



Submission
to the European Parliament Sub-committee on Human Rights (DROI)
for its meeting on “ASEAN Human Rights Mechanisms” on September 18, 2012

September 17, 2012

This submission expresses civil society’s long-standing and largely unaddressed concerns regarding the **independence, transparency, and effectiveness** of the ASEAN Intergovernmental Commission on Human Rights (AICHR). We call upon the European Union (EU) to urge ASEAN to fully address these structural flaws before extending any substantive assistance. Assistance should also be benchmarked against AICHR’s concrete actions in protecting and promoting human rights, as well as in advocating, monitoring and reporting on ASEAN Member States’ compliance with international human rights law and standards.

Independence

AICHR is **not independent** by design. Its Terms of Reference (ToR)¹, drafted by ASEAN Member States, defines its mandate, purposes and functions. AICHR is ostensibly an “intergovernmental” and “consultative” body (article 3). Under article 5 of the ToR, AICHR “consists of Member States”, rather than independent and competent human rights experts; each Member State appoints a “Representative” to AICHR and these Representatives are “accountable to the appointing Government.” AICHR reports to the ASEAN foreign ministers, who receive and approve of the commission’s work plans and budgets, upon the recommendation of the Committee of Permanent Representatives to ASEAN. This means AICHR’s constituents are States, not the peoples of ASEAN.

Article 5.6 gives Member States total discretionary power to replace their Representatives, without prior notice or reason. Two Representatives (Brunei and Vietnam) have been replaced since AICHR’s establishment in 2009 without much publicity. To date, the Representatives’ biographies on AICHR’s webpage on ASEAN’s official homepage have not even been updated to reflect the change.

Seven out of ten AICHR Representatives are either current or former State officials with little proven track record or recognised competence in the field of human rights. Brunei’s Representative is a former Minister of Industry and Primary Resources. Cambodia’s Representative is the President of two government bodies: the Anti-Corruption Unit within the Office of the Council of Ministers and the Cambodian Human Rights Committee. Lao PDR’s Representative is a career diplomat and deputy foreign minister. Burma’s Representative, also a career diplomat, served as a director-general in the Burmese foreign ministry and was his country’s long-time ambassador to the United Nations between 2001 and 2009. The Vietnamese Representative is also a veteran diplomat and served as ambassadors to Cambodia and Thailand. Some Representatives, in their prior diplomatic roles, have defended their countries’ poor human rights record before the UN and other international fora.

AICHR’s lack of independence is evident in the on-going drafting of an ASEAN human rights declaration (AHRD). AICHR has so far refused to release and disseminate the full draft of the AHRD for public consultation, and ASEAN officials have defended such secrecy by arguing that the draft must be seen and

¹ <http://www.aseansec.org/DOC-TOR-AHRB.pdf>

reviewed by the ASEAN foreign ministers first. ASEAN officials have also stated that the full draft would not be disclosed until it is approved by ASEAN heads of government when they meet for the 21st ASEAN Summit in November 2012. It is clear that AICHR cannot and does not operate independent of ASEAN Member States.

The three-year terms of AICHR Representatives will come to an end in 2012.

Transparency

AICHR is not transparent and consistently refuses to allow public access to its documents and deliberations. Article 6.7 requires AICHR to “keep the public periodically informed of its work and activities through appropriate public information materials.” Civil society organizations (CSOs) in ASEAN Member States have repeatedly called on AICHR to share key documents so that they could contribute to AICHR’s mandate to promote and protect human rights. However, AICHR has failed to release any documents it has adopted since its establishment two years ago, including its guidelines of operations, annual work plans, and annual report for 2011. AICHR justified such secrecy on the ground that the documents sought are all “internal working documents.”² The only information it releases publicly are short press releases with scant information after each of its formal meetings.

AICHR works largely in secret. AICHR’s formal meetings are not open to the public, civil society or national human rights institutions. Since its establishment, AICHR has turned down numerous requests for meetings by both non-governmental organisations and the national human rights commissions in the region, often on the ground that it has yet to agree on its operating procedures that would allow them to consult with NGOs or entities not recognised by the ASEAN Charter’s Annex.

AICHR’s lack of transparency is on full display in the drafting of the AHRD. Despite repeated calls for transparency and consultation by civil society across the region³, international human rights groups⁴, and the United Nations⁵, AICHR has so far refused to formally publish and disseminate the draft, tightly guarding it as if it is a State secret rather than a human rights document. AICHR had even withheld the full draft when consulting with other ASEAN sectoral bodies, including its sister body, the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC).

Although several individual AICHR Representatives held national consultations with CSOs in their respective countries, no such consultations were held in other ASEAN Member States. On June 22, 2012, AICHR held its first formal consultation on the AHRD in Kuala Lumpur, but did not publish the full draft. Although this consultation could have been a positive step, AICHR regrettably arbitrarily limited participation to only four

² Solidarity for Asian People’s Advocacy-Task Force on ASEAN and Human Rights, *A Commission Shrouded in Secrecy: A Performance Report on the ASEAN Intergovernmental Commission on Human Rights (2010-2011)*, April 2012, pages 6-7. (http://www.forum-asia.org/uploads/books/acsis_final-online-version.pdf).

