Implementing Human Rights in ASEAN Countries: "Promises to keep and miles to go before I sleep"

by Li-ann Thio†

INTRODUCTION

¶1 Human rights have not figured prominently on the agenda of the nine-member Association for Southeast Asian States (ASEAN) since its inception in 1967. Rather, the pursuit of regional security and cooperative measures for promoting trade and economic development have been paramount ASEAN objectives. By insisting on a strict separation between human rights policy and trade issues, ASEAN has marginalized human rights and has consistently opposed the use by foreign states or international organizations of economic or other forms of pressure to induce change in human rights practices. ASEAN member states display an antipathy towards critical scrutiny of their human rights records—for example, in reports from the United States Department of State or nongovernmental organizations (NGOs) like Amnesty International and Human Rights Watch. ASEAN's general response has been that this

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1. As of March 1999, the current ASEAN Member States include Brunei, Burma (Myanmar), Indonesia, Laos, Malaysia, Philippines, Singapore, Thailand, Vietnam. The decision was taken at the Sixth ASEAN Summit to admit Cambodia as the tenth member of ASEAN sometime in 1999, thus fulfilling the founder's vision of "ASEAN-10" whereby all states in the region of Southeast Asia were united through membership in ASEAN.

2. In his opening address to the Twenty-Fourth ASEAN Ministerial Meeting, for example, the Prime Minister of Malaysia noted that "when the issue of human rights is linked to trade, investment and finance, ASEAN cannot but view it as added conditionalities and protectionism by other means." Joint Communiqué of the Twenty Fourth ASEAN Ministerial Meeting, July 19-20, 1991, ¶ 7 (visited May 27, 1999) <http://www.aseansec.org/politics/promm24.htm>. All ASEAN joint communiqués are available at the home page of the ASEAN Secretariat at <http://www.aseansec.org>.
constitutes foreign intervention in domestic matters, which undermines state sovereignty and violates the sacred principle of nonintervention in internal affairs. Within the context of ASEAN itself, an emphasis on harmony, compromise and consensus in ordering interstate relations helps to preserve a fraternal silence with respect to the human rights violations of member states. ASEAN policy (or lack thereof) towards human rights has been one of reticence and nonengagement.

¶2 A sea change in ASEAN policy has, however, been discernible in the last decade of this century. Although a regional or subregional human rights regime such as those found in Europe, the Americas, and Africa remains conspicuous by its absence in Southeast Asia, there is a new, clear willingness on the part of ASEAN states to engage in human rights discourse, albeit on their own terms. The 1993 World Conference on Human Rights placed the spotlight on human rights as a matter of international concern. ASEAN states did not disavow the universal character of the idea of human rights nor the noble cause of promoting human dignity it espoused. They did, however, insist that the application and mode of implementing human rights fall within the realm of national competence, subject to particular economic, social, and cultural realities.

¶3 Spokesmen from some ASEAN states, particularly Singapore and Malaysia, buoyed atop a wave of impressive economic development and growth rates, have challenged the universalist pretensions of human rights law. Under the relativistic banner of "Asian values," they champion an alternative model of domestic governance and development. This was in part a defensive response to the proclamation of a New World Order by United States President George Bush in the aftermath of the Cold War. The United States appeared to be declaring, in hegemonic fashion, the triumph of Western values, such as democracy, human rights, and market economics. The ASEAN response was also, in part, presented as a bulwark against the undesirable social problems rife in permissive Western societies, which, marked by excessive individualism and contentiousness, are viewed as products of excessive freedom unchecked by a strong sense of civic responsibility.3 By contrast, ASEAN spokesmen characterize societies based on "Asian values" as disciplined, group-oriented rather than atomized, and valuing duty to the community over the assertion of rights. These societies are further said to feature consensus-seeking and a deferential respect for public officials and institutions in the interests of public harmony. Critics contend that such arguments smack of an apology for misuse of power by authoritarian governments. The "Asian values" school has mounted a counter-offensive, critiquing human rights as a Western, ethnocentric imposition, hypocritically championed by Western states whose own human rights records are remiss not only in terms of their former colonial practices but also their contemporary "home" states of

3. See Shared Values White Paper, Cmd. 1 of 1991, Jan. 2, 1991 (presented to Parliament by Command of the President of the Republic of Singapore) (noting that "traditional Asian ideas of morality, duty and society which have sustained and guided us in the past are giving way to a more Westernised, individualistic and self-centred outlook on life.").
Implementing Human Rights in ASEAN Countries

1999

Thio: Implementing Human Rights in ASEAN Countries: "Promises to keep and miles to go before I sleep"

The glaring disparity between theory and practice is nowhere more apparent than in the field of human rights. Southeast Asia, not unlike any other part of the world, is not devoid of human rights violations, which do not escape notice abroad. The media, Internet, and NGOs have, for example, focused particular attention on the extra-judicial killings, disappearances, and tortures by the Indonesian military in East Timor, Acheh, and Irian Jaya, where separatist movements exist. Given the widespread terror campaign undertaken against Chinese minorities, the human rights situation in Indonesia was also closely scrutinized in the aftermath of the May 1998 riots. The repressive policies of the military junta in Burma (Myanmar), the State Law and Order Restoration Council (SLORC), against Mon and Karen minorities—including forced labor and forcible relocation—has also assured Burma a place in the media spotlight. SLORC's continued ruthless suppression of the political opposition, headed by the 1991 Nobel Peace Prize winner and leader of the National League of Democracy (NLD), Daw Aung San Suu Kyi, attracts continuing international attention. Finally, critics of Singapore and Malaysia highlight the governments' strict media control, libel and censorship laws, and illiberal preventive detention statutes, while Thailand struggles with problems of child labor and prostitution.

Clearly, the disagreement by ASEAN states over the content and the manner of implementation of human rights norms, and the lack of enforcement machinery pose formidable obstacles to the advancement of human rights in this region. The ASEAN stance has served to highlight the difficulties of ensuring international accountability for governments' treatment of individuals and groups, while also taking the realities of cultural diversity seriously.

This Article offers a critical review of the attitudes that ASEAN and its individual member states have displayed toward the substantive content and enforcement of human rights. It seeks to identify the obstacles to the development of human rights protection in Southeast Asia, and it suggests what the author considers to be the best strategies for constructing

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4. In commenting upon the Universal Declaration of Human Rights before the 53rd Session of the U.N. General Assembly, the Permanent Representative of Singapore noted that "[i]t is shocking to realize today that much of the Declaration was drafted then by major colonial powers who saw no contradiction between colonial rule and human rights. Double standards were present in 1948. They continue to remain in 1998." Ambassador Kishore Mahbubani, Statement on the Universal Declaration of Human Rights on 10 Dec 98, Dec 10, 1998, <http://www.gov.sg/mfa/NewYork>.

5. When the military junta known as the State Law and Order Restoration Council (SLORC) took power in Burma in 1988, it announced in June 1990 that the official English name of the country was "Myanmar" and that of the capital was changed from Rangoon to Yangon. The country is addressed as Myanmar before the United Nations and ASEAN. Demonstrations against the takeover were brutally suppressed and SLORC refused to recognize the results of the elections they held in May 1990, which was overwhelmingly won by the opposition National League for Democracy, led by Aung San Suu Kyi. The opposition continues to reject the term "Myanmar" in protest against the illegitimacy of the present regime. For the purposes of this article, "Burma" is used in preference over "Myanmar."
the most effective and realistic approach to promoting human rights in that context. It argues that despite the general shunting aside of human rights issues to the periphery of the ASEAN agenda, there is cause for cautious optimism with respect to the prospects for promoting human rights in Southeast Asia in conjunction with ASEAN. This assessment is based on a consideration of the developments that have taken place on three levels: national, international, and subregional.

¶7 In the national context, certain ASEAN states have made human rights a part of their national agendas. Both the Philippines and Indonesia have recently set up national human rights commissions, while the 1997 Thai constitution requires the establishment of such a commission by October 1999. A law to regulate the Thai human rights commission is currently in the process of being drafted.6 Both Indonesia and Thailand have, furthermore, announced national plans of action on human rights.7 Meanwhile, the Thai government has for the first time committed itself to the promotion and protection of democratic values and human rights in international fora, as Prime Minister Chavalit Yongchaiyudh declared in his 1997 foreign policy statement before parliament.8

¶8 At the international level, individual ASEAN member states have displayed a greater openness to acceding to human rights conventions and have participated vigorously in human rights debates within United Nations fora. This may be seen as an unequivocal acceptance that human rights are a matter of legitimate international concern; how this concern should be expressed, however, is still open to question.

¶9 At the subregional level, ASEAN states have departed from previous practice by discussing the issue of human rights in formal meetings, albeit stressing that human rights are contingent upon the distinct economic and cultural conditions of the region. The seed of promise for advancing human rights within the institutional framework of ASEAN was planted in the 1993 Joint Communiqué issued at the Twenty-Sixth Annual Ministerial Meetings (AMM), held a month after the Vienna Human Rights Conference. In it, the ASEAN foreign ministers expressly affirmed the Vienna Declaration9 and agreed that "ASEAN should coordinate a common approach on human rights and actively participate and contribute to the application, promotion and protection of human

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rights." They also stated that basic human rights violations could not be tolerated under any pretext and demanded that all governments should uphold humane standards and respect human dignity. Significantly, there was agreement that, in support of the Vienna Declaration, "ASEAN should consider the establishment of an appropriate regional mechanism on human rights." ASEAN parliamentarians reiterated this call for a regional human rights mechanism in October 1993, but government enthusiasm for the project later diminished. No concrete government proposal was made, nor was the issue featured in subsequent annual meetings of the foreign ministers. World attention was focused on human rights again in 1998, by the five-year implementation review of the Vienna Declaration and Program of Action and the fiftieth anniversary of the Universal Declaration of Human Rights (UDHR). In the 1998 Joint Communiqué, ASEAN ministers recalled their 1993 decision to consider establishing an appropriate regional human rights mechanism. Further, they acknowledged the efforts and dialogue conducted with a nongovernment initiative—the Working Group for an ASEAN Human Rights Mechanism—beginning in 1996. It remains uncertain whether this initiative will be consigned to the realm of rhetoric or translated into action.

\[10\] In the author's opinion, attention and effort should be directed toward establishing such a subregional human rights regime, rather than an Asian regime. Indeed, given Asia's geographical breadth, lack of shared historical past (even from the colonial era), and its varied political ideologies, legal systems, cultural-religious traditions, and levels of economic development, "Asia" is not a coherent unit. It would be a

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11. See ASEAN Inter-Parliamentary Organization Declaration on Human Rights, art. 21, reprinted in 3 ASIAN Y.B. INT'L L. 500 (1993) [hereinafter A IPO Declaration] ("It is likewise the task and responsibility of member states to establish an appropriate regional mechanism on human rights.").
14. The Secretariat of the Working Group for an ASEAN Human Rights Mechanism is located at 3/F Human Rights Center, School of Law, Ateneo de Manila University, 130 HV de la Costa SJ Street, Salcedo Village, Makati City, Metro Manila 1116, Philippines. Its email address is <ahrc@acc.ati.admu.edu.ph>.
16. The idea of "Asia" itself is European in origin. See Onuma Yasuaki, In Quest of Intercivilizational Human Rights: Universal vs. Relative Human Rights Viewed from an Asian Perspective, CENTER FOR ASIAN PACIFIC AFFAIRS 1 (Occasional Paper No. 2, March 1996). Yasuaki writes: "The very notion of Asia is not Asian, but of European origin. There is no single Asia, there are many Asians. It is commonplace to talk about the diversity of Asia and to divide Asia into four regions: East, Southeast, South and West (Near East and Middle East, to adopt a more Eurocentric terminology). However, even in such subregions there remains enormous diversity." Id. at 1–2.
Herculean task to find consensus on human rights norms in this context. Transnational regimes must be founded upon shared values, since international institutions embody their creators' willingness to adopt a cooperative approach toward common concerns. ASEAN states largely lack such a common value system. Their post-colonial governments range from Islamic absolute monarchies to military juntas to secular presidential and parliamentary forms of democracy. Given, moreover, that East Asia lacks a political infrastructure akin to the Council of Europe, the Organization of American States, or the Organization of African Unity, associating a regional or subregional human rights system with ASEAN is more realistic. This would take advantage of the existing political infrastructure and, more importantly, the established practice of working together. What binds ASEAN states is a shared pragmatism and consensual ethos in interstate relations, as well as a staunch adherence to the cardinal principle of nonintervention in the internal affairs of member states, enshrined in Article 2(c) of the 1976 Treaty of Amity and Cooperation in Southeast Asia. Although ASEAN has historically treated human rights as a matter of domestic jurisdiction and state sovereignty, the possibility of establishing a subregional protective human rights mechanism represents a significant foothold and change in thinking that should be exploited.

¶11 The task of protecting human rights in the ASEAN context is twofold. On the one hand, an ASEAN Charter of Human Rights should be formulated with the widespread consultation and participation of state and non-state actors; its standards should be compatible with international

17. The European, American and African human rights regimes operate on the assumptions that their member-states share common values. The preamble to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms refers to the like-mindedness and common heritage of political traditions shared by the governments of European countries while that of the 1969 American Convention on Human Rights reaffirms the intention of the American states "to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man". In similar fashion, the preamble to the 1981 African Charter on Human and Peoples' Rights affirms "the values of African civilization which should inspire and characterize" the conceptualisation of human and peoples' rights.


norms. On the other, a subregional protective mechanism vested with monitoring powers, allowing individuals to report alleged human rights abuses to an independent forum, is needed within ASEAN. These subregional efforts must be complimented by human rights promotion through domestic procedures and active participation in the United Nations human rights regime at the global level. Such collective fostering of a human rights culture forms the substratum of any effort to advance

human rights.

Paragraph 12 This Article advocates a three-tier national/regional/international approach to advancing human rights protection. Such an approach envisages the cooperative efforts of NGOs and the international community in engaging ASEAN states and encouraging them, both individually and as ASEAN policymakers, to improve their human rights commitments as an integral facet of good governance. Their incentive to do so would be the domestic and international rewards of a good human rights record.

Paragraph 13 Part I of this Article lays the groundwork for a contextualized response to human rights issues by providing an overview of the genesis and evolution of ASEAN in its thirty-two years of existence. Part II examines the reasons for the so-called "Asian values" school's theoretical counterchallenge to the universality of human rights, and the form that this argument has assumed. It goes on to discuss the scope of ASEAN states' engagement in the United Nations human rights regime to date. Finally, it suggests some factors—centered on developmentalism and individual duties—that might influence the construction of an ASEAN Charter of Human Rights, and highlights how they may be obstacles to the promotion of human rights. Part III deals with the attitude ASEAN states have exhibited towards the implementation of human rights among other member-states. It considers how the ASEAN preference for consensus, nonconfrontation, and adherence to the principle of nonintervention in internal affairs shapes the response of ASEAN states to human rights abusers in their midst, as well as to external critics. To assess whether the general commitment to nonintervention has weakened, it examines recent developments where certain ASEAN states have adopted differing stances towards human rights issues. Lastly, it discusses how ASEAN programmatic goals, characterized as matters of "functional cooperation," are related to human rights, and urges that this linkage be made explicit.

Part IV considers the developing institutions, processes, and initiatives that have been undertaken to construct a human rights regime. It focuses on national human rights commissions within ASEAN and the initiative, pursued by a private group of concerned individuals—the Working Group for an ASEAN Human Rights Mechanism—to promote a subregional human rights system by engaging the ASEAN Secretariat. Some observations are offered on the form such a mechanism might take. Lastly, Part V evaluates the traumatic effects of economic crises and socio-political upheavals in some ASEAN member states, and the impact that this might have on the push toward democratic reform and human rights protection.
in the region.

I. ASEAN: AN AMBIVALENCE TOWARDS HUMAN RIGHTS?

A. The Formation and Evolution of ASEAN

[§14] ASEAN, formed in August 1967 by five noncommunist Southeast Asian states of Indonesia, Thailand, the Philippines, Malaysia, and Singapore, was born "out of fear rather than idealistic convictions about regionalism." The withdrawal of colonial powers from the region had created a power vacuum and a common fear about the spread of communism, which was already entrenched in Vietnam and the People's Republic of China. ASEAN was designed to present a united front against communism, an orientation that drew the support of the United States, then engaged in a war to prevent South Vietnam from falling into the hands of the North Vietnamese communists.

[§15] ASEAN heralded a new era in a region that had previously been destabilized by the clash of national interests and the ensuing conflicts. Malaysia and the Philippines, for example, had disputed the possession of Sabah, while Indonesia pursued an aggressive policy of confrontation with the Federation of Malaysia from 1963 to 1965. After these disputes were resolved and diplomatic ties normalized, ASEAN came into being. The initial unifying bond among its member states was their common vulnerability to, and shared antipathy toward, Vietnam. ASEAN was not designed to be a military alliance, although the founding members subscribed to the idea of finding strength in numbers and sought to reduce their collective dependence on foreign powers. In addition to providing a forum for the peaceful resolution of intraregional disputes, ASEAN allowed its member states to escape their historical experience of colonial exploitation and Western nations' imperialistic maneuverings by safeguarding political and economic stability from external interference. This was to preserve the national identities of ASEAN states in accordance with their peoples' aspirations.


22. For a discussion of Indonesia's confrontation with Malaysia, which arose out of a territorial dispute stemming from Sabah and Sarawak's colonial legacy and resulted in the severance of diplomatic relations between the two countries, see generally DEWI FORTUNA ANWAR, INDONESIA IN ASEAN: FOREIGN POLICY AND REGIONALISM 17-57 (1994).

16. In order to improve the welfare of the people of ASEAN, immediate priority was given to pursuing regional cooperation in the field of economics and development. Principle III of the Declaration of ASEAN Concord declared that a primary concern of ASEAN states was the "elimination of poverty, hunger, disease and illiteracy" through intensive cooperation in "economic and social development, with particular emphasis on the promotion of social justice and on the improvement of the living standards." Economic growth was regarded as a way to promote national resilience. ASEAN governments believed that poverty and economic discontent could motivate internal communist insurgencies and that the best way of countering this was through economic development in close association with the West. This not only required internal political stability to build donor and investor confidence, but would also buttress stability.

17. National resilience would naturally strengthen the sinews of regional resilience. In 1976, it was established, as a matter of principle, that ASEAN states adopt a common stance in international fora on matters affecting the region. Further, a "strong ASEAN community" and sense of regional identity was to actively be sought in accordance with the fundamental principles of self-determination, sovereign equality, and noninterference in the internal affairs of nations. These principles, along with abstention from the threat or use of force and the pacific settlement of disputes, were inspired by the United Nations Charter. It is significant, however, that little reference is made in these documents to the preeminent U.N. goal of promoting respect for human rights and fundamental freedoms. Awakening a "rights consciousness" in ASEAN peoples was to be avoided as it might provoke claims against their governments. That, ASEAN leaders felt, would impede the exercise of broad government powers required to achieve development goals. Civil liberties, for example, were subject to the overriding state-determined objective of public order, as manifested by the use of draconian preventive detention laws in Singapore and Malaysia (a British colonial bequest) to control subversive elements trying to infiltrate trade unions or other organs of civil society.

18. ASEAN emerged as a political community and won the recognition and respect of the international community as a cohesive regional body when it took a principled stand, particularly before the


25. Id. at section A (Political), principle 7 (adopting, as a framework for ASEAN cooperation, a program of action that includes the "strengthening of political solidarity, by promoting the harmonization of views, coordinating positions and, where possible and desirable, taking common action.")

26. See e.g. Kuala Lumpur Declaration for a Zone of Peace, Freedom and Neutrality (ZOPFAN), signed Nov. 27, 1971, preamble, reprinted in 1967-1988 ASEAN DOCUMENTS SERIES 34 (referring to the U.N.'s aims and objectives, including respect for sovereignty, abstention from use of force, and noninterference.).
United Nations, against the Vietnamese invasion of Cambodia in 1979.\textsuperscript{27} This setting aside of economic matters in order to reach a comprehensive political settlement to the Cambodian issue was a deviation from the original plan to focus exclusively on economic matters. The situation in Indochina and the resulting refugee problem were constantly on the ASEAN agenda after the late 1970s. The invasion was characterized as a breach of Cambodia's sovereignty and of the Cambodian people's right to self-determination. Within the United Nations, ASEAN urged the recognition of the government in exile under Prince Sihanouk and condemned the illegitimacy of the Vietnamese puppet regime. ASEAN also stood united in opposition to Vietnam's Grand Design, announced in January 1980 with Soviet backing, to liberate all of Southeast Asia, after having "liberated" Cambodia. ASEAN's collective resolution was a vital factor in thwarting the realization of Vietnam's expansionist plan. At the same time, the Cambodian conflict served as a principal agent in forging a sense of ASEAN solidarity and common purpose.

\textsuperscript{19} The dissipation of Cold War mentalities and alliances over the last decade, the muting of ideological distinctions, and the signing of the Cambodian Paris Peace Accords in 1991 paved the way for an enlarged ASEAN membership. The latter, in particular, opened the door to rapprochement with the Indochinese states. While Brunei had been admitted as a member of ASEAN in 1984, the post-Cold War shift in the ASEAN focus from ideology to economics led to the admission of the socialist state of Vietnam in 1997, followed by Laos and, more controversially, Burma in 1998. With the admission of Cambodia on 30 April 1999, ASEAN enters the twenty-first century as "ASEAN 10," a subregional body encompassing all Southeast Asian states, and forming a Southeast Asian community through common membership in ASEAN. That ASEAN is already identified with the Southeast Asian regional order is a testament to its success.\textsuperscript{28}

\textsuperscript{20} During the Cold War, the United States perceived Southeast Asia as a focus of its containment policy against a worldwide communist threat. The end of the Cold War ushered the world away from a bipolar to a more fragmented power structure, with the United States as the sole remaining superpower. Since Southeast Asia was no longer a primary focus of U.S. political attention, it lost its previous status as chief cornerstone of the regional security order. Without the unifying bond of anti-Communism, ASEAN had to redefine its political goals and orientation. Noting the "profound international political and economic changes" of the post-Cold War era, the ASEAN governments stated in the 1992 Singapore

\textsuperscript{27} Chan Heng Chee, The Interests and Role of ASEAN in the Indochina Conflict, in INDOCHINA AND PROBLEMS OF SECURITY AND STABILITY IN SOUTHEAST ASIA 184 (Khien Theeravit and MacAlister Brown ed., 1981).

\textsuperscript{28} For an account of the prior "failed" regional associations in Southeast Asia, see generally Norman D. Palmer, SEATO, ASA, Maphilindo and ASPAC, in THE ASEAN READER 27, 27-29 (Sandhu et al. eds., 1994).
Implementing Human Rights in ASEAN Countries

Declaration, issued at the Fourth ASEAN Summit, that they would "move towards a higher plane of political and economic cooperation to secure regional peace and prosperity." The sphere of intra-ASEAN cooperation was extended to include matters like environmental protection and sustainable development, the control of HIV, and measures against drug trafficking. The ASEAN Regional Forum (ARF) was launched in July 1993 to serve as a multilateral consultative forum, designed to promote preventive diplomacy and build confidence among Asia-Pacific states. Trade, economic growth, liberalization, and regional security remained priorities. Certain ASEAN states have become showcases for economic development, displaying impressive double-digit growth rates up to 1997, before the present economic crisis. ASEAN plans to establish an ASEAN Free Trade Area (AFTA) by 2008.

