy-making bodies, legislative institutions or the decisions of the court itself.⁹³ The link between the effective protection of human rights and democratic security is due to the existence of three regional structures: the Council of Europe, the Organization of Security and Cooperation in Europe (formerly the Conference for Security Cooperation in Europe), and the European Union or its predecessor, the European Community.⁹⁴

The European system can be primarily traced to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)⁹⁵ which was signed in 1950 and entered into force in 1953. Under the auspices of the European Council, some 41 States have now ratified the ECHR.⁹⁶

The ECHR is of particular importance for a number of reasons.⁹⁷ At the outset, the European Convention is deemed the first comprehensive treaty in the world in its field. It likewise established the first international complaint procedure and the first international court for the determination of human rights matters. To date, it remains the most judicially developed of all the human rights systems; and as such, it has the most extensive jurisprudence than any other human rights system.

Tay describes the European system as having the following attributes:

1. A universal court system in which the European Court of Human Rights can review decisions made by the highest courts of different

92. Tay, *supra* note 68, at 5.

93. *Id.*

94. Kevin Boyle, *Europe: The Council of Europe, the OSCE, and the European Union*, in *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE* 135 (Hurst Hannum ed. 1999).

95. (E.T.S. No. 5), 213 U.N.T.S. 222, entered into force Sept. 3, 1953 (as amended by Protocols Nos. 3, 5, 8, and 11, entered into force Sept. 21, 1970, Dec. 20, 1971, Jan. 1, 1990, and Nov. 1, 1998 respectively).

96. HENRY STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 786 (2d ed. 2000).

97. *Id.*

member states of Europe. Where it disagrees, it can issue a judgment asking the national court to review its decision.

2. A diminished role for political institutions in mediation and compromise, in favour of court-style, legal proceedings. The Council of Ministers has diminished in importance over time, and the work of the Court has increased.

3. A system of individual petitions for citizens to bring their cases against their own state, or others... This moves beyond the more traditional international law right of a state to bring a claim against another state. Recent changes, such as Protocol 11, adopted in 1998, have streamlined the system and made it more effective.

4. An on-going process to review and improve upon the mechanisms at the regional level. Conventions have been added, and amended, that deepen or broaden the human rights norms in Europe (e.g. The European Social Charter, the European Convention for the Prevention of Torture). Institutions have also been strengthened. The European Court of Justice, as the chief judicial organ of the European Union, began to evolve its own doctrine of human rights from 1969, in spite of the fact that constitutional documents of the Union contain no express bill of rights.

5. Examples of compliance by states adjudged by the European Court to be in the wrong, bringing in changes in national law to bring the state into greater conformity with regional norms. The UK, for example, has amended its policy or laws in a number of cases. Most recently, the UK has passed legislation to regulate the influence of the European Court on its national legal order in terms of human rights.⁹⁸

Given this structure, the achievements of the European system have been considerable, if not impressive. This is so not only when compared with other regional arrangements but also as regards the European system's own origins, which was characterized by less legal certainty and more political flavour. Before ASEAN could even consider imitating the European system and appropriate it as its own, it is important, however, to consider the context in which the European system was formed, the culture of the countries which ratified the European Convention, and the history of the region itself.

Steiner and Alston observe that there are three factors that provided an impetus for the adoption of the European Convention. It is against this backdrop that Europe was able to develop its regional human rights system.

First, the European human rights system was a regional response to the atrocities that were committed in Europe during the Second World War as

98. Tay, *supra* note 68, at 6.

well as an affirmation of the belief that governments respecting human rights are less likely to wage war on their neighbours.⁹⁹

Second, the European human rights evolved in a context in which Europe and States of the European Union, have sought *ever closer integration* not only in terms of trade and economic development, but also in questions of culture, politics, and social security policy. The advancement of Europe is therefore tied to the concept of the union of Europe, both in practical terms as well as in a visionary context. Thus, the Preamble of the European Convention states: "European countries ... are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law...."¹⁰⁰

It is also worth noting that compared to the present economic disparity between ASEAN countries, the norms and economic development levels within Europe, while different between, say, Germany and Greece, are within a narrow band of variation.¹⁰¹ Moreover, Europe has embodied and articulated a civilizational ideal where human rights and democracy are key pillars. To illustrate, human rights have been a benchmark by which would be Member States of the European Union are adjudged. Where they are found wanting, as in the case of Turkey previously, their membership is either delayed or bypassed.¹⁰² This is not the case in ASEAN.

Third, another impetus towards the Convention was the desire to bring non-Communist countries of Europe together within a common ideological framework and to consolidate their unity in the face of the Communist threat.¹⁰³

b) Can ASEAN Imitate Europe?

The ASEAN situation is quite different from Europe. To elucidate, three aspects of the ASEAN and the European system will be examined: history, attitude towards human rights, and institutional capacity.

ASEAN countries except for Thailand all share a common history of a colonial past. Except for the Philippines, which was colonized by the United States after Spain ceded it to the United States via the Treaty of Paris of 1898,¹⁰⁴ the eight remaining Southeast Asian countries were colonized by

99. STEINER & ALSTON, *supra* note 96, at 786-87.

100. *Id.* at 787.

101. Tay, *supra* note 68, at 6.

102. *Id.*

103. STEINER & ALSTON, *supra* note 96, at 787.

104. I RENATO CONSTANTINO, *THE PHILIPPINES: A PAST REVISITED* 219 (1998).

European countries.¹⁰⁵ ASEAN is thus composed of relatively young countries compared to Europe. Although some of the ASEAN countries may have waged war against each other, their history is predominantly characterised by most of their people waging war against their colonizers for freedom and self-determination.¹⁰⁶

Furthermore, ASEAN's attitude towards human rights is characterized by ambivalence. Compared to Europe where the countries which ratified the European Convention are likeminded and have common heritage and political traditions, ASEAN presents an opposite picture. To note, ASEAN is composed of emerging democracies (the Philippines, Thailand and Indonesia), communist States (Laos and Vietnam), a military dictatorship (Myanmar/Burma), soft-authoritarian regimes (Brunei, Malaysia and Singapore) and a government in transition (Cambodia).¹⁰⁷ With this kind of political and ideological mix, not to mention the wide economic disparities among the ten ASEAN states, ASEAN countries are far from having much in common.

Finally, ASEAN's institutional capacity is quite limited compared to the European system. Although ASEAN has a Secretary-General, nevertheless, it only has a modest secretariat and its structural development does not compare to that of the European Union's. This is partly because of the lower development levels of the States in the region. Moreover, ASEAN has a different aspiration from the European Union, since the former is an *association* not a *union*.

