

Joint submission to the ASEAN Intergovernmental Commission on Human Rights on the ASEAN Human Rights Declaration

by Civil Society Organisations and people's movements participating in the Fifth Regional Consultation on ASEAN and Human Rights, 22 June 2012

This submission is made in the name of 48 civil society organizations (CSOs) and people's movements who met for the Fifth Regional Consultation on ASEAN and Human Rights on 20-21 June in Kuala Lumpur, Malaysia. The submission focuses on our main concerns and recommendations regarding the substance of the ASEAN Human Rights Declaration (AHRD). At the same time, we cannot ignore the serious procedural failures that have marred the drafting of this Declaration. These failures have persisted despite repeated calls by civil society to ensure an inclusive, transparent process.

The procedural issues throughout the process have been essentially the following:

- CSOs in most member states, especially grassroots organisations, have been sidelined from the process, as their AICHR representatives did not hold national-level consultations. However, we commend those national AICHR representatives who have held largely informal consultations with CSOs at the national level.
- There has been no comprehensive, meaningful, institutionalised consultation at the regional level with CSOs to this point. With the present Consultation coming so close to the scheduled submission of the draft AHRD to the ASEAN Ministers' Meeting, it will only partially mitigate this problem, unless time and space are allocated for further consultations;
- It is unfortunate that no drafts or summaries of deliberations have been issued by AICHR. At this stage of the process, where AICHR is discussing the actual wording of each provision, this seriously hampers CSOs ability to contribute to the process in a meaningful way.

These issues were compounded by the lack of transparency and organisation of this Consultation itself, with some states nominating non-independent organisations; formal invitations being issued very late, resulting in certain CSOs not having time to secure the resources for their participation; and no agenda of the Consultation being issued until two days before the Consultation was to be held

We call on AICHR and on the AMM to make time for further, more extensive and inclusive consultations and for the publication of the latest AHRD draft to ensure that these consultations are meaningful and fruitful.

As for the substance of the Declaration, the CSOs who met for the 5th Annual Consultation expressed the following concerns and suggestions, based on the partial and insufficient information at our disposal. Note that this submission covers only issues regarding which we had specific concerns; nevertheless it should not be understood as either being exhaustive of our concerns, or as us necessarily adhering to any provisions or wording that we have not addressed here.

a. General concerns and suggestions

No	Provision/concern and suggested language	Explanatory note
a(1)	<p>The need to ensure that the human rights protections in the Declaration are not lower than those enshrined in universal standards:</p> <p>We propose the inclusion of the following provision as the final Article of the Declaration:</p> <p>Nothing in this Declaration may be interpreted as implying for any State, non-State actor or person any right to engage in any legislation, policy or activity which may:</p> <p>a. undermine the purposes and principles or weaken the human rights protections of the Universal Declaration on Human Rights, the Vienna Declaration and Programme of Action or international law subscribed to by member states; or</p> <p>b. destroy any of the rights and freedoms stipulated under this Declaration.</p>	<p>This provision will reflect ASEAN’s determination that its Human Rights Declaration becomes part of the universal system of international and regional human rights instruments and will provide for all individuals, groups and peoples at least the level of human rights protections that they already enjoy under existing universal treaties and other instruments. See Article 2(j) of the ASEAN Charter.</p>
a(2)	<p>The apparent inclusion in the draft Declaration of an overarching “General Principle” providing for a “Balance between rights and responsibilities”;</p> <p>We propose the deletion of any provisions for “balancing rights and responsibilities”.</p>	<p>Such “balancing” is alien to the concept of “inalienable” human rights (Universal Declaration of Human Rights (UDHR), 1st preambular paragraph). No existing international or regional human rights instrument seek to define a mutual relationship in terms of “balancing” the human rights of individuals on the one hand and their “duties” or “responsibilities” on the other.</p>
a(3)	<p>The apparent inclusion in the draft Declaration of an overarching “General Principle” providing for a “Limitation of rights”:</p>	<p>Under international law, only certain limitations, strictly and narrowly defined, may be imposed on a limited number of rights.</p>