B. ASEAN Ambivalence towards Human Rights

¶21 The promotion and protection of human rights has, at best, been dealt with in cursory fashion within ASEAN. This is not to say that ASEAN has been unconcerned with human rights issues; rather, it has avoided the human rights terminology. ASEAN has consistently shown a commitment to alleviating poverty by means of a "basic needs" strategy. Such an approach focuses on producing personal consumption items, on community services, and on productive and remunerative employment, all as an integral part of a country's development efforts. There has also been concern for increasing the participation of women and children in the political, economic, social, and cultural development of their countries. These concerns, in large measure, overlap with socio-economic rights.

¶22 There is no official, clear, or comprehensive ASEAN "position" on human rights, and divergences exist among individual ASEAN countries. ASEAN ambivalence toward human rights has been manifested in practice by the attitude it has displayed and the causes it has selectively championed within the ASEAN region. This selectivity demonstrates the general politicized nature of human rights in international relations, in

30. The ARF is the first regional multilateral forum for government level consultations on Asia-Pacific security issues. Its inaugural meeting was held in July 1994. Its members include Australia, Brunei, Burma, Cambodia, China, Canada, Europe, France, India, Indonesia, Japan, Republic of Korea, Laos, Malaysia, New Zealand, Papua New Guinea, Philippines, Russia, Singapore, Thailand, United States, Vietnam. See generally SIMON J. HAY, INSTITUTE OF SOUTHEAST ASIAN STUDIES, ASEAN'S REGIONAL SECURITY DIALOGUE PROCESS: FROM EXPECTATION TO REALITY? (1997); Michael Antolik, The ASEAN Regional Forum: The Spirit of Constructive Engagement, 16 CONTEMP. S.E. ASIA 117, 117-136 (1994).
32. For example, Carolina G. Hernandez cites the Singapore-Philippines diplomatic row over Singapore’s hanging of a Filipino maid for double murder in March 1995. See CAROLINA G. HERNANDEZ, ASEAN PERSPECTIVES ON HUMAN RIGHTS AND DEMOCRACY IN INTERNATIONAL RELATIONS 2 (1995).
both individual countries and regional groupings. ASEAN has supported the Palestinian, Bosnian, Afghan, and Cambodian peoples' right to self-determination, and the former's right to its own homeland. The Soviet violation of Afghan sovereignty was deplored by ASEAN in 1980 on the basis that "the sovereignty and integrity of a nation must always be respected." Subsequently, ASEAN called for foreign troop withdrawal and affirmed the right of the Afghans to freely determine their own destiny. These actions reflect a concern for the "external" aspect of the right to self-determination—the right to self-government free from foreign interference. ASEAN, through its practice, has also affirmed the "internal" aspect of the right to self-determination—that is, the right to a democratic, representative, and authentic government, chosen freely, without intimidation, by actors internal to the state. In the words of Article 21(3) of the Universal Declaration of Human Rights, the basis of government authority rests on "the will of the people" expressed in "periodic and genuine elections on the basis of "universal and equal suffrage." Such a policy has, for example, been manifest in ASEAN's insistence on the right of Cambodians to choose their own government through United Nations-supervised free elections. The idea that domestic government should not rest merely on effective control of the state's territory and population, but that it should conform to certain fundamental international principles, is further reflected in ASEAN's attitude towards South Africa. While downplaying racial discrimination and other violations of civil and political rights on home turf, ASEAN has consistently condemned apartheid in South Africa and Namibia. In so doing, it took a clear normative stance against racism and racist governments. ASEAN even went so far as to approve the use of international pressure to induce a change in South Africa's internal government structure through the dismantling of apartheid and the installation of majority rule. ASEAN noted the efficacy of economic and non-economic sanctions against South Africa and called for their "wider, tighter and more intensified application."

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35. See Joint Communiqué of the Eighteenth ASEAN Ministerial Meeting, July 9, 1985, ¶ 67 (visited May 27, 1999) <http://www.aseansec.org/politics/pramm18.htm>. ASEAN foreign ministers condemned the installation in Namibia of a racist interim government by the white minority Pretoria regime in defiance of U.N. Security Council Resolution 435 of 1978. ASEAN called for the international community to "bring relentless pressure to bear upon South Africa and to continue to support the just struggle of the Namibian people under the leadership of the Southwest Africa Peoples' Organization (SWAPO), their sole and authentic representatives." Id.
Implementing Human Rights in ASEAN Countries: "Promises to keep and miles to go before I sleep"

while urging the release of all African nationalists, including Nelson Mandela. ASEAN has also collectively expressed concern for the genocidal horrors in Bosnia-Herzegovina.

II. A QUESTION OF SUBSTANCE: THE ASIAN VALUES SCHOOL & THE CONTENT OF HUMAN RIGHTS

A. The Counter-Challenge of the Asian Values School

In the post Cold War era, the demise of the Communist threat altered the foreign policy of Western states in their dealings with ASEAN nations. Western foreign policy was previously confined to economic and strategic matters, largely ignoring the human rights abuses of the West's authoritarian anti-Communist Asian allies. This has changed. A new crusade to promote human rights and democracy has been launched.

39. The East Timor situation is briefly discussed in paragraph 23 of the Joint Communiqué of the Ninth ASEAN Ministerial meeting, June 24-25, 1976 (visited May 27, 1999) <http://www.aseansec.org/politics/pramm9.htm>. The ministers, however, merely note with appreciation the explanation given by the Foreign Minister on the question of East Timor and called upon the U.N. to take cognizance of the Indonesian minister's assurances that his government and the provisional East Timorese government would cooperate with the United Nations. They affirm that "the future of East Timor remains, in the final analysis, in the hands of the people of East Timor." Obviously, ASEAN implicitly accepted the validity of the contested referendum held to determine the future of East Timor, whose alleged result was the expressed choice to integrate with Indonesia. On the East Timor problem, see generally CONSTANCIO PINTO & MATTHEW JARDINE, EAST TIMOR'S UNFINISHED STRUGGLE: INSIDE THE TIMORESE RESISTANCE (1997); BILVEER SINGH, EAST TIMOR, INDONESIA AND THE WORLD: MYTHS AND REALITIES (1995).
40. See generally Amitav Acharya, Human Rights and Regional Order: ASEAN and Human
Certain Asian quarters in government circles perceived this shift as a self-congratulatory trumpeting of the superior values of Western liberal democracy: a hegemonic attempt to universalize Western values.41

¶25 ASEAN countries have reacted defensively to charges of human rights abuses, pointing out that no state is guiltless in this respect. The West's selective criticism is denounced as hypocritical, witnessed by its own omissions, such as the failure to prevent human rights violations in Bosnia.42 After United States Vice President Albert Gore delivered an implicit critique of Malaysian democracy at the APEC meeting held in November 1998 in Kuala Lumpur, the Malaysian foreign minister's riposte was that "Malaysians do not take kindly to sanctimonious sermonising from any foreign quarter, especially the U.S., a country which is known to have committed gross violations of human rights."43 Similar mud-slinging was apparent in Malaysian Prime Minister Mahathir's response to Canada's interest in the state of human rights in Malaysia: "Canada once belonged to Red Indians. I don't see them represented in APEC."44 Since human rights touch upon ethical issues, ASEAN states resent being hectored on their human rights performances by the West in tones of moral self-righteousness. Notwithstanding, such rhetorical thrust and parry at the interstate level does little to alleviate human suffering. Clearly, a posture of humility on all sides, stemming from introspective self-criticism, would facilitate the actual solution of human rights problems.

¶26 Since the early 1990s, filled with a new found self-confidence stemming from the management of successful economies, ASEAN states have mounted a positive counter-critique against their western detractors. Taking hold of the reins of human rights discourse, rather than simply employing defensive rebuttals, ASEAN countries have, without disavowing the entire corpus of human rights norms, expressed dissatisfaction with the status quo. The ASEAN position rests on three distinguishable bases: a cultural argument, an "economics-first" argument, and a contextual "asian values" argument.

¶27 First, most ASEAN states did not participate in the formulation of

42. Malaysian Foreign Minister Datuk Abdullah Badawi in his statement at the 1993 Vienna Conference stated that "nowhere is the double-standard approach to human rights more glaring than in the West's evasion of its responsibilities through its inaction in the face of the massive and gravest violations of human rights in Bosnia-Herzegovina. Surely, their apathetic and meek response to genocide, ethnic cleansing and rape, in the heart of Europe, makes a total mockery of their preaching and posturing on the promotion and protection of human rights in the far corners of the world." Statement reproduced in HUMAN RIGHTS AND INTERNATIONAL RELATIONS IN THE ASIA-PACIFIC REGION 234-38 (James T.H. Tang ed., 1995).
these norms. Insofar as ASEAN states have affirmed the Universal Declaration of Human Rights by adopting the Vienna Declaration of 1993, ratified human rights treaties of their own accord, and endorsed international legal norms like self-determination, and free elections, and the prohibition against racial discrimination in policy statements such as those in reference to Cambodia, South Africa, Afghanistan and Palestine, this objection cannot be maintained. Second, "Asian values" school proponents argue that since human rights norms embody "alien values" they are inappropriate in specific cultural contexts where other cultural values hold sway. This argument is often simplistically framed in terms of a "universalism versus cultural relativism" dichotomy which questions the applicability of norms. This opens up the question of how to identify "core" global norms. Lastly, a third, non-culture-specific argument asserts that the application of certain norms is contingent on a certain level of economic development. Prior to attaining that undefined threshold, individual rights must be subordinated to state-defined development goals, in the interest of the community. This concerns the prioritization of different categories of rights, namely, the debate about the nature of the relationship between democracy (civil and political rights) and development (socio-economic rights). It follows from this assertion that rights are not "natural" or "inherent" as in the Western natural law tradition, but that they are privileges to be progressively implemented, given or rescinded by the state. The shift from "right" to "privilege," the move to making a claim contingent rather than inherent, detracts from the concept of rights as an instrument of empowerment and a tool for ensuring the accountability of those in public office, whose power is based, in the democratic conception, on trust rather than will or divine fiat. Rights confer upon the right-holder (the individual, in the case of human rights) the power to initiate a claim against the duty-bearer (the state) for alleged violations of human rights, before a judicial or political forum. The last two "Asian values" school arguments are discussed more fully below.

i. The Cultural Argument

¶28 The cultural strain of the "Asian values" school operates along two tracks. On the one hand, "culture" is invoked defensively and negatively as a shield against the neo-imperialistic imposition of "alien" Western liberal values. The acceptance of cultural diversity is presented as a facet of respect for the sovereign equality of states. On the other, "Asian values" are invoked offensively and positively as a distinctive approach to human development and state-community-individual relations that is superior to the individualistic, rights-oriented Western liberal democracies, typified by moral decay, social dysfunction, and disrespect for public authority.

¶29 Empirically, the practice of ASEAN states in affirming certain human rights declarations and ratifying certain treaties indicate their acceptance of human rights law. However, it is clear that cultural values do differ and this affects the application of these norms. Clearly, invoking the
fact of pluralism in a multicultural world is insufficient in itself to fend off human rights scrutiny. The human rights project is ultimately about a normative ordering of state-individual relations and the role of the international community, which includes both state and nonstate actors. It is not culturally neutral. Human rights norms will clash with racist or sexist cultures. In the event of a clash between "human rights" and "culture" in a horizontal, state-centric world, the question is which should prevail and who should be the adjudicator: the state, the international community, the big powers, the transnational NGO community, the domestic community? Whose agenda prevails?

\[30\] An even more basic question, however, is whose voice is amplified by the definition of these terms? The articulators of the "Asian values" school are by and large government officials or diplomats seeking to justify the operation of the regimes they represent. The presentation of "Asian" and "Western" cultural values as identifiable, distinct entities obscures the existence of divergent views within a region or within a single state itself. The state does not always speak with an all-inclusive "voice." Indeed, human rights is the language of the oppressed and marginalized. The more authentically representative a government is, the greater the authority of its "voice."

\[31\] It is also important to recognize that "human rights" and "culture" are not always in opposition. Attention should be directed to searching for resources within cultures and traditions that reflect the values inherent in human rights ideology.\(^4\) This would affirm the universal reach of human rights. Second, the assertion that "Asian" and "Western" cultural values are static, monolithic entities calls into question the very nature of culture.\(^5\) This "essentialization" of cultural values ignores the fact that cultures are not static but in flux, given the influences of international capitalism, globalism, industrialization and the emergence of a global culture of human rights within modern states. One might point out that the emergence of human rights is a response to the advent of the modern state and its monopoly on public power. With the disappearance of traditional group or community structures and the atomizing effects of modern, urban, industrial life, human rights appears in the gap to mitigate the imbalance of power in state-individual relations. Furthermore, even with respect to "core" or even immutable religious-cultural values, a high view of the human person that respects his/her moral autonomy and moral responsibility must accept that individuals are not defined exclusively by

\(^{45}\) Scholarship demonstrating that religious or "non-Western" ideologies also reflect a "high view" of the individual has been undertaken to foster the legitimacy of human rights norms both through internal discourse within the state and through cross-cultural dialogue. \textit{See generally ABDULLAHI AN-NAIM, HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS} (1992).

\(^{46}\) "Culture" may be understood to encompass "all issues of human thinking, feeling and behavior in a given geographic area[,]. . . the religion, philosophy and mentalities, the social, administrative, public and legal institutions, clothes, nutrition, architecture, demographical behaviour, 'arts', loving, hating, war, peace. . . ." \textit{WOLFGANG SCHMALÉ, HUMAN RIGHTS AND CULTURAL DIVERSITY} 11 (1993).
Implementing Human Rights in ASEAN Countries

Thio: Implementing Human Rights in ASEAN Countries: "Promises to keep and miles to go before I sleep"

their cultures and traditions. Human rights seek to vindicate human dignity in part by policing the boundaries of individual autonomy. By protecting the freedoms, for example, of conscience and association, human rights ideology deems it a "good" to enable the individual to "opt out" or reaffirm the cultural values of the community into which he or she is born. Such a choice is essential to human self-development.

In the absence of an international legislature, states will continue to be the international lawmaking instruments, though nonstate actors play an important role in influencing policy. At the international level, NGOs and treaty-based human rights bodies shape policy by consulting with state officials. At the domestic level, through information dissemination and human rights education to the general public, citizens can shape the way their governments behave in international fora, though this presumes a functioning democracy and constitutional government. Apart from any a priori postulates grounding human rights norms, the legitimacy of a norm is partially, if not mainly, derived from widespread popular support, which is itself a function of politics and the "culture wars" waged within that arena.

The second way in which "Asian values" proponents claim a distinctive approach to human development and state-individual-community relations is to attack Western culture while defending their own. The moral decay of individualistic, rights-oriented Western liberal democracies (European and American) as manifest in widespread dysfunctional families, disrespect for public authority and the breakdown in social order is highlighted to claim the superiority of "Asian values." Indeed, the economic success in certain East Asian countries that industrialized before they democratized (for example, Taiwan, Hong Kong, Singapore, and Malaysia) has been attributed to "Asian values," which engender discipline and respect for public authority. The legitimacy of

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50. Doubts are cast on the proposition that Asians respect government authority more than Westerners, given the popular movements against autocratic governments in the Philippines (1986), Burma (1988), Thailand (1992), and, lately, Indonesia (1998).
"soft authoritarianism" rested on the provision of economic goodies to citizens. The present economic crises in Asia deprive governments of this base of legitimacy, forcing them to rest their claims to legitimacy on a democratic, representative basis.\(^5\)

\(^{34}\) There is certainly truth in the proposition that excessive individualism unrestrained by a sense of civic or moral responsibility is anarchical. Recognizing this problem, which is fueled to a large extent by a capitalistic, consumer-oriented industrial society, is one thing. Prescribing a cultural antidote in the form of "Asian values" is a bit disingenuous. When one gets down to identifying what "Asian values" are, the list includes a respect for hard work, the family, and public authority, an emphasis on social harmony and thrift.\(^{52}\) These values are not exclusively "Asian," bearing resonance with a kind of Protestant work ethic, sans the Western emphasis on individualism. The point is that identifying the values that buttress social cohesion, a just order, and economic development should be a matter of assessing a proposition on its intrinsic merits, rather than on the dubious basis of cultural superiority.

\(^{35}\) Next, a distinction should be drawn between contested human rights norms and those norms upon which all agree, such as the right to free speech. The controversy surrounding the latter category is one with respect to the scope of application. The right of free speech, which underpins a democratic society, is, for example, formally guaranteed in the Singapore and Malaysian Political Constitutions, the United States Bill of Rights and the Canadian Charter of Rights and Freedoms. The controversy is in the degree of liberty permitted, and in what are the permissible grounds for derogation. This can have extensive ramifications in the practical realm, as illustrated by the following quote from Islamic scholar Shad Faruqi:

> Admittedly, the rugged individualism, un-inhibitedness and licentiousness of what is still 'the wild, wild West' is contrary to Asian tradition. Our attitudes to nation, religion and culture, race, family and community are reverential. We draw a line between liberty and license. We do not deem it a matter of constitutional principle that there should be a right to desecrate our national flag, to blaspheme our religions and to walk freely into shops to buy murderous weapons. We view a free-wheeling sexual lifestyle, drug taking and alcohol addiction with revulsion. With the bulk of

\(^{52}\) See Tommy T.B. Koh, The 10 Values that Undergird East Asian Strength and Success, INT'L HERALD TRIB., Dec. 11, 1993. These include the importance of the family, education, high savings, home ownership and hard work and clean living.
us, pornography is not part of free speech, abortion on demand is not part of personal liberty and homosexuality is not part of freedom of choice. We acknowledge that rights and responsibilities must go hand-in-hand and that freedom is not an end in itself.53

¶36 It is an eternally impossible task to determine the line between legitimate cultural differences and those that should be subject to international standards. This is the difficulty already alluded to in the clash of ideologies in a multicultural world. Certain disputes are unlikely to bear legal, much less moral, resolution in this lifetime. Advocates on opposing sides both adopt the self-righteous mantle of crusaders who see their way as that of enlightenment, whether arguing from the epistemology of faith or "reason." It is essential to note, however, that this is not a West versus the Rest debate.54 Advocates on both sides straddle interstate lines and wage their campaigns in both the domestic and international fields of politics and persuasion.

¶37 When governments invoke their versions of "culture" to support their respective approaches to governance or their perceptions of society, they present problems of cultural authenticity. In Singapore, for example, the government in 1990 issued the Shared Values White Paper, which contained five key values underpinning a national ideology that "Singaporeans of all races and faiths can subscribe to and live by."55 The values presented have a notable communitarian bias insofar as there is a heavy emphasis on social order and harmony. As former Prime Minister Lee Kuan Yew has noted:

Whether in periods of golden prosperity or in the depths of disorder, Asia has never valued the individual over society. The society has always been more important than the individual. I think that is what has saved Asia from greater misery.56

¶38 The Prime Minister referred to Confucian values to legitimate government policy, but the government's heralding of Confucian values

54. In his speech at the 1993 Vienna Conference on Human Rights, the Indonesian Foreign Minister Ali Alatas noted that the debate on human rights was not an East-West or North-South clash but rather, "the lingering echo of an earlier clash between two Western traditions, between the principle of individual liberty which, for example, Thomas Jefferson passionately espoused and the principle of a strong, lawful authority which Alexander Hamilton just as passionately advocated." Text reproduced in Appendix III, Statements by Representatives of Asian Governments at the Vienna World Conference on Human Rights, in HUMAN RIGHTS AND INTERNATIONAL RELATIONS IN THE ASIA-PACIFIC REGION 228, 229 (James Tang ed., 1995).
55. Shared Values White Paper, supra note 3, at ¶ 1. These five values include: (1) Nation before community and society above self; (2) Family as the basic unit of society; (3) Regard and community support for the individual; (4) Consensus instead of contention; (5) Racial and religious harmony. Id. at ¶ 52.
has been accompanied by contradictory non-Confucian practices. The selective adoption of some Confucian values and casting aside of others raises questions about the desirability of a flawed ideology. Intellectual honesty demands that the validity and legitimacy of ideas be tested on their intrinsic merits rather than their cultural pedigree. Furthermore, state definitions of local culture can effectively drown dissenting voices resident within the state through the conflation of the interests of the state with those of the community. In Southeast Asia, as in all parts of the world, there is an ongoing debate as to which traditions merit preservation and which should be discarded. To develop a civic society, states must find the right balance between traditional and contemporary values. In finding this golden mean, the values of a community must be ascertained through an inclusive, participatory process, not imposed by government fiat.

57. For example, the passage of the Maintenance of Parents Act, Chapter 167B (1996), which legally compels children to maintain their parents seems contrary to the Confucian ethic of filial piety. Christopher Tremewan has argued that, while the significance of philosophical traditions must not be denied, neither must they be divorced from historical and political realities. He writes that Asia’s pre-industrial societies did place duties to the community above individual rights, but that:

this observation does not license a leap in logic to the claim that modern East Asian societies are consequently not suited to the observance of human rights or liberal democracy because of residual Confucianism. This ignores the historical discrediting of Confucianism, the emergence of revolutionary left-wing politics and the development in South Korea, Taiwan, Hong Kong and Singapore of the most un-Confucian practices associated with rapid industrial growth such as corporate conglomerates with 12-hour working days for executives, the breaking up of community through massive urbanization, the necessity of parliamentarianism for legitimacy, government by military elites and the militarization of politics.

Christopher Tremewan, Human Rights in Asia, 6 PAC. REV. 17, 27 (1993).

58. For example, in the Singapore context, the Confucian tradition has been lauded as a valuable source from whence to derive a national ideology. In the Shared Values White Paper, however, certain sexist Confucian traits were excised as being unsuitable in the context of a modern society. Paragraph 44 provides:

Traditional Confucian family relationships are strictly hierarchical. Sons owe an absolute duty of filial piety and unquestioning obedience to fathers. Males take precedence over females, brothers over sisters, and the first born over younger sons. But in Singapore, the parent-child relationship is more one of respect rather than absolute subordination.

ii. The Economics First Argument

¶39 The position that human rights must be contingent on other goals where linked with community interests is often expressed with the "economics first" argument. This asserts that the entire spectrum of human rights can only be enjoyed after a certain level of socio-economic development is reached. Since human dignity is denied by abject poverty, according to this view, the inalienable right to development must be guaranteed first. This argument further holds that, for the attainment of economic development, civil and political rights must be subject to social order; they may be suspended or severely curtailed in the name of development until the people are supplied with basic food, housing and jobs. This argument is premised on the view that certain civil and political rights, which buttress "democracy" in the Western liberal view, impede economic growth. Developing countries must, therefore, sideline those rights to which, perhaps not coincidentally, ASEAN countries seem to bear an antipathy.

¶40 Conversely, critics have argued that certain civil and political rights actually promote economic development. For example, the right to free speech is needed so that citizens can criticize misconceived economic policies, denounce government corruption, or call for the equitable distribution of the benefits of economic development and social justice. While the relationship between civil and political rights and development is indeterminate and merits closer examination, the economics first argument does draw attention to a valid point: that government priorities differ depending on the stage of a country’s economic development.

¶41 Both Western and ASEAN countries tend to treat categories of rights unequally. ASEAN countries claim that the West is inordinately preoccupied with civil and political rights, evident from frequent attacks on ASEAN libel laws, media restrictions, censorship and preventive detention laws. Malaysia has elicited international concern in invoking the latter to detain former Deputy Prime Minister Anwar Ibrahim and to aid investigations that eventually led to his being charged in September 1998 with ten counts of corruption and sodomy. This also undercut Ibrahim's budding nationwide reform movement, which was a threat to the national


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security interests of the country as defined by the current powerholders.

