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The New ASEAN Inter-governmental Commission on Human Rights:

A Toothless Tiger, or an Important Step Forward for the Region?

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On July 20, 2009, the ASEAN Ministerial Meeting in Phuket, Thailand, adopted the Terms of Reference (TOR) for the long-awaited human rights arm of the Association of Southeast Asian Nations (ASEAN).¹ ASEAN Secretary General Dr. Surin Pitsuwan proclaimed that "Democracy and human rights are two basic principles enshrined in the [ASEAN] Charter and we are now taking steps towards the fulfillment of these principles for our peoples."² However, the extent to which this new body will be able to effectively address human rights concerns in the region is an issue of great disagreement among ASEAN's member nations, the international media and civil society organizations. While some feel that any progress at all in the area of human rights protection in Southeast Asia should be lauded, others have claimed that the new body is essentially powerless to enforce a minimum standard of human rights, or even to investigate and bring to light any human rights violations that may occur in the region. This article seeks to review the initial reaction of interested parties to the TOR, to review the TOR themselves to determine what powers and restraints the new body will be operating under, and to highlight a few of the ongoing human rights dilemmas that the new body will face. Finally, it is concluded that while the TOR certainly could have been stronger and the new body will start out without the power to investigate violations or enforce rights, it should not be dismissed as altogether useless, and its future utility will depend on ASEAN's ability to follow through on its promise to strengthen the body in an "evolutionary" manner.³

Reaction

Reaction to the TOR has been mixed. There was some disagreement within the member nations of ASEAN themselves as to how strong a body should be created and to what extent the compromise that eventually resulted would be able to adequately address human rights concerns. Indonesia, in particular, sought a stronger protection mandate for the new body. In fact, Indonesian representatives at the negotiations were almost unwilling to sign-on, but assented when assured that the body and its work would undergo continuous re-



view and would be strengthened after time.⁴ Indonesian Foreign Minister Hassan Wirajuda explained that "We would not have been involved if there were no guarantee that its procedures and mechanisms will later be improved, especially with regard to the protection aspect."⁵ Other representatives seemed happy that any agreement was reached at all. Thai Prime Minister Abhisit Vejjajiva noted that even though the Commission would at first be concerned with only the promotion, not protection, of human rights, "It's better to make a start than to leave it hanging, with no progress at all."⁶ Reaction from international rights groups and regional observers has been less positive. Amnesty International expressed concerns with various aspects of the TOR. First, they noted that any action that the Commission takes shall be by consensus, so that any member state can veto a measure that would seek to expose or to stop rights violations within their borders.⁷ Amnesty representative Donna Guest pointed out that "Key concerns are a lack of a clear protection mandate for the AICHR; lack of binding requirements for independence and expertise of AICHR members; and an emphasis on 'regional particularities' and 'non-interference in the internal affairs' which could undermine respect for universal human rights standards."⁸ Rafendi Djamin, head of the Solidarity for Asian Peoples' Advocacy Task Force, voiced similar concerns, noting that the Commission lacked even the power to make country visits to explore possible rights violations.⁹ The Wall Street Journal's Editorial Board expressed an even graver concern, asserting that the Commission could actually be used as a "rubber-stamp" for authoritarian regimes in the region to legitimize abuses that would be considered human rights violations under international law.¹⁰ Some praise of the new Commission came from Navi Pillay, the United Nations High Commissioner for Human Rights. In a press release she lauded the new organization, and urged ASEAN nations to take full advantage of it. "I strongly encourage ASEAN states to appoint Commission members who are independent and impartial, and have proven expertise in human rights," the High Commissioner said. "I also hope that national selection processes will allow for wide consultation and participation by all sections of society."¹¹ Pillay did express some concern that the Commission did not have a clear protection mandate, but she also stressed that regional organizations like ASEAN can play a crucial role in expanding international norms and addressing local problems that the United Nations is not equipped to handle.