	<p>We propose:</p> <p>(1) the deletion any provisions imposing overarching limitations on the totality of the rights provided in the draft;</p> <p>(2) the inclusion of the following General Principle:</p> <p>In respecting, protecting and fulfilling human rights, Member States shall at all times observe the relevant rules of international law, in particular the principle of non-derogability of fundamental human rights.</p>	<p>International law also elaborates for principles governing any acceptable restrictions on rights, whilst providing that key human rights may not be derogated from under any circumstances (International Covenant on Civil and Political Rights (ICCPR), Art. 4).</p>
a(4)	<p>The apparent inclusion in the draft Declaration of an overarching “General Principle” providing for “Taking into account national and regional particularities”:</p> <p>We propose the deletion of any provision that includes such explicit or implicit conditioning.</p>	<p>Regional and national contexts cannot be used by states as an excuse to weaken the protection of human rights as provided in universally agreed standards. In fact, the opposite is true. For instance, Art. 5 of CEDAW provides <i>inter alia</i> that “States Parties shall take all appropriate measures:</p> <p>(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”.</p>
a(5)	<p>The need for the Declaration to address human rights abuses by non-state actors:</p> <p>We propose the inclusion of the following provision: Where human rights abuses are perpetrated by non-state actors, including individuals, groups and corporations at the national, regional and international levels, Member States shall exercise due diligence to prevent, punish and ensure reparation for such abuses.</p>	<p>There is a growing awareness of the duty of states to address human rights abuses by non-state actors, from the domestic scene to transnational corporations, which should be reflected in the Declaration. See e.g. UN Declaration on the Elimination of Violence against Women, Art. 4(c).</p>
a(6)	<p>The need to ensure implementation and dissemination of the Declaration:</p>	<p>Unless the Declaration is implemented by states parties and disseminated widely to the population it will remain ineffective and obscure. The need for this provision is therefore self-evident.</p>

	<p>We propose the inclusion of the following provision:</p> <p>(1) Each member state shall ensure that its laws, policies and practices are in conformity with this Declaration;</p> <p>(2) Each member state shall ensure that this Declaration is disseminated to the population throughout its territory, including by translation into local languages and is incorporated into the training of the staff of judicial, law enforcement, and other relevant authorities.</p>	
a(7)	<p>The need to monitor and assess the impact and dissemination of the Declaration:</p> <p>We propose the inclusion of the following provision:</p> <p>The AICHR shall include in its annual report to the AMM detailed information on the dissemination and the promotion of the Declaration in the region, including translation to all national languages and incorporation in the training of relevant officials; its invocation in laws, parliamentary and public debate and the media; and its implementation by governments and other duty-bearers. The report shall be made public.</p>	The need for this provision stems from the previous one.
a(8)	<p>The need for cooperation with civil society and the public as a whole in promoting and protecting human rights:</p> <p>We propose the inclusion of the following provision:</p> <p>In promoting and protecting the human rights provided in</p>	This provision would ensure that the Declaration reflects ASEAN member states' legal obligation, under the ASEAN Charter to "promote a people-oriented ASEAN in which all sectors of society are encouraged to participate in, and benefit from, the process of ASEAN integration and community building" [Art. 1(13)].

	this Declaration, ASEAN in general and member states in particular will cooperate with individuals, groups and organisations of civil society in the widest sense of this term.	
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b. Concerns and suggestions about civil and political rights

No	Provision/concern and suggested language	Explanatory note
b(1)	Right to life: Everyone has an inherent right to life. No one shall be deprived of this right.	This represents a progressive reading of the current state of international human rights law.
b(2)	Enforced disappearance: No one shall be subjected to enforced disappearance.	Enforced disappearance must be included explicitly in light of current international trends. Indonesia and Thailand have signed the International Convention Against Enforced Disappearances.
b(3)	Right to information: Everyone has the right to seek, receive and impart information through any media and regardless of international frontiers.	Ensure that right to impart and receive information is protected explicitly as set out in the UDHR and subsequent international treaties. Indonesia has a Law on Freedom of Public Information. Malaysia has state-level legislation (two states) and the Philippines Congress is considering Freedom of Information legislation.
b(4)	Right to electronic privacy: Everyone has the right to have his or her personal data protected from arbitrary or unlawful use or interference. States may only acquire, store or access personal data in strict and narrowly construed circumstances defined in law, and access to such data shall be limited to the minimum number of officials or agencies necessary.	The right to privacy includes the right to protect personal data, especially in electronic form. This reflects developing state practice in the ASEAN region. This reflects the e-ASEAN initiative. See ICCPR Art. 17.

