

CIVIL SOCIETY'S POSITION PAPER ON ASEAN HUMAN RIGHTS DECLARATION

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I. INTRODUCTION

Under Article 4.2 of its Terms of Reference (ToR), the ASEAN Intergovernmental Commission on Human Rights (AICHR) has been mandated “to develop an ASEAN Human Rights Declaration (AHRD) with a view to establishing a framework for human rights cooperation through various ASEAN conventions and other instruments dealing with human rights”.¹

The Solidarity for Asian People’s Advocacy Task Force on ASEAN and Human Rights (SAPA TF-AHR), a coalition of more than 70 non-governmental organizations in Southeast Asia, welcomes the drafting of the AHRD. We are committed to assist the AICHR and the Drafting Group in this important historical endeavour for the peoples in the Southeast Asian region. We therefore wish to submit this position paper as part of our contribution to the AHRD for the consideration of the AICHR and the Drafting Group.

This position paper sets out the views and perspectives of the SAPA TF-AHR as to the proposed principles and the drafting process that should guide the AICHR and the Drafting Group in drafting the AHRD.

Like its predecessors in other regions throughout the world, the AHRD should be inspired by the Universal Declaration of Human Rights (UDHR) and take into account the obligations of ASEAN Member States as members of the United Nations and under its Charter to promote universal respect for, and observance of, human rights and fundamental freedoms. It should also enshrine universal human rights principles and rules as provided in the International Bill of Human Rights² and other universal human rights treaties, declarations and standards. Under no circumstances may the standards for human rights in the AHRD fall below those provided by universal human rights instruments. Instead, ASEAN as a regional association should aspire to commit itself to higher standards of human rights and contribute to the advancement of the promotion and protection of human rights globally.

¹ Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights (“ToR”), Article 4.2.

² The International Bill of Human Rights consists of the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and its Optional Protocol, and the International Covenant on Civil and Political Rights (ICCPR) and its two Optional Protocols.

II. GUIDING PRINCIPLES IN FRAMING THE AHRD

The ASEAN Charter sets out that all ASEAN Member States shall act in accordance with a set of principles, including “*adherence to the rule of law, good governance, the principles of democracy and constitutional government (Article 2.2(h)); respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice (Article 2.2(i)); and upholding the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN Member States (Article 2.2(j)).*”

In addition, the ToR of the AICHR obliges it, including when drafting the AHRD, “to uphold international human rights standards as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and international human rights instruments to which ASEAN Member States are parties” (Article 1.6)

The SAPA TF-AHR calls upon the AICHR to ensure that the AHRD is drafted with the guidance of at least six central principles that will create a strong culture of human rights in the ASEAN region and lead to human rights-sensitive regional policies by taking into account universal human rights law and standards.

Principle 1: Compliance with international human rights law and standards

The SAPA TF-AHR submits that the basis of ASEAN’s normative framework of human rights should be in compliance with international human rights law and standards, and in particular that human rights standards in ASEAN are to be no lower than those at the international level. Moreover, in developing its human rights standards, ASEAN should take cognizance of the latest developments in human rights law and standards internationally, including in other regions. In this regard, ASEAN as the latest intergovernmental body that is going to adopt a regional human rights declaration, should strive to commit to the highest human rights standards in line with the international development of human rights.

The term ‘other instruments dealing with human rights’ on which (among other standards) the AICHR must base the AHRD under Article 4.2 of its TOR, as mentioned above, should be interpreted as referring to international human rights instruments, including the UDHR, the ICCPR, the ICESCR, and other international human rights treaties and standards.

Principle 2: Human dignity

Pursuant to Article 1 of the UDHR, which proclaims that “All human beings are born free and equal in dignity and rights”, as reiterated in the Preamble of the two international Covenants, human dignity should be the key principle that underpins the AHRD since all human rights derive from the inherent dignity of the human person. The respect for ‘human dignity’ is also upheld in at least six Constitutions of the ASEAN Member States as illustrated in Annex 1.

Principle 3: All human rights are universal, indivisible and, interdependent and interrelated

The universality of human rights is reflected in the very name of the Universal Declaration of Human Rights (UDHR), and in the fact that it is proclaimed “as a common standard of achievement for all peoples and all nations.” The Vienna Declaration and Programme of Action (VDPA) reaffirms the universal nature of all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law.³ Because individual states have sometimes used concepts such as cultural relativism as a convenient pretext for denying and violating human rights, it is important that the application of universal human rights should go beyond one’s own national and regional particularities and various historical, cultural and religious backgrounds. As expressed in Article 5 of the VDPA, “The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis”.