¶42 The problem with the "economics first" argument is that since government elites are the actors who declare when the threshold of sufficient economic development has been achieved (so as to justify a more robust enjoyment of civil and political liberties), there is no one to hold them accountable in two respects. First, no one will actually compel them to declare when the threshold has been reached. Second, if no clear criteria are put forward to define the threshold, it remains a matter of state prerogative. The fear then is that civil and political rights will be suppressed in the name of the nebulous goal of economic development.

iii. The Asian Values School: A Conclusion

¶43 Essentially, the "Asian values" school advocates a contextual approach towards human rights which, while universally valid in the world of theory and ideas, are qualified in their practical application by culture and contingency. Since the supporters of this school hold, or are closely connected to, government power, framing human rights in this fashion can allow government elites greater control over the terms of the discourse. Government elites may invoke their definition of local culture to decide for themselves which human rights are to be applicable, even if their version of culture is nothing more than an amalgam of traits selectively cobbled together from a past cultural tradition to justify current, perhaps authoritarian, political practices and institutions. They can cite the need for development to postpone indefinitely the protection of civil and political rights. This reserves to government elites a broad discretion in controlling the domestic implementation of human rights. Both the development argument and the cultural relativist argument are variants of the theme that external scrutiny of how states treat individuals violates national sovereignty.

iv. Summing Up

¶44 Since human rights involve fundamental issues of ethics and justice, one might reasonably expect to find as many views on what

61. For example, the Confucian notion of hierarchical relationships, the wulun, which relates to the ordering of relationships between father-son, husband-wife, and older brother-younger brother, has been translated into the Singapore political context. Here, the citizen is cast as the child who is to relate to government leaders, who adopt the role of the pater familias, in a deferential fashion rather than in a relationship between equals. This is well illustrated by a statement by a government minister, B.G. George Yeo, who, in setting the boundaries of political debate, noted: "Remember your place in society before you engage in political debate . . . debate cannot degenerate into a free-for-all where no distinction is made between the senior and junior party . . . . You must make distinctions—what is high, what is low, what is above, what is below—and then within this, we can have a debate, we can have a discussion . . . ." Debate Yes, But Do Not Take Those in Authority as 'Equals,' STRATTS TIMES, Feb. 20, 1995, at 11, reproduced in KEVIN Y.L. TAN & LI-ANN THIO, CONSTITUTIONAL LAW IN MALAYSIA AND SINGAPORE 25 (1997).
constitutes human rights as there are value systems. While ASEAN states have quite rightly asserted that human rights are molded by Western liberal values, this does not bar their application in non-Western contexts, nor does it mean that the Western incarnation of human rights must be accepted as sacred writ. To ignore pluralist conceptions of what it means to be a human being, and what constitutes human development and fulfillment, would be imperialistic. But it would be equally dogmatic, and ultimately deleterious to the human condition, to fall into the abyss of relativism which, taken to its logical conclusion, validates all views and practices except the view that any one practice is wrong, immoral or invalid. In the author's view, the fiction that human rights are culturally neutral should receive its quietus est. Human rights embody a political ideology. The project of human rights must, however, be recognized as a continuing, open-ended experiment in elucidating the principles of good governance to serve the goal of vindicating human dignity.\(^6\) The normative content of "human dignity" is not entirely self-evident; it cannot be exhaustively defined. But neither is it obscure. We know it when we see it. Ultimately, we either intuit or deduce from some a priori postulate what human dignity is and from this, consider how best to fashion rights to secure it. This will not be free from ideological bias and dispute. In a relativistic universe, one must look to areas of agreement to discern which core or fundamental rights are universally accepted. The Universal Declaration of Human Rights, which was affirmed by 171 countries at the 1993 Vienna Conference on Human Rights, and constitutional bills of rights are good starting places. Even though human rights originated in Western liberal thinking and values, some human rights values are also found in non-Western ideologies.\(^6\) Explicit links should be drawn as this would, as a matter of strategy, aid peoples in non-Western countries in developing their sense of "ownership" of human rights at the grassroots level, as a sort of common heritage of mankind rather than an alien object.

\[^{45}\] This is not to ignore the fact that clashes between traditional and cultural values and those espoused by human rights ideology are inevitable. There will always be gray areas of debate over such topics as reproductive rights or whether international law requires the abolition of the death penalty. These are not settled matters of law; they remain fodder for political dispute. The lack of resolution over contentious issues should

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64. As Aung San Suu Kyi noted: "If ideas and beliefs are to be denied validity outside the geographical and cultural bounds of their origin, Buddhism would be confined to north India, Christianity to a narrow tract in the Middle East and Islam to Arabia." AUNG SAN SUU KYI, *FREEDOM FROM FEAR AND OTHER WRITINGS* 175 (1991). For an analysis of how the values of democracy are linked to the ethical norms of Buddhism, Confucianism, Hinduism, Islam, Judaism and Christianity, see generally DEMOCRACY IN ASIA 61-214 (Michele Schmiegelow ed., 1997).
not, however, detract from defending human rights against what are unequivocally considered to be illegitimate exercises of government power, such as genocidal policies, extrajudicial killing, and torture.

¶46 The focus should not be on the origin of the idea of human rights; this is a red herring. Rather, a focus on the teleology or raison d'être of human rights will be far more useful for demonstrating the validity and necessity of human rights. Theoretically, the idea of human rights affirms a "high" view of the human being, whether stemming from natural law thinking such as the Judeo-Christian doctrine of personality, or secularized variants such as the Kantian ideal that man should be treated as the end, rather than the means to another end. In practical terms, this means that the purpose of the state is to facilitate human fulfillment and development. The best approach is a holistic one, which seeks to promote the physical, psychological and pneumatic (spiritual) well-being of man. This entails postulating that fundamental ethical rights inhere in individuals, and charging the state with securing these rights. Rather than asserting that human rights scrutiny impinges upon a state's sovereignty, human rights advocates should attempt to dissociate "sovereignty" from absolute, arbitrary power. Sovereignty should be associated with the legitimate exercise of power, and the preserving and safeguarding of fundamental rights. This comports with the assertion that the state exists to serve the people, and not vice versa. Indeed, states formally subscribe to this principle insofar as they support the principle of democratic legitimacy and a consent-based form of government that genuinely represents the interests of its people. Within ASEAN, the principle of free and fair elections and the right of a people to choose their own government has received formal support. This is evidenced by the ASEAN reaction when Vietnam invaded Cambodia in 1978 and installed the puppet Heng Samrin regime during the years of the Cambodian crisis. ASEAN consistently deplored the Vietnamese armed intervention against the independence, sovereignty and territorial integrity of Cambodia and reaffirmed the right of the Cambodian people to determine their own future free from foreign interference, pursuant to their right of self-determination.

¶47 Human rights law was developed in the second half of the

65. This asserts "the individual as the final value, [placing] the emphasis upon the transcedent importance of each man's soul." CARL J. FRIEDRICH, LIMITED GOVERNMENT: A COMPARISON, 12-13 (1974).
66. See Fernando Teson, The Kantian Theory of International Law, 92 COLUM. L. REV. 53, 54 (1992) ("A liberal theory commits itself . . . to the premise that the primary normative unit is the individual, not the state. The end of states and governments is to benefit, serve and protect their component human beings.").
67. See e.g., Geoffrey Butler, Sovereignty and the League of Nations 1920-21 BRIT. Y.B. IN'T L. 35 (discussing the manner in which sovereignty should be understood in relation to the functions of the League of Nations). See also W. Michael Reisman, Sovereignty and Human rights in Contemporary International Law, 84 AM. J. INT'L L. 866 (1990).
68. See e.g., Joint Communiqué of the Twelfth ASEAN Ministerial Meeting, June 28-30, 1979, ¶¶ 13-18 (visited May 27, 1999) (http://www.aseansec.org/politics/pranmar.htm) (dealing with the situation in Indochina when the Pol Pot regime was driven out by Vietnamese forces in 1978).
twentieth century as a reaction against totalitarian and fascist regimes—to curtail state power and to afford vulnerable individuals some protection against maltreatment by their governments. States are positioned both to protect, and to abuse, human rights. To prevent abuse, it is imperative to subject states to some form of external accountability. This could be done through the monitoring or quasi-judicial powers of a regional or international human rights body. ASEAN states should also be encouraged to participate in the United Nations human rights regime by acceding to the existing corpus of human rights treaties, as well as by working towards establishing a subregional mechanism for human rights.

B. Engagement with the United Nations Human Rights Regime

§48 Beyond examining the contours of the theoretical joust between the "Asian values" school and "Western" conceptions of human rights, it is also important to look at the practice of ASEAN states in relation to the United Nations human rights regimes, to see whether this sheds any light on their views of human rights.

§49 Given that human rights have developed into a major issue in international relations in the latter half of the twentieth century, nonengagement in the human rights discourse creates the suspicion that one has something to hide. To demonstrate their willingness to be counted as responsible members of the international community, ASEAN countries are readily participating in international dialogues. In statements made at the 1993 Vienna Conference, the ASEAN foreign ministers affirmed their commitment to the United Nations Charter and the Universal Declaration of Human Rights (UDHR), but stressed a particularist approach based on contextual exigencies.69

§50 At Vienna, the Singapore Foreign Minister Wong Kan Seng accepted that a "core" group of universal rights existed—for example, the right to life, prohibition against torture, and other nonderogable rights found in the International Covenant of Civil and Political Rights (ICCPR).70 Nonetheless, he maintained that international consensus on what constituted "core" rights was fragile, and that "the hard core of rights that are truly universal is perhaps smaller than we sometimes like to pretend."71

69. The statements made at the 1993 Vienna Conference of Human Rights by the foreign ministers of Myanmar, Brunei Darussalam, Indonesia, Malaysia, Philippines, Singapore and Thailand are reproduced in HUMAN RIGHTS AND INTERNATIONAL RELATIONS IN THE ASIA-PACIFIC REGION 213 (James Tang ed., 1995).


He advocated a pragmatic, clinical approach to strike a realistic balance between "the ideal of universality and the reality of diversity." As things stand, the scope of the "core" remains contestable—for example, whether the right to development is an inalienable right, as maintained by many developing countries. Hence, outside the core—in the equivocal words of the 1993 Inter-Governmental Bangkok Declaration:

[H]uman rights 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."

75. In response, Datuk Param Cumaraswamy, a Malaysian lawyer and U.N. Special Rapporteur on the Independence of Judges and Lawyers has pointed out that the U.N. Charter and the UDHR are the sources of a large number of codified human rights, which were adopted with the participation and consent of many U.N. Member States. For example, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child, the Convention against Torture, and the Convention for the Elimination of All Forms of Discrimination against Women have all been ratified by over 100 States. This is "further testimony of universal acceptance of the 1948 Declaration." In his opinion, "any review of the source of these codifications would have a far-reaching and destabilising effect on international human rights law and could very well threaten world peace." Datuk Param Cumaraswamy, The Universal Declaration of Human Rights: Is It Universal?, 18 HUM. RTS. L.J. 476, 477 (1997).
76. The point has been made that many Third World states did not participate in the drafting of the UDHR, throwing into question its universal applicability. In an interview with Time, former Singapore Prime Minister Lee Kuan Yew, has stated: The UDHR was written up by the victorious powers at the end of World War II, which meant the U.S. and the British primarily, as well as the French, the Russians and the Chinese. The Russians did not believe a single word of what they signed in the declaration. The Chinese were in such a mess they had to pretend they were espousing the inalienable rights and liberties of man to get American aid to fight the communists,
Union and the United States, fearing a dilution of standards, were put into a combative mood when the Malaysian Prime Minister Mahathir Mohamad proposed the idea at the 1997 ASEAN Post Ministerial Conference.77

¶53 China, the Philippines, and Indonesia supported the Malaysian proposal. The Indonesian Foreign Minister Ali Alatas expressed surprise that a "review" would be considered a "dilution," which illustrates the mutual suspicion of Asian and Western states in debating human rights standards. He stated that Asian nations sought to confer "equal weightage" to political, social, and economic rights rather than purporting to articulate a distinct Asian set of rights.80

¶54 One way of determining which rights have received the widest state support and might fall within the catalogue of "core" rights is to see which treaties are most widely ratified. Of course one would have to

who were threatening them in 1945. So the victors settled the UDHR and every nation that joined the U.N. was presumed to have subscribed to it. However, once you started applying human rights conditions for aid, that was different. People started looking at the declaration seriously. Now a serious alternative formulation is being worked out in Asia.

Sandra Burton, Society vs. The Individual, Time, June 14, 1993, at 20, 21. Thailand was among the countries voting in favor of the UDHR at the time of its drafting, while the ASEAN countries at Vienna all implicitly affirmed the UDHR by adopting the Vienna Declaration and Program of Action.

77. Prime Minister Mahathir was endorsing an earlier statement made by Economic Adviser Tun Daim Zainuddin to the effect that the Universal Declaration of Human Rights was outdated, having been drafted fifty years ago by superpowers who did not understand the needs of developing countries. Daim noted that:

Reform does not mean that the present declaration is fundamentally flawed from the very beginning. What it means is that the passage of time and the emergence of new situations and issues necessitate the formulation of a new declaration or a major overhaul of the present declaration to make it relevant for present times and to make it acceptable to all nations and peoples.

Zubaldah Abu Bakar, Call For Review of UN Charter on Human Rights, New Sunday Times, July 27, 1997, at 3. Prime Minister Mahathir said that a review of the Declaration did not necessarily connote dilution of its standards:

It is not a question of diluting it as there are very unsympathetic views towards human rights problems in developed countries. These countries would rather see people starve than allow for a stable government. They would rather have their government chasing demonstrators in the streets . . . But to us, the welfare of our people is important . . . In a country like ours where stability is important to provide a good life to our people, we consider the good life of people as the right of the people.

Zuhrin Azam Ahmad, PM: Review Not Meant to Dilute, Star, July 31, 1997, at 2. Malaysia has considered submitting a proposal to the U.N. to review the definition of human rights. See PM Agrees with Daim on Human Rights Review, Star, July 28, 1997, at 3. ASEAN and China have supported this call for a review.

78. ASEAN Bid Faces West Opposition, Indian Express, July 30, 1997 (visited April 21, 1999) [http://www.expressindia.com/e/daily/19970730/21150133.html].


80. Alatas stated "everybody knows that human rights does [sic] not only consist of individual, political or civil rights. It now has grown in perception in the world and people are now much more aware that economic rights, cultural rights and social rights are just as important." ASEAN Bid Faces West Opposition, supra note 78.
temper any conclusions by noting the many reservations to the treaties and their compatibility with the treaty object and purpose under Article 19(c) of the 1969 Vienna Convention on the Law of Treaties.81

§55 The Vienna Program of Action encouraged ratifications of U.N. human rights treaties, particularly of the Convention on the Rights of the Child, for which universal ratification was sought by 1995. Setting a time limit for a specific treaty seems to have worked well. Since Vienna, ASEAN countries that had not previously been party to any human rights treaties have displayed a significant change in practice. Singapore in 1995, for example, acceded to the CEDAW,82 the Child Convention,83 and the Genocide Convention.84 Undoubtedly, this type of move not only displays a degree of good will on the part of states that seek to advance human rights as part of their foreign policy. It also has a twin legitimating effect. Domestically, it signals to the citizenry that its government is not out of step with international mores (insofar as they are reflected by human rights) or that it is in fact "liberalizing" and answering the call to accountability. Internationally, it illustrates a commitment to the international rule of law and a desire to further engage the United Nations regime as a responsible and active participant. Should an ASEAN country seek, for example, a seat on the Security Council, a demonstrated commitment to human rights (one of the fundamental objectives of the U.N. Charter) would stand it in good stead. It is, however, to be noted that, in the case of Singapore at least, the obligations accepted were confined mainly to reporting obligations. No fundamental change in domestic policy was contemplated, as accession was effected on the basis that domestic laws were already compatible with the international obligations undertaken.85

§56 The major human rights treaties ratified or acceded to by ASEAN states and Cambodia, the member in waiting, are listed in Appendix 1.86 All ASEAN states are currently parties to the Child Convention and CEDAW, save Brunei in the latter instance. The Bangkok IGO Declaration encouraged the ratification of both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR).87 To date, only Cambodia, Philippines

and Vietnam have ratified both, and only the Philippines has signed the
optional protocol to the ICCPR.

§57 Extensive reservations have, however, limited the scope of states
parties' international obligations. Malaysia subjected Articles 5(a) and 7(b)
of CEDAW to the Syariah law on testamentary dispositions of property,
and exempted its application from the appointment of public offices like
that of Syariah, court judges, Muftis and Imams. Similarly, Singapore
reserved Articles 2 and 16 of CEDAW insofar as they conflicted with
personal and religious law. 88 These reservations were challenged for
incompatibility with treaty purpose since general references to national or
religious law without specifying when this might apply to exclude or
modify treaty obligations do not clearly define to other state parties the
extent to which the reserving state has accepted treaty obligations. 89
Further, invoking internal law does not excuse the nonperformance of
international responsibilities. These extensive reservations, 90 framed in
terms of non-acceptance of obligations beyond constitutional limits,
effectively truncate the domestic impact of the treaty. This casts doubts
about the degree of genuine commitment to these human rights
instruments. Governments should be encouraged, particularly by the
related U.N. human rights bodies, to withdraw their reservations or, at
least, to formulate their reservations more restrictively.

C. Factors likely to influence the shaping of an ASEAN Charter of
Human Rights: Duties, Development, and Discretion

§58 An ASEAN Charter of Human Rights is likely to be an alternative
formulation with a different emphasis, reflecting ASEAN realities and
primary concerns for economic development and socio-political order.
Drafting may be guided by the language of the Bangkok IGO Declaration,
the Kuala Lumpur AIPO Declaration of Human Rights (the only sub-
regional human rights document that bears government affiliation), 91 and

88. For an analysis of the impact of Singapore's accession to CEDAW, see Li-ann Thio, The
Impact of Internationalisation on Domestic Governance: Gender Egalitarianism and the
89. See, for example, Finland's objections to Malaysia's reservations to CEDAW. 1249
90. In the context of the Convention of the Rights of the Child, see the reservations made
by Malaysian, Brunei, Indonesia and Singapore, Myanmar, and Thailand, which were
challenged by many countries, including Austria, Finland, Germany, Ireland, Netherlands,
91. Approved by the Second Plenary Session of the 14th General Assembly of the ASEAN
Inter-Parliamentary Organization, October 1993. Text reproduced in the 1993 ASIAN Y.B. INT'L
constitutional bills of rights.92


93. See supra note 73.


96. Article 3 of the Federal Constitution of Malaysia states that "Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation." Constitution of Malaysia, Human Services Research Council (visited May 27, 1999) http://star.hsrc.ac.za/constitutions/mal1.htm.


there is no united ASEAN vision of human rights, most ASEAN members will want to ensure sufficient space for self-definition within their respective national contexts. In the interests of being inclusive and multicultural, it is submitted that both a theocratic and secular reference to the inherent dignity of human beings should be maintained. This would avoid an anthropocentric or excessively secularist orientation that may well be interpreted as an anti-religious bias or an epistemological triumph by default of Reason over Revelation.

i. Duty

¶60 That rights operate within the framework of community and obligation is a truism. Lately, presumably to counter what is perceived as excessive stress on individual rights, ASEAN state elites have been among those suggesting, within the context of the human rights debates, that an increased focus should be placed on duties. A lingering fear is that if state elites arrogate to themselves the task of defining what constitute duties to the community, this could be done in a self-serving manner to prop up authoritarian regimes. "Duty" has been misused as a demand to support the Fuhrer, the Volk or the Party, to serve statist values. It is also unclear how such duties can be enforced.

¶61 An ASEAN Charter is likely to elaborate a group-oriented vision of society incorporating the critique of social irresponsibility100 to counter the influence of excessive Western "individualism" and its attendant social ills. Like the African Charter,101 an ASEAN charter would place significant emphasis on individual duties in relation to the state. The AIPO Declaration, a muddy document that incoherently lumps together discussions of state and citizens' rights declares uncontroversially:

[T]he peoples of ASEAN accept that human rights have two mutually balancing aspects; those with respect to rights and freedom of the individuals and those which stipulate obligations of the individuals to society and State.

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constitution is available at <http://www.hatin.com.vn/uninfo/vni.htm>

99. Chapter IV, Article 51 of the 1993 Constitution of the Kingdom of Cambodia adopts the policy of liberal democracy and pluralism, while Article 56 adopts the market economy system. See CAMBODIAN CONST., supra note 92, at 13. Text of the constitution is available at <http://www.constitution.org/cons/cambodia.html#ChapterIV>.

100. For an explanation of such critiques, see Linda C. McClain, Rights and Irresponsibility, 43 DUKE L.J. 989 (1994); DAVID SELBOURNE, THE PRINCIPLE OF DUTY: AN ESSAY ON THE FOUNDATIONS OF THE CIVIC ORDER (1994).

102. This is unlikely to mean the duty to speak against public policy or maladministration but more likely, to speak in a manner that does not impair the socio-political status quo or threaten stability. In Singapore for example, an alternative model of responsible journalism has been advocated by the government, whereby a balance is to be struck between the press as adversarial watchdogs and as government mouthpieces. The overriding guideline is that reporting must be done in a manner that forges harmony and consensus, creating and sustaining a climate conducive to Singapore’s progress. See Li-ann Thio, *Human Rights and the Media in Singapore, in HUMAN RIGHTS AND THE MEDIA* 69, 72-75 (Robert Haas ed., 1996).

Different approaches to journalism in several Southeast and East Asian nations are discussed in MURRAY MASTERTON, ASIAN VALUES IN JOURNALISM (1996). An indication of what might constitute irresponsible free expression may be found in topics that are subject to censorship. For example, the Internet Code guidelines drawn up by Singapore Broadcasting Authority (http://www.sba.gov.sg) lists specific taboo topics: pornography (displays of nudity to titillate, forced sex, homosexuality, sex with children, animals, corpses as opposed to content with an intrinsic medical, scientific, artistic or educational value); incest; bestiality; necrophilia; excessive violence; and materials inciting racial and religious hatred. See Revised Internet Code Makes Taboo Areas Clear, STRAITS TIMES, Oct. 23, 1997, at 3.
community interests to "trump" individual rights.\textsuperscript{103}

§64 The constitutions of many ASEAN states contain chapters detailing citizens' duties.\textsuperscript{104} Not all duties are framed in terms of obligations owed to the state—for example, duties to respect the Constitution, to receive education and training, to protect national arts and culture, and to conserve natural resources and the environment. Some duties are addressed primarily to private parties. Article 47(1) of the 1993 Cambodian constitution states that "Parents shall have the duty to take care of and educate their children to become good citizens" while article 47(2) declares that "Children shall have the duty to take good care of their elderly mother and father according to Khmer traditions." In some cases, the state is enjoined to "serve and protect the people,"\textsuperscript{105} "respect the role of the independent people's organizations,"\textsuperscript{106} protect children's rights,\textsuperscript{107} and protect the interests of racial and religious minorities.\textsuperscript{108} The AIPPO Declaration also asserts, in Article 16, "the right and duty of each Member State to formulate appropriate and sustainable national development policies." This right to development, which is statist in nature, may be asserted by a state in political fora against other states to protest any interference with its economic policies, and may be asserted as a defense against the suspension of civil and political rights. To prevent the right to development from degenerating into a justification for repressive state policy, it must be remembered that the people must be considered the foundation upon which to develop this nebulous "right."\textsuperscript{109} Individual well-being and the equitable distribution of benefits must be central to development strategies.