Terms of Reference

A review of the TOR themselves should shed some light on how powerful the Commission will be at its inception. First, §1.1 states that the mission of the Commission will be to "promote and protect" human rights and fundamental freedoms for the people of ASEAN.¹² Some significance has been read into the order of these goals. It is clear that, at least at its onset, the Commission's "promotion" mandate will be primary, and that any powers of "protection" will come later. Further, the body is not authorized to promote human rights ideals unconditionally. Rather, §1.4 states that the Commission shall "promote human



rights 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." This section implies a certain margin of appreciation for different cultures and customs in the region, so that what is a rights violation in one member country may not be a violation in another. Such relativism is common to international bodies trying to implement rights standards across diverse jurisdictions, but this clause must be implemented cautiously to avoid making the Commission completely powerless to speak out about any rights violations whatsoever. After all, if a Member State can simply claim that they are following local custom, who is ASEAN to disagree? Rather, the commission must assume at least some universality of basic rights. Remember that here we are only talking about "promotion", so a member nation's sovereignty is not at risk if the Commission were to speak out about perceived violations that ASEAN as a whole finds more objectionable than the member state in question. The tension between universal rights and differences in local culture is made more explicit in §1.6, where we learn that another primary function of the Commission will be "To uphold international human rights standards as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and international human rights instruments to which ASEAN member states are parties." The Universal Declaration of Human Rights, as the name implies, is not qualified by concerns for local custom or culture, and protects very basic rights including the rights to life, liberty, property and freedom from torture. So the TOR seems to recognize that there are at least some rights that should not be viewed through the relativistic lens described in §1.4.

Next, the TOR sets forth a list of principles by which the Commission shall operate. Here again the order of the provisions probably provides some insight into the mindset of the drafters. The first three principles listed explicitly restrict the power and reach that the new body will exercise. §2.1(a) emphasizes "respect for sovereignty, equality, territorial integrity and national identity of ASEAN Member States." The next principle listed, §2.1(b) is "non interference in the internal affairs of ASEAN Member States." Similarly, §2.1(c) states that the Commission shall operate with "respect for the Right of every Member State to lead its national existence free from external interference, subversion and coercion." Taken together, these three guiding principles seem to stress that the Commission shall have no real power to impose its will on any Member State that does not completely assent to whatever action is contemplated. One has to wonder how any international body, let alone a human rights protection organization, can function when these are the most important values listed in its charter. It is not until after these principles of non interference are listed that the TOR mentions the principles guiding the actual work of the Commission, including the promotion of human rights and adherence to democracy and the rule of law.



Further enumerated principles give some sense of how the Commission will work with Member States. §2.8 states that the "primary responsibility to promote and protect human rights and fundamental freedoms rests with each Member State." This is undoubtedly true as a practical matter, but this clause presupposes a willingness on the part of each Member State to value human rights principles and to advance them in their territories. A "constructive and non-confrontational approach" to human rights promotion is put forth in §2.4. Here again the Commission seems to rely on actual cooperation and good will of Member States to implement human rights norms that the Commission seeks to embrace. The extent to which they will actually find this cooperation remains to be seen. The last principal, listed in §2.5, is the "adoption of an evolutionary approach that would contribute to the development of human rights norms and standards" in the region. Those who feel that the TOR are not nearly strong enough as an enforcement mechanism can hope that this clause is taken seriously by Member States, and that as time passes, a clearer set of accepted rights standards, and tools for ensuring that everyone enjoys them, are established.

Next, what will the new Commission actually do? Sections 4.1 through 4.13 spell out the functions that the body is authorized to carry out. These include developing strategies to promote human rights, developing an ASEAN declaration of human rights, increasing public awareness of human rights issues, promoting capacity building of civil society organizations, facilitating dialog and cooperation between Member States on rights issues and producing periodic reports on its activities. Critics note that what is not included is the power to actually investigate rights abuses. §4.10 states that the Commission shall "obtain information from Member States on the promotion and protection of human rights." This clause appears to indicate that the information the Commission can gather is entirely through self reporting. Here again a high level of transparency and cooperation is assumed to guarantee a functioning body. It is unclear though, whether there will be any remedy if Member States less inclined to enforce human rights norms or to report on internal matters to the international community are not cooperative. However, §4.14 does state that the Commission shall "perform any other tasks as may be assigned to it by the ASEAN Foreign Ministers Meeting," so it is possible that other powers, like the ability to investigate a particularly serious claim or rights violation, could be granted on an ad hoc basis.

Just as with the Chairmanship of ASEAN itself, the Chair of the Commission shall rotate between the Member States, as explained in §5.9. This method of rotation has presented problems for ASEAN in the past, as was the case when Burma (Myanmar) was set to take over the Chairmanship in 2006. Eventually, under regional and international pressure, Burma gave up its turn as Chair, attempting to deflect criticism that its human rights record would reflect poorly on ASEAN as a whole.¹³ This problem is likely to reoccur, especially now that



holding the Chair of ASEAN also means heading the human rights body. It would certainly be a perverse outcome if a nation universally recognized as a human rights abuser were allowed to sit as Chair of the new ASEAN human rights organ.