Further, under the principle of interdependency and interrelatedness of all human rights, “the promotion and protection of one category of rights should never exempt or excuse States from the promotion and protection of the other rights”.⁴ In other words, duties of states arising from one particular right are inseparable from and often overlap duties arising from other rights. Therefore, the fulfilment of one right often depends, wholly or in part, upon the fulfilment of others. Human rights are also indivisible in the sense that rights do not exist in isolation and that one human right cannot be exercised at the expense of another.

As noted, Article 1.6 of the AICHR’s ToR obliges it to uphold, among other standards, those of the VDPA. Moreover, the TOR explicitly refers to “respect for international human rights principles, including universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms (Article 2.2).

The AHRD should reflect this principle, as provided in the VDPA.

International law acknowledges the principles of independence, sovereignty and non-interference, and there is also a widespread acknowledgment across the globe of the need to respect different cultures. Article 2.3 of the TOR recognises, rightly, “that the primary responsibility to promote and protect human rights and fundamental freedoms rests with each Member State.” This is reflected in the principle of complementarity, upheld by all human rights treaty bodies and courts, under which they only admit individual cases for consideration once domestic remedies have been exhausted. However, there is no “sovereign right to violate human rights” - it is similarly accepted universally that when a state fails to live up to its responsibility to respect and protect human rights in its territory or within its jurisdiction, such a state can no longer claim that its sovereignty, right to non-interference or unique culture is compromised by regional or international human rights mechanisms stepping into the breach and

³ General Assembly, Vienna Declaration and Programme of Action (VDPA), A/CONF.157/23, 12 July 1993, Article. 1.

⁴ See for instance, UN Commission on Human Rights, Resolution 2000/67, 26 April 2000, Preamble.

exercising their duty to protect those whose rights have been violated or who are facing such violations.

The AHRD should reflect these principles.

Principle 4: Equality and non-discrimination

The principle of equality and non-discrimination is embodied in practically every international human rights instrument; not least Article 7 of the UDHR, Articles 2(1) and 26 of the ICCPR and Article 2(2) of the ICESCR. The principle calls for the assurance that as equal human beings, no one shall be subjected to any form of discrimination on grounds such as race, colour, ethnicity, gender, age, language, sexual orientation, religion, political or other opinion, national, social or geographical origin, disability, property, birth or other status in the enjoyment of their human rights.

ASEAN acknowledges the significance of the principle of equality and non-discrimination by enshrining it in the ASEAN Charter, not least Article 1(11) which provides an equitable access to opportunities for human development, social welfare and justice.

As part of the bedrock principle of equality and non-discrimination, actions aimed at advancing vulnerable or disadvantaged groups, is encouraged until equality is achieved, and does not constitute discrimination.⁵

The AHRD should therefore include a strong and unequivocal provision for equality and against discrimination in the enjoyment of human rights for which it provides.

Principle 5: Democracy

Article 1(7) of the ASEAN Charter provides that all ASEAN Member States adhere to the principles of democracy, the rule of law and good governance, respect for and protection of human rights and fundamental freedoms.

Article 21(3) of the UDHR, for instance, states: “*the will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures*”. This right is also provided in Article 25 of the ICCPR and elsewhere.

Democracy and good governance are essential preconditions for the building of a free society based on human rights and the rule of law. In an explicit manner, the UN General Assembly in its resolution 59/191 recognises that “*the respect for human rights, the respect for democracy and the respect for the rule of law are interrelated and mutually reinforcing*”.⁶ It is in a truly democratic society alone that all human rights and

⁵ Human Rights Committee, General Comment No. 18: Non-Discrimination, 37th Session, 1989, para. 10.

⁶ UN General Assembly, “Protection of human rights and fundamental freedoms while countering terrorism”, A/RES/59/191, 10 March 2005.

fundamental freedoms are respected and protected. This is particularly relevant to countries which have experienced authoritarian regimes.

The rights of democratic governance, as recognised by the United Nations,⁷ comprises the right of the citizens to choose their governmental system through constitutional or other democratic means; the right of political participation; the right of universal and equal suffrage; transparent and accountable government institutions; the right to freedom of opinion and expression, of thought, conscience and religion, and of peaceful association and assembly; the right to freedom to seek, receive and impart information and ideas through any media; the rule of law; and the right of equal access to public service. States should ensure the protection and respect for all human rights, including those related to the right of democratic governance.

The AHRD should echo these standards to ensure a democratic and rule of law framework for human rights protection.

