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ASEAN HUMAN RIGHTS  
COMMISSION – THE WAY  
FORWARD

American Bar Association  
Rule of Law Initiative  
Chiang Mai, Thailand  
9 January 2010.

CLOSING THOUGHTS

The Hon. Michael Kirby AC CMG

**AMERICAN BAR ASSOCIATION**

**RULE OF LAW INITIATIVE**

**ENSURING THE EFFECTIVENESS OF THE ASEAN INTER-  
GOVERNMENTAL COMMISSION ON HUMAN RIGHTS: THE ROLE  
OF CIVIL SOCIETY**

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**CLOSING THOUGHTS**

These thoughts are offered at the close of a workshop organised by the American Bar Association Rule of Law Initiative.

The occasion for the workshop has been the decision, in November 2007, of the Association of South-East Asian Nations (“ASEAN”) to establish an ASEAN Inter-governmental Commission on Human Rights (“the Commission”)<sup>1</sup>. Pursuant to that decision on 25 October 2009, ASEAN leaders announced the launch of the Commission at their meeting in Thailand. In particular, the ASEAN leaders pledged funding; promised a review of the mandate every five years; undertook that the Commission would meet twice a year; and provided for the appointment of members from each of the ASEAN states. The names of those members were made public later in 2009. No formal role was

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\* Justice of the High Court of Australia (1996-2009); President of the International Commission of Jurists (1995-8); Special Representative to the Secretary-General for Human Rights in Cambodia (1993-6); Member of the Reference Panel of UNAIDS on Human Rights (2005-).

<sup>1</sup> Nanyang Technological University, Centre for Non-Traditional Security Studies, The ASEAN Inter-governmental Commission on Human Rights, AICHR inaugural members (December 2010)

established for civil society organisations (CSOs). This led to a somewhat fractious involvement of some such bodies in the ASEAN summit at Cha-am Hua Hin<sup>2</sup>. Nevertheless, CSOs had played a part in the development of the idea for such a Commission. Members of CSOs from all ASEAN countries came together, with international experts at this workshop in Chiang Mai to consider the approach that should be taken to the new Commission, having regard to its terms of reference (TOR) and the announced membership.

Prior to the Chiang Mai meeting, various views had been expressed of a conflicting kind:

- \* That the Commission was provided with a “tongue but no teeth”<sup>3</sup>;
- \* That the Commission could nonetheless afford opportunities for further action in a region sometimes neglectful of human rights protection, to trigger further discussion of the issues and to provide ‘remarkable’ new opportunities to CSOs<sup>4</sup>; and
- \* That, whatever hesitations might exist, the initiative should be given a fair chance to demonstrate its credentials as a force to integrate human rights, democracy and the rule of law within the total ASEAN organisational structure<sup>5</sup>.

The American Bar Association (ABA), Rule of Law Initiative (RLI) facilitated the attendance of CSO participants and international experts. It was agreed that opinions would be freely expressed and that no attribution of views, nor other formal record provided. The debates were

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<sup>2</sup> See e.g. “Quarrelling Overshadows Progress at Asean Talks”, *International Herald Tribune*, 24 October 2009, 1; “Summit Fell Well Short”, *Bangkok Post*, 23 October 2009, 10.

<sup>3</sup> A. Durbach, C. Renshaw and A. Byrnes, “A Tongue But No Teeth?: The Emergence of a Regional Human Rights Mechanism in the Asia-Pacific Region” (2009) 31 *Sydney Law Review* 211.

<sup>4</sup> M.S. Kelsall, “The New ASEAN Inter-governmental Commission on Human Rights: Toothless Tiger or Tentative First Step?” in East West Center, *Asian Pacific Issues* (No.90, September 2009), 1.