³ ASEAN Civil Society Calls for Broad Public Consultation on the ASEAN Human Rights Declaration and Make the Draft Declaration Public, November 26, 2011 (<http://www.forum-asia.org/?p=11761>); Civil Society Demands Transparency and Consultation on the ASEAN Human Rights Declaration, April 8, 2012 (<http://www.forum-asia.org/?p=12449>); AICHR’s Consultation on ASEAN Human Rights Declaration: Too Little Too Late, April 16, 2012 (<http://www.forum-asia.org/?p=12478>); Open Letter to the ASEAN Foreign Ministers’ Meeting (AMM) on the ASEAN Human Rights Declaration, July 7, 2012 (<http://www.forum-asia.org/?p=14252>).

⁴ FIDH, FIDH expresses concern about the drafting process of the ASEAN Human Rights Declaration, March 6, 2012. (<http://www.fidh.org/FIDH-expresses-concern-about-the>); FIDH and 13 international human rights groups, The ASEAN Human Rights Declaration: Drafts must be published and subject to meaningful consultations with local, national and regional civil society and human rights defenders, May 1, 2012 (<http://www.fidh.org/The-ASEAN-Human-Rights-Declaration>); FIDH and 5 international human rights groups, Less than Adequate: AICHR Formal Consultation with Civil Society on the ASEAN Human Rights Declaration, June 21, 2012 (<http://www.fidh.org/Less-than-Adequate-AICHR-Formal>); FIDH and 5 international human rights groups, Joint open letter to ASEAN foreign ministers on the draft ASEAN Human Rights Declaration, July 7, 2012 (<http://www.fidh.org/joint-open-letter-to-ASEAN-foreign>).

⁵ OHCHR, Pillay urges ASEAN to set the bar high with its regional human rights declaration, May 11, 2012. (<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12142&LangID=E>)

organisations from each member state, thus excluding many other interested organizations from across the region. Several regional and international human rights organisations were informed that the AICHR could not reach a consensus to invite them and therefore they were not allowed to attend the consultation. Moreover, many organisations hand-picked by their governments are not independent CSOs, but are run by or are very closely affiliated with the State.

In July 2012, ASEAN foreign ministers agreed to release 'key elements' of the draft but continued to keep the full draft a secret. They also instructed AICHR to conduct more consultations, but it took AICHR two months before deciding to hold another one-day regional consultation on the AHRD on September 12. However, AICHR continued to selectively limit the participation of civil society in this consultation and continued to bar some organisations from participating. This submission is also concerned that two one-day consultations with extremely limited participation are wholly inadequate to receive and consider input into a document that will have significant regional implication for human rights protection and promotion.

Effectiveness

AICHR is **not effective** and suffers from a **weak mandate**. Not surprisingly, it has so far failed to implement any protection measures for victims of human rights violations in ASEAN Member States.

AICHR is **handicapped by its consensus decision-making**. Article 6.1 of ToR requires AICHR Representatives to make decisions on the basis of "consultation and consensus." In practice, this approach gives a de facto veto power to every member and that every decision made is thus very likely the lowest common denominator. This flaw has reportedly been exploited by Representatives of governments with poor human rights record to introduce regressive languages and to block the inclusion of certain rights, such as the right to self-determination and LGBT rights, into the AHRD.

AICHR's ToR **undermines the universality and primacy of human rights** under international law. Article 1.4 of AICHR's ToR stipulates that AICHR should promote human rights "within the regional context, bearing in mind national and regional particularities and mutual respect for different historical, cultural and religious backgrounds, and taking into account the balance between rights and responsibilities." Statesmen from countries like Malaysia and Singapore have long been promoting these so-called "Asian Values" which have been used to justify violations and limitations of human rights protected by international human rights instruments.

AICHR is made impotent by the principle of "**non-interference in the internal affairs** of ASEAN Member States", which is enshrined in article 2.1(b) of its ToR. Abusive ASEAN governments in countries like Burma, Cambodia, Laos and Vietnam have consistently used this convenient 'principle' to deflect international scrutiny of human rights abuses. Not surprisingly, AICHR has not issued a single public statement raising its concerns on any country-specific situation. Since AICHR does not publicise its deliberations, it is also impossible to know whether any such situations have been discussed in any way within the Commission.

