
Submission of the Solidarity for Asia People's Advocacy (SAPA) Task Force on ASEAN and Human Rights (TFAHR) to the High Level Panel (HLP) on the Creation of ASEAN Human Rights Commission

Submitted on 7 November 2008

PROPOSED HEADS OF DISCUSSION FOR
THE TERMS OF REFERENCE OF THE ASEAN HUMAN RIGHTS
COMMISSION

I. Preamble/ Preliminary Provisions

1. **GUIDED BY** the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, International Humanitarian Laws, International Refugee Laws, International Labour Standards, UN Declaration on the Rights of Indigenous Peoples and the more specific human rights treaties and instruments on human rights adopted by the international community, and enshrined universal values of human dignity and worth including the outcome document from the 2005 UN Summit;
2. **REAFFIRM** that all human rights are to be respected and ensured without distinction of any kind, such as race, colour, sex, age, language, religion, political or other opinion, national or social origin, differing abilities, birth or other status
3. **RECOGNISE** that all ASEAN countries are member states of the United Nations, and are legally obliged to promote and encourage respect for and observance of, human rights and fundamental freedoms for all as stipulated in the UN Charter, have ratified the UN Convention on the Elimination of all Forms of Discrimination against Women and the UN Convention on the Rights of the Child, which recognises women and children rights as human rights, observe and respect international human rights treaties obligations ratified by the state parties;
4. **RECALL** that all ASEAN member states have voted for the UN Declaration on the Rights of Indigenous Peoples;
5. **RECALL** that international consensus achieved during the World Conference on Human Rights in Vienna, 14-25 June 1993, which states that "Regional arrangements play a fundamental role in promoting and protecting human rights," and "should reinforce universal human rights standards, as contained in international human rights instruments, and their protection."
6. **RECALL** the Joint Communiqué of the 26th ASEAN Ministerial Meeting in June 1993 which declared that "the Foreign Ministers welcomed the international consensus

achieved during the World Conference on Human Rights [...] and reaffirmed ASEAN's commitment to and respect for human rights and fundamental freedoms" and that "ASEAN should also consider the establishment of an appropriate regional human rights mechanism";

7. **RECALL** the landmark ASEAN Vision 2020, where leaders jointly declared that, "We envision our nations being governed with the consent and greater participation of the people with its focus on the welfare and dignity of the human person and the good of the community";
8. **ACKNOWLEDGE** the human rights commitments and progress made by ASEAN in the Hanoi Action Plan (1999-2004), Declaration on the Commitment for Children in ASEAN (2001), Vientiane Action Programme (2004-2010), Declaration on the Elimination of Violence Against Women in the ASEAN Region (2004), Declaration Against Trafficking in Persons Particularly Women and Children (2004), and Declaration on the Promotion and Protection of Migrant Workers (2007);
9. **RECOGNISE** that all children living in member states of ASEAN are peoples of ASEAN who are entitled to all human rights. As citizenry of ASEAN, they are entitled to be informed about and to participate in all processes and all decisions affecting them. Furthermore, their voices should be acknowledged and taken into consideration.
10. **EMPHASISE that** the 13th ASEAN Summit had undertaken to "strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms" through the ASEAN Charter and welcome the objective of creating a "people's centered" community.
11. **WELCOME** the establishment of an ASEAN human rights body under Article 14 of the ASEAN Charter to promote and protect human rights and fundamental freedoms;
12. **ACKNOWLEDGE** years of continuous civil society engagements on ASEAN human rights mechanism;
13. **WELCOME** the establishment of the High Level Panel to draft the terms of reference of the ASEAN human rights body and the statement by the Chairperson of the High Level Panel on the importance "to engage ASEAN civil society in our work";
14. **RECALL** the 2006 submissions on the three pillars of an ASEAN community from the Solidarity for Asian People's Advocacy Working Group on ASEAN to the Eminent Persons Group on the ASEAN Charter;