§65 This trend toward emphasizing duties in human rights documents is embodied by the draft Universal Declaration of Human Responsibilities (DHR) proposed by the Interaction Council in September 1997, to complement the UDHR.\textsuperscript{110} Its supporters include former Prime Ministers of

\begin{itemize}
\item \textsuperscript{103} For an analysis of the Singapore Court of Appeal's approach towards fundamental liberties, see Li-ann Thio, An "I" for an "I": Singapore's Communitarian Approach Towards Constitutional Adjudication, 27 HONG KONG L.J. 163 (1997).
\item \textsuperscript{106} PHILIPPINE CONST., art. XIII, §15, reprinted in id., at 56.
\item \textsuperscript{107} CAMBODIAN CONST., supra note 92, art. 48, at 11.
\item \textsuperscript{108} SINGAPOREAN CONST., art. 152, reprinted in Kevin Tan, Republic of Singapore, in 16 Constitutions of the Countries of the World 106 (Gisbert Flanz ed., 1995).
\item \textsuperscript{109} For a discussion of the putative quality of this "right" and what its content might be, see Roland Rich, The Right of Development: A Right of Peoples?, in THE RIGHT OF PEOPLES 39 (James Crawford ed., 1988).
\item \textsuperscript{110} This is available at <http://www.asiawide.or.jp/iac/declara1/EngDecl1.htm>. See
\end{itemize}
Thailand and Singapore, and the Indonesian Foreign Minister. The Council Chairman, former West German Chancellor Helmut Schmidt, has said that the UDHR was influenced by Western ideas of freedom and individuality stemming from the eighteenth century European Enlightenment, while the DHR has an Eastern genesis, since "in the East, the notions of responsibility and community have prevailed." Composed of twenty-nine elder statesmen, the Council sought to draft a set of universal ethical standards balancing freedom with the responsibility that allows it to grow. The Declaration shuns exclusive insistence on rights, which, purportedly, generate conflict and division. The enumerated obligations—for example, to speak truthfully, to behave honestly and fairly, and to develop one's talents—speak primarily to persons. Religious leaders and the media are additionally singled out as having special responsibilities to avoid acts of prejudice and hatred and to report accurately, eschewing sensationalism. Reference is also made to conjugal and filial responsibilities, and duties to preserve the environment for unborn generations. Only Article 6 seems to be directly aimed at governments, exhorting their nonparticipation in, and intolerance of terrorism, genocide, and the use of women, children and other civilians as instruments of war.

66 Given the asymmetries of power between the state and individuals, an undue emphasis on individual and non-state group duties is likely to further render the individual vulnerable to misuses of state power. Implicit in human rights are the duties of government, either to refrain from restricting rights or to undertake positive steps to protect them. The Draft declaration reflects a desire to make explicit the obligations individuals owe to their community. But this should not be done at the cost of diverting attention from the duties states owe to their individuals. A charter of state duties towards citizens might substantially replicate the provisions of human rights documents. If the concept of duty is going to take a more prominent place in human rights discourse, however, human rights advocates should ensure that the duties of all parties involved are set forth, including state duties. Further, it should be stressed that individual duties are contingent upon the state's responsible discharge of its role to protect and promote the human rights of individuals, the primary subject of international human rights law.


Thio: Implementing Human Rights in ASEAN Countries: "Promises to keep and miles to go before I sleep"

1999] Implementing Human Rights in ASEAN Countries 35

ii. Discretion and Derogation

§67 Rights and liberties are likely to be crafted with broad derogation clauses, evidencing a bias towards states.112 States also maintain large measures of discretion insofar as they can limit the scope of human rights, balancing individual rights against requirements of public order, morality, and welfare. This technique is employed in the AIPO Declaration, which some view as a regional attempt to articulate an Asian model of human rights. Part II deals with "Fundamental Human Rights," guaranteeing the right to life, freedom of conscience and religion, right to property, liberty, and security of person, and the right to have violations of these rights redressed. These rights are expressly qualified by the phrase "in accordance with law." National legislation may contain a communitarian bias and the judicial interpretation of derogation clauses may be liberal to reinforce a communitarian philosophy that subjects individual rights to the interests of the collective. This may effectively denude them of any worth.113 The Singapore chapter of the deregistered Jehovah's Witnesses, for example, claimed that their constitutional rights to religious freedom had been impugned by an administrative ban on all their publications. The publications were considered prejudicial to the public welfare since their pacifist tenets contradicted the national policy of compulsory military service. The High Court dismissed the claim, giving great leeway to "national security" interests:

The sovereignty, integrity and unity of Singapore are undoubtedly the paramount mandate of the Constitution and anything, including religious beliefs and practices, which tend to run counter to these objectives, must be restrained.114

113. In the Singapore context, see Li-ann Thio, supra note 103. See also H.P. Lee, Constitutional Values in Turbulent Asia, 23 MONASH U. L. REV. 375 (1997). In the constitutional history of Singapore, there has only been one case before the Court of Appeals where the state sought to justify a preventive detention order in the interests of national security. The Court of Appeal found the order to be invalid on account of a technicality; the wrong officer had signed it. See Chng Suan Tze v. Minister of Home Affairs, [1989] 1 MLJ 69. This decision asserted that the exercise of ministerial discretion in issuing detention orders was objective in nature and subject to judicial review. Chng overturned the decision of Lee Mau Seng v. Minister of Home Affairs [1971] 2 MLJ 137, which had held that the exercise of such jurisdiction under the Internal Security Act was subjective and immune from review on substantive grounds. The government showed its displeasure with the decision in Chng by legislatively overruling it within a month. The amendment stated effectively that the law was "frozen" to the state of affairs that had existed on the date that the Lee Mau Seng judgment was delivered, effectively reinstating the subjective test of restricting judicial review to grounds of procedural compliance. For a discussion of Chng and its subsequent legislative overruling, see Li-ann Thio, Trends in Constitutional Interpretation: Oppugning Ong, Awakening Arumugam, 1997 SINGAPORE J. LEGAL STUD. 240, 241-46.
114. See Chan Hiang Leng Colin & Ors v. Public Prosecutor [1994] 3 SLR 662. For a detailed critique of this judgment, see Li-ann Thio, The Secular Trumps the Sacred: Constitutional
68 The differing approaches of the European Court of Human Rights (ECHR) and the Singapore Court of Appeal (SCA) toward the scope of free speech to criticize politicians usefully illustrates how the judicial interpretation of a right determines how robustly it is enjoyed. Adjudicating between individual and community rights is not a value-neutral exercise; it is greatly affected by whether a judge believes individuals exist primarily in "splendid isolation" or primarily as social units. The communitarian bias in ASEAN countries tends to favor state-defined collective interests over individual interests.

69 In considering a claim that an opposition parliamentarian had made libelous statements disparaging then Prime Minister Lee Kuan Yew during election rallies, moreover, the SCA accorded paramount importance to protecting politicians' reputations. Citing two pre-Charter Canadian cases, the SCA rejected the American "public figure" exception, which maintains a broader scope of acceptable criticism against public figures, because of their voluntary acceptance of public scrutiny. The SCA feared that privileging such critical political speech would "deter sensitive and honourable men from seeking public positions of trust and responsibility, and leave them open to others who have no respect for their reputation." A dearth of worthy public officials would be contrary to the collective public interest. The judicial affirmation of this statement echoes the official executive stance in the Shared Values White Paper that government leaders are Confucian junzi, or honorable men, to whom society should defer. These "honorable men" demand that a superior-subordinate posture be adopted in the realm of political debate and yet expect to enjoy the same protection as private individuals in relation to libel law, without being subject to a wider scope of public criticism. This stance seems to entirely ignore the "chilling" effect exerted on free speech, and the collective democratic interest in hearing criticism about the community's elected representatives. In the latest run of libel cases arising out of the 1997 general elections, damages have reached a record high of $3.63 million for defamatory words uttered during political rallies. This strongly deters critical political speech, which is the lifeblood of a democratic regime.

By contrast, in Lingens v. Austria, the European court took a far more balanced approach by not focusing exclusively on a single interest. In


116. Jeyaretnam Joshua Ben v. Lee Kuan Yew [1992] 2 SLR 310, 333H (quoting GATLEY ON LIBEL AND SLANDER (Philip Lewis, ed., 8th ed., 1981)). Jeyaretnam had spoken at a political rally in the hustings for the 1988 General Elections in Singapore where he made insinuations that the poison used in the suicide of Minister Teh Cheng Wan was somehow linked to the Prime Minister.


118. (1986) 8 ECHR 407 (involving a journalist who had written an article where the words 'basest opportunism' and 'immoral' were used in relation to the Federal Chancellor of Austria, who was accused of protecting former Nazi members for political reasons).
addition to public reputation, the court considered the public's right in a
democratic society to receive information critical of its government leaders,
as well as the electioneering context of the case, and the speaker's right to
speak. The vindication of democratic values was the governing principle.
These contrasting approaches show that similar paper commitments to
democracy may diverge substantially in their practical application, depending
on the ideological values of the adjudicators.

iii. Development

¶71 ASEAN countries stress the right to development, which was
elevated to the status of a "universal and inalienable" right in the Bangkok
IGO Declaration. Article 1 of the 1986 Declaration on the Right to
Development states that "every human person and all peoples are entitled
to participate in and contribute to and enjoy economic, social, cultural and
political development, in which all human rights and fundamental
freedoms can be fully realised." This suggests a holistic approach to both
civil and political rights and social, economic, and cultural rights. The
nebulous quality of the right, however, makes it difficult to monitor.

¶72 ASEAN statesmen have cited the exuberance of democracy as an
inhibitor of economic growth, lauding the discipline engendered by "Asian
values" as the basis of their economic success. Given the present Asian
economic crisis, the "democracy versus development" debate remains
topical. A wave of popular discontent in Indonesia culminated in the May
1998 riots and unseated a long-term authoritarian ruler. This has revived
assertions that economic development cannot progress unchecked without
some attention being paid to political liberalisation. It also undergirds the
belief that democratic governments can better handle crises than
authoritarian ones, and that free markets and political liberalism are
mutually reinforcing. Political and economic reconstruction needs
popular endorsement to be effective. The legitimacy of the current
President B.J. Habibie's administration is still being challenged, as
manifested in street demonstrations, such as the deadly Black Friday clash
of November 13, 1998. Economic reform cannot be carried out when
there are riots in the street as this certainly dampens investor confidence.
Democratic elections whereby people actively participate in choosing their
representatives are a crucial source of legitimacy. Democracy, while not a
panacea for economic woes, is an important stabilizing force that buttresses
rather than impedes economic development.

(1986).
120. Steve Lohr, Business, Asian Style: A Revaluing of Values; Some Say Market Collapse Shows
Democracy is Key to Growth, After All, N.Y. TIMES, Feb. 7, 1998, at B9; Fareed Zakaria, Will Asia
Turn Against the West?, N.Y. TIMES, July 10, 1998, at A15.
121. Habibie Honeymoon Over After Riots, STRAITS TIMES INTERACTIVE, Nov. 18, 1998 (visited
iv. An ASEAN Charter on Human Rights?

§73 Since ASEAN governments engaged in the human rights discourse favor the statist themes of individual duties and collective rights, some human rights advocates fear that a regional ASEAN Charter on Human Rights will undermine international standards and further weaken the position of individuals.

§74 Rather than lobby for an ASEAN Charter, some feel that a wiser strategy would be to encourage ASEAN states to ratify more human rights treaties and participate more actively within the UN human rights regime.

§75 A more optimistic approach would seek to draft a regional charter based on a genuine commitment to the indivisibility of civil and political rights and socio-economic rights, both of which are aspects of humane development. Both categories of rights reflect legitimate aspects of human dignity and are not necessarily mutually exclusive. Studies should be undertaken to show how these categories of rights complement and reinforce one another. Clear indicators or goals should be set out, so that the progress of development can be monitored and a government's performance can be subject to the censure or praise of an informed public opinion.

§76 The problem of not having an authoritative (as opposed to a loud) voice is one endemic to a decentralised international legal system. Minimally, a regional charter should affirm the international bill of rights—the UDHR and both 1966 International Covenants—to enhance the possibility of compatibility with international standards. A regional body has to uphold international standards lest a particularistic approach lead to "the kind of arbitrary, political interpretation of actions that leads to human rights violations in the first place." 122 Political culture in this respect may be determinative, but it cannot be definitive where it conflicts with international standards.

III. "ACCEPTABLE" MODES OF IMPLEMENTATION: CONSTRUCTIVE ENGAGEMENT AND DESTRUCTIVE ADVERSARIALISM

A. Anti-Conditionalities: De-linking Human Rights and Development

§77 As discussed above, ASEAN countries view the implementation of human rights as primarily a matter of national competence, rather than one subject to international supervision. Consonant with the "ASEAN way," which eschews confrontation, and with an eye at not marring the image of unity projected by ASEAN to the world, any concern ASEAN states might have about the human rights violations of one of their members is

addressed through discreet diplomatic channels. In addition, any such concern is articulated in terms of avoiding human rights terminology. This conveys the unfortunate impression of nonengagement with the outside world.

¶78 ASEAN asserts that, in promoting human rights, the international community should adopt a "positive, balanced and non-confrontational" posture, following the call to international cooperation in Articles 55 and 56 of the United Nations Charter. The Bangkok IGO Declaration advocates promoting human rights by "cooperation and consensus, and not through confrontation and the imposition of incompatible values."

¶79 In spite of their support of economic sanctions against South Africa, ASEAN states have generally opposed such external measures. The Bangkok IGO Declaration stresses the "universality, objectivity and non-selectivity" of human rights and the importance of avoiding double standards in implementing human rights. Further, tying economic aid to human rights performance could constitute a form of economic neo-imperialism, insofar as developing countries in desperate need of foreign assistance will then be subject to the terms of aid as dictated by foreign states. Such terms may be nothing more than thinly veiled protectionist measures designed to impede the economic competitiveness of developing countries. Hence, ASEAN jointly presses for delinking human rights from economic development issues, for example, through rejecting the inclusion of a social clause in international trade agreements as a new form of protectionism.

B. ASEAN Admissions Policy

¶80 The ideological animosity that had divided Southeast Asian countries and made the founding vision of an ASEAN composed of all ten Southeast Asian countries illusory ended with the Cold War. The 1991 Cambodian Paris Peace Accord brought a limited, uneasy peace to a country torn by decades-long civil strife, paving the way for the rapprochement of Vietnam and Laos with individual ASEAN countries. This made the dream of a regionwide institution more concrete. The stances adopted in regard to the applications of Burma and Cambodia for ASEAN membership appear prima facie contradictory, insofar as no demands were made to the Burmese military junta, SLORC, as a condition for entry. Conversely, Cambodian admission to ASEAN has been delayed and made contingent upon the establishment of a democratic government established under United Nations-supervised free and fair elections.

¶81 In applying to join ASEAN, Burma departing from its self-imposed isolationist policy. Its application immediately stirred opposition from

Western states that felt that ASEAN membership would confer a degree of legitimacy upon what the West considered an illegitimate, repressive regime. In seeking to dissuade ASEAN from admitting Burma, Western states argued that ASEAN's association with an international pariah would only tarnish the ASEAN image, and that ASEAN admission would only fortify the junta leaders' belief that they could get away with abusive and authoritarian practices. The western view was that only through a regime of harsh sanctions could SLORC, now euphemistically renamed the State Peace and Development Council (SPDC), be motivated to make changes toward a democratic, and presumably human rights-respecting, government. ASEAN begged to differ on the effectiveness of sanctions to induce such change, noting that this would only work if Burma were plugged into the world economy. The ASEAN predilection for harmony and consensus yielded the softer approach of "constructive engagement." This assumed that problems are best solved by inclusion rather than exclusion. Once Burma was admitted, it could gently be nudged along the path of change through moral suasion. In November 1996, the ASEAN Heads of Government agreed to simultaneously admit Cambodia, Laos, and Burma into ASEAN.

Burma's eventual admission into ASEAN in 1997, however, was not plain sailing. ASEAN leaders held differing views as to whether Burma should democratize before being awarded the prize of membership, with Thailand and the Philippines at times suggesting they should. Malaysia was disgruntled by Burma's treatment of the Muslim Rohingyas minority groups, while Thailand suffered the brunt of Burma's status as the chief refugee exporting country in the region. A general discomfit existed, moreover, over the military junta's repression of democratic forces, including the house arrest of the head of the National League for Democracy, Aung San Suu Kyi, who had won a victory in democratic elections in 1990. The prevailing consensual view, however, was that it would be easier to influence the military regime once it was an ASEAN member. Burma, together with Laos, was thus admitted to ASEAN in July 1997 without any requirement of democratization. For admitting Burma, and for ignoring the contrary plea of Aung San Suu Kyi—the leader of the party that won ninety percent of the vote in the 1990 elections—ASEAN has been criticized as "rejecting democrats in favor of

124. Proposals were made to the effect that a genuine tripartite dialogue between the junta, the ethnic minorities and the National League of Democracy, perhaps mediated by an ASEAN member serve as a condition for entry. See Asean Values for Myanmar, ASIAWEEK, Nov. 22, 1996, at 184.

125. ASEAN to admit Myanmar, Cambodia, Laos, in July, STRAINS TIMES, June 1, 1997, at 1.

126. The list of agreements to which Laos had to accede include those for contributing to an ASEAN Food Security Reserve and Fund for ASEAN, as well as various other agreements relating to tariffs, customs, economic cooperation, investment, and dispute settlement. See Declaration on the Admission of the Lao People's Democratic Republic into the Association of Southeast Asian Nations (visited May 9, 1999) <http://www.asean.or.id/amm/admlao97.htm>.
despots."\textsuperscript{127}

\textsuperscript{127} Since the promotion of human rights and democracy is not an express ASEAN goal, it is not surprising that ASEAN admission policies exclude human rights policy as a condition for membership. This may be contrasted with the European approach in the wake of the Yugoslav and Soviet implosions in the early 1990s.\textsuperscript{128} States wanting to join the European Union had to satisfy certain normative conditions including a commitment to a form of governance that respects democracy, the rule of law, and international human rights standards. A prospective ASEAN member had only to satisfy the following non-human rights related criteria: accession to the Treaty of Amity and Cooperation and all other ASEAN treaties, declarations, and agreements. It also had to agree to join the ASEAN Free Trade Area (AFTA), which takes effect in 2003, and to have the capacity to participate in all other economic arrangements.

\textsuperscript{128} ASEAN's decision to delay Cambodia's admission stemmed from dramatic changes in the political situation. Just sixteen days before Cambodia was scheduled to enter ASEAN, together with Laos and Burma, Second Prime Minister Hun Sen staged a military coup to seize power by force. Certainly, the accommodating approach ASEAN had displayed toward the Burmese junta, which is widely viewed by the international community as illegitimately ruling by force of arms, did not serve to deter Hun Sen.\textsuperscript{129} The immediate statements issued by ASEAN governments were varied, with Indonesia and Vietnam leading a six-strong faction championing Hun Sen's case and opposing delayed entry, leaving Singapore, Thailand, and the Philippines, inspired by the principle of the peaceful transfer of power, troubled enough to rethink the whole issue.\textsuperscript{130}

\textsuperscript{129} On July 10, 1997, ASEAN issued the following statement:

In the light of unfortunate circumstances which have resulted from the use of force, the wisest course of action is to delay the admission of Cambodia into ASEAN until a later date.\textsuperscript{131}


\textsuperscript{129} While the United Nations recognizes the government of Myanmar, it remains insistent on calling upon the SPDC to establish a meaningful democracy in accordance with the popular will expressed in the 1990 democratic elections, and to engage upon talks with the political opposition in the interests of national reconciliation. United Nations Commission on Human Rights, \textit{Situation of Human Rights in Myanmar}, para. 4(b), 54\textsuperscript{th} Sess., U.N. Doc. E/1998/23 (1998).

\textsuperscript{130} It was reported that Singapore, in addition to urging restraint and calling for a ceasefire stated that it "disapproves of the change of government through violent means and calls on all parties to adhere to the constitutional processes in place in Cambodia." \textit{Singapore Disapproves of Government Change}, \textit{SYDNEY MORNING HERALD}, July 11, 1997.

\textsuperscript{131} \textit{Joint Statement, The Special Meeting of the ASEAN Foreign Ministers, Kuala Lumpur, 10
¶86 At first, in its characteristic nonantagonistic manner, ASEAN refused to adopt a stance concerning the legality of Hun Sen's government as this would cross the line into internal Cambodian affairs and be "tantamount to making an assessment of his position." Ranariddh had urged ASEAN to delay Cambodia's entry, cautioning against a "business first, democracy next approach" and calling for stronger economic and political pressure from the international community. Hun Sen characterized the Cambodian problem as purely domestic, arguing that it should pose no impediment to the scheduled admission. It was clear that ASEAN membership would bolster Hun Sen's legitimacy and open the door to foreign aid. ASEAN manifestly did not want to take sides, and assigned envoys to work with both parties. The delay, however, was effectively a censure of Hun Sen. To maintain its credibility as an organization, ASEAN felt that it could not condone the use of force for unconstitutional purposes. This would contradict the ASEAN fundamental principle of renouncing the threat or use of force. It continued to recognize Ranariddh as co-premier—along with Hun Sen—of the coalition government set up after the 1993 elections. Clearly, ASEAN could not remain indifferent to these potentially destabilizing developments, nor could this indifference extend to accepting a new member that used force to solve domestic political disputes, flouting the ASEAN tradition of peaceful consensus-seeking approaches to problems. Cambodian entry was thus made contingent upon the formation of an effective government, with ASEAN urging the conduct of free and fair elections and the return of political normalcy to Cambodia.

¶87 The ASEAN Foreign Ministers had decided to indefinitely delay Cambodia's admission until a government was formed, otherwise Cambodia would be unable to discharge its rights and obligations as an ASEAN member. Even after the stalemate following the July 1998 elections ended, in November, when Hun Sen and Ranariddh arrived at a deal to form a coalition government in November, ASEAN showed a distinct wariness, still harboring serious reservations about the political stability of the country. ASEAN stated that a functioning government was necessary before admission into ASEAN could be recommended. Cambodia did not gain full membership at the ASEAN summit in December because key aspects of the coalition pact, which included the formation of a Senate, had

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132. ASEAN Feels 'Let Down,' S. CHINA MORNING POST, July 11, 1997 (quoting Malaysian Foreign Minister Abdulla Badawi).
134. See e.g., ASEAN and the Question of Cambodia, STRAITS TIMES, Sept. 10, 1997, at 43; Waiting for Normalcy, BUS. TIMES, July 11, 1997, at 5.
135. See e.g., Treaty of Amity and Cooperation in Southeast Asia, signed Feb. 24, 1976, art. 2(e) (providing that, in their relations with one another, the High Contracting Parties shall be guided by the fundamental principle of renunciation of the threat or use of force). Text may be found at <http://www.asean.or.id/politics/pol_agr2.htm> and <http://www.aseansec.org/summit/amity76.htm>.
136. See Hun Sen and Ranariddh Agree to Coalition, STRAITS TIMES, Nov. 14, 1998; Cambodia's ASEAN Entry Unlikely in Dec, STRAITS TIMES, Nov. 18, 1998.
yet to be implemented. Consensus as to Cambodia's admission was finally reached in March 1999 after Cambodian legislators effected extensive constitutional changes necessary to form the Senate. On April 30, 1999, Cambodia was admitted to ASEAN.

Judging by the Cambodian experience, it would appear that the minimum criterion for ASEAN admission is the presence of a stable internal order, maintained without resort to force. If this is so, ASEAN's credibility seems to be called into question, insofar as it has adopted an inconsistent position, rendering ambiguous the admissions criteria. ASEAN seemed to apply a double standard in calling for the return of a democratically elected government in Cambodia, but not for one in Burma. Although the Burmese military junta maintains its position by force and was democratically repudiated by the Burmese people in the 1990 elections, there was no delay in Burma's 1997 admission. Burma's admission was characterized as an internal ASEAN affair, with Malaysia noting that the political systems of countries did not factor into the United Nations admissions process. Yet ASEAN appeared to intervene in the domestic affairs of Cambodia by requiring the observance of constitutional processes and political legitimacy as a condition of membership. Ostensibly this did not constitute meddling in Cambodia's domestic politics insofar as the role played by the ASEAN Troika—the Philippines, Thailand, and Indonesia—to help restore political stability came in immediate response to a request by a Cambodian elected official for help. The Burmese junta, by contrast, never asked ASEAN to mediate its conflict with the country's political opposition.