Unlike other more independent, transparent, and effective human rights mechanisms, AICHR is **not mandated to receive and consider communications** from individuals or groups of individuals. At the same time, it is also not prohibited from doing so by its ToR. Civil society organisations and victims of human rights violations have submitted over a dozen cases to AICHR, but they have not received any formal acknowledgment or response from the commission.⁶ Article 4.10 cryptically allows AICHR to "obtain information from ASEAN Member States on the promotion and protection of human rights", but there has

⁶ Solidarity for Asian People's Advocacy-Task Force on ASEAN and Human Rights, *Hiding Behind Its Limits: A Performance Report of the First Year of the ASEAN Intergovernmental Commission on Human Rights (2009-2010)*, January 2011, pages 72-125. (http://forum-asia.org/2010/AICHR@1_web.pdf).

been no publicly available information to suggest that the commission has ever exercised this function. Due to its lack of independence, consensus approach, and constraints imposed by the current ToR, it is implausible that this AICHR could progressively interpret the ToR to formally receive, consider or act on any cases of human rights violations.

AICHR's ToR will be reviewed in 2014, when Burma chairs both ASEAN and AICHR.

Recommendations

In the Bandar Seri Begawan Plan of Action to Strengthen the ASEAN-EU Enhanced Partnership (2013-17), the EU committed to support “the work of the ASEAN Intergovernmental Commission on Human Rights (AICHR), as the overarching body for the promotion and protection of human rights in ASEAN through regional dialogues, seminars, awareness raising activities, exchange of best practices and other capacity building initiatives aimed at enhancing the promotion and protection of human rights through technical cooperation programmes as well as giving support to the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC).”

This submission believes that EU assistance to AICHR at this stage may be pre-mature and risks lending it a kind of legitimacy that it does not yet deserve, considering the existing structural flaws and a seeming lack of political will to rectify them. Therefore, this submission respectfully calls on the EU, its institutions, including the European Parliament, and EU Member States to:

- Recognise and express deep concerns at the current lack of independence, transparency and effectiveness of AICHR, and call upon ASEAN, its Member States and AICHR to take all necessary measures to urgently address these structural flaws before the EU extends substantive assistance to ASEAN in the field of human rights
- Ensure that any assistance to and cooperation with AICHR are negotiated, implemented, and evaluated transparently and in consistent and broad consultation with independent civil society both in Europe and in ASEAN Member States, and that meaningful participation and broad-based representation of civil society in all areas of EU-ASEAN cooperation on human rights should be made a priority. In this regards, the EU should instruct its EU Delegations in ASEAN Member States, together with the embassies of EU Member States, to conduct such consultations
- Call on ASEAN Member States and AICHR to immediately conduct broad-based, transparent, and regular consultations with the public and independent civil society in all Member States on the necessary reforms of AICHR's purposes, composition, mandate and functions
- Call on AICHR to publish and make accessible all relevant documents, including drafts, working documents, detailed summaries of meetings, annual reports on AICHR's activities and financial statements
- Call on ASEAN Member States and AICHR to immediately publish the current draft of the ASEAN Human Rights Declaration and disseminate it as widely as possible throughout the region; and allow more time for transparent and broad-based consultations with independent and representative CSOs on the draft, both at the national level (especially in member states which have not yet conducted national consultations) and regionally, without selectively limiting participation to only a few chosen CSOs
- Call on AICHR to frequently and regularly meet with independent civil society organizations, as well as other key stakeholders such as national human rights institutions, without discrimination, both at the national and regional levels, both during AICHR official meetings and between them
- Call on AICHR to solicit and seriously consider CSO input before finalizing its reports, documents and standard-setting activities

- Call on AICHR to establish independent, transparent and effective mechanisms to receive and consider communications on human rights violations from individuals and groups
- Call on AICHR to seek information from and actively engage with Member States where credible allegations of human rights violations have been reported, and to ensure that the violations are stopped and independently and impartially investigated, and that justice and reparations are provided to victims and survivors without discrimination
- Call on the ASEAN Secretary-General to proactively bring human rights concerns to the attention of AICHR, as mandated by article 7.1 of AICHR's ToR

In relations to the draft ASEAN Human Rights Declaration, this submission recalls that in the EU Strategic Framework and Action Plan on Human Rights and Democracy adopted in June 2012, the EU is committed to promote the universality of human rights and to speak out against any attempt to undermine respect for universality of human rights. Therefore, this submission calls on all EU institutions, including the European Parliament, to⁷:

- Remove any provision purporting to impose limitations or restrictions on all rights in general
- Remove any provision subjecting the rights in the Declaration to “national and regional particularities” which may be used by States as an excuse to weaken the protection of human rights as provided in universally agreed standards
- Remove any reference to the balancing of rights and responsibilities, given that human rights are inalienable and cannot be made contingent on responsibilities
- Include a provision explicitly guaranteeing that no part of the Declaration shall be interpreted or implemented in a manner that is inconsistent with or undermines international human rights standards
- Ensure that provisions on specific rights are in line with international human rights standards and clearly adding value to them

⁷ These same recommendations were submitted to the ASEAN foreign ministers in an open letter on July 7, 2012 signed by six international human rights groups, including FIDH. See: <http://www.fidh.org/Joint-open-letter-to-ASEAN-foreign>.