ASEAN, however, is not without any considerable success. Prior to the 1997 financial crisis, ASEAN was seen as the most successful sub-regional organization outside Europe. Even today, in spite of the Association's shortcomings, it can be reasonably judged with comparative success, next to other sub-regions in Asia.¹⁰⁸

In view of the foregoing, can ASEAN imitate Europe? If only ASEAN were more cohesive, it could. However, considering the historical, political, and human rights climate in the region, to attempt to have a mechanism akin to Europe will result in treating dissimilarly situated regions similarly. Although the European system is well developed and deemed the most successful, it is not the model for ASEAN. True, ASEAN can draw

105. Asian Focus Group, *History of South East Asia*, available at http://www.aseanfocus.com/publications/history_region.html (last visited August 6, 2003).

106. *Id.*

107. *Id.*

108. Tay, *supra* note 68, at 7 (emphasis supplied).

inspiration from the beginnings of the European model, but to pattern its human rights mechanism after it would be too ambitious, if not disastrous.

2. The Americas

a) Origin and Mechanics of the System

In May 1948, at the ninth Inter-American Conference, the Organization of American States (OAS) was established.¹⁰⁹ The OAS is like ASEAN in the sense that it is both an international and inter-governmental organization. The OAS has 35 Member States coming from North, Central and South America.¹¹⁰

Dating back to 1890 is the International Union of American Republics, the predecessor of the OAS.¹¹¹ It was in the Bogota Conference that the OAS was born and it was also in the same year (1948) and in the same conference that the American Declaration of the Rights and Duties of Man¹¹² was adopted.

The Inter-American system had a declaration seven months before the United Nations had adopted the Universal Declaration of Human Rights and two and a half years before the European Convention was adopted. Nevertheless, the development of the regional treaty monitored by effective machinery took a longer time. The Inter-American Commission on Human Rights¹¹³ was created in 1959 while the American Convention on Human Rights¹¹⁴ was adopted in 1969 and entered into force only in 1978.¹¹⁵

The creation of the Inter-American Commission of Human Rights was not by a treaty but by mere resolution at a special meeting of Foreign

109. STEINER & ALSTON, *supra* note 96, at 868.

110. David Padilla, *Existing Human Rights Regional Mechanisms: Experience of other Regions, The Inter-American Commission on Human Rights*, Proceedings of the First Workshop for an ASEAN Regional Mechanism on Human Rights, Jakarta, Indonesia, at 56 (July 5-6, 2001) [hereinafter Padilla].

111. STEINER & ALSTON, *supra* note 96, at 868.

112. O.A.S. Res. XXX (1948), O.A.S. Off. Rec. OEA/Ser. LV/L.4 Rev. (1965).

113. The Inter-American Commission of Human Rights (IACHR) is established under Article 33 of the American Convention on Human Rights, 9 I.L.M. 673 (1970).

114. O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

115. STEINER & ALSTON, *supra* note 96, at 868.

Ministers.¹¹⁶ The Commission was created at a critical period in the Americas, the time of the Cuban revolution and the height of the Cold War. It was also during that time that the dictator of the Dominican Republic was attempting to assassinate heads of State of some neighboring countries. Thus, in response to these circumstances, the American Foreign Ministers decided to create a Commission.¹¹⁷

Although the institutional structure of the Inter-American system is superficially quite similar with its European counterpart, its development followed a different path. Within the Council of Europe, military and other authoritarian forms of government have been rare and short-lived. In Latin America however, it was close to becoming the norm until the changes occurred in the 1980s.¹¹⁸

The socio-political factors faced by the European and the Inter-American systems, which were quite different, greatly affected their respective developments. While Europe was concerned with issues like the length of the pre-trial detention and the implications of the right to privacy, the Americas had to deal with unresponsive and antagonistic governments or national legal systems, or with deep structural problems that led to systematic and serious human rights violations. It was only later with the expansion of the membership of the European Convention to include authoritarian States in Central and Eastern Europe as well as Turkey that it encountered some difficulties that the Inter-American system initially faced at its inception.¹¹⁹

In Latin America, states of emergency have been common, the domestic judiciary was characterized as weak, if not corrupt, and large-scale practices involving torture, disappearances and executions have not been unfamiliar. Moreover, many of the governments that the Inter-American Commission and Court had to deal with have been ambivalent towards those institutions at best and hostile at worst.¹²⁰

In March 2000, of the 35 members of the OAS, only 25 had ratified the American Convention on Human Rights and only 20 had recognized the jurisdiction of the Court.¹²¹

The American Convention vested the authority to supervise its observance in two bodies: the Inter-American Commission, which pre-

116. See Hernan Vales, *The Latin American View on the Doctrine of Humanitarian Intervention*, J. OF HUMANITARIAN ASSISTANCE (posted on Feb. 11, 2001), available at <http://www.jha.ac/articles/a064.htm>.

117. Padilla, *supra* note 110, at 57-58.

118. STEINER & ALSTON, *supra* note 96, at 869.

119. *Id.*

120. *Id.*

121. *Id.*

existed the Convention, and the Inter-American Court of Human Rights, which was created by the Convention.¹²²

The Commission on the one hand has seven members who are elected in their personal capacity by the OAS General Assembly and represents all the OAS Member States. The entry into force of the Convention in 1978 vested the Commission with a dual role. First, it retained its original status as an organ of the OAS, thereby maintaining its original mandate to protect and promote human rights in the territories of all OAS Member States. Second, being an organ of the Convention, it supervises State human rights compliance in the territories of the Convention.¹²³

The Commission's functions include:

1. promoting human rights in all OAS member states;
2. assisting in the drafting of human rights documents;
3. advising member states of the OAS;
4. preparing country reports, which usually include visits to the territories of these states;
5. mediating disputes over serious human rights problems;
6. handling individual complaints and initiating individual cases on its own motion, both with regard to states parties and states not parties to the Convention; and
7. handling of cases and advisory opinions before the Court.¹²⁴

The Court on the other hand also has seven judges irrespective of the number of States that have recognized the jurisdiction of the Court. It has both contentious and advisory jurisdiction. In exercising its contentious jurisdiction, it may settle controversies regarding the interpretation and application of the provisions of the American Convention through a special procedure designed to handle individual or State complaints against State Parties to the Convention. Meanwhile, under its advisory jurisdiction, the Court may interpret the Convention as well as any other treaty concerning the protection of human rights in the American States.¹²⁵

Aside from the fact that the European system has more financial support and enjoys a more human-rights-friendly environment than that in the

122. Carlos P. Medina, *The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflection on a Joint Venture*, in INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW POLITICS MORALS 872 (Henry Steiner & Philip Alston eds., 2d 2000).