The fact is, however, that ASEAN was more comfortable not intervening in Burma because the dispute there was not perceived as a threat to regional stability; SLORC had the country under its effective, brutal control. This was not the case in Cambodia, where the bitter political rivalry, built on a strife-ridden history, threatened to explode into fighting sufficient to threaten regional stability. It would thus appear that ASEAN is prepared to take a more interventionist stance when a conflict between actors in one state is sufficiently grave to threaten the stability of the state and the region. ASEAN seems content to ignore the grossest human rights violations committed by a state like Burma—where extra-judicial killings, torture, and forced labor are widespread—so long as there is a strong government with which it can deal. ASEAN is not, after all, a club of democratic nations; some of its longstanding members have autocratic governments. To deny Burma membership because of its notorious human

139. See ASEAN Won't Let US Influence its Decision to Admit Myanmar, STRAITS TIMES, Apr. 28, 1997, at 14. The head of the largest US investor in Burma, Unocal Corp., pointed out that economic sanctions hurt people, not regimes, justifying his company's investment on the belief that the fastest route to an open society was through the open market. See US Oil Giant Defends its Role in Myanmar, STRAITS TIMES, April 23, 1997, at 15.
rights violations, would have forced some pots to call the kettle black.

C. Constructive Engagement vs. Imposition of Sanctions

¶90 Burma's admission into ASEAN displeased the European Union (EU) and the United States. EU members and the United States often address human rights violations by attempting to induce authoritarian regimes to liberalize through such measures as unilateral or multilateral economic sanctions or pressuring multi-national corporations to withdraw their investments. After the Dili Massacre carried out by Indonesian forces in East Timor in November 1991, Canada, Denmark, and the Netherlands suspended bilateral aid to Indonesia. This approach is not confined to Western states. Taiwan, the sixth biggest investor in Indonesia in 1997, suspended rice aid to Indonesia in the wake of the violent attacks on the ethnic Chinese minority there in 1998. Prior to Burma's entry into ASEAN, in October 1996, the European Union imposed a visa ban on the SLORC military rulers. All military cooperation and military equipment sales to Burma were banned. Further, all nonhumanitarian or development assistance had been suspended since 1988 after SLORC seized power, crushing nationwide pro-democracy protests and killing and jailing thousands. The European Union expanded its existing visa ban on Burma government officials in October 1998. The United States and Canada were among those countries that unilaterally imposed sanctions on Burma, condemning its systematic human rights violations, including the freedom of expression. The United States banned all new investments in Burma in April 1997, while in August 1997, Canada removed Burma's eligibility under the General Preferential Tariff and placed it on the Area Controls List, which requires all exports from Canada to Burma to have an export


143. Taiwan halts rice aid for Indonesia, STRAITS TIMES, Aug. 21, 1998, at 1.

144. EU Bans all High Level Government Contacts: SLORC feels chill, NATION, Nov. 12, 1996.


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Implementing Human Rights in ASEAN Countries: "Promises to keep and miles to go before I sleep"

The opposition leader Aung San Suu Kyi supports the Western economic sanctions against Burma.148

91 The traditional ASEAN way avoids confrontation, preferring quiet diplomacy. "Constructive engagement," as an alternative method of human rights management, seeks not to embarrass the object of engagement through isolation or condemnation. Change is induced through peer pressure. Its proponents argue that isolating Burma will be ineffective, given Burma's self-reliant ethos and recent emergence from self-imposed isolation, a manifest indication of its non-receptivity to international pressure. In this view, more effective results can be attained through gentle suasion and the wielding of "economic carrots" that can economically benefit all Burmese. Promoting Burma's economic development through foreign trade and investment and through its integration into the world economy will eventually lead to peaceful, political liberalization, it is argued. Singapore, for example, has responded enthusiastically to foreign investment solicitations from Burma in recent years, and is now one of the largest sources of foreign investment in Burma. Indeed, Singapore has property development and manufacturing projects in Burma worth an estimated $1.5 billion and actively promotes bilateral economic cooperation between the two countries.150 Powerful economic interest groups in the West also support this stance.151 ASEAN is of the opinion that economic sanctions violate its policy of nonintervention in the internal affairs of a state.152

92 Opponents of "constructive engagement" argue that the policy is morally repugnant; it serves merely as "a prop of the military regime for


149. For a description of this policy, see Amitav Acharya supra note 142, at 175-78.

150. See e.g., Singapore to Promote Economic Cooperation with Burma, XINHUA, Feb. 18, 1999 (visited May 27, 1999) <http://www.singapore-window.org/sw99/90218xin.htm>. The imposition of U.S. sanctions against Burma was criticized in a Straits Times editorial on April 25, 1997, at 60. In the editors' view, which is closely associated with the views of the Singapore government, sanctions would be ineffective in bringing about an acceptable form of government in Singapore because it would have a minor impact in dollar terms; foreign investment would continue to pour in from Asia and Europe. Interestingly, it stated that the U.S. motive of restoring Burma to rights and to end the suppression of free choice and political dissent there was one shared by ASEAN. ASEAN chose to work toward transition through investment and offering ASEAN membership though the editorial stressed ASEAN membership carried not merely benefits but obligations, and that it behooved SLORC to show a sincerity towards political reform.

151. USA Engage!, for example, is a coalition of American businesses, agricultural groups and trade associations that opposes unilateral economic sanctions. Their website is at <http://www.usaengage.org/>.

short term economic gains." It is hard to predict the effects of private pressure and it is uncertain whether engagement will elicit change or embolden resistance to change. In a video smuggled out of the country, Aung San Suu Kyi highlighted the danger that admitting Burma in ASEAN might make the regime "even more obdurate and repressive than ever," seeing that there was no real opposition to its ways.

¶93 "Constructive engagement" also feeds the interests of those ASEAN states that wish to shield their human rights policy from international scrutiny. Were ASEAN states to comment on the repressive measures taken by the renamed State Peace and Development Council (SPDC), this might threaten their own interests; their own domestic policies might become fair game for the embarrassing scrutiny of international criticism. Membership in ASEAN is supposed to enhance legitimacy, rather than provide a forum for the exposure of illegitimate policy.

¶94 After Burma's admission into ASEAN, Amnesty International argued that the ASEAN claim that "constructive engagement" with SLORC would improve human rights in Burma would now be put to the test. There does not seem to be any improvement in Burma's human rights record after it gained ASEAN membership. To the contrary, after Burma's admission as an official ASEAN observer in July 1996, human rights violations intensified. In September 1996, SLORC detained 500 democracy activists and barricading the home of Aung San Suu Kyi.

¶95 What's more, the issue of human rights in Burma has not been put on any formal ASEAN agenda. It is likely that ASEAN will maintain an official blind eye with respect to Burma's human rights, given Burma's insistence that it will not tolerate criticisms from its regional partners. When Malaysia's foreign minister suggested that SPDC open talks with Aung San Suu Kyi, he was simply rebuffed; SPDC indicated that it saw no point in commencing dialogue with her. The Burmese government has remained resolute in refusing to start such a dialogue, despite repeated pleas. Under pressure, the Burmese junta has made certain concessions

154. See Shame on Southeast Asia, JERUSALEM POST, June 1, 1997.
159. See TEST FOR ASEAN, S. CHINA MORNING POST, July 5, 1997.
160. Japan also called for the Burmese government to start a dialogue with Suu Kyi but this was ignored. See ACTIVISTS FREE, BUT PRESSURE ON MYANMAR CONTINUES, STRAITS TIMES, Aug. 16, 1998, at 21. In a Reuters interview conducted by Rajan Moses on February 28, 1999, a Burmese government spokesperson argued that tacit Western support for the opposition National League for Democracy hindered the introduction of democracy. The spokesman insisted that Suu Kyi must drop all talk of convening a Parliament in order to start the process
with respect to foreign nationals. In August 1998, SPDC detained eighteen foreign activists for allegedly inciting unrest by handing out pamphlets recalling the bloody military crackdown on pro-democracy demonstrators in August 1988, and sentenced them to five years of hard labor. This provoked international outrage and even some disquiet from ASEAN members. Among the foreign activists detained were six Americans and nationals from ASEAN countries like Thailand, Malaysia, Indonesia, and the Philippines. Demonstrating a readiness to speak out against the SPDC, but only where the interests of a state's own nationals are affected, the Philippines called for the release of the two detained Filipinos. All of the activists were eventually freed, primarily due to pressure from states protecting their nationals.

¶96 Burma continued to be a source of embarrassment after joining ASEAN, fueling discord between ASEAN and some of its dialogue partners. Indeed, Burma has remained a central issue in ASEAN-EU affairs. The European Union has decried the inefficacy of "constructive engagement." A senior EU official pointed out that the human rights situation had deteriorated since Burma's ASEAN membership: more opposition politicians have been disappeared, and killings have increased. He asked pointedly, "If ASEAN can intervene in Cambodia, why can't it intervene in Myanmar?"

¶97 At the ASEAN Post Ministerial Conference in July 1998, the European Union expressed grave concern about the lack of democratic progress in Burma. ASEAN-EU cooperative ventures had hit a rock because of the EU's stand against repression in Burma. The European Union's continuing refusal to accept Burma as a member of the European Community-ASEAN Joint Committee has caused a rift with ASEAN, which insists that it wants all of its foreign ministers present at EU talks.

¶98 Although ASEAN has insisted that the European Union not discriminate against any of its members, individual ASEAN ministers did not feel compelled to publicly defend Burma for its harsh policies against pro-democracy political opponents during the 1998 ASEAN Regional Forum security talks. The European Union continues to prevent Burma from exploiting the full privileges of ASEAN membership by denying Burma a seat at the Asia-Europe Meeting (ASEM)

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163. The EU had called for change in four aspects to improve human rights conditions: the release of all political prisoners, the end of military rule, granting democratic political parties access to political life and the promulgation of a democratic constitution. German Minister says EU seeks Change on Four Fronts in Burma, NATION, Oct. 22, 1997.
165. See EU and ASEAN reconciliation talks breakdown, STRAITSTIMES, Jan. 24, 1999, at 22;
ASEAN wants all its members at EU talks, STRAITSTIMES, Feb. 26, 1999, at 21.
167. The inaugural Asia-Europe Meeting was held in March 1996 in Thailand and provided a forum for European and Asian leaders to consolidate links and to discuss any
leaders. Further, unlike other new ASEAN members (Laos and Vietnam), Burma does not receive aid from the West. The tension precipitated by Burma in EU-ASEAN relations has stilted dialogue between the two groups, delaying the disbursement of much needed EU development funding.

\[99\] An influential European-led pressure group, the International Network of Political Leaders Promoting Democracy in Burma (PD Burma), has put further pressure on Burma to democratize by calling on ASEAN to put its own house in order and to push for talks between the Burmese military junta and the opposition leader. This, it believes, will bring about political stability and European investment in the region. The glare of negative international publicity increased even further in August 1998 when the National League for Democracy raised the ante by calling for the convening of a People’s Parliament, and the military blocked attempts by Aung San Suu Kyi to meet her supporters. The EU Ministerial Council supported Aung San Suu Kyi's convocation of the Committee Representing Parliament (CRP) and the European Union urged the SPDC to recognize, and hold genuine dialogues with, the CRP. Continuing adverse public opinion in the United States has also caused corporations like Ericsson to suspend all business ties with Burma as of September 1998. Anti-Burma grassroots movements in state governments and campuses have already pressured major corporations like Pepsi, Liz Claiborne, and Apple Computer to pull out of the country.

\[100\] "Constructive engagement" is ultimately a limited tool to induce changes in the dictatorial Burmese regime. It is obviously a method for the patient, yet, in the interim, rampant human rights abuse continues in Burma. Countries and corporations that invest in Burma are in complicity with those human rights violations. Constructive engagement has been attacked as merely allowing the SPDC to exploit Burma's resources and divert its earnings to the military apparatus for oppressing the Burmese people, rather than providing for their basic needs.\[101\] Promoting the topic of mutual interest. The official ASEM home web page is at <http://asem.inter.net.th>.

168. European countries are determined not to let Burma attend ASEM until its human rights record improves. British Foreign Minister Robin Cook has criticised the military regime there as being repressive and irresponsible insofar as it profited from the drug trade. While the Malaysian Prime Minister has stated that discrimination against Burma is discrimination against ASEAN, other ASEAN leaders have been more circumspect in the matter, pointing out that ASEM is not a meeting of regional blocs but rather, a forum for individual countries. See ASEM Ban on Myanmar Will Provoke Strong ASEAN Reaction, STRAITS TIMES, Sept. 3, 1997, at 23; see also Myanmar’s Place at Asem Not Asean’s Call, STRAITS TIMES, Sept. 4, 1997, at 24.


173. See Debbie Stothard, Alternative ASEAN Network on Burma, "Constructive engagement”—an alternative view—(citing the briefing on human rights in Burma before the U.N. Human Rights Commission on April 8, 1997) (visited May 9, 1999)
welfare of the peoples in ASEAN is one of the founding objectives of ASEAN. A repressive military regime that treats human rights with contempt and cracks down on political dissent harms the welfare of its people. Such policies cannot be the basis for long term stability. ASEAN states are best positioned to influence Burma, but a more aggressive stance is needed to produce results. This would necessitate a radical shift in ASEAN policy, such as the placing of serious human rights abuses on ASEAN's formal agenda. If ASEAN were able to contribute to restoring democratic rule in Burma, this would enhance its prestige both internationally and within the region.  

D. The Principle of Non-Intervention in Internal Affairs: Erosion of a Bedrock ASEAN Principle?

i. Maintaining a Fraternal Silence and a Blind Eye

¶101 Article 2(c) of the 1976 Treaty of Amity and Cooperation in Southeast Asia enshrines the fundamental principle of nonintervention in the internal affairs of another state. This prohibition is also set out in Article 2(7) of the United Nations Charter and the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. This section deals with the application of the principle of nonintervention in the ASEAN context.

¶102 A matter is "internal," or falls within the domestic jurisdiction of a state, if it is "not regulated by international law or if it is not capable of regulation by international law." Human rights issues are clearly matters of international concern, evident from the substantial corpus of human rights law. Human rights concerns cannot be characterized as issues of domestic governance where states have voluntarily assumed international obligations in this regard. All United Nations members, which include all of the ASEAN states, have a de minimis obligation to promote and protect human rights and fundamental freedoms in accordance with the United Nations Charter. By acceding to specific human rights treaties, ASEAN states accept the obligations contained therein. For a state's action to constitute "intervention" there must be an element of compulsion, which Lauterpacht defines as "a peremptory demand or an attempt at interference

<http://www.soros.org/burma/altview1.html>

174. Local NGOs, such as the Burma Solidarity Group Malaysia, have called for a change in ASEAN policy with regard to constructive engagement as being one that favors the military junta and encourages it to discard the democratic process. See the Burma Solidarity Group's February 14, 1997 press statement issued in conjunction with some fifty NGOs throughout the ASEAN region, ASEAN urged to ditch "constructive engagement" (visited May 9, 1999) <http://www.soros.org/burma/malaygrp.html>.

175. G.A. Res. 2625 (XXV)

accompanied by enforcement or threat of enforcement in case of non-compliance.” Enforcement may entail “either direct measures of compulsion or such indirect pressure as is associated with non-compliance with a legal obligation or with a pronouncement of an international authority having binding legal effect.”\textsuperscript{177} A Security Council resolution imposing mandatory sanctions against a recalcitrant state certainly falls within the orbit of “intervention.” A specific recommendation to a State, drawing its attention to the propriety of taking action to bring a course of behavior in line with an international obligation, does not constitute "intervention," since it lacks the element of dictatorial and peremptory interference. The pressure of public opinion may induce changes in state behavior but this change does not flow from a binding legal determination.

\textsuperscript{103} In practice, ASEAN states have "closed ranks" against intervention and adopted a united stance against foreign states or international organizations that have criticized the human rights record of one of their members, particularly Burma. A clear "hands-off" policy was adopted with respect to the Indonesian annexation of East Timor in 1975. Only in 1976 was the issue discussed formally by ASEAN foreign ministers; the rest was silence. ASEAN's blind eye toward intraregional human rights abuses was also evident in regard to the human rights abuses in the Philippines under the Marcos administration.

\textsuperscript{104} This policy of ignoring human rights abuses in ASEAN member states has, nevertheless, damaged ASEAN's relationships with its dialogue partners and other regional and international bodies. The military abuses committed in East Timor have elicited much international concern and have been a perennial bugbear in ASEAN-EU relations. The European Union wants to place the promotion of human rights and democracy on the ASEAN-EU agenda while ASEAN wants to confine the agenda to economic cooperation, trade, and investment issues.\textsuperscript{178} ASEAN had characterized the problem as a bilateral issue between Portugal and Indonesia, while Portugal has asserted that such a viewpoint is too narrow given the fact that the United Nations has never recognized the Indonesian annexation and still considers Portugal to be the administering colonial power.\textsuperscript{179}

\textsuperscript{105} ASEAN cites the principle of nonintervention for its refusal to comment on East Timorese claims to self-determination, but its fraternal silence is motivated by a desire not to embarrass Indonesia, the largest

\textsuperscript{177} Id. at 168.
\textsuperscript{179} With a "sea change" in Indonesian policy, some headway is currently being made in resolving the East Timor issue. It has been decided as a matter of principle that the East Timorese were to vote in a U.N. organized ballot about whether they wanted autonomy within Indonesia, with the possibility that a refusal of this proposal could open the way to independence. See Cameron Stewart & Don Greenles, Jakarta accepts E. Timor ballot, THE AUSTRALIAN, Feb. 9, 1999 (visited June 2, 1999) <http://www.theaustralian.com.au/extras/016/4232376.htm>.

https://digitalcommons.law.yale.edu/yhrdlj/vol2/iss1/1
member of ASEAN. This seems to be an exercise in selectivity, given ASEAN's role in brokering a peace in Cambodia and between the Muslim Moros in Mindanao and the Philippines.

¶106 The concern not to upset a fellow ASEAN member in the interests of solidarity extends further than refusing to confront them directly. ASEAN states have displayed a great reluctance to allow conferences on contentious issues affecting other ASEAN states to be held on their soil. This may be in line with Article 10 of the Treaty of Amity and Cooperation in Southeast Asia (1976), which provides that "[e]ach High Contracting Party shall not in any manner or form participate in any activity which shall constitute a threat to the political and economic stability, sovereignty or territorial integrity of another High Contracting Party." In refusing to allow the use of their country as a base for protesting against others, the Filipino President banned forty prominent foreign delegates, including South African Archbishop Desmond Tutu, from entering the country to attend the first Asia Pacific Conference on East Timor (APCET I). This conference was held in Manila in 1994 in the absence of the foreign delegates.

¶107 Malaysia was similarly discomfited by plans to hold APCET II in Kuala Lumpur in November 1996. Malaysian NGOs and the Asia Pacific Coalition on East Timor,\textsuperscript{180} who seek to change the ASEAN position from that of silence to proactive conflict resolution, organized the conference. The Malaysian government appealed to the conference organizers to cancel it, to avoid harming bilateral relations with a fellow ASEAN member. The cabinet decided at the eleventh hour not to permit the meeting and said that foreign delegates would be deported. The local media was directed not to cover the Conference, which was held but disrupted by a mob that included youth members of Malaysia's governing National Front Coalition (UMNO). Led by UMNO youth, the mob broke doors, overturned tables and threatened delegates with violence if they did not leave the hotel hosting the conference. The police eventually arrived, bussing the delegates to the airport for deportation and arresting some mob members who were later released. Indonesia was pleased with the deportations, declaring that this "reflected the ASEAN members' commitment not to interfere in the affairs of other countries and their highest solidarity."\textsuperscript{181} By failing to prevent the violent crackdown on this private meeting to promote self-determination, Malaysia tainted its international reputation for adherence to the rule of law. The Philippines also manifested this spirit of ASEAN cooperation and solidarity when it informed the Malaysian authorities of the movements of a Filipino who had convened APCET I; he was detained by immigration officials and deported back to the Philippines.\textsuperscript{182}

\textsuperscript{180} The press statements made in connection to the events surrounding APCET II can be found at \texttt{<http://www.geocities.com/Capitolhill/6133/5.html>}.  
\textsuperscript{181} \textit{Melee Over a Meeting}, ASIAWEEK, Nov. 22, 1996, at 20-21.  
\textsuperscript{182} See Asia-Pacific Conference on East Timor II, Press Release, \textit{APCET I Convener detained by Malaysian Immigration} (visited May 9, 1999)
108 The "ASEAN way" of avoiding public discussion of human rights abuse appears to be a vehicle for silencing dissent from alternative, non-state actors like NGOs active in the East Timor cause. In general, NGOs are suspiciously regarded as advocates of "Western" values, out to undermine the legitimacy of ASEAN governments. Influential human rights reports like those produced by Amnesty International and Human Rights Watch have great potential to embarrass, and to strain interstate relations. Even local NGOs are sometimes considered too aggressive, akin to opposition political parties in highlighting social problems. Malaysia has threatened to unleash its draconian Internal Security Act (ISA) which allows for preventive detention, if NGOs pose a threat to "national security," which can be expansively defined. For example, NGOs planning to hold a public tribunal to highlight the abuses of the Malaysian police were dissuaded by a threat to invoke the ISA. Clamping down on the expression of critical political views is effected in the name of national resilience and order.

ii. Testing the Waters: The Call for a More Flexible Posture

109 Cracks in the façade of ASEAN unity have appeared over how to handle certain matters of common concern, such as the admission of Cambodia and the management of the economic crisis. This is also reflected in the strained bilateral relations between certain ASEAN countries. Indonesia has made remarks that Singapore is not doing enough to help Indonesia as a friend. Singapore and Malaysia are occupied in a heated railway land row. ASEAN countries also seem to be displaying differing attitudes toward engaging Aung San Suu Kyi in Burma. For example, Filipino Foreign Minister Domingo Siazon paid a private visit to Aung San Suu Kyi at her Rangoon home in October 1997, becoming the


183. For a discussion of non-statist perspectives on human rights, see Dianne Otto, Rethinking the "Universality" of Human Rights Law, 29 COLUM. HUM. RTS. L. REV. 1 (1997); Sharon K. Hom, Commentary: Re-Positioning Human Rights Discourse on "Asian" Perspectives, 3 BUFF. J. INT'L L. 209 (1996). It is instructive to compare the 1993 Bangkok IGO Declaration on Human Rights with the Bangkok NGO Declaration on Human Rights, a product of the 240 participants from 110 non-governmental NGOs from the Asia-Pacific region. The latter, the Bangkok NGO Declaration on Human Rights, affirms the universality of human rights and stresses that religious-cultural traditions do not pose an obstacle to realizing international human rights norms. The text of both Bangkok Declarations is reproduced in 1 ASIA-PACIFIC HUMAN RIGHTS DOCUMENTS AND RESOURCES (Fernand de Varennes ed., 1998) at pages 88 and 147, respectively.


185. See ISA Threat Forces NGOs to Shelve Tribunal on 'Police Abuses,' STRAITS TIMES, Dec. 22, 1996, at 18.

186. The Singapore Prime Minister has stated that his government will restrain itself and say little in response to the litany of criticisms leveled against Singapore by the Indonesian president, to avoid being drawn into the latter's domestic politics. See S'pore Won't be Drawn by Indonesia, STRAITS TIMES, Mar. 5, 1999.
highest ranking Southeast Asian government official to have done so and risking the displeasure of the Burmese authorities. The Filipino President had requested official permission to visit her but when this was met with silence, he did not pursue the matter.  