b(5)	<p>Political participation and voting:</p> <p>Everyone has the right to meaningfully participate in all spheres of social and community life, including political processes, peace negotiation processes and decision-making processes in both the public and the private spheres.</p> <p>Everyone has the right to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.</p>	<p>This reflects UDHR Article 21 and subsequent developments in international human rights law, including the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and UN Security Council Resolution 1325.</p>
b(6)	<p>Freedom of religion and belief:</p> <p>Everyone has the right to freedom of thought, conscience, and religion. This right shall include freedom to have or to adopt a religion or belief of his or her choice, and freedom, either individually or in community with others and in public or private, to manifest his or her religion or belief in worship, observance, practice and teaching.</p>	<p>Reflecting the language of the UDHR Article 18 and subsequent international human rights law.</p>
b(7)	<p>Access to justice:</p> <p>Everyone has an equal right to access to justice, which includes procedural and substantive justice in both formal and informal justice systems in compliance with the principles of substantive equality and non-discrimination.</p>	<p>Access to justice should cover all forms of justice, whether formal or informal.</p>
b(8)	<p>Access to remedy:</p> <p>Every person whose human rights have been violated shall have the right to an effective and enforceable</p>	<p>See UDHR Art. 8; ICCPR Art. 2(3)</p>

	remedy that includes his or her physical and psychological recovery and social reintegration to be determined by a court or other competent authorities.	
b(9)	<p>Right to nationality:</p> <p>Everyone has the right to nationality, which denotes full access to citizenship. No one shall be arbitrarily deprived of his or her nationality, nor rendered stateless.</p>	Citizenship denotes a legal status to the State whereas 'Nationality' has inconsistent definitions in ASEAN states.

c. Concerns and suggestions about social, economic and cultural rights

No	Provision/concern and suggested language	Explanatory note
c(1)	<p>Right to self-determination:</p> <p>All persons, groups and peoples have the right to freely determine their political status and freely pursue their economic, social and cultural development;</p> <p>Right to dispose natural wealth and resources: Everyone, individually or collectively, has the right to freely dispose his or her natural wealth and resources, without prejudice to any obligations arising out of international economic cooperation, based on the principles of mutual benefits, and international law. No one shall arbitrarily deprived of his or her means of subsistence.</p>	The AHRD should not frame economic, social and cultural rights as State rights, but rather as the duty of member states to protect and fulfil these rights. See ICCPR, International Covenant on Economic, Social and Cultural Rights (ICESCR), Art. 1; UN Declaration on the Rights of Indigenous Peoples (UNDRIP).
c(2)	<p>Right to an adequate standard of living:</p> <p>Components of this right should include adequate food, clothing, adequate medical care and social services, safe drinking water,</p>	The AHRD has a unique opportunity to exceed minimum international human rights standard by enshrining a right to a clean, healthy and sustainable environment which has been increasingly and widely accepted as a key component of the right to an adequate standard of living.

	<p>housing,.</p> <p>Right to a clean, healthy and sustainable environment:</p> <p>Everyone has the right to a clean, healthy and sustainable environment, which includes the right to a balanced and healthy ecology.</p>	<p>See Philippine Constitution, Sec. 16, Art. 2, and further elaboration by the Supreme Court of the Philippines in the case Oposa v. Factoran (1993)</p>
c(3)	<p>Right to work</p> <p>Everyone has the right to decent work, which includes the opportunity to gain his or her living by work which he or she freely chooses or accepts,.</p>	<p>The right to work should be enjoyed without discrimination on any form or basis. The AHRD should avoid languages that would grant this right only to a certain category of persons.</p>
c(4)	<p>Right to form and join a union:</p> <p>Everyone has the right to form and to join a union or association of his or her choice and to collective bargaining, subject only to the rules of the organization concerned. States should take all necessary measures to protect and fulfil this right, including through legislation.</p>	<p>The AHRD should not include any language that implies this right could be subject to national laws and regulations without making explicit that national laws should protect this right and should be consistent with international human rights and labor rights standards. See ILO Conventions 87 and 98.</p>
c(5)	<p>Right to health</p> <p>The provision for this right should explicitly include “sexual and reproductive health and rights.”</p> <p>This provision should avoid qualifications such as “in accordance with national laws and regulations”.</p>	<p>General Comment 14 of the ICESCR recognizes the right to health as including sexual and reproductive health. Sexual health is distinct from reproductive health and therefore should be recognized. These two issues are inter-related. Lack of protection of the right to sexual and reproductive health affects both sexes.</p> <p>National laws cannot be invoked as a justification to derogate from rights protected under international law. If national laws and regulations must be mentioned, it should phrased as : “States should take all necessary measures to protect and fulfil this right, including through legislations, consistent with international human rights standards and law.”</p>
c(6)	<p>Right to education</p> <p>Everyone has the right to education without discrimination regardless of status. States should take all necessary measures to protect</p>	<p>CESCR General Comment 13. ICESCR Art. 13.</p>