123. *Id.* at 873.

124. *Id.*

125. *Id.*

Americas, another major distinction between the Inter-American and the European systems lies in the level of enforcing final decisions and judgments. The Inter-American system has no counterpart to the supervisory role of the Committee of Ministers of the Council of Europe. Related to this is the fact that the decisions of the Inter-American system are not necessarily deemed legally binding decisions. True, the judgments of the Court are legally binding upon the parties. Nevertheless, although there is no comprehensive study yet on State record vis-à-vis response to Commission recommendations, there are indications that these recommendations have not been followed in many cases of gross violations by military regimes.¹²⁶

b) What can ASEAN learn from the Americas?

Compared to Europe, the socio-political situation of the Americas is closer to ASEAN's. While at the moment it is conceded that having a Court in ASEAN is improbable, a Commission similar to but with lesser powers than what the Americas have is desirable in the sub-region. It is significant to emphasize, however, that whatever mechanism is created, it should be respected and followed in ASEAN. To have a Commission like in the Americas whose recommendations are often ignored will be a waste of resources for an already financially challenged ASEAN.

Yet, the question now is what can the ASEAN learn from the Americas? Padilla, the Assistant Executive Secretary of the Inter-American Commission on Human Rights, imparts:

[I]n the Americas...I think you will see the parallel with your own region, we were moving along gradually and incrementally. But we were making progress. This is the message I want to impart...In 1948, we had a declaration, in 1959, we had a commission, the legal foundation of which is very fragile, in 1969, we had a treaty, but it was not until 1978 that that treaty came into force. According to the terms of the treaty, it required eleven ratifications in order for it to come into force. So, three decades have gone by between 1948 and 1978. During that period, there were dictatorships in Argentina, in Uruguay, Paraguay, Chile, in Brazil, Ecuador, Columbia, Venezuela; in the meantime, we had a left-wing revolution in Cuba - so it was a period of great instability and yet, persons like yourselves, leaders of your respective countries, activists and NGOs were pushing the envelope, bringing out the best in their respective societies in pushing towards the adoption of these instruments, building a mechanism, such as our Commission.¹²⁷

126. David Harris, *Regional Protection of Human Rights: The Inter-American Achievement*, in INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW POLITICS MORALS 875 (Henry Steiner & Philip Alston eds., 2d. 2000).

127. Padilla, *supra* note 110, at 58.

Although the outcome of the persistence and perseverance of civil society in the Americas may have not resulted in a human rights mechanism akin to Europe, their efforts have shown that a human rights mechanism is possible even in a hostile environment. This is the lesson from the Americas and it can be a source of motivation for the ASEAN people.

3. Africa

a) Origin and Mechanics of the System

The newest and least developed compared to the European, and Inter-American mechanisms is the African system. It is also the most distinctive and most controversial among the three mechanisms. It was in 1981 when the Assembly of the Heads of States and Government of the Organization of African Unity (now African Union) adopted the African Charter on Human and Peoples' Rights.¹²⁸ It entered into force in 1986. To date, there are 53 African States which are parties.¹²⁹

The Organization of African Unity (OAU),¹³⁰ the predecessor of the African Union is the official regional body of all African States. It was inspired by the anti-colonial struggles of the late 1950s and was primarily aimed at the eradication of colonialism. The emergent African States created it to be a political bloc to facilitate intra-African relations and to forge a regional approach to Africa's relationships with external powers. It was in 1963 that OAU's charter was adopted through a conference of the Heads of State and Government. All African States are members of the OAU, now African Union.¹³¹

Unlike the United Nations Charter, the African Charter does not make a provision for the enforcement of its principles. It emphasizes cooperation among Member States and peaceful settlement of disputes, and includes among its purposes, the promotion of the *unity and solidarity* of African states, as well as the defence of *their sovereignty, their territorial integrity and independence*.¹³² This inviolability of territorial borders, expressed through the principle of non-interference in internal affairs, has been the norm of the African system.¹³³

128. African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986 [hereinafter African Charter].

129. STEINER & ALSTON, *supra* note 96, at 920.

130. 479 U.N.T.S. 39, entered into force Sept. 13, 1963.

131. *Id.* at 921.

132. African Charter, art. 2.

133. *Id.*

This stance of non-interference among African States has contributed to the reluctance of Member States to aggressively promote human rights. This is most visible in the reluctance of Member States to criticize one another about human rights violations. A case in point was the failure of most African States, except for Tanzania, to denounce the abusive regime of Ugandan dictator Idi Amin.¹³⁴

However, over the last decade, there have been several peacekeeping missions and acts of interventions by African States, either independently or through a joint force, into States with systematic and serious human rights violations, particularly those States in insurgencies and civil wars. Congo and the Great Lakes region best illustrates intervention for human rights violations. Most recently, another good example in this aspect is the intervention being done in Liberia.¹³⁵

Article 45 of the African Charter grants a broad mandate to the African Commission on Human and Peoples' Rights (Commission). Four functions are noteworthy: promotion, protection, interpretation of the Charter, and performance of any other tasks which might be entrusted to the Commission by the African Union Assembly of Heads of State and Government.¹³⁶

In the African system, the Charter's insistence on negotiation notably reflects the fact that most African States are not willing to expose themselves to the possibility of a legally binding judgment being adopted concerning their *domestic* affairs. This is in keeping with the African tradition of conciliation rather than adjudication. The Charter therefore did not provide for the establishment of a court. However, the OAU Assembly of Heads of State and Government adopted an Optional Protocol in 1998 to create and African court; the Protocol requires 15 ratifications to enter into force.

Dankwa, President of the African Commission on Human and Peoples' Rights, states that a court is essential for effective protection of human rights in the region. Unfortunately however, as of 2002, three years after the adoption of the Protocol on the Establishment of a Court of Human Rights, only six countries have ratified it.

Although much criticized, the African Commission still made a significant contribution to Africa. Even if States can be faulted for their delinquency in giving reports, the other activities of the Commission — the communication procedure; promotional visits; resolutions; sessions,

134. *Id.*

135. *Id.* at 920-21.