II. Purposes and Principles

Principles

15. The ASEAN Human Rights Commission (hereafter “Commission”) shall be governed by rules and principles not lower than international laws and standards including the Universal Declaration of Human Rights and all related international human rights and humanitarian laws and principles, including conventions of the International Labor Organization, and function based on the principles that “all human rights are universal, indivisible, interdependent and interrelated” including civil, political, economic, social, and cultural rights;
16. The Commission shall reiterate that human rights equally refer to collective and peoples’ rights.
17. The Commission shall commit to the elimination of both direct and indirect discrimination, in law and in practice, and in the public and private spheres of women.
18. The Commission shall emphasise the adherence “to the rule of law, good governance, the principles of democracy and constitutional government” as stated in the ASEAN charter, independence of judiciary, transparency, accountability and freedom of information, including the international recognised responsibility to protect its populations from genocide, war crimes, ethnic cleansing, and crime against humanity.
19. The Commission, in all processes, decisions, and in the performance of all its tasks and functions, shall adhere to the following principles:
 - a. Primacy of the best interest of the child;
 - b. Recognition of children’s evolving capacities and their right to participation;
 - c. Protection of children from all forms of abuse, exploitation and violence;
 - d. Non-discrimination on the basis of sex, age, culture and ethnicity, religion, class, geographical area and differing abilities.
20. The Commission shall uphold the principle of justice for women and children even while recognising the cultural diversity and pluralism of ASEAN and having due regard to legal obligation of the states under CEDAW and CRC to eliminate cultural and religious norms that perpetuate discrimination against women and children.
21. The Commission shall work in an inclusive and democratic manner with civil society groups including individuals, groups, communities and peoples, general public and in particular those who are disempowered, marginalised, vulnerable or difficult to access¹.

Purposes

¹ including and not limited to indigenous people, ethnic minorities, women, migrants and migrant workers, trade unions, LGBT communities, stateless, refugees, children, the aged, disabled persons, poor and those who have been deprived of their liberty

22. To ensure the promotion, protection, and thereby fulfilment and actual realization of human rights and fundamental freedom, decent living and working standards of the peoples in ASEAN member states. All mandates shall be treated in equal importance at all times;
23. To contribute, through dialogue and cooperation, toward the prevention of human rights violation and to address situation of human rights violations and make recommendations on them;
24. To create mechanisms and procedures at the regional level which enable peoples including children's access to justice for all;
25. To ensure substantive equality (access, opportunity and results) towards the full realisation of women's human rights;
26. To implement temporary special measures to facilitate access and benefits in ensuring full realisation of women's human rights by taking into account the historical and multiple-sites of discrimination experienced by women;
27. To help bridge gaps in implementation of human rights both at national and regional levels;
28. To offer people protection from human rights violations when national processes fail;
29. To empower people from within the region to claim their human rights, due to the geographical proximity of the mechanism;
30. To help national governments to implement their international human rights obligations, enforce their international human rights obligations and to harmonies national laws with the international human rights standards by accelerating changes and amending regulations which are discriminatory to women, children, vulnerable and marginalised groups.
31. To promote regional peace and security (through the promotion and protection of human rights);
32. To provide regional input to the development of international human rights standards and the improvement of international human rights mechanisms;
33. To help national governments to better address human rights concerns that are trans-boundary (e.g. human trafficking, migrant workers, refugees, and asylum seekers).

III. Evolutionary Process

34. The evolutionary process must start not lower than the international human rights standards, by establishing the Commission that can carry out the role to promote, protect,

fulfil and realize human rights, and subsequently sub-commissions, in particular the sub-commissions on women, children, migrant workers, and indigenous peoples, and other sub-commissions.