This was followed by a meeting of the Malaysian foreign minister, the Nobel Peace Prize winner, and top leaders of the National League of Democracy (NLD) in March 1998. Singapore's Prime Minister made no attempt to visit her during his visit to Burma that same month. Visits by high-level ASEAN government officials to NLD members, whom the SPDC considers political dissidents, and whom they want to continue to marginalize, may well be construed by the SPDC as moral support for an opposition faction and, therefore, interference with Burma's internal affairs.

Speculation that ASEAN would alter its longstanding commitment to the principle of nonintervention in internal affairs was fueled when Thailand proposed that the policy should be reexamined during the thirty-first annual ministers' meeting in July 1998. Malaysian Deputy Prime Minister Anwar Ibrahim had already suggested that ASEAN needed a more proactive response to manage the spill-over effects of certain domestic socio-economic crises and political upheavals, such as that in Cambodia, through "constructive intervention" to prevent the escalation of problems. A Thai minister also criticized the inadequacy of a "neutral" ASEAN stance. In a world of interdependent economies, no neighbor should sit quietly while another suffered from foreign speculative attacks on the baht, for example.

Recognizing that the world was becoming increasingly interdependent and globalized, Thailand argued that a stronger new approach was needed to handle the escalation of economic, environmental, and political crises in the latter half of the 1990s. ASEAN member states had to be able to criticize each other's policies more openly where these had regional repercussions. Thailand suggested a policy of "flexible engagement".

All the ASEAN members have the responsibility of upholding the principle of non-interference in the domestic affairs of one another.

189. See The Word is Constructive Intervention, STRAITS TIMES, July 15, 1997, at 19. In the Cambodian context, this could involve extending direct assistance to firm up the electoral process and strengthening civil society and the rule of law. While affirming the nonintervention principle, he stressed that there were certain core humanitarian values by which all should be bound. Datuk Anwar cited ASEAN's willingness to ensure free and fair elections in Cambodia and its constructive engagement with Burma as indicators of a more active stance in handling potential sources of regional conflict.
190. See Time for ASEAN to Play a More Active Role in Members' Affairs, STRAITS TIMES, July 25, 1997, at 26.
But this commitment cannot and should not be absolute. It must be subjected to reality tests and accordingly, it must be flexible. The reality is that, as the region becomes more inter-dependent, the dividing line between domestic affairs on the one hand and external or trans-national issues on the other is less clear. Many "domestic" affairs have obvious external or trans-national dimensions, adversely affecting neighbors, the region and the region's relations with others. In such cases, the affected countries should be able to express their opinions and concerns in an open, frank and constructive manner which is not, and should not be, considered "interference" in fellow-members' domestic affairs. 192

¶112 This proposal provoked a great deal of debate within ASEAN. Ultimately, only the Philippines supported the Thai suggestion. The other ASEAN nations expressed public alarm at any attempt to change gears.

¶113 Most of the ASEAN governments also feared that "flexible engagement" might encourage foreign forces to step up their efforts to influence change within ASEAN countries, through more intensive criticism or even stepped up sanctions. Within ASEAN, a more critical interstate approach might precipitate a level of discord that could threaten the cohesiveness of the grouping. The majority of ASEAN countries paid little heed to the Thai argument that, far from promoting divisiveness within ASEAN, the proposed policy reflected an enhanced degree of political maturity within ASEAN; ASEAN regionalism and resilience would be promoted in the long run if states took a more active interest in each other. As far as human rights are concerned, franker discussion would promote awareness about abuses and contribute to raising the standards of human rights protection in the region. Flexible engagement would also provide an early warning system by alerting the grouping to the domestic problems of an ASEAN country that had transnational implications, helping the formulation of informed solutions. Notably, Thailand was not calling for abandonment of the principle of nonintervention in internal affairs. Rather, Thailand was calling for recognition that the division between internal and international affairs is no longer so clear. Some matters were no longer to be considered taboo, and the threshold was to be determined by an "effects" test. ASEAN states should engage more intensively with respect to matters with adverse effects on countries outside the state where the problem originated.

¶114 The nonintervention policy was, however, affirmed in the closing statement issued by the Singapore Foreign Minister S. Jayakumar at the end of the 1998 meeting. 193 The majority of ASEAN states were obviously wary of any attempts to whittle away the "consensus" approach, which provides a useful way of avoiding political questions with wider regional

implications. Nevertheless, there was a growing acceptance of the need to
talk more openly about common problems in the form of "enhanced
interaction." According to Filipino Foreign Secretary Domingo Siazon,
ASEAN had been in "enhanced interaction" mode in Burma, holding
extensive and comprehensive talks with the authorities over the process of
national reconciliation among other issues. ASEAN continued to hope
that integrating Burma would induce the junta to introduce reforms and
political pluralism in the face of criticisms that the human rights situation
had deteriorated.

¶115 This semantic nitpicking over how to characterize suggested
modifications to the principle of nonintervention reveals some internal
fissures in ASEAN unity and a general, if mild, disaffection with a total
"hands off" policy. Thailand continued to push for change. In August 1998,
the Thai government urged ASEAN states to expedite political reform to
enable them to adjust to outside forces, in particular to comply with global
standards of business administration. In relation to managing social trends,
Thailand urged other ASEAN states to "open up" and take care of their
peoples' needs, including increasing demands for political participation,
respect for human rights and freedom of religion.

¶116 The principle of nonintervention in internal affairs has also been
tested by recent events. Thailand and the Philippines, for example, both
criticized Malaysia for the ill-treatment of the sacked Deputy Prime
Minister Anwar Ibrahim in September 1998 while held in detention,
expressing fears that Anwar was being denied due process of law. Anwar
had been charged with corruption, gross indecency, and eleven counts of
sexual offenses. Punishment for these offenses range from up to twenty
years imprisonment, to caning, to fines. Anwar maintains that these are
trumped-up charges, part of a political conspiracy by Malaysian Prime
Minister Mahathir Mohamad to remove him from politics.

¶117 Prima facie, the removal of a government minister would be an
internal matter. Both President Habibie of Indonesia and President Estrada
of the Philippines, however, expressed open disapproval of Anwar's
alleged maltreatment. Habibie has both close personal ties to Anwar and,
given concerns with human rights and democracy at home, an eye to
legitimizing his political position domestically. At the same time, Estrada
was the only ASEAN minister who openly supported United States Vice
President Albert Gore's speech lauding the nascent internal political reform
movement of the "brave people of Malaysia" at the November APEC

196. Gore’s speech was quoted in Malaysians Are Enraged, STRAITS TIMES INTERACTIVE, Nov. 18, 1998 (visited May 9, 1999) <http://straitstimes.asia1.com/pages/wrld_11118.html>. It continues: "Democracy confers a stamp of legitimacy that reforms must have in order to be effective. And so, among nations suffering economic crises, we continue to hear calls for democracy, calls for "reformasi". We hear them today—right here, right now—among the brave people of Malaysia . . . . Citizens who gain democracy also gain the opportunity and the obligation to root out corruption and cronyism." Id.
Yale Human Rights and Development Law Journal, Vol. 2 [1999], Iss. 1, Art. 1

meeting. President Estrada declared, "[a]s a president of a democratic country, I go along with him," meaning that "human rights and due process of law transcend national boundaries." Other ASEAN countries like Singapore criticized the American stance, urging all sides to settle their bilateral tiffs diplomatically and not to mix politics with economics. For being "civil" and not commenting on Anwar's sacking, the Malaysia Prime Minister called Singapore a "true friend."

"118 The point is that two ASEAN members "broke ranks," first, by commenting on a politically sensitive matter in another ASEAN state and, second, by framing Anwar's maltreatment in detention in terms of previously eschewed "human rights" terminology, implying that it is a matter of universal concern. Malaysian politicians criticized the inexperience of the two "new kids on the block," who failed to follow the ASEAN practice of washing dirty linen in private, if at all.

119 These maverick stances may well have been performances to curry favor with the West, or displays of support for a personal friend, rather than advocacy for human rights. Nevertheless, Malaysia formally accused the Indonesian and Filipino heads of government of breaching ASEAN's sacrosanct principle and interfering in internal Malaysian affairs. Bilateral relations were further strained when Habibie and Estrada appeared to hesitate over attending the November APEC conference in Malaysia. This was taken as further criticism of the treatment of Anwar.

120 Trying to soothe the troubled waters, Indonesian Foreign Minister Ali Alatas sought to clarify what constitutes intervention in another state's internal affairs. He suggested that Habibie's comments were personal in nature and did not constitute interference in Malaysian affairs. Estrada


202. President Estrada has expressly stated: "I sympathize with Anwar because I can say he is not being given due process (being under preventive detention) and that's a human rights violation ... He looks like a human rights victim. It is sad what is happening to our friend." Estrada: Anwar's Rights Being Violated, STRAITS TIMES, Oct. 7, 1998, at 22. President Habibie, in expressing concern over "how my friend, Anwar Ibrahim, has been treated," also spoke the language of human rights: "You cannot just forget the Constitution or a man or a woman in this society. Because of the human rights involved—and I think it is [sic] universal—people should be given the chance to defend themselves. People should not be tortured. There's a United Nations convention." Habibie Concerned About Anwar's Well-Being, STRAITS TIMES, Oct. 5, 1998, at 25.

203. Foreign Minister Alatas noted that as long as the statements made did not voice agreement or disagreement, or lecture another state, they should not be considered as intervening in the affairs of another country, stating that a distinction had to be drawn "between a personal opinion about the conditions of someone and intervention." Alatas: Comments
and Habibie's criticisms can be understood as unofficial statements rather than as intervention. Given their standing, however, their comments made them appear to be taking sides in a domestic political dispute. Knowing that the leader of another ASEAN country has expressed concern for Anwar probably made it easier for Anwar's supporters to question the Prime Minister's actions. At the very least, it may be said that certain ASEAN leaders seem to be less inhibited about criticizing the policies of their fellow member states, though they are careful to stress that, in so doing, they are not intervening. Naturally, if either Estrada or Habibie do something controversial at home, they will not be able to fall back so easily on the ASEAN tradition of noninterference, should ASEAN states choose to criticize their policies.

¶121 Disagreement among ASEAN states over what constitutes "internal affairs" has certainly strained bilateral relations and breached the silence. Further, the Indonesian government may not even be able to act "fraternally" as Malaysia did by preventing Malaysians from organizing an East Timor conference in Kuala Lumpur. This is because the notion of government accountability is taking root in an increasingly free and vocal press. NGOs in the region are increasingly ready to air their opinions independent of the government's foreign policy concerns. As Dr. Dewi Fortuna Anwar, foreign policy adviser to the Indonesian president, stated, "if NGOs in Indonesia organized a conference on Malaysia now, Jakarta would not be able to do anything about it." Dr. Dewi noted that "ASEAN is in danger of being split between countries that regard democracy and human rights as universal values whose promotion becomes a common responsibility, and those that are still proponents of "Asian values." 204

¶122 While the principle of nonintervention may have taken a battering during recent events, ASEAN has by no means been abandoned it. ASEAN's action in helping to restore political stability in Cambodia was grounded in consensus, since Cambodia for help. One may speculate that ASEAN will now be more willing to intervene when a government is not in control, and when internal political instability within an ASEAN state threatens regional peace and security.

E. Promising Trends in ASEAN Practice: Expanding the Range of Functional Co-operation – Women and Children First

¶123 In recent years, ASEAN has expanded its scope of cooperative activities beyond its original economic and political mandate. In so doing, it has acknowledged that ASEAN's mandate extends to addressing many concerns that are pertinent to human rights, even though it does not use the term "human rights." Rather, these matters are classified as "functional cooperation."

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204. Supra note 142.
¶124 The 1992 Singapore Declaration provided that functional cooperation should promote child development and allow for the "wider involvement and increased participation by women in the development of the ASEAN countries in order to meet their needs and aspirations." The Bangkok Summit Declaration of 1995 stated that "ASEAN shall elevate functional cooperation to a higher plane to bring shared prosperity to all its members," guided by the theme of "shared prosperity through human development, technological competitiveness and social cohesiveness." Aside from the promotion of the rights of women and children, ASEAN has broadened its reach to human resource development, management of HIV-related problems, reduction of rural poverty, eradication of illiteracy, fighting transnational crime like drug-trafficking, and to management of transborder environmental problems such as the haze problem from Indonesian forest fires. These programs seek to improve


206. Fifth ASEAN Summit, Meeting of the ASEAN Heads of Government, Bangkok, Dec. 14-15, 1995 (ASEAN Secretariat) . This is available at the ASEAN web site, found at <http://www.aseansec.org>.

207. See, e.g., 1988 Declaration of the Advancement of Women in the ASEAN Region, July 5, 1988 (visited May 9, 1999) <http://www.aseansec.org/function/dsd88.htm> (seeking, in recognition of women's roles as active agents and beneficiaries of national and regional development, to integrate the specific concerns of women in national plans of action).

208. See, e.g., 1993 Resolution on the ASEAN Plan of Action for Children, Dec 2, 1993 (visited May 9, 1999) <http://www.aseansec.org/function/rd93.htm>. This resolution deals with issues pertaining to child survival (poverty, basic needs), protection against exploitation, abuse, child prostitution and trafficking, and alternative family care arrangements for victims of abuse. An institutional framework is provided in the form of designating a Desk Officer for Children to serve as a focal point for ASEAN countries. These Officers assist in recommending regional policy, facilitating information exchanges, reviewing each country's implementation of ASEAN programs of cooperation on children, and submitting proposals and reports on children to the ASEAN Committee on Social Development.


210. See the Framework for the ASEAN Plan of Action on Rural Development and Poverty Eradication (visited May 9, 1999) <http://www.aseansec.org/function/rdve_frm.htm> (seeking to enhance ASEAN capacity to monitor and assess the incidence of poverty through, for example, the development of socio-economic indicators).

211. See 1997 ASEAN Declaration on transnational crime (visited May 9, 1999) <http://www.asean.or.id/politics/adtc97.htm> (pursuing regional modalities to combat crime through information exchanges and policy coordination and contemplating the establishment of an ASEAN Centre on Transnational Crimes to co-ordinate regional efforts); see also 1998 Joint Declaration for a Drug-Free ASEAN (visited May 9, 1999) <http://www.aseansec.org/amn/prdrug98.htm>.

212. See, e.g., Jakarta Declaration on Environment and Development, Sept. 18, 1997 (visited May 9, 1997) <http://www.aseansec.org/function/env97.htm> (identifying flagship projects in the area of ASEAN environmental cooperation); Regional Haze Action Plan (visited May 9, 1999) <http://www.aseansec.org/function/pa_haze.htm> (setting out cooperative measures to monitor fires and promote better land and forest management policies as well as plans for an early warning regional system for first outbreaks of smoke haze).
the welfare of ASEAN peoples, which contributes to the vindication of human dignity.

¶125 At the 1997 Informal Summit held in Kuala Lumpur, the ASEAN heads of government adopted a road map for the twenty-first century, entitled ASEAN Vision 2020. Once again, the term "human rights" is absent from this document, although some Vision goals, such as eradicating poverty, disease, and illiteracy, correspond with goals in the field of socio-economic rights. The Vision conceives of ASEAN as a concert of Southeast Asian nations operating as "an effective force for peace, justice and moderation in the Asia-Pacific." It foresees:

vibrant and open ASEAN societies consistent with their respective national identities, where all people enjoy equitable access to opportunities for total human development regardless of gender, race, religion, language, or social and cultural background... a socially cohesive and caring ASEAN where hunger, malnutrition, deprivation and poverty are no longer basic problems, where strong families as the basic units of society tend to their members, particularly the children, youth, women and elderly; and where the civil society is empowered and gives special attention to the disadvantaged, disabled, marginalized and where social justice and the rule of law reign.

The idea of a "community of caring societies" is fully consistent with the humane values of human rights law.

¶126 This ASEAN manifesto of sorts is promising insofar as it lays before the domestic constituencies of ASEAN states and the international community a declaration of intent to achieve certain goals. These programmatic aspirations allow for some degree of political accountability, as the public will expect ASEAN states to make good on them, and opposition groups can derive political capital from a failure to fulfill the goals. Programs do not, however, confer rights; they do not provide individuals and groups with a legal means for compelling government action. The highly worthwhile goals of Vision 2020 are couched in the most general and abstract manner, making monitoring and enforcement difficult. Governments should formulate and widely disseminate a detailed national program, setting out principles and establishing guideposts for the monitoring and measurement of goal fulfillment. If not, implementation of these goals will remain largely a matter of government largesse. Explicit linkages should, moreover, be drawn between ASEAN 2020 and human rights to demonstrate their compatibility and to build bridges between constituencies. This would not merely be educational in terms of

demonstrating to ASEAN peoples the relevance of human rights to the region; it would also bolster ASEAN legitimacy insofar as ASEAN states are seen as fulfilling their human rights commitments in good faith, particularly with respect to women's and children's rights. Focusing on the particular interests of these vulnerable sectors of society is a way of gradually incorporating the promotion of human rights into government policy, which will be less threatening than a full immersion into a comprehensive human rights program. A gradual, but firm, approach in promoting certain human rights will hopefully encourage ASEAN governments to incorporate broader human rights goals into their domestic policies.

§127 In this way, the promotion of human rights could become a facet of ASEAN policy. For example, Vision 2020's commitment to promoting the role of women in national development and improving their welfare could work hand in hand with the commitments that ASEAN states have made, by acceding to CEDAW, to promoting women's rights and equal treatment. The reporting obligations under CEDAW will provide for some measure of international scrutiny. Maximum protection would be afforded to women if ASEAN states can be persuaded to accede to the proposed optional protocol to CEDAW, thereby giving individuals a channel for sending "communications" to an international body. Although this will open up ASEAN states to more intensive scrutiny, their commitment to increasing the level of human rights protection could translate into domestic approval and support, upon which a government's legitimacy ultimately rests.

IV. A QUESTION OF STRUCTURE: DEVELOPMENTS IN HUMAN RIGHTS ARCHITECTURE

§128 Government initiatives in developing infrastructure for human rights protection in the ASEAN context have focused on the development of national institutions. The Commonwealth has been supportive of this and has held meetings to develop such national institutions. In July 1996, delegates from various Human Rights Commissions, including those from India, Indonesia, and New Zealand, met in Australia and decided to establish an informal Asia-Pacific Forum of National Human Rights Institutions. This was seen as a tangible and constructive step toward the establishment of longer-term regional human rights arrangements. The Australian government funded support services for three years. The Larrakia Declaration sets out the functions of this Forum. The United


215. See The Larrakia Declaration: Conclusions, Recommendations and Decisions of the First Asia-Pacific Regional Workshop of National Human Rights Institutions, 1996 AUSTRALIAN J. HUM. RTS. 117. Its functions include facilitating mutual support through information exchanges,
Nations is involved in establishing networks among national institutions, as it recognized that national institutions are positioned to ensure human rights protection at the national level. Furthermore, bilateral exchanges and coordination could aid the development of subregional human rights arrangements. The United Nations also holds regular workshops on the possibility of developing a regional human rights system in the Asia-Pacific region.

A. The Move Towards National Human Rights Commission: Domestic Initiatives

¶129 The Geneva Centre for Human Rights has arranged consultations on national human rights institutions. It released a statement of "Principles relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights (Paris Principles)." The 1992 Commission on Human Rights endorsed this statement, as did the 1993 Vienna Conference. Paragraph 36 of the Vienna Declaration affirms the constructive and important role played by national institutions as part of the human rights architecture, recognizing each state's right "to choose the framework that is best suited to its particular needs at the national level."

¶130 ASEAN states have displayed a general distrust of supranational institutions. Paragraph 24 of the Bangkok Declaration states:

We welcome the important role played by national institutions in the genuine and constructive promotion of human rights, and believe that the conceptualisation and eventual establishment of such institutions are best left for the States to decide.

¶131 Promoting human rights by creating genuinely independent national bodies to document human rights violations would be less threatening to territorial sovereignty. Further, it would constitute a "good practice," reflecting a willingness to translate human rights rhetoric into developing joint positions on issues of common interests, sharing expertise and training development, holding periodical regional meetings, and engendering quick responses to requests from national institutions to investigate violations of the human rights of their nationals present in a country which has a national institution.


action. Naturally, these institutions must be structured and empowered in a manner that protects them from political pressures. To prevent them from being limp puppets in the hands of their creators, they should be constitutionally entrenched, rather than subject to legislative will. This will help commission members to discharge their duties freely without fear of offending the government of the day.

§132 Six primary elements have been identified as necessary for the effective functioning of national institutions:

Independence in terms of legal, operational and financial autonomy and with respect to procedures governing the composition, appointment and dismissal of members. Although national institutions are state-funded entities, they must be able to rise above party politics to be real watchdogs.

A defined jurisdiction and adequate powers. These institutions are charged with promoting human rights—for example, through legislative review, receiving complaints from aggrieved individuals, serving as roving investigators into alleged gross human rights violations. They need sufficient powers to enable them to discharge their legislative mandate e.g. to call witnesses, to compel public officials to answer requests for information.

Accessibility in the sense of being physically accessible, also in terms of public awareness of the institution and whether its members represent all relevant social forces.

Developing avenues of co-operation with IGOs, NGOs and other national institutions. This broadens the institution's support base and enhances its visibility, besides opening up new sources of information about human rights abuses, expertise and technical support.

Operational efficiency in terms of working methods, having adequate resources.

Accountability both to the government, for example, through reporting obligations, as well as to its clients, for example, through conducting mandatory public evaluation of institutional activities

devolution, culled from reports submitted to help the Review Process. These are (a) human rights-oriented changes in national legislation; (b) enlargement of national human rights capacities including the establishment or strengthening of national human rights institutions (national commissions or ombudspersons); (c) special protection extended to women, children and vulnerable groups; (d) development of human rights education programmes; (e) adoption of national plan of actions.

and reporting the findings.

¶133 At present, only the Philippines and Indonesia have established national human rights institutions, while Thailand, in accordance with the requirements of the 1997 Thai Constitution, is currently drafting a law to create one. These national institutions are distinct from and complement existing constitutional mechanisms for human rights protection, such as the office of the ombudsman and judicial review.

¶134 The Philippines Commission on Human Rights (CHR) finds its constitutional basis in Section 17, Article XIII of the 1987 Philippines Constitution. This was drafted in the wake of the triumph of "people power" over the authoritarian Marcos regime. Neither the executive nor Congress can summon or sack individual commissioners. Legal training is considered important insofar as Article 17(2) requires that the majority of the compact five-member Philippines Commission be members of the Bar.

¶135 In June 1993, the twenty-five member Indonesian National Human Commission on Human Rights was established by Presidential Decree No. 50. This was done to facilitate the development of a national atmosphere conducive to the exercise of human rights. It was meant to reflect Indonesia's commitment to the decisions and agreements reached during the 1993 Vienna world conference on human rights.

¶136 Despite doubts that this Commission could not function independently, particularly since it owes its existence to an executive order that can be rescinded at will, it has since taken on an active life of its own. Commission members who were initially appointed by the President are considered prominent national figures and include academics and former military officers. The commission's budget comes solely from the State Secretariat, which manages public funds.

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221. See supra note 6, pt. 8. Section 199 provides that in composing the 11-member national human rights commission, regard should be had to the participation of representatives from private human rights organizations. Section 200 provides that it's powers and duties include the investigation of human rights violations, proposing recommendations to the legislature with regard to revising laws for the purpose of promoting human rights protection, to promote co-ordination between government agencies and private human rights organizations and to prepare an annual report appraising human rights situations in the country. The commission is to be empowered to demand relevant documents or evidence from any person for the purpose of performing its duties.