	<p>and fulfil this right, including through legislation.</p> <p>Basic education shall be compulsory and available free to all.</p> <p>States have a responsibility to provide human rights education at all levels</p>	<p>This is consistent with the UN Declaration on Human Rights Education and Training.</p>
c(7)	<p>Trade, globalization and human rights</p> <p>Member states shall ensure that any trade, investment or other economic agreement they enter or which they implement is consistent with their obligation to respect, protect and fulfil human rights; they shall take all necessary measures to prevent or remedy any adverse impact, particularly on marginalised groups, including Indigenous Peoples, resulting from any failure to meet this obligation.</p>	<p>See UN the Special Rapporteur on the right to food’s Guiding Principles on Human Rights Impact Assessment for Trade and Investment Agreements. The Rapporteur states: “since States are bound by these pre-existing treaty obligations, they are prohibited from concluding any agreements that would impose on them inconsistent obligations. Therefore, there is a duty to identify any potential inconsistency between pre-existing human rights treaties and subsequent trade or investment agreements, and to refrain from entering into such agreements where such inconsistencies are found to exist.” This is also consistent with Vienna Convention on the Law of Treaties, arts. 26 and 30, para. 4 (b).</p>
c(8)	<p>Human rights-based approach to the right to development</p> <p>Member States shall adopt a human rights-based approach to sustainable development, recognizing that full realization of this right requires the meaningful participation of all persons, in particular those affected at all stages of the development process. This right shall apply both to state-owned and privately-owned developmental enterprises.</p>	<p>The UN Declaration on the Right to Development defines this right as “The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.”</p> <p>Development should be understood as a process and not a product and therefore requires respect for all human rights, including the principles of equality and non-discrimination.</p>

d. Concerns and suggestions on the rights of specific groups

No	Provision/Concern and suggested language	Explanatory note
d(1)	<p>Where possible, we recommend that provisions be gender-neutral. For example, with respect to the apparent inclusion of a provision that “Men and women shall have the right to marry...”, we propose:</p> <p style="text-align: center;">Adults shall have the right to marry....</p> <p>The apparent inclusion of the phrase “No one shall be arbitrarily deprived of his nationality.” We propose:</p> <p style="text-align: center;">No one shall be arbitrarily deprived of his or her nationality.</p>	<p>This suggestion is to reflect non-discrimination principles.</p>
d(2)	<p>The apparent inclusion of the phrase “The family is the natural and fundamental unit of society.” We propose:</p> <p style="text-align: center;">The family is a social unit and shall have the right to be protected by society and the individual ASEAN Member States.</p>	<p>The suggested wording reflects another application of non-discrimination principles.</p>
d(3)	<p>With respect to the right to asylum, the apparent inclusion of the phrase “as required by law.” We propose:</p> <p style="text-align: center;">Everyone has the right to seek and to obtain in other countries asylum from persecution.</p> <p style="text-align: center;">No Member State shall expel, return or extradite a person to where his or her life would be in danger or where he or she would be at risk of persecution, torture, enforced disappearance, or other serious human rights violations.</p>	<p>The suggested wording is derived from the Universal Declaration of Human Rights. Since the AHRD is an aspirational document, the phrase “as required by law” is unnecessary. The concept of non-refoulement is a fundamental and essential principle of customary international law, including international refugee law.</p>