35. The process should involve the evolution of the ASEAN Human Rights Commission's capacity as an institution, resources, expertise, and the evolution of the systems and procedures for comprehensive promotion, protection, fulfilment and realization of human rights, including the establishment of special procedures and issue specific mandates.
36. The process should be conducted in efficacious manner within reasonable period, directed toward the improvement of human rights, defined with clear period, and can be measured, evaluated, and monitored.
37. The process should involve the participation of civil society organisations and peoples. Regular periodical reviews as part of evolutionary process with civil society engagement should be made on a yearly basis.

IV. Responsibilities

38. The Commission shall be accountable and responsible to a body that is higher than the three ASEAN Community Councils.

V. Nature and Status

39. The commission and its members shall be independent, especially from government and non-state actors such as corporations, and in line with the criteria of the mandate-holders under the Special Procedures of the United Nations and guided by Paris Principles.
40. The commission shall be placed above the three community councils so that human rights serve as an overarching mechanism for all matters and conducts of the three ASEAN community councils.

VI. Mandate and Function

41. The commission shall be given the mandate to work on promotion, protection, fulfillment and realization of human rights. All mandates shall be treated in equal importance at all times and shall enhance the promotion, protection, fulfillment and actual realization of all human rights, bearing in mind that all human rights are universal, indivisible, interrelated and interdependent.

On Promotional roles:

- a. Develop wider public awareness and knowledge of human rights in the region by carrying out, publishing and distributing widely, materials on specific subjects; organising conferences, seminars and meetings with representatives of governments,

- b. Develop and contribute to human rights training programmes for relevant groups such as the judiciary, police, military, government officials, parliamentarians, civil society organisations, national human rights institutions, schools, universities, faith-based organisations, vulnerable groups and communities.
- c. Advise on national and regional policies and legislations in order to ensure synchronisation, harmonisation and compliance with international human rights laws and standards.
- d. Respond to request for advice from State Parties on matters concerning human rights.
- e. Help to clarify the application of human rights standards in line with international human rights laws and standards.
- f. Conduct country-based consultations with the purpose of engaging with government officials, reminding State Parties of their obligations, and promoting human rights standards.
- g. Encourage states to ratify without reservations, fully incorporate into domestic laws, and implement in practice² and shall enhance the promotion, protection and fulfillment of all human rights, bearing in mind that all human rights are universal, indivisible, interrelated and interdependent.
- h. Encourage state to ratify the Rome Statute of the International Criminal Court as well as exercise universal jurisdiction over cases of war crimes and crimes against humanity.
- i. Encourage state to report in a timely manner to UN human rights monitoring bodies and implement their recommendations as well as fully cooperate with the UN Special Procedures and implement their recommendations.
- j. Promote the implementation of existing ASEAN human rights related declarations.
- k. Assist member states in setting up national human rights institutions in compliance with the Paris Principles.
- l. Urge that the commission including its mechanisms, institutions, and the secretariat shall be made accessible to civil society, individuals and groups who are disempowered, marginalised, vulnerable or difficult to access.

² Including optional protocols for CEDAW and CRC, UN Security Council Resolution 1325 (women, peace, and security) 1612 (children in armed conflict and special protection mechanism), 1820 (sexual violence in armed conflict), UN convention against transnational organised crime and Protocol to prevent, suppress, and punish trafficking in persons, especially women and children.

- m. Promote its work and mandate through civil society organisations, other relevant non-state institutions, and the media.
- n. Ensure accountability of commissions to the peoples of ASEAN by providing annual reports and engage in multilateral consultations with states and civil society annually.
- o. Establish human rights instruments in compliance with the international human rights laws
- p. Initiate discussions on the establishment of an ASEAN human rights court.