As noted earlier, another concern among rights activists is that the Commission will only be able to act by consensus, as described in §6.1. As such, any Member State can veto any initiative by the Commission that it finds objectionable. This is likely to be problematic if the Commission ever seeks to target rights promotion or protection at an individual Member State. The Commission has to, in essence, do its work without ever offending anyone. However, §9.6 does state that the TOR shall be reviewed in five years, so perhaps if action by consensus proves unworkable for the Commission, change will come at that time.

Challenges

Asia and the Pacific are the only regions in the world without a human rights enforcement body. While tribunals including the European Court of Human Rights, the Inter-American court of Human Rights, and the African Court on Human and Peoples' Rights are established and functioning to investigate and prosecute rights violations, the countries of ASEAN and the larger region are just now beginning to build an international consensus toward a stronger rights enforcement regime. One reason Southeast Asia has yet to create strong international institutions is the history of colonialism in the region.¹⁴ Until fairly recently, nations were under foreign rule and could not independently enter into rights treaties and mechanisms. Now that Sovereignty has been won, in many cases through years of suffering and war, the notion of international intervention in the domestic affairs of any one nation is anathema to the region. Hence, the principle of non-interference has been stressed in the ASEAN charter and the workings of the organization throughout its history, and is now enshrined in the TOR of the new rights Commission. However, there is a building consensus to embrace international human rights norms, especially as more countries in the region see economic and democratic reform. Regardless of how powerful or effective the TOR allow this first incarnation of the rights Commission to be, there are certainly great challenges to be met in the region when it comes to human rights.

First and foremost is the ongoing and well-documented rights abuses taking place in Burma. Among other atrocities, the military junta that rules the country has launched a sustained ethnic cleansing campaign in several of its eastern provinces. Rights violations include: extrajudicial killings, torture, murder as collective punishment, enforced disappearances and arbitrary arrests, forced labor, forced displacement, destruction of crops and villages, systematic rape by the military and arbitrary levies and fines.¹⁵ Additionally, rights activists have ac-



cused the government of being complicit in the deaths of thousands of victims of cyclone Nargis in 2008, after the junta initially refused to allow foreign aid into the country.¹⁶ The military continues to hold over 2,100 political prisoners, including Nobel Laureate Aung San Suu Kyi.¹⁷ Despite increasingly frequent and insistent calls from the international community and its neighbors to allow for more transparency and a more open attitude towards human rights, the junta has shown no willingness to change its ways. This situation will be a major test of the new ASEAN rights Commission. Though non-interference will remain a guiding principle, it will be impossible to say that the Commission has been a success if the rights situation in Burma has not improved in a few years time as a result of the creation of the new body.

Human trafficking is an ongoing problem in the region, and ASEAN has recognized it as a priority.¹⁸ ASEAN members in 2004 acknowledged that economic and social factors in the region had led to an epidemic of exploitation in the form of the forced migration of the poor, especially women and children, who are transported and sold as domestic servants or sex workers. The new human rights Commission has pledged to work towards the fulfillment of those rights included in the Universal Declaration of Human Rights, which list liberty and freedom from slavery as fundamental. Thus, human trafficking should be a top priority for the new Commission, as it is a problem that is not confined to one Member State.

Ongoing ethnic conflicts in the region present another challenge for the new rights body. Almost every ASEAN nation is dealing with some kind of ethnic or religious insurgency, and these types of conflict often lead to human rights abuses. ASEAN governments are struggling to balance a respect for the rule of law and the need to provide security for their people with international human rights norms when dealing with militant religious groups like the Muslim separatists in southern Thailand and Abu Sayyef in the Philippines. As has been seen repeatedly since the inception of the "Global War on Terror," it is all too easy to cast aside human rights rules when dealing with these groups. If the new rights Commission is going to fulfill its mandate, it will need to help ASEAN Member States find ways to promote peace and reconciliation within their borders without violating human rights standards. These are but a few of the challenges facing the new body. The larger question will be whether ASEAN has established an entity that is strong enough and adequately flexible in its ability to address all human rights concerns in the region along with new situations as they arise.

Conclusion

It is clear that the new ASEAN Intergovernmental Commission on Human Rights is not, in the near term, going to function as a strong investigator or tribunal of human rights. That does not mean, however, that the body should



be dismissed as totally useless before its work even begins. While there are certainly great challenges to human rights norms in the region, there is also a very strong historical current of non-interference that the new body will have to work against if it is going to be successful in implementing international rights standards. Ultimately, the body will be what the Member States make of it.