136. Cees Flinterman & Evelyn Ankumah, *The African Charter on Human and Peoples' Rights*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 164 (Hurst Hannum ed., 1999).

conferences and studies; as well as special rapporteurs have slowly but significantly improved the human rights climate of Africa.¹³⁷

b) Learning from Africa

If the Inter-American socio-political climate is similar to the ASEAN, that of Africa's is even closer to home. Aside from both sharing a colonial past, the African norms of non-interference and non-intervention coupled with the need for dialogue and respect for sovereignty are also well-entrenched in ASEAN. ASEAN can likewise identify with the existence of insurgencies in some African countries. The proposed ASEAN Human Rights Commission, moreover, possesses powers of a very similar nature to those granted to the African Commission.

To date, however, the African system remains the weakest and much criticized mechanism among the three existing human rights mechanisms worldwide. Nevertheless, one should not leave behind the element of relative newness of the African system in ascertaining its level of effectiveness and success.

There are at least three lessons that Africa imparts to ASEAN.

First, even in a region where the norm gives preference to dialogue and non-interference, it is still possible to have a human rights mechanism that will infringe on the sovereignty of States.

Second, even if a human rights mechanism does not have an enforcement mechanism and its functions are limited to promotion, protection, monitoring, and recommendation, it can still significantly improve the human rights climate in the region.

Third, for a region that has been subjected to decades of colonization, it is a matter of regional pride and identity to be subjected to an internal human rights monitoring system which is more sensitive to the issues of governments and peoples in the region than an external monitoring system that will judge the region's human rights climate using Western standards.

The African system can be adjudged as almost ineffective if compared to the European system. However, the mere existence of the African system is proof and encouragement that the creation of a human rights mechanism is possible even in regions where economic prosperity, development, peace, and integration have not yet been fully realized.

¹³⁷. *Id.* at 17.

B. Why a Sub-regional Mechanism for Southeast Asia?

Before the strong lobby for a sub-regional mechanism came about, there were several attempts to form a regional human rights mechanism in Asia and the Pacific. One of the more prominent was initiated by the Human Rights Committee of the Law Association for Asia and the Pacific (LAWASIA). LAWASIA had organized various seminars and conferences on the feasibility of an intergovernmental human rights Commission in the South Pacific and an Asian Human Rights Commission. As a result, LAWASIA produced a *Draft Pacific Charter of Human Rights* which was inspired by the African Charter of Human and Peoples' Rights.¹³⁸ Nevertheless, due to lack of support, the initiative was momentarily placed in the back burner.

The prospects of a sub-regional mechanism originated at a LAWASIA conference in Colombo in 1979, where a proposal was made for the establishment of sub-regional commissions as a preliminary step for a regional Asian Human Rights Commission. In June 1982, LAWASIA Secretary-General Dr. D.H. Geddes proposed at a United Nations convened conference in Colombo the division of Asia-Pacific into four sub-regions, namely: the Western region (Afghanistan, Bangladesh, India, Iran, Pakistan, and Sri Lanka); the Central Region (ASEAN member countries of Southeast Asia); the South and South-eastern Region (Australia, Fiji, New Zealand, Papua New Guinea, and the countries of the Pacific); and the North and North-Eastern Region (China, Japan, North Korea, South Korea, and Taiwan).¹³⁹ It is from these geographical divisions that the initiative for a sub-regional human rights mechanism in Southeast Asia was given form.

Bañás gives ten reasons why a sub-regional arrangement will be successful in Southeast Asia:

1. The vastness and diversity of the Asia-Pacific region makes it impractical and unrealistic to think immediately of establishing a regional human rights mechanism. Sub-regional systems are viewed as a preliminary step toward regionalism;
2. Experience in other parts of the world has shown that a regional human rights agreement can be based on a pre-existing inter-governmental structure for cooperation. For instance, the European Convention is built on the Council of Europe; the American Convention is built on the Organization of American States; the African Charter is linked to the African Union; and the Arab Commission is part of the League of Arab States. It could be seen from these that the development of a regional institution includes a human rights component;

¹³⁸. Bañás, *supra* note 62, at 92.

¹³⁹. Carlos P. Medina, Jr., *Activities of the LAWASIA Human Rights Committee, in CUSTODY OF THE LAW* 164 (1994).

3. While ASEAN's creativity in dealing with issues may be admired and emulated around the world, this "success" is empty as respect for human rights is a *sine qua non* to real development;

4. The establishment of a human rights arrangement can make ASEAN look even better;

5. The idea of a human rights arrangement in the entire Asia-Pacific similar to those already in existence would take time to be realized. The establishment of sub-regional arrangements would be a pragmatic and realistic approach, particularly in areas where sub-regional governmental cooperation exists;

6. A sub-regional human rights mechanism is a way of safeguarding and strengthening a common tradition of pursuing freedom, ideals and the rule of law. Therefore, any regional or sub-regional human rights arrangement must be expressed in terms which may be able to accommodate additional rights brought about by cultural and economic diversities. It is submitted, however, that rights to be included may add but cannot diminish or detract from whatever rights are already guaranteed in other instruments like the UDHR;

7. A sub-regional mechanism can complement existing local and national laws and constitution;

8. The so-called "Asian" perspective on human rights can be enhanced or preserved in an Asian or ASEAN human rights arrangement;

9. A sub-regional arrangement means pooling of resources. Member-countries can help one another with promotion, training of people and dissemination of information. More exchanges in human rights activities among governments can take place; and

10. ASEAN sub-regional human rights cooperation may contribute to a more tolerant, multicultural and pluralistic society. This can lead to a more lasting peace which can contribute to making ASEAN a more attractive economic and investment area.¹⁴⁰

It can therefore be said that the formation of the sub-regional mechanism is not an end in itself but a means to an end, which is the eventual establishment of an Asian human rights mechanism.

C. Options for an Appropriate Human Rights Mechanism

Aside from the proposed ASEAN Human Rights Commission, the lobby groups in the Working Group for an ASEAN Human Rights Mechanism saw other possibilities or options for a sub-regional arrangement in Southeast Asia. They are:

¹⁴⁰ Bañas, *supra* note 62, at 88-90.