<sup>5</sup> Vitit Muntarbhorn, “Ten Tips for ‘Humanising’ Asean”, 10 November 2009, 11.

vigorous and the opinions expressed were candid. The international experts included Professor Dinah Shelton (George Washington University Law School, USA), a member of the Inter-American Commission on Human Rights. Other experts included Professors James Cavallaro (Harvard Law School); Ariel Dulitzky (University of Texas); Nobuntu Mbelle (formerly African Court Coalition); Ibrahima Kane (Open Society Institute, East Africa); Maureen Maloney (Canada); Yonko Grozev (Centre for Liberal Studies, Bulgaria); as well as Dato' Param Cumaraswamy (one-time Special UN Rapporteur on the Independence of the Judiciary) (Malaysia) and myself (Australia).

As in its earlier successful initiatives to support the emergence of democracy, human rights and the rule of law in Europe after 1990 (the CEELI [Central and Eastern European Law Initiative]), the ABA role was confined to inviting participants and facilitating free discussion. To me, it has fall to offer some concluding comments. Necessarily, these are personal and impressionistic. They have no official status. Every participant would have his or her own impressions and memories.

I have collected my report by reference to three principal feelings that were exhibited during the workshop:

- \* *ASPIRATION*: The feeling of participants that we should aspire to a future of better human rights protection in the ASEAN region, to which the new Commission could make an important contribution;
- \* *OPPORTUNITY*: That the TOR provide an opportunity for CSOs to promote knowledge of, and better protection for, human rights in the ASEAN region; and
- \* *REALISM*: That the only way to approach the role of the Commission within its TOR, and its prospects, was to address,

with realism, the concerns that CSOs felt for the mandate given to the Commission by the ASEAN member states.

## **ASPIRATION**

All participants from the region expressed hope that the Commission would prove an effective protector of human rights. This aspiration was symbolised by the golden teeth ascribed to the Commission in symbolic portrayals. Many CSOs hope that the symbol of golden teeth will prove accurate rather than the prediction that the Commission would prove a ‘toothless tiger’.

It was recognised that the self-image of the Commission would be vital. In TOR 4.9, the Commission is enjoined to consult national, regional, international institutions and entities concerned with human rights. Such consultation will position the Commission within the worldwide family of official human rights institutions. Potentially, that family gives strength to its members.

It was noted that the Commission would, by TOR 4.2, develop an ASEAN human rights declaration. But by TOR 106, it was envisaged that the Commission would uphold “international human rights standards as prescribed by the *Universal Declaration of Human Rights* [UDHR]; the Vienna Declaration and Programme of Action; and international human rights instruments to which ASEAN member states are parties. Anchoring the mandate of the new ASEAN Commission in the UDHR was seen as an important affirmation of ASEAN’s commitment to human rights which the United Nations has declared belong to people everywhere, universally and without exception.

The function of human rights in upholding good governance in ASEAN was a point emphasised by Dato' Param Cumaraswamy. Good governance is an essential ingredient to the attainment of the United Nations Millennium Goals<sup>6</sup>. Human rights is not an optional add-on, but an essential ingredient to make government work better for the people. This was seen as a reason why ASEAN, hitherto a “political-security entity with some economic orientation”<sup>7</sup>, had felt that it was necessary and timely to create the Commission.

Several features of the Commission were emphasised:

That it would not be the exclusive, or even the main, guardian of human rights in ASEAN countries. Others would exist including the courts; local human rights institutions; the Bar and especially young lawyers; the media and mechanisms of public education. The importance of CSOs themselves in the initiation and operation of the other regional human rights bodies already in existence was stressed (the Inter-American Commission and Court on Human Rights; the European Court of Human Rights; and the African Commission and Court on Human and Peoples' Rights (with the African Court of Justice)<sup>8</sup>. The experts who were familiar with the earlier established regional bodies laid emphasis upon:

- \* The inter-action of the regional and national institutions and their work;
- \* The role of public education and the media in spreading knowledge of this;

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<sup>6</sup> United Nations, Office of the High Commissioner for Human Rights, *The Millennium Development Goals and Human Rights*, (Geneva, 2009), 23.

<sup>7</sup> V. Muntarhorn, above n.5, *loc cit*.

<sup>8</sup> T. Buergenthal, R. Norris and D. Shelton, *Protecting Human Rights in the Americas* (Engel Verlag, Kehl, Germany), 4<sup>th</sup> Ed., 1995; D. Shelton, *Regional Protection of Human Rights* (OUP, NY, 2009); pbk 2010; Fatsah Ouguerouz, *The African Charter on Human and People's Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*, Kluwer, The Hague, 2003.