On Protection roles:

- q. Receive, inquire, analyse and decide on communications whether written or otherwise from any individual, group of persons, parties, or civil society organisations alleging human rights violation including cases where states have failed to exercise *due diligence* to prevent abuses by non-state actors including corporations and armed groups.
- r. Assess and review the general human rights situation in the region and publish reports on recommendations for collective action at the regional level. This includes requesting member states to provide information on the human rights situation within the respective country.
- s. The report shall be made public and widely circulated with the help of state parties to legislatures, national human rights institutions, civil society organisations, academic institutions, the media, and general public.
- t. State Parties shall provide periodic reports with information on the promotion and protection of human rights, including information on specific human rights situations, where the commission may review the report with the participation of civil society organizations and national human rights institutions;
- u. The commission shall develop procedures on the admissibility and prioritizing of communications in accordance with international standards.
- v. Carry out on-site visits to inquire on specific human rights concerns and obtain all necessary information during investigation of human rights violations, including unrestricted, confidential access to victims, witnesses, and places such as prisons, with a guarantee that state parties will not engage in reprisals against those providing information to the mechanism.
- w. Issue urgent letters (including press statements and letters of inquiry) to request government action in response to information received.

- x. Issue progress reports and recommendations to the relevant state to adopt measures to remedy any violations identified including reparation for victims.
- y. Whenever the commission considers a complaint in need of urgent action, it will issue an urgent communication to the government where upon the government must provide the commission with information within 30 days, as to the steps it has taken to remedy the said situation.
- z. The commission shall transmit findings, decisions, and recommendations including those from urgent communications and fact-finding missions to the states concerned. To help ensure compliance, state parties shall report within 90 days on steps proposed to give effect to the findings or decisions of the commission. A mechanism should be established to follow-up on information pertaining to compliance and implementation of remedies and recommendations of the commission.
- aa. Where it has concluded that the member state has committed widespread and systematic human rights violations, the commission shall be authorised to refer the matter to the ASEAN Summit as a serious breach of the charter in accordance with article 27(2) on non-compliance.
- bb. Take measures to protect from violence, threats of violence, and any other form of intimidation the complainants, witnesses, persons undertaking the investigation activities, and other persons otherwise involved in the investigation of human rights cases.
- cc. Develop an early warning system to prevent gross violations of human rights.
- dd. The commission shall have the power to request suspension of the application of any legislative and executive steps that have created or may create human rights violations such as, but not limited to Internal Security Act or National Security Act.
- ee. The commission shall create mechanisms for the protection on human rights defenders based on the UN Declaration on Human Rights Defenders,
- ff. The commission shall establish independent and impartial mechanisms to deal with trans-boundary problems including regional concerns including stateless persons, refugees, migrant workers, indigenous peoples, and trafficked persons.
- gg. Establish independent and impartial coordination mechanisms among ASEAN countries to deal with trans-boundary human rights violations relating to women and children such as migration, trafficking, and refugees
- hh. The Commission shall consult and cooperate with international, regional, national and local institutions including civil society organisations, national human rights

institutions and United Nations agencies and offices with competence in the field of human rights promotion and protection.

- ii. Ensure the setting up of the commissions would not affect the admissibility of communications and requests for inquiries under other treaty bodies and Special Procedures.

VII. Organisational Structure, Composition and Modalities

Organisational Structure:

42. The commission shall devise its own mechanisms and institutions for the promotion and protection of human rights, including the setting up of its sub-commissions, special rapporteurs, and working groups to conduct studies and fact finding on country and thematic issues;
43. The commission shall establish appropriate procedures its work to reach out to the widest section and largest groups of peoples of society as much as possible at the national level through creative forms of communication.
44. The commission shall appoint the secretariat to assist the commission in its work. Decision making roles of the staff of the secretariat shall be based on geographical representation and gender balance;
45. The secretariat of the commission shall be independent from the ASEAN secretariat and shall be given adequate resources. The secretariat shall include professional staff selected in an open process ensuring the participation of civil society organizations.
46. The commission shall be open for the creation of sub-commissions, including sub-commissions on women, children, migrant workers, indigenous peoples, and others.³
47. In the creation of the sub-commission on women, the sub-commission shall be guided by the Declaration on the Elimination of Violence against Women in the ASEAN region and must implement and monitor:
 - a. The promotion of an understanding of the nature and causes of violence against women, and changing societal attitudes and behavior
 - b. The elimination of all forms of discrimination against women
 - c. The investigation, prosecution, punishment and where appropriate, the rehabilitation of perpetrators, and to prevent the re-victimisation of women and girls.