1. *Establishment of an ASEAN Human Rights Commission and an ASEAN Human Rights Court.* In this option, the Commission functions like the Inter-American Commission of Human Rights where it can screen and channel cases to the Court. The Court can make binding decisions with the possibility of sanctioning a state which has violated human rights.¹⁴¹

2. *Establishment of an ASEAN Human Rights Court.* The Court would be elected from candidates preferably suggested by governments and/or non-governmental organisations. It would have judicial powers to make binding decisions with concomitant sanctions. Member governments and/or individuals may complain against another State directly in the Court. Complaints may be subjected to prior acceptance of the Court's jurisdiction by the State complained against. There would be no Human Rights Commission similar to the European system as cases would be directly screened by the Court.¹⁴²

3. *Establishment of an ASEAN Human Rights Commission and an ASEAN Human Rights Committee of Ministers or Assembly of Heads of Government.* The Commission's role is to monitor, recommend and mediate. Its members are drawn from elected candidates, preferably nominated by governments and non-governmental sectors. The Commission can channel cases to the Committee or Assembly as the political arm empowered to make binding or "cogently persuasive" decisions against the State complained against. Member governments and/or individuals may have access to the Committee or Assembly. This may be subject to prior declaration (acceptance of the Committee's or Assembly's powers) by the State complained against. The members of the Committee or Assembly would be elected or nominated by Governments as a political organ rather than as a judicial organ.¹⁴³

4. *Establishment of an ASEAN Human Rights Commission, an ASEAN Human Rights Court and an ASEAN Committee of Ministers or Assembly of Heads of Government.* The powers of each organ are as mentioned above. The difference is that the Committee of Ministers or Assembly of Heads of Government would be an additional means of pressuring the State which has violated Human Rights for accountability. The Committee or Assembly may also be empowered to help monitor and enforce court judgments, including expelling the State in breach from ASEAN.¹⁴⁴

5. *Establishment of National Human Rights Commissions and Concretisation of their Network.* This is already taking place to some extent there being human rights institutions in the Philippines, Indonesia, Malaysia and

¹⁴¹ Muntarhorn, *Human Rights Mechanism, supra* note 63, at 25.

¹⁴² *Id.* at 26.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 26-27.

Thailand. However, other countries need to be pressured to establish such mechanisms based upon the principles of independence and pluralism.¹⁴⁵

Promotion of Regional Human Rights Activities. This approach is being less targeted towards establishing a human rights mechanism but it is more oriented towards confidence-building activities, such as training of law enforcers on human rights and human rights education. To date, these activities are already taking place. Its goal is to create networks which would eventually lead to national mechanisms and would progress to a regional mechanism.¹⁴⁶

7. *An ASEAN Commission for the Promotion and Protection of the Rights of Women and Children.* In the interim, while ASEAN is still hesitant to grant a broad mandate to a Commission, powers in relation to women's rights and children's rights in view of the fact that all ASEAN countries are parties to CRC and nearly all ASEAN countries are parties to CEDAW. These powers could be expanded gradually to cover a comprehensive range of civil, political, economic, social and cultural rights in regard to all groups.¹⁴⁷

While the seven above-mentioned options are being considered and debated in ASEAN, what was Such Draft Agreement will be examined in the succeeding Chapter.

IV. SCRUTINIZING THE PROPOSED ASEAN HUMAN RIGHTS COMMISSION

The Working Group drafted in 2000 the Draft Agreement on the Establishment of an ASEAN Human Rights Commission.¹⁴⁸ The Draft Agreement was formally submitted to the ASEAN Foreign Ministers and has been the subject of regional consultations with governments, academics, and civil society in Indonesia in 2001, Philippines in 2002, and Thailand in 2003.¹⁴⁹

145. *Id.* at 27.

146. *Id.*

147. *Id.* at 25.

148. Muntarbhorn, *Engaging Challenge*, *supra* note 37, at 7.

149. Summary of Proceedings, Third Workshop for an ASEAN Regional Mechanism on Human Rights, Bangkok, Thailand ¶ 2 (May 28-29, 2003).

A. Underlying Principles and Elements

Article 1 of the Agreement states the purpose of the sub-regional treaty to establish a human rights mechanism to promote and protect human rights.¹⁵⁰ In Article 2 therein, no listing of the substantive rights to be protected in the Agreement is given; what is mentioned is that the Agreement is inspired by the International Law on Human Rights, referring in particular to relevant instruments as the 1948 Universal Declaration of Human Rights (UDHR),¹⁵¹ the 1986 UN Declaration on the Right to Development,¹⁵² the 1993 Vienna Declaration and Programme of Action on Human Rights¹⁵³ and the treaties to which member countries have acceded.¹⁵⁴

There are two points to consider in this formulation. First, the Draft focuses on the establishment of a human rights mechanism rather than on the creation of a general human rights treaty. This explains why the Agreement does not provide an explicit listing of rights, a clear departure from the treaties found in the other three human rights regimes. Second, the human rights documents from which the Agreement drew inspiration are quite limited as mentioned in the Agreement.

In analyzing these provisions, it is important to underscore the interrelatedness of these two points. The absence of the explicit listing of rights as well as the limited mention of human rights documents (which happens to be instruments that are unanimously acceptable to ASEAN) from which the Agreement is based shows a definite and strategic purpose. It can be inferred that the Agreement was designed foremost to accommodate ASEAN's regional particularities without necessarily deviating from the concept of universality, interdependence, interrelatedness and indivisibility of human rights. The formulation can thus be seen as tactical so as not to alienate some ASEAN countries who have not ratified some of the universal human rights treaties. Furthermore, the formulation under the Agreement neither precludes nor rules out a more comprehensive listing of rights in the future if the region becomes ready for an ASEAN Human Rights Treaty or Convention.

150. Draft Agreement on the Establishment of the ASEAN Human Rights Commission, art. 1. (2000) available at www.aseanhrmech.org/WGPages/Database%20Files/Word%20Format/documents/DraftAgreement.doc [hereinafter Draft Agreement].

151. G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948).

152. G.A. Res. 41/128, annex, 41 U.N. GAOR Supp. (No. 53) at 186, U.N. Doc. A/41/53 (1986).

153. U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993).

154. Draft Agreement, art. 2.

True, from the formulation itself, ASEAN manifests a different track compared to the approach of the other regional mechanisms. However, in a region with a very strong adherence to Asian values and a strong attachment to the ASEAN Way, this formulation will be less threatening and more encouraging for States to accede to having a Commission.