- \* The priority of devising facultative *Rules of Procedure* to maximise the flexibility of the ASEAN Commission; and the vital part played by those appointed to hold office in such high regional bodies. Sometimes, it was emphasised, although TOR and *Rules of Procedure* might be confined by participating governments, the creative hand of independent judges and Commission members had provided effective responses when those judge and members were faced by clear cases of injustice and deprivation of universal human rights calling for a response.

The participants urged that the ABA should prepare a detailed commentary on the ASEAN TOR; a history of the development of the ASEAN Commission (drawing on the outstanding historical survey provided by Dato' Param Cumaraswamy); and the work of academic commentators who have already addressed both the limitations and potential of the Commission. V.I. Lenin once taught that the enemy to action was the blank page. Creating a detailed commentary by experts, stimulated by regional CSOs, addressed to the ASEAN TOR would be of great help to the Commissioners themselves; to regional and national CSOs representing complainants; and civil society more generally.

## **OPPORTUNITY**

Approaching the TOR in this aspirational way, many participants expressed the hope that the new Commission would provide both immediate and long-term protection for human rights in the ASEAN region. In this respect, a number of features of the TOR were identified to give reason for optimism:

- \* The TOR were expressed to be made pursuant to Article 14 of the *ASEAN Charter*. Thus, although not themselves anchored a

specific treaty provision, agreed by ASEAN members thereby bound to their terms, treaty law underscored the TOR (Preamble). This meant that the TOR themselves should be interpreted by reference to the international rules governing treaty interpretation, as laid down in the *Vienna Convention on the Law of Treaties*<sup>9</sup>. Accordingly, particular provisions of the TOR were to be construed so as to help fulfil the purpose and nature of the document from which it drew life, ultimately the *ASEAN Charter*. Out of such a document, the rule would be derived that, having established the Commission with a broad jurisdiction, it was empowered to exercise that jurisdiction in a way that, if particular action was not forbidden by the TOR, it was to be taken as permitted. Jurisdiction of such a body would normally be given a very wide ambit.

- \* In support of this construction of the TOR, the fact that the body was designated a 'Commission' (as distinct from a 'body' or a 'committee' or 'group') suggested a permanent, senior and significant body with a jurisdiction to match. This inference would also be supported by the subject matter assigned to the Commission, namely the protection of human rights. Although, by TOR 2.1(b), a principle is established of "non-interference in the internal affairs of ASEAN member states", this exclusion could not be pressed too far. This was because human rights themselves are, by definition, universal and thus not exclusively "internal affairs". This was an advance achieved by the *UN Charter* and by the human rights instruments adopted pursuant to it. Human rights

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<sup>9</sup> *The Vienna Convention on the Law of Treaties*, adopted 22 May 1969. UN Doc A/Conf39/27. See for discussion in Australia on the use of the *Convention in Domestic Decision-Making: Applicant A v Minister for Immigration & Ethnic Affairs* (1997) 190 CLR 225 at 251-256 per McHugh J; 293-4 of my own reasons.



law is now significantly international in its expression and implementation.

- \* Moreover, in numerous provisions of the TOR, the mandate given to the Commission is expressed broadly to “promote and protect” human rights. See TOR 1.1, 1.5, 2.1, 2.3, 2.4, 4.1, 4.9, 4.10, 6.5, 6.9.9. Contrast 8.6 where, in confining the use of resources, reference is also made to “human rights promotion, capacity-building and education”.
- \* The fundamental basis of the mandate of the Commission is expressed in TOR 1 as being the protection of human rights and freedoms “of the *peoples* of ASEAN”. In this sense, readers of the TOR are reminded of the duty of nation states to protect people and not, as such, the states or state institutions. In all exercises of its jurisdiction, the Commission is bound to so act to uphold the rights of peoples “to live in peace, dignity and prosperity”.
- \* The universal character of human rights also emphasises the broad mandate given to the Commission. This is specifically recognised in TOR 1.6.
- \* Another indication of the broad mandate is the independence of members of the Commission, recognised and upheld by TOR 5.7. Whilst discharging duties, a member is obliged to “act impartially”. Doing so, he or she, by TOR 5.11 is to “enjoy such immunities and privileges as are necessary for the exercise of their functions”. Such provisions underlie the duty of Commission members to act

with integrity and independence. Otherwise, why would such immunities, privileges and protections be afforded?