d(4)	<p>Reference to specific groups within a general principle of non-discrimination. We propose:</p> <p>Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind whatsoever.</p>	<p>International law has applied non-discrimination principles to a broad variety of different groups. The proposed wording reflects this comprehensive and increasingly inclusive approach under international law.</p>
d(5)	<p>The lack of a provision on substantive equality. We propose:</p> <p>Member States will not confine themselves to achieving equality in law for marginalized individuals, groups and peoples, but will also adopt, whenever necessary, temporary special measures to ensure substantive equality, that is, equality to access, opportunities and results. Such measures should be subject to regular review and be discontinued when the objectives of substantive equality have been achieved.</p>	<p>This reflects the state of international human rights law, in particular under the International Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW)</p> <p>Realisation of equality for marginalised groups needs to compensate for or cater to the difference, disparity or disadvantage experienced by them and ensure that equality is achieved both formally (de jure) and in practice (de facto).</p>
d(6)	<p>To the extent reference is made to “vulnerable and marginalized groups”, we propose deletion of the word “vulnerable”:</p> <p>Marginalized groups</p>	<p>The use of the word “vulnerable” implies that certain groups are unable to assert or defend their rights.</p>
d(7)	<p>Lack of a provision on the right to rest and play. We propose:</p> <p>Everyone has the right to rest, recreation, and leisure. Children in particular have the right to play.</p>	<p>This provision is derived from the UDHR, art. 24.</p>
d(8)	<p>Lack of provision for indigenous peoples. We propose:</p> <p>Indigenous peoples and traditional communities have</p>	<p>Taken from UNDRIP, for which all ASEAN member states have voted in support</p>

	<p>the right to own, use, develop and control the lands, territories, and resources which they have traditionally owned, occupied or otherwise used.</p> <p>States and non-state actors shall consult and cooperate in good faith with indigenous peoples and traditional communities through their own representative institutions in order to obtain their free, prior and informed consent before the approval of any project affecting their lands, territories and resources, particularly in connection with development or exploitation of natural resources.</p>	
d(9)	<p>Lack of a clear provision protecting children. We propose:</p> <p>Every child shall be entitled to the enjoyment of human rights and fundamental freedoms recognized and guaranteed in this Declaration and other regional and international human rights instruments. Children shall be protected from all forms of violence, neglect, maltreatment , exploitation and abuse. ASEAN Member States shall place paramount consideration on the best interest of the child in promoting and protecting the rights of all children, and shall guarantee the right of children to be heard in any judicial and administrative proceeding affecting them.</p>	<p>This suggested provision is derived from the CRC, to which all ASEAN Member States are party.</p>
d(10)	<p>Lack of a provision on migrant workers. We propose:</p> <p>Recalling the ASEAN Declaration on the Promotion and Protection of Rights of Migrant Workers, ASEAN Member States shall protect and promote the rights of</p>	<p>This provision is consistent with international standards reflected in the ASEAN Declaration on the Promotion and Protection of the Rights of Migrant Workers, the UN Convention on Migrant Workers and ILO standards. Given that much of the global migrant workforce originates in ASEAN countries, migrant workers deserve mention in the AHRD.</p>

	<p>migrant workers and their families in the entire migration process, consistent with international instruments, in particular core labour standards of the International Labour Organisation.</p>	
d(11)	<p>Lack of a provision on the rights of persons with disabilities. We propose:</p> <p>ASEAN Member States shall promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.</p> <p>In order to promote equality and eliminate discrimination against persons with disabilities, Member States shall take all appropriate steps to ensure that reasonable accommodation is provided.</p>	<p>This suggested provision is drawn from the Convention on the Rights of Persons with Disabilities, Arts. 1 and 5(3).</p> <p>The Convention defines “reasonable accommodation” as “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms”.</p>

It is our sincere hope that, meeting tomorrow, AICHR will consider both our general and our specific concerns and recommendations seriously and that it takes them forward so that the end result is an ASEAN Human Rights Declaration that fully reflects, and indeed enhances international human rights standards. Such a Declaration will be considered by individuals, groups and people within the region as a vital instrument for protecting their human rights, and by those outside the region as an example to be followed.