B. Composition

The Commission will be composed of seven members who shall act independently.¹⁵⁵ The number of the Commission members for ASEAN is similar to the number of members in the Inter-American Commission.¹⁵⁶ They are to be elected by the Ministers of Foreign Affairs of the Contracting Parties from a list of candidates proposed by their governments based on consultations with civil society, including non-governmental organizations.¹⁵⁷ Only nationals of Contracting States may be nominated¹⁵⁸ and those Commission members who will be elected have a single non-renewable term of five years.¹⁵⁹ In choosing the members of the Commission, gender balance will be borne in mind.¹⁶⁰

It is readily apparent that the Commission's method of selection is quite similar to the Paris Principles,¹⁶¹ which being followed by national human rights institutions. This method of selection is supposed to guarantee independence and pluralism of the membership in the Commission.

C. Mandate

The functions and powers of the Commission are to:

- a. develop human rights awareness;

¹⁵⁵ *Id.* art. 3.

¹⁵⁶ American Convention on Human Rights, art. 34, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force July 18, 1978, reprinted in BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992) [hereinafter American Convention].

¹⁵⁷ Draft Agreement, art. 7 (1).

¹⁵⁸ *Id.* art. 7 (2).

¹⁵⁹ *Id.* art. 8.

¹⁶⁰ *Id.*

¹⁶¹ Paris Principles, Annex, A/RES/48/134, 85th Plenary Meeting, art. 4 (Dec. 20, 1993), available at http://www.asiapacificforum.net/about/paris_principles.html (last visited Feb. 15, 2004).

- b. recommend to governments of Contracting Parties adoption of measures in favor of human rights;
- c. prepare studies or reports on human rights;
- d. request the government of the Contracting States to provide it with information on the measure adopted by them in relation to human rights;
- e. investigate on its own initiative alleged human rights violations;
- f. respond to inquiries from Contracting States on matters concerning human rights and, where possible, to provide those States with the advisory services they request;
- g. take action on petitions and communications from States and individuals/groups concerning allegations of human rights violations;
- h. interpret all the provisions of the Agreement;
- i. submit an annual report to the Ministers of Foreign Affairs of the Contracting States; and
- j. perform any other tasks concerning the promotion and protection of human rights which may be entrusted to it by the Heads of State and Government and the Ministers of Foreign Affairs of the Contracting States.¹⁶²

The mandate of the Commission is a combination of the mandates of both the Inter-American¹⁶³ and African¹⁶⁴ Commissions. It is interesting to note, however, that the most controversial function of the ASEAN Commission is its power to investigate on its own initiative alleged violations of human rights by a contracting State.¹⁶⁵ Considering the ASEAN culture of adherence to the principles of non-intervention and non-interference, this provision is the most blatant disregard for the ASEAN Way. What makes it very controversial is that it does not only intrude into a State's internal affairs; it intrudes into a State's internal affairs even in the absence of a complaint or communication from another State or individual/groups.

Aside from this investigative power, the Commission can likewise side step the boundaries of non-intervention and non-interference through its powers to:

- a. recommend to governments of Contracting Parties adoption of measures in favour of human rights;

¹⁶² Draft Agreement, art. 11.

¹⁶³ American Convention, art. 41.

¹⁶⁴ African Charter, art. 45.

¹⁶⁵ Draft Agreement, art. 11(e).

b. request the government of the Contracting States to provide it with information on the measure adopted by them in relation to human rights; and

c. take action on petitions and communications from States and individuals/groups concerning allegations of human rights violations.

To note, the first and second powers above-mentioned might in some way be acceptable to ASEAN as it is now. Nevertheless, the Commission's *motu proprio* power of investigation on allegations of human rights violations as well as its power to take action on petitions and communications concerning allegations of human rights violations might be the major stumbling blocks in gaining a sub-regional consensus in having a human rights mechanism.

This is not to say that the ASEAN Way should be favoured; this is completely not the case. However, since most ASEAN governments still adhere to the much revered concept of sovereignty and it will reasonably take time for ASEAN to rid itself of old beliefs, it will take longer for ASEAN to have a Commission as powerful as what the Draft Agreement envisions it to be with all ASEAN countries being parties to the Agreement.

D. Procedure and Enforcement

Since the Commission is not a court of law, it can only make recommendations.¹⁶⁶ Access to the Commission is subject to the rules on exhaustion of domestic remedies before the Commission can take cognizance of the complaint or communication unless the exercise of such remedies are deemed ineffective or inutile.¹⁶⁷

When the Commission finds the petition or communication admissible, it proceeds on the basis of a friendly settlement first.¹⁶⁸ Failing that, the Commission will then proceed to make findings on whether human rights violations have taken place. These findings are deemed simply as persuasive recommendations and not judgements.¹⁶⁹

To add to the persuasive effect of the recommendations, the Commission can make cross references of its findings to the Foreign Ministers for additional pressure for compliance. There can also be another cross-referral to the Heads of Government if needed.¹⁷⁰

166. *Id.* art. 18(1).

167. *Id.* art. 14.

168. *Id.* art. 16 (2).

169. *Id.* art. 18 (1).

170. *Id.* art. 18 (4).

There are two points to highlight as regards the procedural and enforcement provisions of the Commission.

First, the concept of friendly settlement is consonant with the Treaty of Amity and Cooperation existing among ASEAN States which says that in dispute settlement, States should "refrain from the threat or use of force and shall at all times settle disputes among themselves through friendly negotiations."¹⁷¹ The procedure in the Commission, however, is not only confined to States. It also involves communications or petitions from individuals/groups. If ASEAN states accede to the Agreement, this will be the first time that such a remedy will become available for the ASEAN peoples and ASEAN states.

The ASEAN is generally wary when it comes to the right of individuals to lodge communications against their countries particularly in the realm of civil and political rights. This can be seen in the status of ratifications of the First Optional Protocol of the ICCPR in the ASEAN.¹⁷² Among the four ASEAN countries that have either ratified or signed the ICCPR which consists of Cambodia, Lao PDR,¹⁷³ Philippines, and Vietnam, only the Philippines ratified the First Optional Protocol which allows individual redress of human rights violations to the Human Rights Committee.¹⁷⁴

This wariness can also be seen in ASEAN's ratification of the Optional Protocol to CEDAW.¹⁷⁵ All ASEAN States, except Brunei, have ratified CEDAW. However, when it comes to CEDAW's Optional Protocol which allows individuals or groups to send Communications to the CEDAW Committee for alleged violations of women's rights, only Thailand has ratified it while Cambodia and Indonesia have just recently signed it.¹⁷⁶ It is therefore clear that ASEAN is still unwilling to empower its people to go to an international body to complain about their governments.