Principle 6: Right to development

Paragraph 10 of the VDPA unequivocally stipulates the right to development as a universal and inalienable right and an integral part of fundamental human rights. The right to development places the human person as the “central subject of development” as well as the “active participant and beneficiary” of the development process.⁸

The VDPA also clarifies, “*While development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights.*”⁹ The AHRD should echo this position, and clarify that neither under-development nor measures to facilitate or enhance development may be used as pretexts to suppress other human rights, such as freedom of expression, association and assembly and the rights of minorities and indigenous peoples.

The AHRD should provide for the right to development, ensuring its place among other human rights without either trumping or being trumped by other rights.

⁷ Commission on Human Rights Resolution 1999/57 of 27 April 1999.

⁸ UN Declaration on the Right to Development (A/RES/41/128), art. 2(1).

⁹ VDPA, Article 10.

III. THE DRAFTING PROCESS

ASEAN has aspired to promote a people-oriented ASEAN in which all sectors of society are encouraged to participate in, and benefit from, the process of ASEAN integration and community building. (ASEAN Charter, Article 1.13)

Paving a greater way for civil society participation in every aspect of ASEAN, including in direct input into ASEAN decision making processes, entails more openness and transparency by ASEAN bodies, including, but not limited to, human rights-specific ones. This would allow civil society to play a more active role in building ASEAN's commitment to human rights and fundamental freedoms. Further, in a people-oriented ASEAN, civil society will not only help shape ASEAN human rights agenda, but also help ASEAN meet its human rights commitments.

As such, the process of drafting the AHRD should be inclusive, participatory, consultative and transparent. In order to ensure this, we recommend that the AICHR and the Drafting Group:

- a. Conduct broad consultation meetings at national level with all national stakeholders, including the government, civil society organizations and national human rights institutions;
- b. Conduct broad consultation meetings at regional level that will bring together all stakeholders from the ten ASEAN countries to develop regional agreement;
- c. Make public the draft AHRD to allow comments from stakeholders before final texts are adopted;
- d. Invite human rights experts from within and beyond ASEAN to provide technical assistance and advice;
- e. Invite the United Nations Office of the High Commissioner for Human Rights to provide technical and other assistance, support and guidance.

IV. LIST OF RIGHTS AND FREEDOMS THAT SHOULD BE PROTECTED UNDER THE AHRD

The rights and freedom that should be protected in the declaration should include:

1. Right to life
2. Right to liberty and personal security
3. Prohibition of enforced disappearance
4. Prohibition of slavery, forced labour and human trafficking
5. Prohibition of torture, cruel, inhuman or degrading treatment or punishment
6. Freedom of thought, conscience and religion or belief
7. Freedom of expression and opinion
8. Freedom of information
9. Freedom of peaceful assembly and association
10. Freedom of movement and residence
11. Right to seek and obtain asylum
12. Right to a nationality
13. Freedom to found a family
14. Respect for private and family life
15. Rights of Human Rights Defenders
16. Prohibition of discrimination
17. Right to equal protection
18. Rights of women
19. Rights of children
20. Protection of minorities
21. Rights of indigenous peoples
22. Rights of the elderly
23. Rights of persons with disabilities
24. Rights of Lesbian, Gay, Bisexual and Transgender persons
25. Rights of Internally Displaced Persons
26. Right to recognition as a person and equality before the law
27. Right to an effective remedy and fair trial
28. Presumption of innocence and right of defence
29. Freedom from retroactive punishment
30. The prohibition of impunity
31. Right to participate in Government
32. Right to participate in free elections
33. Right to work
34. Rights to social security
35. Protection of migrant workers and members of their families
36. Right to an adequate standard of living
37. Right to property
38. Right to health
39. Right to education

ANNEX 1

RECOGNITION OF DIGNITY OF HUMAN PERSON IN THE CONSTITUTIONS OF 6 ASEAN COUNTRIES

Country	Provision	Reference
Cambodia	“The law shall protect the life, honour and dignity of the citizens”.	Constitution, Article 38
Indonesia	“Every person shall have the right to protection of his/herself, family, honour, dignity [...]”.	Constitution, Article 28G(1)
Myanmar	“No penalty shall be prescribed that violates human dignity”.	Constitution, Article 44
Philippines	“The State values the dignity of every human person and guarantees full respect for human rights”. “The Congress shall give highest priority to the enactment of measures that protect and enhance the right of all the people to human dignity [...]”.	Constitution, Article 2, section 11 Constitution, Article 13, section 1
Thailand	“[...] the human dignity, right, liberty and equality of the Thai people protected by the democratic tradition of Thailand [...]”.	Constitution, Section 3
Vietnam	“Citizens have the right to physical inviolability and to have their lives, health, honour and <i>dignity</i> protected by law. [...] All forms of coercion, humiliation and violation of a citizen's honour and <i>dignity</i> are strictly prohibited.”	Constitution, Article 71