³ The ASEAN commission on the promotion and protection of the rights of women and children and the ASEAN Instrument on the Protection and Promotion of Migrant Workers, once set up, shall be subsumed under the ASEAN Human Rights Commission.

48. The provision above shall be implemented without prejudice to UN human rights treaties and other instruments in particular on the Convention on the Elimination of all Forms of Discrimination against Women and the UN Declaration on Violence against Women; where the said declaration falls short of international norm, the latter shall prevail.
49. The Sub-Commission on Children's Rights (SCC) shall be established in accordance with the principles contained in the Convention on the Rights of the Child, the Optional Protocol on the Sale and Trafficking of Children, the Optional Protocol on the Involvement of Children in Armed Conflict, and the ASEAN Declaration on the Commitments of Children in ASEAN.
50. In all processes and decisions, and in the performance of all its tasks and functions, the SCC shall adhere to the following principles:
 - a. Primacy of the best interest of the child;
 - b. Recognition of children's evolving capacities and their right to participation;
 - c. Protection of children from all forms of abuse, exploitation and violence;
 - d. Non-discrimination on any basis of such as age, class, race, color, sex, language, religion, political or other opinion, national or social origin, differing abilities, property, birth or other status.
51. The SCC shall recognize and consider the results and recommendations of the United Nations Study on Violence against Children.
52. In the creation of the sub-commission on migrant workers, the sub-commission shall promote and protect the rights of all migrant workers, shall implement the ASEAN Declaration on the Protection and Promotion of Migrant Workers.

Composition:

53. Members of the Commission shall be appointed for their integrity, impartiality, professionalism, commitment and competence in human rights; due consideration should be paid to selection of representatives from civil society sectors, based on geographical and gender balance. They shall act as independent experts and shall not act as representatives of governments.
54. The selection process shall be transparent and involve extensive and meaningful consultations with civil society groups, giving due consideration to feedback and suggestions by civil society organizations.
55. The criteria for qualification and selection of sub-commissioners shall be the same as those for the commissioners. In addition, the sub-commissioners shall be experts and have the relevant qualifications in their respective mandate.

Modalities:

56. Members of the Commission shall be appointed for a 5-year non-renewable term. Elections shall be held on a rotating basis every 2 year.
57. Members shall be given privileges and immunities according to provisions specified under relevant international instruments including the Convention on the Privileges and Immunities of the United Nations by the state parties in order to conduct their works.

VIII. Role of ASEAN Secretariat

58. The ASEAN secretariat should work to support the work of the secretariat of the ASEAN human right Commission to carry its mandate effectively.

IX. Relationship with Other Relevant Human Rights Instruments and Bodies in ASEAN

59. ASEAN Human Rights Commission should adhere to the existing ASEAN human rights instruments namely the Declaration on the Commitment for Children in ASEAN (2001), Declaration on the Elimination of Violence against Women in the ASEAN Region (2004), Declaration Against Trafficking in Persons Particularly Women and Children (2004), and ASEAN Declaration on the Protection and Promotion of Migrant Workers.
60. The ASEAN Commission on the promotion and the protection of the rights of women and children, the committee on the implementation of the Declaration on the Protection and Promotion of the Rights of Migrant Workers, and other thematic committees shall be subsumed under the ASEAN Human Rights Commission as its sub-commissions, but equal structures unto themselves.