Second, although legally speaking, these recommendations have no binding effect and direct encroachment on sovereignty, they nevertheless still subject the State concerned into external scrutiny and interference. These recommendations thus directly counter the ASEAN Way as embodied in the

171. Treaty of Amity and Cooperation, art. 13.

172. G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, entered into force March 23, 1976.

173. Lao PDR has only signed the First Optional Protocol of the ICCPR.

174. Office of the United Nations High Commissioner for Human Rights, *Status of Ratification of the Principal Human Rights Treaties as of Jul. 7, 2003* available at <http://www.unhchr.ch/pdf/report.pdf> (last visited Aug. 23, 2003).

175. Optional Protocol to the Convention on the Elimination of Discrimination Against Women, G.A. Res. 54/4, Annex, 54 U.N. GAOR Supp. (No. 49) at 5, U.N. Doc. A/54/219 (Vol. 1) (2000).

176. *Id.*

Treaty of Amity and Cooperation which asserts "the right of every State to lead its national existence free from external interference, subversion or coercion."¹⁷⁷ The Commission's power of "peer criticism"¹⁷⁸ might thus be seen as something unwelcome among the ASEAN nations.

E. Entry into Force

Ratification of the Agreement by at least three ASEAN countries brings the Agreement into force. The mandate, however, of the Commission pertains only to the ratifying countries.¹⁷⁹ The Agreement becomes effective on the 30th day after the third ASEAN country ratifies it.¹⁸⁰ No reservations are possible.¹⁸¹

The Agreement follows an *x-y formula*¹⁸² to be able to enter into force, leaving it open for other States to accede in the future. There is some criticism in this *x-y formula* that the Draft Agreement proposes. Some ASEAN experts assert that since ASEAN's decision-making process is based on consensus, any proposed mechanism to ASEAN should be acceptable to all the ten ASEAN governments.¹⁸³ It is suggested that if some governments are unable to accept the proposal, confidence building and/or compromises would be needed to allow the members to attain a common level of comfort before the agenda can move forward.¹⁸⁴ Thus, the formula itself is not very ASEAN since it is exclusionary and not inclusive; it is more inflexible than consensus-building.

V. IS THE PROPOSED COMMISSION TOO POWERFUL FOR ASEAN STATES?

ASEAN governments have received the proposal of the Draft Agreement for an ASEAN Human Rights Commission in 2000. Muntarbhorn sees ASEAN's response to the proposal in this manner:

177. Treaty of Amity and Cooperation, art. 2(b).

178. Draft Agreement, art. 2(b).

179. Working Group for an ASEAN Human Rights Mechanism, Report on the Experts' Meeting on the Draft Agreement on the Establishment of the ASEAN Human Rights Commission, Bangkok, Thailand ¶ 2 (May 7-8, 2000).

180. Draft Agreement, art. 23.

181. *Id.*

182. *Id.* art. 24.

183. Ignacio & Medelina Hendytio, *The Civil Society Initiative to Establish an ASEAN Human Rights Mechanism: An Assessment (Working Draft)* 7 (July 2003).

184. *Id.*

[T]here has been no official reaction to the proposal in terms of a Yes or No. However, in 2001 in the annual ministerial communiqué, the ASEAN Foreign Ministers stated that "we agreed that ASEAN-ISIS¹⁸⁵ should also be involved in the discussion especially in the broader context of a People's ASEAN".

At the beginning of 2002, ASEAN-ISIS organized a Colloquium on Human Rights where the idea of the ASEAN Human Rights Commission was introduced and discussed. A position is awaited from ASEAN-ISIS on the issue of the proposed ASEAN Human Rights Commission.

Perhaps the best way to analyze the (lack of) response from the ASEAN Governments on the issue is to watch the body language. The prolonged silence on the issue implies that the Governments are not yet ready to opt for the ASEAN Human Rights Commission, at least in the short term. Other options may thus need to be tabled.¹⁸⁶

Judging from the reaction of ASEAN, it is clear that the silence or its lack of response is an indication of its unwillingness to welcome the proposal in the short term.

For a sub-region which generally advocates Asian values and adheres to the ASEAN Way of diplomacy, a human rights Commission with monitoring, investigative and recommendatory powers is still threatening for governments. Thus, in the meantime, there are at least three interim measures that are being discussed in the region.

The first being discussed among governments, academics and civil society in the region is that pending the establishment of the ASEAN Human Rights Commission, an ASEAN Commission for the Promotion and Protection of the Rights of Children and Women be created.¹⁸⁷ This is seen as a momentary compromise since the powers of this Commission could be gradually expanded to cover a comprehensive range of civil, political, economic, social, and cultural rights with regard to all groups.¹⁸⁸ It is also believed that it will be easier to get a consensus among the ASEAN

185. ASEAN-ISIS (ASEAN Institute of Strategic and International Studies) is an association of non-governmental organizations registered with the Association of Southeast Asian Nations. Its purpose is to encourage cooperation and coordination of activities among policy-oriented studies of, and exchanges of information and viewpoints on, various strategic and international issues affecting Southeast Asia's and ASEAN's peace, security and well-being. It has contributed significantly to the emergence of an important regional and international political process - that of track two diplomacy.

186. Muntarbhorn, *Roadmap*, *supra* note 22, at 4.

187. Summary of Proceedings, Second Workshop for an ASEAN Regional Mechanism on Human Rights, Manila, Philippines ¶ 19 (June 14-15, 2002).

188. Muntarbhorn, *Human Rights Mechanism*, *supra* note 63, at 25.

countries since all of them ratified the CRC and all except Brunei ratified CEDAW.¹⁸⁹

The second proposed option in the interim, leading to the eventual creation of an ASEAN Human Rights Commission, is having functional cooperative groupings on issues of common concern. Aside from the rights of women and children, the ASEAN is seen to focus on the rights of migrant labour, the issue of human trafficking, the problem of terrorism in the aftermath of the September 11 terrorist attack, and the effects of internal conflict on human rights.¹⁹⁰

The third proposed option as a preliminary step which more ASEAN stakeholders are voicing out is for the existing national human rights institutions in the ASEAN to come together and constitute them into an informal mechanism.¹⁹¹ To date, Philippines, Indonesia, Malaysia, and Thailand already have NHRIs. Myanmar and Cambodia are considering having their own. It is believed that Myanmar and Cambodia may elect to join this informal mechanism in the future, pursuant to the *x-y formula*.¹⁹²

VI. CONCLUSION

To determine the appropriateness of a human rights mechanism, it is important to examine the region's history, socio-cultural context, political situation, and human rights environment. In considering all these and in evaluating the merits of the proposed ASEAN Human Rights Commission, it can be concluded that although having the Commission in ASEAN is desirable, it is not at the moment unanimously acceptable to the ten ASEAN countries. The proposal is still premature. ASEAN always operates collectively and by consensus. Anything contrary to this appears to be unacceptable to most ASEAN governments.