222. Both the ombudsman and human rights commissions serve accountability-holding functions in regard to government action. While the commission focuses on direct human rights abuse, ombudsmen may deal with instances of government maladministration that do not directly implicate individual human rights violations. At the same time, national human rights commissions compliment judicial review as a means of protecting human rights. While judicial review is essentially a reactive instrument, responding to specific cases where someone has locus standi to bring a case through judicial channels, the commission can conduct investigations into ongoing human rights situations that may be systemic in nature.


i. The Indonesian Human Rights Commission (Komnas HAM)

¶137 The Indonesian Human Rights Commission is divided into three subcommissions and its tasks are established by presidential decree.

¶138 There are four main functions of the Indonesian Commission, which are to be discharged pursuant to the state Pancasila philosophy. The first mandate is to inform national and international communities about the national and international concept of human rights. The Sub-Commission for Education and Public Awareness on Human Rights handles this, contributing thereby to the promotion of dialogue on human rights issues and filling informational gaps. Second, the Sub-Commission for Monitoring the International Conventions on Human Rights is required to monitor international human rights treaties and make ratification recommendations. Thus far, this Sub-Commission has recommended that Indonesia adopt the Convention on the Elimination of All Forms of Racial Discrimination and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Indonesia is a party to neither treaty, although it has signed the latter. This promotes Indonesian involvement and participation in the global United Nations human rights regime, laying to rest any arguments that human rights are a matter of national concern only. Third, the Sub-Commission for Monitoring the Implementation of Human Rights does what its name suggests and makes recommendations to government agencies on how to strengthen human rights protection. Lastly, the commission is mandated to cooperate with regional and international agencies for the continuous protection of human rights. It thus holds coordinating meetings and workshops and serves as an information center on human rights conditions in Indonesia.

¶139 Significantly, the Monitoring Sub-Commission has received many complaints by letter and in person. It provides individuals or groups with a forum to ventilate their grievances. The Commission is not purely reactive as it seeks out human rights violations on its own initiative as a roving body. It raises public awareness of human rights abuses through the release of position papers on alleged human rights violations. It has displayed independence in this practice by addressing politically delicate matters. When the government banned the popular Tempo publication in 1994, the Commission released a critical statement even before Tempo lodged a formal complaint contesting the constitutionality of the ban. The Commission also conducts fact-finding missions and investigations, although when it looked into the abduction and murder of a young labor activist in March 1994, the State Secretary reproved the Commission for

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225. This is a Hindu term meaning Five (Panca) Sila (principles). These are that every Indonesian citizen should (a) believe in the existence of God the Almighty; (b) strive to achieve a just and civilized humanity; (c) maintain Indonesian unity (d) adhere to democracy which is guided by Inspirational Wisdom in Consultation and Representation and (e) strive to achieve social justice for all the people of Indonesia. See generally Eka Darmaputera, PANCASILA AND THE SEARCH FOR IDENTITY AND MODERNITY IN INDONESIAN SOCIETY (1988).
Implementing Human Rights in ASEAN Countries

exceeding its mandate.\textsuperscript{226}

\textsuperscript{226} The Commission's annual reports are made available not only to the President and to the Indonesian people, but also to the international community at large.\textsuperscript{227} The reports indicate that most of the cases handled are not politically contentious, pertaining mainly to land ownership and labor issues. The Commission has adopted an approach to conflict resolution consonant with indigenous values, favoring nonconfrontational methods of mediation and arbitration. It has achieved significant success in eliciting responses to complaints from the relevant government authorities. In several cases where the government acquired land for state purposes without paying compensation, the aggrieved owners wrote to the Commission for help.\textsuperscript{228} In turn, the Commission wrote to the relevant authorities requesting their assistance, provoking them into action and payment of compensation. Similarly, Commission-authored letters highlighting worker complaints of denial of overtime wages, addressed to the Ministry of Labor, elicited the direct intervention of the Ministry and the consequent settlement of grievances.\textsuperscript{229} Other grievances range from torture and beatings inflicted by the military, to the unlawful seizure of goods, to housing issues, and even to environmental problems.\textsuperscript{230}

\textsuperscript{227} The 1994-96 Annual Reports in English are available through the Indonesian Commission's website at \texttt{<http://www.komnas.go.id/english/report>}.\textsuperscript{228} See, for example, \textit{Comoro Village Land Case} and \textit{Compensation for the Land of An. Koddang}, both reported in the 1996 Annual Report. \textit{Id.}\textsuperscript{229} See the Problem of Overtime Pay for the Workers of PT Artika Optima Inti Djayanti Group, reported in the 1996 Annual Report. \textit{Id.}\textsuperscript{230} See, for example, \textit{The Burning of Waste from the Wood Industry and from the manufacture of Mosquito Repellent} case, complaint made on April 9, 1996, reported in the 1996 Annual Report. A company openly burned industrial waste in the province of Tangerang causing health-related problems to the nearby residents. They wrote to the Commission who in turn wrote to the Mayor. Firm action was taken to control this air pollution by requiring the relevant companies to dispose of their waste in a manner which did not involve burning and by continuously monitoring the actions of the companies to ensure their compliance with the mayoral order. \textit{See id.}\textsuperscript{231} The 1996 Annual Report of the Indonesian Human Rights Commission states that, from 1995 to 1996, the number of land cases have increased by ninety-four percent—from 168 to 327—while labor cases have increased by forty-two percent—from 112 to 160.
office to lodge their complaints. National commissions have the advantage of being closer to the ground than international or regional human rights bodies. Aside from the obvious advantage of geographical proximity, which saves time and costs, national commissions such as the Indonesian institution are staffed by people who speak the native language, are conversant with local customs, and know how best to engage government officials to procure results.

¶142 On the larger scale, the role of the Commission is more that of a watchdog than a mediator of disputes. The Commission's statements draw attention to systemic human rights violations, which require far-reaching changes to existing government practices for effective redress. Publicizing such abuses serves to call the government to account and informs the citizenry about how their government is performing. On April 30, 1998, the Commission issued a statement of censure concerning reports it had received from the families of victims and various social groups about disappearances.232 The Commission did not discount the possibility that security forces were involved in this practice, although it quoted the Minister of Defense as saying that there was no official policy to cause the disappearances of people. This approach was perhaps the wisest one to take, given the limitations of operating in the context of an authoritarian state with a dominant military presence. The Commission referred to the violation of both constitutional liberties and international legal norms, citing the Indonesian Criminal Code, as well as Articles 7, 9, 10 and 16 of the International Covenant on Civil and Political Rights (which Indonesia has not ratified), and the Declaration on the Protection of All Persons from Enforced Disappearances. It recommended that a National Investigative Commission be formed to address these serious complaints, that immunity be guaranteed to "survivors" and witnesses, that compensation be afforded, and that the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (which Indonesia has signed) be ratified immediately.

¶143 Indonesia is currently in a state of flux, given the resignation of President Suharto after a thirty-two year rule, and following the May 1998 riots. The country's economic problems are presently driving demands for democratic reform. The Indonesian Human Rights Commission is taking an active role amid post-Suharto enthusiasm for bringing to light alleged human rights violations by conducting investigations and issuing statements on matters related to tumultuous events in both the long and recent past. Numerous complaints of human rights violations are surfacing, particularly with respect to military atrocities in the separatist Aceh province in Sumatra233 and violations of the right to freedom from fear, life, property, and dignity during the May riots. In particular, there were claims that the ethnic Chinese minority had been targeted as victims

of mass rapes and sexual assaults by mobs whose orchestrators may have had state links. Human Rights activists, including the Volunteers for Humanity group led by Catholic priest Sandiyawen Sumardi, have claimed that 168 women and children were raped and sexually assaulted during the riots, twenty of whom died or committed suicide.  

¶144 The Commission's reports in this respect differ markedly from the government's official denials. Citizens are apparently more willing to make complaints to the Commission than to government agencies like the armed forces and police who are suspected of complicity in human rights violations. The Commission has made increasingly critical statements about the police, recommending that it be distinct from ABRI (the armed forces), and that it serve the people rather than remain "a mere security tool of the power-holder."  

¶145 The Commission's finding that 1188 people had died in the riots was more than double the estimate given by the military. It identified the main causes of the riots as corrupt government practice, resentment directed against the wealthy ethnic Chinese minority, and the lack of genuine military effort to contain the spread of the riots, which resulted in deaths, injuries and extensive damage to property, the brunt of it suffered by ethnic Chinese Indonesians. As the Commission expressed in a public statement:

The security vacuum during the riots points the blame at the state, on the neglect by civilian and military leaders in providing effective protection, which, in turn, allowed these sexual assaults to become widespread.

¶146 In the face of government statements that the police and armed forces had not found conclusive proof of mass rapes of Chinese minority women, the Commission, which undertook an inquiry into reports of rape and sexual abuse of women, found that gang rapes did in fact occur.  

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239. The military has reported that not a single victim has come forward to lodge a complaint. The state Minister of Women's Affairs had also adopted a similar stand but under public pressure, initiated the formation of an all-woman's group to help those sexually abused during the riots. Most of the data about the rapes had been compiled by voluntary women's NGOs. The Commission issued a critical statement regretting "the lack of moral response from the public to the report of sadistic rapes, and notes with deep concern the government's skepticism, which influenced public opinion to doubt these reports in the absence of any evidence." Id.; see also Indonesian National Human Rights Commission, Statement of the National Commission on Human Rights Concerning the Sexual Assault Including Rape of Ethnic Chinese and Other Indonesian Citizens, July 8, 1998 (visited May 9, 1999)
scale and intensity of the attacks "amounted to terrorism" although it
could not be established whether they were organized. That the
Commission did not encounter any real difficulty in accessing witnesses
and victims is testament to the public trust it has earned. The Commission
has called upon the government to declare that the rapes did in fact occur,
to apologize, and to convene a national commission to investigate the riots
and prosecute the culprits. It has, in effect, emerged as an independent
and respected voice in the field of human rights protection.

§147 The Commission's 1998 Annual Evaluation of the Implementation
of Human Rights in Indonesia was particularly candid. It criticized
the security apparatus and judiciary for failing to investigate even one case of
gross human rights violations, in a year in which widespread incidents of
public violence, especially sexual assault against women, threatened to
divide the nation and erode confidence in the government. It warned that
all cases not swiftly and fairly resolved posed latent threats to Indonesian
stability, which was particularly fragile in this transitional period. Among
its recommendations, it called upon the government to periodically and
promptly make publicly known progress in resolving all cases of gross
human rights violations. This would allay public suspicion of "cover-ups"
of the armed forces and security apparatus's involvement in these matters.
The armed forces needs to win back public confidence as well as to
discharge their function of maintaining order. To that end, the Commission
advised, steps should be taken to depoliticize the army and to diffuse the
concentration of power within it. This might include a functional division
between the office of the Minister of Defense and Security and the
Commander of the Armed Forces, and the granting of extensive autonomy
to all regions in Indonesia. Clearly, the Commission does not feel restricted
to making only minor suggestions for reform.

§148 In its five years of existence, the Indonesian Commission has
played a vital role in promoting a human rights culture within Indonesia.
Indonesian citizens know that the Commission is an accessible body from
which they can seek assistance in remedying injustices. Through its role in
providing human rights education and information dissemination, the
Commission raises public consciousness about human rights and the
duties owed by the state to individuals. As a vehicle for focusing attention
and publicity on human rights violations on a larger scale through its
public statements and investigations, the Commission may be able to check
government abuses. This can contribute to garnering support for the

<http://www.komnas.go.id/english/cases/cs_text03.html>.
241. A national fact-finding commission was set up on July 23 to investigate the May
unrest, composing of representatives from Abri, government agencies, the rights body and
non-governmental organisations. It is expected to deliver its final report in October 1998. Abri
Denies Confirming May Rapes, STRAIT TIMES INTERACTIVE, Sept. 25, 1998 (visited May 9, 1999)
242. The Report was issued on Jan. 4, 1999 and is available in English through Komnas
system of government. This is particularly important, concerning the present unsettled state of affairs in Indonesia, where domestic stability is needed not only to maintain public order, but also to build investor and donor confidence, which is necessary for economic recovery.

ii. The Philippine Human Rights Commission (CHR)

¶149 The Philippines has ratified more human rights treaties than any other ASEAN country; the list includes the International Covenant on Civil and Political Rights (ICCPR) and its first Optional Protocol. Significantly, the latter allows individuals to make direct communications to the U.N. Human Rights Committee, which goes beyond the usual reporting obligations that attend most human rights treaties. The Philippines has also declared that it recognizes the Committee's competence to receive interstate complaints. The Philippines Human Rights Commission (CHR) is empowered to monitor the Filipino Government's compliance with international treaty obligations on human rights. Overall, this exhibits an open willingness to actively engage with, and be held accountable to, the international human rights regime.

¶150 Naturally, a commitment to human rights at the international level does not mean that serious human rights violations are absent in the domestic context. In the Philippines particularly, the police and armed forces commit many serious human rights abuses. In its role as an independent public watchdog, the CHR has published a report pointing the finger at state agents as the top perpetrators of human rights violations such as killings, tortures, kidnapping, and illegal detentions.24 The CHR role in drawing embarrassing attention to these practices, while important, is insufficient. Effective redress for these violations depends on the government taking active steps to reform the police and military, and to build an effective and accessible court system.

¶151 The CHR has a high degree of operational autonomy. It appoints its own employees, adopts its own procedural guidelines and can cite for contempt those who breach them. The powers of the CHR are established by Section 18 of the 1987 Constitution. These include investigatory powers exercised either on its own initiative, or in response to a complaint made by any party. To facilitate this process, it may grant witness immunity and also request the assistance of any government department. The CHR's mandate seems chiefly limited to human rights violations involving civil and political rights. Clearly, the CHR was designed to be creative and proactive, engaged in fact-finding in the field rather than bureaucratic paper shuffling.24 To this end, the CHR has established a system of local human rights officers ("barangay") who monitor local authorities and

report complaints to regional CHR offices. In 1998, there were over 8,000 such officers. The CHR actively investigates extra-judicial killings and, in 1998, looked into 201 cases. Where there are suspicious circumstances concerning the clashes of the Armed Forces of the Philippines (AFP) with alleged insurgents in areas where the AFP is engaged in a counterinsurgency campaign, the CHR points these out. For example, it investigated a reported June 9 summary execution of four people, including two teenage girls in Dingalan. The military report stated that soldiers had sought to engage the suspected insurgents in an exchange of fire. The Commission took note of eyewitness reports that the soldiers removed the pants of the girls who were allegedly raped before they were killed, and found it suspicious that the soldiers burned the personal effects of the girls, shot them in the pelvic area and had the victims' bodies immediately embalmed without consulting their next of kin.

The CHR also promotes human rights in other ways. Aside from disseminating information to enhance respect for human rights, the CHR holds human rights seminars for public officials including the police, although this training is not mandatory. These include primers on the rights of the criminally accused. The CHR has oversight power over jails, prisons or detention facilities, and has conducted research on the subject. In a 1990-1996 report based on an examination of 6,939 jail facilities, the CHR pointed out that detention facilities inadequately segregated women and children from male inmates. Female prisoners were at particular risk of sexual assault, sometimes by prison guards. The culture of corruption and the preferential treatment given to certain famous prisoners were highlighted. For example, a provincial governor being held on suspicion of murder was allowed to carry out a successful re-election campaign from his jail cell, through the privileged use of communications equipment.

The CHR is also empowered to provide legal aid services for the underprivileged. It can intervene on behalf of individuals and offer them concrete aid. For example, it was reported that through the efforts of the CHR between 1988 and 1996, 627 prisoners and detainees were released. The CHR had helped in obtaining their parole or pardons and brought to official attention those detained beyond the term of their sentences. In a report, it found that a primary reason for prison congestion was that large numbers of prisoners were held in pretrial detention, unable to post bail.

In 1997, the CHR reported that only eighteen percent of the cases it had referred to government agencies or the courts had been resolved, and that the court dismissed seventy-six percent of the few cases that went to trial. While the CHR succeeds in bringing cases of human rights abuses

246. See id. ("Political and Other Extrajudicial Killings").
247. See id. ("Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment").
248. See id. ("Denial of Fair Public Trial").
to light and providing data, in itself, this does not go far enough towards redressing and reforming abusive government practices. This would necessitate a broader process of inculcating respect for human rights in public officials and providing a disciplinary, punitive process for those in dereliction of duty so that they know that they cannot misuse the powers of public office with impunity. Furthermore, aggrieved individuals must have effective remedies for human rights violations, including financial compensation, such that justice may be translated into real terms. The present economic crisis and shortage of funds are not promising in this respect. For example, the CHR is unable to expand its staff due to lack of funds, and had to suspend an agreement made with the Justice Department in 1997 to add Justice Department prosecutors to the CHR staff.

¶155 In conclusion, encouraging ASEAN countries to set up their own national human rights commissions is a worthwhile strategy, particularly since a local commission composed of independent experts cannot be accused of being a mouthpiece for foreign political interests. In addition to building an autonomous human rights culture that can be measured against international standards, such institutions could play a vital role in educating the people of their human rights as well as their responsibilities. They could provide a less threatening informal setting where grievances could be lodged and receive attention through nonadversarial means of dispute resolution. The establishment of national human rights institutions in the Philippines, Indonesia, and Thailand will hopefully inspire other ASEAN countries to adopt a similar approach. Malaysia seems to have been influenced by these developments. Indeed, Malaysian Foreign Minister Datuk Syed Hamid Albar noted them in his March 1999 announcement that a bill would be tabled in July to set up a National Commission on Human Rights. Whatever motives a detractor might allege for the establishment of these institutions, such as public relations, it must be remembered that institutions like Komnas Ham have a way of assuming a life of their own quite apart from the intention of their creators.

B. Towards a Regional Human Rights Mechanism?

¶156 The United Nations General Assembly has been promoting efforts to establish a regional human rights mechanism in regions lacking one since the late seventies. The United Nations Economic and Social

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249. See KL to Set Up Human-Rights Commission, STRAITS TIMES, Mar. 26, 1999, at 41. The Malaysian Foreign Minister said that this body would compose some twenty individuals from various interest groups to be appointed by the King and selected on the basis of their individual expertise. He said that the commission would be charged with investigating alleged infringements in human rights, visiting places of detention, issuing public statements on human rights, and promoting human rights awareness through education.

Commission for Asia and the Pacific (ESCAP) is a depository for human rights materials. The Human Rights Commission has also issued numerous resolutions calling upon states to consider agreements to establish suitable regional human rights machinery.  

¶157 Since the 1982 Colombo seminar organized by the Secretary General, the United Nations has sponsored six intergovernmental workshops on regional arrangements for human rights protection in the Asia-Pacific Region with the participation of ASEAN countries, various NGOs, and representatives of the various national human rights commissions. It has offered its advisory services and has conducted training courses. The concluding remarks of the 1992 Jakarta Workshop underscore that the primary responsibility for implementing human rights norms rests at the state level. As far as the international system of monitoring human rights is concerned, this should be done in a spirit of international cooperation, creatively, and constructively, and taking into account the diversity of the region. This evolutionary, step by step, or "building blocks," approach was affirmed at the 1993 Seoul Workshop. The first step would be coordinating human rights information dissemination, followed by an Asia Forum for a regional exchange of ideas and experiences. Only then should attention be shifted to using the Forum to design some form of regional or subregional human rights machinery. 

¶158 A central principle for any regional arrangement was reiterated at the March 1998 Tehran workshop, namely that it must emerge from within the region after extensive consultation among the governments concerned. Further, any such arrangement must be determined by consensus and be based on the priorities and needs established by the Governments of the region, bearing in mind the region's diverse particularities. The workshop adopted a framework of regional technical cooperation in certain specified areas, but did not include any concrete proposals for developing regional human rights machinery. Rather, strengthening national human rights

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254. The framework focused on (a) development national plans of action for promoting human rights and strengthening national capacities (b) human rights education; (c) developing national human rights institutions and (d) strategies for realization of the right to development and economic, social and cultural rights. This document is attached Annex II to the Report of the Secretary General on the Regional Arrangements for the promotion and
capacities was viewed as a necessary step toward further consideration of regional cooperation and even regional human rights arrangements. While an effective regional human rights mechanism was the long-term goal of the workshop, it was considered premature to discuss any formal arrangements. Instead, the immediate shift has been towards localized theme-specific domestic programs. Clearly, the governments involved are not in a rush to establish a regional arrangement.


Nevertheless, by referring to the possibility of establishing an appropriate regional human rights mechanism in the Foreign Ministers Joint Communiqué, recalled at the 1988 ministers’ meeting, ASEAN seemed to open a door of opportunity. Several NGOs seized upon this opportunity to conduct consultative meetings and to issue concrete, if ambitious, proposals and charters.\(^{255}\) In the ASEAN context, NGOs have been primarily responsible for lobbying for an ASEAN human rights mechanism, as part of the push for political liberalization and respect for human rights.\(^{256}\) As members of a transnational civil society, these nonstate actors have played a central role in focusing attention on the gap in human rights protection.\(^{257}\)


Establishing an independent, effective regional human rights mechanism that is readily accessible to the public, including NGOs, was a

\(^{255}\) The Friedrich Naumann Stiftung, in association with the European Commission of Human Rights, for example, conducted two seminars in Strasbourg on the Regional System for the Protection of Human Rights in Asia, in Africa, in the Americas and in Europe in 1993 and 1994. It invited a select group of Asian participants to attend, among whom were government representatives, human rights commission members, academics, and NGO members; the author participated in the 1994 meeting. Members of the European Court and Commission on Human Rights, the African Commission of Human and Peoples’ Rights and the U.N. Centre for Human Rights also attended. Discussions centered on comparative reviews of the various regional systems and prospects for one in the Asia region. Recommendations from the 1993 Meeting called for the establishment of an Asian Commission for the Promotion and Protection of Human Rights, funded by ASEAN as well as calling for a group of jurists to prepare a draft instrument for presentation before ASEAN. A more realistic approach was contained in the Second Strasbourg Resolution from the 1994 meeting. This called on ASEAN member states to convene an experts’ group to study the possibility of an appropriate regional mechanism, as well as the establishment of a consultative human rights forum composed of representatives from ASEAN national governments, practitioners, academics, and NGOs. The set-up of an ASEAN Center for Human Rights to deliver advisory and technical services within the region was also advocated.


key specific recommendation of the Bangkok NGO Declaration.  

If a regional commission is set up, it should be mandated to apply without reservations the International Bill of Human rights, CEDAW, the Convention against Torture, the Declaration of the Right to Development and other relevant human rights instruments; member states ... must ratify or accede to the above instruments prior to their membership; the right of individuals and NGOs to petition the regional Commission should be guaranteed; such petitions or appeals should not preclude concurrent appeals to the various U.N. mechanisms for the protection of human rights; no member of this regional Commission should hold an official position in government concurrently, and members should be appointed in consultation with NGOs; there should be a regular reporting system by states on their implementation of human rights standards domestically, with NGO participation in the drafting of the reports; meetings of this regional Commission and its deliberations should be generally open to the public; no aspect of government operation and no official should be immune from scrutiny or investigation, including the military and security forces; the regional commission should have full investigative powers; a separate body should be set up to adjudicate complaints; member governments must be required to disseminate information on the regional commission and how it operates.

161 The nongovernmental Working Group for an ASEAN Human Rights Mechanism (WG) was established after a series of workshops and meetings.  