- \* An additional indication of such independence is found in TOR 6.7. This obliges the Commission to keep the public periodically informed of its work and activities and, for that reason, to produce “appropriate public information materials”.
- \* By TOR 4.10, the Commission is empowered to obtain information from member states of ASEAN “on the promotion and protection of human rights”. It is significant that this instances “protection”, which suggests (as other provisions do) a duty of the Commission to play a part in such ‘protection’, presumably on the basis of complaints and notifications of alleged derogations, needing “protection”.
- \* The power given to the Commission to gather information and evidence (TOR 4.10, 4.8, 4.9) suggests that the Commission is intended to have effective investigatory powers. This is also implied by the duty to promote and protect human rights, emphasised throughout the TOR.
- \* Whilst particular member countries of ASEAN were named during discussions as having problematic records in the protection of human rights, other countries in the region were seen as human rights-friendly, as instanced in the persons of high integrity appointed to the Commission by their government.

- \* For the purpose of deploying resources raised from non-ASEAN member states, a limitation is imposed on their use which is to be confined to human rights “promotion, capacity-building and education”. By inference, this provision was included so as to discourage or forbid the deployment of foreign funds towards measures designed to “protect” human rights of complainants and others.
  
- \* The widespread publicity given to the establishment of the Commission, especially in the media in ASEAN countries, has raised expectations. This will encourage demands for effective action.

Much attention was given during the workshop to the strategies that might be adopted to support the work of the Commission. Amongst the many ideas suggested were the following:

- \* An emphasis by CSOs on the need for greater transparency of procedures leading to appointments to the Commission;
- \* The desirability of establishing a small CSO working group with a five-year plan to provide ideas to the new Commission members;
- \* The encouragement of site visits by the Commission to particular areas of human rights derogation;
- \* The desirability of a facility for CSOs to submit, or support, test complaints before the Commission;
- \* The possible need to start the work of the Commission with human rights grievances of a non-partisan/political character, such as trafficking in persons; environmental damage; and refugee flows. Attention to economic, social and cultural rights (such as education

and health) were also thought likely to be safer in the early years of the Commission's mandate as it built up credibility and influence;

- \* The announced intention of ASEAN that the Commission should engage in a consultation over its operations was thought likely to afford an opportunity for CSOs to press the Commission for open and transparent procedures.
- \* CSOs should offer to train individuals (online and by community meetings) to use the Commission to advance human rights causes. The Commission will be heavily reliant on the flow of submissions, suggestions, complaints and accusations from civil society;
- \* If the Commission were keen to undertake an issue of great potential global concern about the ASEAN region, it might consider performing a particular role as, e.g. an electoral monitor in Burma/Myanmar or laying down guidelines for the conduct of free and fair elections in the region; and
- \* The Secretariat of the Commission should be encouraged by CSOs to publish a work plan and to reach out to civil society to assist it in the performance of its duties.

## **REALISM**

Despite the foregoing aspirations and the perceptions of opportunities that may arise, the participants were anxious about particular features of the TOR that might impede the Commission in the performance, in the ASEAN region, of the type of activities that have been performed by other regional bodies in the Americas, Europe and Africa.

Particular concerns that gave rise to this anxiety included:

- \* The failure to create the Commission by a separate treaty of its own (as in the Americas, Europe and Africa); imposing individual obligations on participating member states;
- \* The failure to provide transparent and acceptable appointment processes, to ensure that *all* members of the Commission should be persons of the highest record of integrity as human rights protectors and advocates in the past. Whilst some members of the Commission would qualify by these criteria, others, it was considered, did not; and
- \* The actual provisions of the TOR contain articles that are limiting or inhibiting upon the Commission and appear to be deliberately so, doubtless as a result of political compromises between the participating ASEAN states.