Much will depend on the quality of representatives each nation sends to the Commission. If the members are merely tools of their home country, unwilling to speak out or raise objections without the consent of their superiors, then the Commission will probably not accomplish much. If, however, experienced and strong-minded rights activists are appointed to the body, and are able to act with autonomy, then there is more hope. Member States should seek to appoint individuals who will represent their interests, but at the same time be willing to carry out the stated goal of helping ASEAN to fully embrace the rights listed in the Universal Declaration of Human Rights. Likewise, once in session, the commission itself will play an important part in determining how strong a body it is. There is much room to maneuver within the terms "promote and protect." What issues will the Commission take up? How will they go about their task of fostering an understanding of rights in the region? Basically, will they be passive, or aggressive? Hopefully, given the right representatives, the Commission will take it upon itself to widen its sphere of influence as much as possible from its inception.

Finally, activists and the public should remember that this is not the end of the road, but the beginning. The TOR expressly states that the body is meant to be "evolutionary," and that the rules governing the Commission will be reviewed in five years. That gives everyone a goal to work towards; if the body proves to be too weak, then Member States and civil society organizations should make every effort to lobby for change at the time of review. In the meantime, all interested parties should do everything they can to make the Commission effective. Member States and rights organizations should provide cooperation and resources to the best of their ability, regardless of whether or not the commission looks exactly as they would have wished. Ultimately, the adoption and enforcement of international human rights norms in the region will depend on all government and private stakeholders helping ASEAN and each other reach a commonly accepted accord between legitimate and valued principles of sovereignty and non-interference and the universal need to protect the most fundamental human rights to which everyone is entitled, regardless of ethnicity or nationality.

(Endnotes)

¹ "Another step forward for regional human rights cooperation." ASEAN Secretariat. July 20, 2009. Web. August 7, 2009. www.aseansec.org.



² Ibid.

³ See Zulfakar, Mergawati, and Yeng Ai Chun. "Abhisit defends Asean human rights body." Malaysia Star. July 20, 2009. Web. August 5, 2009. www.thestar.com

⁴ See Hermawan, Ary. "Govt defends compromise on rights body." Jakarta Post. August 1, 2009. Web. August 8, 2009. www.thejakartapost.com

⁵ Ibid.

⁶ "ASEAN defends human rights body." Al Jazeera. July 21, 2009. Web. August 8, 2009. www.aljazeera.net.

⁷ "ASEAN's new body must protect and promote human rights." Amnesty International. July 21, 2009. Web. August 3, 2009. www.amnesty.org

⁸ Ibid.

⁹ Pokpong Lawansiri. "Human Rights in Asean; A Struggle Going Nowhere?" The Irrawaddy. 23 July 2009. Web. August 7, 2009. www.irrawaddy.org

¹⁰ "Asean's Toothless Council." The Wall Street Journal. July 22, 2009. Web. August 6, 2009. www.online.wsj.com

¹¹ "UN Human Rights Chief welcomes important step towards establishment of ASEAN Commission on Human Rights." United Nations. July 23, 2009. Web. August 8, 2009. www.unhcr.ch.

¹² For complete TOR see "Terms of Reference of ASEAN Intergovernmental Commission on Human Rights." ASEAN Secretariat. July 20, 2009. www.aseansec.org.

¹³ See "Myanmar gives up 2006 Asean chairmanship." The New York Times. July 26, 2005. Web. August 9, 2009. www.nytimes.com.

¹⁴ See Moreda, Noel. "R2P Roadmap in Southeast Asia: Challenges and Prospects." UNISCI Discussion Papers. No. 11, May 2006.

¹⁵ "Crimes against humanity in eastern Myanmar." Amnesty International. June 5, 2008. Web. July 6, 2009. www.amnesty.org.

¹⁶ See Weaver, Mathew. "Cyclone Nargis: one month on, U.S. accuses Burma of criminal neglect." The Guardian. June 2, 2008. Web. August 9, 2009. www.guardian.co.uk.

¹⁷ See more at Assistance Association for Political Prisoners (Burma). www.aappb.org.

¹⁸ See "ASEAN Signs Declaration Against Trafficking in Persons Particularly Women and Children." Humantrafficking.org. November 29, 2004. Web. August 9, 2009. www.humantrafficking.org.

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