259. LAWASIA convened two preparatory meetings in 1995 in Manila with representatives from government institutions and NGOs to plan for a conference in Jakarta in 1996 to discuss ASEAN values and the forms an ASEAN subregional mechanism might take.
nongovernmental sectors. To work toward a regional human rights institution, the workshop participants resolved to consolidate links between ASEAN and civil society, to organize regional conferences, to promote programs and research to raise the status of women and children, and to consider drafting an ASEAN Convention of Human Rights. The group held dialogues with ASEAN officials during 1997 and 1998 and presented a concept paper to the ASEAN Foreign Ministers at the Thirty-First Annual Ministerial Meetings in Manila, July 24–25, 1998. The Ministers acknowledged the importance of these dialogues in their Joint Communiqué. The paper urged ASEAN to examine the possible forms a regional mechanism might take, in particular urging the development of an intergovernmental regional human rights commission to promote human rights and suggesting several progressive steps. It also contained seven options concerning the steps ASEAN could adopt towards a regional human rights mechanism, drawing inspiration from the experience of the Inter-American, European, and African systems.

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It was envisaged that National Working Groups would be formed within each ASEAN State to encourage governments and peoples to support the initiative. After these three meetings, a workshop was held in Kuala Lumpur in November-December 1996 out of which the Working Group for an ASEAN Human Rights Mechanism was born. It consists of members of the National Working Groups that have currently been established in Indonesia, Malaysia, the Philippines and Thailand, with government and nongovernmental links. See Initiative for an ASEAN Human Rights Mechanism, 6 LAWASIA HUM. RTS. NEWSLETTER (LAWASIA Human Rights Committee, Philippines), Jan-June 1996, at 3.

260. Wittit Muntarbohon, Towards an ASEAN Human Rights Mechanism (1998) (unpublished paper, on file with author). Available upon request from the Working Group for an ASEAN Human Rights Mechanism Secretariat at 3/F Human Rights Center, School of Law, Ateneo de Manila University, 130 HV de la Costa SJ Street, Salcedo Village, Makati City, Metro Manila 1166 Philippines (email: ahro@acc.aiti.admu.edu.ph)

261. These included (i) evolving a dialogue between ASEAN and civil society with respect to human rights protection and the possible creation of a regional human rights commission; (ii) forming a task force to investigate the formal and substantive issues attendant upon the possible emergence of such a mechanism; (iii) encouraging an exchange of views on this proposal via regional conferences; (iv) promoting programs to protect the rights of women and children and (v) calling upon ASEAN Foreign Ministers to propel the establishment of a regional human rights commission. See id.

262. These steps, in various combinations, included establishing an ASEAN Human Rights Commission with recommendatory powers and possibly the power to hear complaints from individuals or states; an ASEAN Human Rights Court with the ability to make binding decisions and with the mandate to afford compensation to victims of human rights abuses; an ASEAN Human Rights Committee of Ministers or Assembly of Heads of Government which would serve as a political forum of accountability; establishing national human rights commissions where they are currently non-existent, consolidating their networks, and promoting regional human rights activities through training schemes and education. See id.

Evaluating Prospects for Promoting and Protecting Human Rights

¶162 Both the European and American human rights systems are grounded in regional treaties that establish both adjudicatory and investigatory institutions, with fact-finding powers and the competence to receive individual and interstate complaints. The African system is far more modest and revolves around information-dissemination, fact-finding and the issuing of reports after receiving communications from states and others.

¶163 Human rights related activities in the ASEAN region are at the stage of infancy, to apply Donnelly's categorization of the stages in the evolution of human rights regimes.264 Such activities are mainly at the declaratory or promotional stage, which requires a relatively low level of commitment. The former involves an affirmation of international norms but does not extend to international decisionmaking. Even at this level there are fears that a regional charter will undermine international standards. If the AIPO Declaration on Human Rights is any indication of what such a charter might look like, prospects look grim since its subjection of fundamental rights to national laws could seriously undermine universal human right standards. Further, this Declaration reads more like one on individual duties rather than individual rights. Promotional efforts may involve efforts to promote or render assistance to national implementation of international norms. This is underway to some extent in the form of ASEAN programs to promote the interests of women and children both nationally and through a coordinated regional approach. Promotional efforts also involve international exchanges of information, such as those that take place within the Asia-Pacific Forum of National Human Rights Institutions. This can facilitate the development of a regional human rights consensus through highlighting common views and identifying divergent ones. Such institutions, being closer to the ground and conversant with local conditions, are well positioned to suggest strategies for human rights protection. Interaction with NGOs at this level would be valuable, particularly in relation to data collection and dissemination.

¶164 Promotional activities are less threatening to the status quo and could support the establishment of an ASEAN consultative forum to discuss and promote awareness of human rights, building cross-cultural dialogue and consensus. To be inclusive, NGOs must take part in consultations and research. Such a forum could make recommendations to governments on how to improve human rights practices and increase awareness of the human rights consequences of their policies. Furthermore, it could identify specific treaties that ASEAN governments should ratify, particularly those containing values ASEAN governments have already

264. See JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 206 (1989) (providing a scheme for classifying regimes as declaratory, promotional, implementation and enforcement, in order of their muscularity).
endorsed in policy statements or practice. For example Singapore, which has made a public commitment to multi-racialism and meritocracy, should be encouraged to accede to the Convention for the Elimination of All Forms of Racial Discrimination (CERD).

¶165 ASEAN states might be persuaded to accept an implementation-oriented regime that entails some monitoring procedures such as reporting obligations. A limited degree of external scrutiny would seem acceptable, given that ASEAN states have, by becoming party to human rights treaties, accepted periodic reporting obligations to United Nations human rights organs. In this scenario, states could make use of an international forum to formulate policies that ultimately remain under national control. This gels with the sentiment expressed in the 1993 Bangkok Declaration at paragraph 9, recognizing that "States have the primary responsibility for the promotion and protection of human rights through appropriate infrastructure and mechanisms, and also recognize that remedies must be sought and provided primarily through such mechanisms and procedures." It is unlikely, though, that ASEAN states will look with favor upon a monitoring body that can receive communications from states or nonstate actors. At present, only the Philippines is party to the ICCPR's first optional protocol, which grants the Human Rights Committee jurisdiction to hear individual communications concerning human rights violations. The Committee examines the communications in camera and forwards its views to both the state party and the concerned individual. ASEAN parties to the Torture Convention (Philippines) and Race Convention (Laos, Philippines, Vietnam) have not recognized the competence of the relevant treaty committees to receive and process individual communications. In their cautious shift toward human rights, ASEAN states have generally kept their legal obligations to a minimum, avoiding international channels of accountability. Instead, ASEAN states tend to declare programmatic objectives that are not easily monitorable nor judicable. In national human rights institutions, individuals have a forum to articulate complaints but this has evolved as a matter of practice, rather than legal right. There seems to be a strong preference for keeping things at an informal, conciliatory level and a desire to avoid formal legal engagement.

¶166 To make monitoring schemes with reporting obligations more palatable to ASEAN governments, attention should be focused on the possibility of creating theme-specific committees at the national and regional level with limited mandates. Particular focus should be given to forming committees with monitoring powers designed to promote and protect the interests of children and women, given ASEAN's formal commitment to the related U.N. treaties and its own ongoing programs in this regard. Explicit linkages between the human rights of women and children and ASEAN's "functional cooperation" in women and children's issues should be encouraged so improvement can be sought in an integrated fashion. Since ASEAN countries stress the right to development, a reviewing committee could be formed to undertake research into both
human and economic indicators of development. From there, momentum could be built to extend monitoring to the entire gamut of human rights—civil and political as well as economic, social, and cultural—on a basis of genuine indivisibility. In the short term, however, it is unlikely that any such committees will be able to assiduously oversee national compliance with international norms. This is because ASEAN states jealously guard their state prerogatives to implement human rights concerns at their own pace, within their territorial borders, without external interference. Nevertheless, once institutions are created they can stretch their own limited mandates.

¶167 For several reasons, it is unlikely that ASEAN states will incorporate a judicial organ into any proposed regional mechanism in the foreseeable future. Such adjudicatory institutions, which feature in strong enforcement regimes such as the European Court of Human Rights, are able to issue authoritative judgments and binding awards.

¶168 First, the structure of ASEAN itself militates against commitment to formal processes. While hailed as an exemplar of regional cooperation, ASEAN is not based on the principle of supra-nationality or political union like the European Union. ASEAN has a minimal organizational structure. Its Jakarta-based Secretariat was established only in 1976. Foreign Ministers meet annually while the supreme decisionmaking authority, the assembled Heads of Government, meet once every three years with informal summits in between. ASEAN is more a forum or arena wherein member states interact, consult, and coordinate policy, rather than an actor in its own right. Its activities are largely consistent with the national sovereignty of ASEAN member states and no considerable powers have been delegated to ASEAN. A functioning regional court, while representing a strong form of human rights protection, requires preconditions that simply do not currently exist. Most importantly, it presupposes a regional human rights culture. This will take time to develop. A better strategy would be to encourage the development of independent national human rights institutions in every ASEAN country and to encourage consultations between these institutions. These institutions will provide a body of experts whose knowledge could be tapped in drafting a regional human rights charter or who could be a pool for supplying the personnel of an ASEAN human rights commission charged with oversight functions and empowered to receive individual petitions. Within ASEAN, the pressing need is to create a human rights culture at the domestic grassroots level, which permeates both the citizenry and officialdom. The priority must be to create participatory, civil societies with a high level of civic consciousness. A concern for human rights has to be born from within before it can be enforced from without.

¶169 Second, ASEAN's modus operandi is that of pragmatism, mutual accommodation and consensus-seeking. Informal consultation, dialogue, and mediation rather than the adversarial "winner takes all" nature of adjudication is the preferred mode for managing conflict in ASEAN. The collectivist culture with its premium on harmony means that
decisionmaking and problem solving tend to be based on personal relations rather than on structures or institutional frameworks. The Treaty of Amity and Co-operation in Southeast Asia provides for a conflict resolution process and mechanism in the form of a ministerial High Council comprising representatives from each state. To date, it has never been used, indicating an antipathy for formal mechanisms of dispute settlement. ASEAN states will not want to point accusatory fingers at each other in an adversarial judicial forum; they are generally reluctant to do so even in informal contexts. The Philippines is the sole ASEAN country to become a party to the Optional Clause of the International Court of Justice (ICJ), which confers advance compulsory jurisdiction on the Court, although Cambodia has also accepted ICJ jurisdiction. The other ASEAN countries are unlikely to accept a Regional Human Rights Court transcending the jurisdiction of national courts. The ASEAN preference for preventive diplomacy and dislike for judicial mechanisms is further evident in the fact that ASEAN state parties to CEDAW have not, per Article 29(1), accepted the compulsory jurisdiction of the ICJ in relation to disputes over the interpretation and application of CEDAW.\footnote{Indonesia, Myanmar, Singapore, Thailand and Vietnam in their reservations to CEDAW have declared that they were not bound by article 29(1). Text of reservations is available at United Nations Treaty Series, Treaties in Force (visited May 9, 1999) <http://www.un.org/Depts/Treaty/fin_newsfiles/part_boo/iv_boo/iv_8.html>.}

The proverbial flying pig must make its debut before individuals are given a right of access to international courts, let alone a regional one! Because of the importance of giving individuals a channel for making complaints, the model of the U.N. Human Rights Committee, with its first optional protocol, is the best option to aspire to for an ASEAN human rights commission. The success of such a body will largely depend on the degree to which governments are willing to implement its recommendations.

\[170\] In conclusion, human rights activism within ASEAN remains at the early stage of promotion, where publicity and persuasion are the strongest tools. Stamina is needed to cultivate the "heartware" that sustains a human rights regime's "hardware" in the form of institutions and processes. The primary task ahead is educating both the public and private sectors about human rights norms and the alternate methods for implementing them. A transnational human rights body with definite oversight powers should become a collective goal. Work has already been done to this end, through the cooperation of the ASEAN Secretariat and the private Working Group. NGOs have already begun supporting the Working Group with funding and expert technical assistance; this should continue. It is important that this initiative be perceived as a regional one, rather than one motivated by the agenda of some distant foreign power. The activities of this group should be publicized to domestic ASEAN constituencies, to foster public debate and, hopefully, to stimulate positive government responses.
V. PROMISES TO KEEP AND MILES TO GO BEFORE I SLEEP

¶171 As ASEAN approaches the new millennium, cooperation in regional economic, socio-cultural, and technical programs is likely to intensify. ASEAN is seeking to forge more of a regional identity as it evolves from a mere forum to coordinate economic policy into a community of nations bound together by a shared vision. Plagued by economic and financial crises and the continuing political unrest in Burma, \(^{266}\) Indonesia, \(^{267}\) and Malaysia, \(^{268}\) ASEAN states are unlikely to make human rights protection a top priority. At least three potential obstacles to promoting human rights in the region have already been identified: the antipathy of some ASEAN states towards civil and political rights, which leads to an emphasis on the economic aspects of the right to development; the paramount importance accorded to collective interests, which has been used to justify broad derogation from human rights in the interest of public order; and ASEAN’s general treatment of human rights as matters of national competence.

¶172 Nevertheless, in their 1998 Joint Communiqué, the ASEAN foreign ministers did not ignore human rights entirely. They did acknowledge the importance of international treaties and declarations that promote human rights. They drew a clear link between international human rights law and the ASEAN 2020 vision of creating a “community of caring societies,” \(^{269}\) which gives particular emphasis to vulnerable groups like children, youth, women, and the elderly. This link needs to be strengthened in order to integrate the effective protection of human rights into recognized ASEAN policy. Since there is continuing dialogue with private groups about a regional mechanism, ASEAN has not rejected the idea outright.


\(^{267}\). Ethnic and inter-religious clashes are increasingly becoming a serious problem, as witnessed by the recent clashes between Muslims and Christians in the Ambon province. See Amy Chew, Ambon Unrest Ethnic Cleansing, Moslem Cleric Says, STRAITS TIMES INTERACTIVE, Mar. 12, 1999 (visited May 27, 1999) [http://straitstimes.asial.com.sg/reuters/as9903124.html].

\(^{268}\). Malaysia’s Deputy Prime Minister and Finance Minister, Datuk Seri Anwar Ibrahim, for example, was recently dismissed from his government positions after evidence of alleged inappropriate behavior emerged. See Anwar Sacked, STRAITS TIMES, Sept. 3, 1998, at 1; The Final Rupture, STRAITS TIMES, Sept. 3, 1998, at 6.

\(^{269}\). This explicit reference to a “community of caring societies” may be a useful foundation upon which to develop human right norms for the ASEAN region in at least two respects. First, "care" relates to a moral ordering of state-society relations, which could open up discussions about what is necessary to vindicate human dignity in all its permutations. Second, caring societies cannot remain indifferent to the sufferings and injustices in the larger community of states. This could open the door towards the cultivation of a transnational civil society whereby NGOs take an active interest in human rights conditions in the ASEAN states, both in terms of advocacy and relief efforts. At the interstate level, in taking an interest in their counterparts' human rights performances, ASEAN governments could present themselves as good, caring neighbors rather than officious busybodies, not just through urging changes to abusive government practices, but by providing technical aid and moral support in the joint enterprise of promoting human rights to benefit all ASEAN peoples.
¶173 Human rights and democratic reform are likely to fall within ASEAN’s purview as the grouping matures for several reasons. First, pressures for societal change are likely to come from within. More educated, economically advanced societies, increasingly integrated into the various global systems, will have higher expectations for “good governance”—including an end tocronyism, nepotism, and corruption, charges presently levied against Prime Minister Mahathir Mohamad’s government and which contributed to the downfall of President Suharto’s administration. Political legitimacy and accountable, transparent governments that display a greater respect for human rights and dignity will be considered facets of what is considered “good governance.” Attempts to suppress popular democratic reforms implicates regional security. Burma is the major refugee-producing country in the region. As individual ASEAN countries go through transitions with social and political unrest, such as those recently experienced by Cambodia, Indonesia, and Burma, ASEAN leaders may come to realize that states must be stabilized by means other than economic development. Political pluralism cannot be ignored as an agent of stabilization and national reconciliation, whereby citizens accept the legitimacy of the political order and ethnic and religious minorities no longer fear persecution and discrimination.

¶174 ASEAN may well have to focus its attention on ensuring that its member states’ governments are perceived as legitimate and civilized, both by the domestic population and the international community. This will require a tempering of its nonintervention policy. The consciousness displayed by some ASEAN states of the interdependent nature of the region and the need for increased cooperation and a more activist form of engagement in each other’s affairs may already point to a more interventionist future ASEAN policy. Indeed, ASEAN states have already demonstrated a limited willingness to curtail sovereignty in matters of common concern such as reducing barriers to trade and economic development and undertaking environmental obligations. ASEAN, moreover, is increasingly adopting coordinated approaches for interdependencies like unemployment and managing banking and financial systems. There is widespread sentiment that the Asian currency crises could have been mitigated had a regional early warning system been in place, with governments freely sharing information.270 This may translate into a greater acceptance that a "hands-off" approach is unfeasible in relation to problems "where the chains of cause and effect stretch across national and geographical divides... where the point of origin of the problems are in one country and the consequences therefore in another."271

270. ASEAN Parliamentarians have recommended that ASEAN develop an early warning system to monitor and anticipate impending economic crises. See Asaans MPs call for crisis warning system, STRAITS TIMES, Aug. 30, 1998, at 19.

271. Sukhumbhand Paribatra, Preparing ASEAN for the 21st Century, BUS. TIMES ONLINE, Aug. 29, 1998 (visited May 27, 1999) <http://business-times.asia1.com.sg/6/focus50.html>. This article is extracted from a speech delivered by the Thai Deputy Minister of Foreign
National borders are becoming as porous as the line that separates domestic and international affairs.

¶175 ASEAN has committed itself to the ASEAN 2020 vision of developing caring communities. This may contribute to inducing internal changes in modes of government as national governments jettison those policies that make their societies less open, less caring, and less protective of individual welfare and dignity. The overlap with human rights here should be made apparent, linking ASEAN policy towards the goal of promoting human rights.

¶176 External influences pushing for human rights and democracy are also increasing. ASEAN has become a political forum where Asian countries and world powers can discuss problems of security, political issues and military concerns as well as trade. This growing engagement of ASEAN with countries and regional blocs beyond the confines of Southeast Asia has resulted in the discussion of human rights and political liberalization issues at the highest ministerial levels, as in the ASEM context. The international community should continue to exert pressure on egregious human rights violators like Burma, particularly where Burma's fellow ASEAN states refuse to do so. Unacceptable government conduct cannot be glossed over, lest dictators and tyrants be encouraged in their repression. While it may not be profitable to isolate Burma, Burma should be taken sternly to task in international and regional fora. ASEAN states should press their fellow members for change, even if this is done in private. ASEAN should also be encouraged to take responsibility for its policy of "constructive engagement" by publicizing concrete improvements in the human rights situation in Burma. The failure to report any improvement will itself pose a reason for changing a policy demonstrated not to work.

¶177 The post-1997 period marks the demise of the orthodoxy of optimism in ASEAN, given the region's economic downturn and socio-political unrest. Much of the national and regional resilience of ASEAN and its members rested on their economic successes; that bubble has been punctured, as countries like Indonesia face desperate economic crises and struggle to meet even the basic needs of their people. The task of elevating the human dignity of ASEAN peoples is mammoth. It will require staving off violence, rebellions, instability and insecurity, and the holistic promotion and protection of human rights.

¶178 Before ASEAN can speak of having a human rights convention, commission, or court, its peoples must become aware of human rights and how they can be of practical use. Educational initiatives in this regard should be affiliated with and support the United Nations Human Rights Education decade (1995-2004). Educating public officials about their

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responsibilities under human rights law may induce a change in behavior while educating people about their rights will enable them to participate in formulating human rights standards at both the domestic and international level. Exposure to the international human rights regime will feed domestic initiatives urging governments to ratify human rights treaties or to set up regional institutions, thereby strengthening civil society.

179 Encouraging trends can be found in the ratification of human rights treaties by individual ASEAN countries, albeit muted by extensive reservations, and in their greater acceptance of the United Nations' role in promoting human rights. Several ASEAN states, for example, have permitted special rapporteurs from thematic U.N. human rights committees to conduct on-site investigations. The development of national human rights commissions can promote a climate for human rights advocacy and provide useful models for addressing human rights issues. It is heartening too, that ASEAN is developing specific programs for promoting the interests of women and children. It will be easier for human rights activists to engage ASEAN in dialogue over these matters, for which ASEAN has already demonstrated concern.

180 On a more localized basis, some positive changes may be observed. While Indonesia still struggles with a mounting economic crisis and the daily risk of civil disorder, a slow change in the government's attitude toward human rights is taking place. This is evident in the aftermath of the November riots and military crackdown. The human rights commission called for a probe into the violence, followed by the unprecedented step of the Indonesia military taking out advertisements in three major newspapers to express condolences for the fourteen dead. Apparently accepting responsibility, the government stated that the hundreds injured in the attack would receive free medical treatment. Governments should be reminded that commitments to human rights, which can contribute to a stable political order in the long run (as opposed to order coercively maintained, which is inherently unstable), can serve other goals. A government respecting human rights and environmental concerns may well, for example, be able to attract more aid and investment.

181 NGO activism in the region is crucial to the task of popularizing human rights consciousness and drawing attention to abuses. Attention should be focused on establishing the groundwork for an institutionalized

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human rights culture at the grassroots level, line by line, precept by precept. Government action must be called to account first through the internal check of an active civil society, and then through the external check of the international community.

¶182 The international community will need the wisdom to know when to condemn human rights abuses and when to come alongside ASEAN states in an attitude of partnership to offer expert help and technical assistance, and all states should be critical of their own human rights records. They are all accountable to the same law and all fall short, to varying degrees. To assume a posture of moral superiority is to promote a battle of wills that detracts from the real task of promoting the welfare of human beings. Yet, the human rights deficiencies of a state that criticizes another state do not in themselves provide an excuse for the criticized state to ignore its own shortcomings.

¶183 The international community can help in building the national resilience of ASEAN states by supporting the development of civil society, and government based on the rule of law. These will take time to grow; it cannot be imposed by decree or will. With sober realism, one must acknowledge that miles of road lie ahead for human rights activism in this region.
## Appendix 1 (EIF = Entry into Force)

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<thead>
<tr>
<th>Treaty</th>
<th>ASEAN State Party</th>
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<tr>
<td>Convention against Torture and other Cruel Inhumane or Degrading Treatment or Punishment(^{276})</td>
<td>Cambodia 14 Nov 1992 EIF&lt;br&gt;Indonesia 23 Oct 1985 (Date Signed)&lt;br&gt;Philippines 26 Jun 1987 EIF</td>
</tr>
<tr>
<td>International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families</td>
<td>Philippines 5 July 1995 Receipt of Instrument</td>
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\(^{276}\) UNTS Vol. 1465 at page 85. At present it has 66 signatories and 106 parties.

\(^{277}\) UNTS Vol. 1249 at page 13. At present, it has 97 signatories and 162 parties.

\(^{278}\) Do. A/RES/44/25. At present, it has 140 signatories and 191 parties, making it the most widely ratified treaty.

\(^{279}\) UNTS Vol. 660 at page 195. At present, it has 77 signatories and 151 parties.

\(^{280}\) UNTS vol. 999 at page 171. The Covenant has 59 signatories and 140 parties.
<table>
<thead>
<tr>
<th>Treaty (continued)</th>
<th>ASEAN State Party</th>
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<tr>
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<td>Philippines 3 Jan 1976 EIF</td>
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<td>Vietnam 23 Dec 1982 EIF</td>
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<td>Optional Protocol to the ICCPR\textsuperscript{281}</td>
<td>Philippines 22 Nov 1989 EIF</td>
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<tr>
<td>Second Optional Protocol to the ICCPR\textsuperscript{282}</td>
<td>None.</td>
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\textsuperscript{281} UNTS Vol. 999 at page 171. The protocol has 26 signatories and 92 parties.  
\textsuperscript{282} Doc. A/RES/44/128. The protocol has 21 signatories and 33 parties.