Thus, in the meantime, to be able to arrive at a compromise, a Commission for the Promotion and Protection of Rights of Children and Women can be created or ASEAN can focus on thematic functional cooperative groupings on issues of common concern or have an informal mechanism through the network of its NHRIs while it is not yet unanimously ready to proceed with the mechanism.

Perhaps for democratising societies like the Philippines, Thailand, Indonesia and even Cambodia, the proposed ASEAN Human Rights

189. *Id.*

190. Second Workshop, *supra* note 188, ¶ 20.

191. Personal Interview with Carlos P. Medina, Secretary-General, Working Group for an ASEAN Human Rights Mechanism (Aug. 28, 2003).

192. *Id.*

Commission can be considered appropriate; and in following the *x-y formula*, these like-minded countries may go ahead and have the mechanism. It is akin to a coalition of the willing. However, since the ASEAN spirit of collective action and consensus based decision-making is still very strong in the region, it is highly improbable that "willing" ASEAN governments will risk having a mechanism that will leave behind the "unwilling" ASEAN states.

As to the question of ASEAN's readiness for the establishment of a sub-regional human rights mechanism in the form of an ASEAN Human Rights Commission, it is well to note that ASEAN is ready to welcome interim forms of mechanisms while it is still preparing itself for the eventual creation of a Commission. In reading ASEAN's body language, it is important to meet governments where they are at and at their level of comfort. Thus, a Commission focusing on children's and women's rights is more promising since all governments have ratified the CRC and only Brunei has not ratified CEDAW. Other functional groupings on issues that are relevant to ASEAN can be a springboard for the eventual creation of the proposed Commission. In the same manner, an informal mechanism formed by NHRIs can also be a momentary alternative.

A. Recommendations

To ensure the eventual establishment of an ASEAN Human Rights Commission, the author proposes the following recommendations with respect to the following respective actors:

4. Non-Government Organisations and Civil Society

NGOs and civil society should continually follow a step-by-step, multi-track and multi-sectoral approach in lobbying for the establishment of the ASEAN Human Rights Commission. They should continually involve governments and the peoples of ASEAN in their engagements.¹⁹³

This can be done through the following methods:

- a. continuous engagement with governments through constant dialogue, confidence building measures, human rights education and awareness, and giving concrete recommendations like coming up with an ASEAN Declaration on Human Rights based on existing constitutions of ASEAN

193. Plan of Action Towards the Establishment of an ASEAN Human Rights Mechanism, Oct. 11, 2002, Strasbourg, France (for text see Working Group for an ASEAN Human Rights Mechanism 2003 Brochure).

countries and generally accepted international human rights instruments in ASEAN;¹⁹⁴

b. broadening the support base/constituency of the lobby group by engaging with ASEAN parliamentarians, the ASEAN People's Assembly, national human rights institutions, and civil society groups;¹⁹⁵

c. identifying new issues and challenges in ASEAN by being sensitive to the human rights issues that are very relevant to ASEAN like violations of economic, social and cultural rights, particularly the right to life and the right to development emerging from the current state of economic development and globalization;¹⁹⁶ and

d. maintaining the lobby group's position *vis-à-vis* ASEAN by continually engaging with ASEAN Foreign Ministers and co-organizing human rights workshops with ASEAN governments.¹⁹⁷

2. The ASEAN States

Among the ten ASEAN states, the governments of Indonesia, Philippines and Thailand can be seen as the champions for the establishment of the ASEAN Human Rights Commission. As the *willing* ASEAN states, they should continually use the ASEAN Way of diplomacy to convince the other *unwilling* governments to seriously consider the advantages of having a human rights commission in the region. These three states can have a strong persuasive effect considering they are three out of the five original members of ASEAN (the other two being Singapore and Malaysia).

3. The United Nations

The UN has always been supportive in establishing suitable regional arrangements in the Asia-Pacific region. Aside from its now annual Asia-Pacific Workshops on human rights, it should give more focus on the ASEAN region where there is already a strong momentum and dialogue regarding the setting-up of a human rights mechanism.

It would be helpful in the campaign if the UN could also annually conduct ASEAN workshops on human rights. These workshops will serve as a follow-up to the annual Track III dialogues being done in the sub-region. Moreover, these UN sponsored workshops will add pressure to ASEAN

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

governments to seriously consider setting up an ASEAN Human Rights Commission.

B. ASEAN and Human Rights in 2020

The proposal for an ASEAN Human Rights Commission of ASEAN peoples with the assent of some ASEAN governments is already a milestone in the history of ASEAN.¹⁹⁸ Never before has this idea been directly discussed in the sub-region.¹⁹⁹ However, due to the region's diversity and complexity, while some States are ready to take the next step and support the creation of the Commission, many other States are still wary as to giving way to external accountability through supra-national arrangements on human rights.

While it is true that having a Commission in the region in the next two years is next to impossible, a conservative estimate of ten to fifteen years is not overly ambitious. Perhaps it is even possible that the region may meet the aspirations of ASEAN Vision 2020 of having "by the year 2020, established a peaceful and stable Southeast Asia where each nation is at peace with itself and where the causes of conflict have been eliminated, through abiding respect for justice and the rule of law and through the strengthening of national and regional resilience";²⁰⁰ and one way of achieving this is through a regional human rights mechanism.

ASEAN has constantly been changing, slow as it may seem. Unlike the other three regional mechanisms that spent decades to achieve what they have now, ASEAN has not yet spent a decade in this campaign considering the initiative just began in 1996.

The road towards the establishment of the ASEAN Human Rights Commission is a slow climb. However, the Commission's birth is a matter of certainty. The dialogue has started and the momentum has been gathering. Moving forward is inevitable. It is just a matter of time; and with the present visible changes in ASEAN, even if it is a step-by-step process, it is not optimism but pragmatism which dictates that the ASEAN Commission may be already established by the year 2020.

198. Ignacio & Hendyio, *supra* note 183, at 17.

199. *Id.*

200. ASEAN Vision 2020, *supra* note 23.