X. Relationship with Regional and International Human Rights Entities

61. The ASEAN Human Rights Commission shall consult and cooperate with regional and international human rights entities including regional and international civil society organizations, United Nations agencies and offices with competence in the field of human rights promotion and protection.
62. The ASEAN Human Rights Commission shall adhere to the international human rights standard and principles and shall work in mutual complementation with international human rights mechanism;
63. In the case of conflicting decisions between the ASEAN Human Rights Commission and the international mechanism, the decision and ruling of the international human rights mechanism shall prevail;
64. Any person who seek redress in the ASEAN Human Rights Commission shall not be prohibited to access to other international human rights mechanism for redress;

XI. Rules of Procedure

65. The Commission shall establish its own rules of procedure independently without the interference of member states in order to carry out its duty professionally and impartially;
66. The rule of procedure shall adhere to the principle of non-discrimination, transparency, accountability, gender equity and genuine and meaningful civil society participation;
67. English and the national languages of 10 ASEAN countries may be the working language of the Commission;
68. The Commission's decisions, rulings and reports shall be made publicly available and accessible in accordance to the principle of freedom of information;

State annual report

69. The State members shall adhere strictly to the reporting obligations to the Commission;
70. The Commission may also receive information of the state of human rights in member states from other stakeholders;
71. The Commission considers the state of human rights in member states in the absent of the state report based on its own investigation or other source of information;

Receiving and handling of complaint

72. Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of human rights. Where a communication is submitted on behalf of individuals or groups of individuals, this shall be with their consent unless the author can justify action on their behalf without such consent.
73. The Commission shall provide adequate protection for petitioners and the confidentiality of the identity of the petitioners; anonymous complaints shall not be admissible;
74. The petitioner may lodge complaint in his or her own language;
75. The Commission shall address all complaints and reply to the petitioner of its decision in a reasonable time frame;
76. The Commission shall provide translation and support for any language such as but not limited to - Braille, in all inquiry proceedings petitioners alleging human rights violations;

Country visit

77. The Commission and its special procedures shall be able to visit member states to investigate human rights violation allegations upon state's invitation;
78. During the country visit, the Commission shall be allowed access to all places and persons without hindrance

Systemic and widespread human rights violations

79. The Commission may set up special inquiry into allegations of systemic and widespread gross human rights violations;

Visit to prison and detention center

80. The Commission shall be allowed to visit all prisons and places of detention without hindrance and prior notification

Standard setting

81. The standard setting by the Commission shall adhere to the principles of universality, indivisibility, interrelatedness and interdependence of all human rights, as set out in international law, including the International Bill of Rights, the other major international human rights treaties, and key laws, such as the treaties of the International Labour Organisation, the laws comprising international humanitarian law and international refugee law, and contained in other major international commitments, such as the UN Declaration on the Rights of Indigenous Peoples.

XII. Budget

82. The secretariat of the Commission shall be independent from the ASEAN secretariat and shall be given adequate resources to carry out its mandate effectively.
83. The ASEAN governments shall provide adequate financial support to the Commission.
84. The Commission shall have fiscal autonomy from ASEAN governments.

XIII. Name

85. The ASEAN human rights body shall be called "ASEAN Human Rights Commission".

XIV. Road Map

Short term

86. The terms of reference (TOR) of the Commission shall be adopted by July 2009 by ASEAN Ministerial Meeting and adopted by ASEAN leaders by December 2009 during 15th ASEAN Summit;
87. The Commission shall be established no later by 2010;
88. In the immediate stage of the establishment of the Commission, it shall be allowed to develop its rules of procedure, institutions and special procedures for the promotion, protection, fulfillment and realization of human rights;
89. The Commission shall have the powers to receive annual state of human rights report from state members, receive information of human rights violations from all stakeholders, investigate allegations of human rights violations, provide recommendations to member states and monitor the implementation of the recommendations;

Mid-term

90. The Commission may draft a regional convention on human rights in full compliance with the body of international human rights law by 2012;

Long term

91. The Commission shall work with the vision to set up a regional human rights court by 2015;

XV. GENERAL PROVISION

92. The TOR shall be reviewed every five years.

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