Amongst the most worrying and restrictive provisions of the TOR, which the participants called to notice, in their realistic assessment of the potential of the Commission, were:

- \* Article 1.4 which somewhat ominously requires members of the Commission to “[bear] in mind national and regional particularities and mutual respect for different historical, cultural and religious background”. In addition, that article contains the common reference by those who seek to impede the full attainment of human rights to the need to take “into account the balance between the rights and responsibilities”. No such “balance” is recognised by international law as an impediment or inhibition upon the protection of universal human rights;
- \* Article 2.1(a) which enjoins the Commission to particular “respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN member states”. International law

does not recognise qualifications of universal human rights by reference to such considerations precisely because such rights are international.

- \* Article 2.1(b) enjoining the Commission to “non-interference in the internal affairs” of ASEAN states. Inevitably, human rights commissions, being concerned with universal values and rights, necessarily involve some interference, on the part of a body such as the Commission”, in “internal affairs. It is impossible, otherwise, for it to perform its functions of “promotion and protection” of such universal rights.
- \* Article 2.4 enjoins the Commission to a “non-confrontational approach and co-operation”. This is very well. But in case of egregious departures from universal human rights, where such a ‘soft’ approach fails, the Commission will have to consider some measures of honest confrontation invoking the truth, if the task of “promotion and protection of human rights” is truly to be performed;
- \* Article 3 describes the Commission as a “consultative body”. Is this intended as an indication that it cannot itself investigate complaints? If so, it is hard to see how it can genuinely help in the “promotion and protection of human rights” in the ASEAN region. The emphasis upon the fact that the Commission is an “inter-governmental” body may, unless read with other provisions in the TOR, diminish the independence and integrity of the Commission and its members simply because its members are appointed by member government;
- \* Article 5.2 provides for member states to appoint persons to the Commission as “a Representative” and so as to be “accountable to the appointing Government”. This was regarded as a specially

worrying provision, given that the integrity of the members of the Commission depends upon the independence of its members and their capacity, where truth and principle require it, to be critical of governments, including of their own appointing government. Read as a whole, the TOR should be construed to mean that the members of the Commission “represent” their member state; must account (report) to it; but are nonetheless independent and impartial in the discharge of their duties because of other provisions and by reason of the very nature of the Commission and its intended work;

- \* Article 5.6 provides that, notwithstanding the fixed term (of three years or an additional term of that period) provided in Art.5.5, “the appointing Government may decide, at its discretion, to replace its Representative”. This was the provision causing the most concern at the meeting. It was seen to hang as a kind of Damoclean sword over any representatives who displeased their government by their participation in Commission business. Other regional and international bodies contained strict requirements for the independence, impartiality and professionalism of their members. The express provisions of Art.5.6 appear inimical to these qualities in the case of the ASEAN Commission. Much will depend upon any future interpretation and exercise of the TOR 5.6 power; the reaction to any such exercise; and the response of the Commission itself should this occur. This provision will need to be most carefully monitored. Otherwise, human rights decisions by the Commission may never rise above the standard of the least observant ASEAN member state. The real danger of the provision may rest not so much on its exercise as on the threat of the exercise. No senior office-holder would welcome removal from

office. Yet no criteria are provided for the grounds of such removal except the absolute discretion of the member state appointing the “Representative”;

- \* Article 6.1 provides for decision-making based on “consultation and consensus”. In this respect, the processes of the Commission are expressed to be the same as in Art.20 of the ASEAN Charter. But the ASEAN Charter concerns mainly economic and political decisions. Whereas the Commission’s mandate is concerned with issues of principle; international law and a great deal of decisional writing by other regional and international bodies exists that bear upon particular instances;
- \* Article 8.2 provides for the Commission to prepare and submit a budget, which is unremarkable. This is to support “high priority programmes and activities”. These require “approval” by the ASEAN Foreign Ministers’ Meeting. This means that political office-holders have the power to deny funding for programmes deemed “high priority” by the Commission yet disapproved by the Foreign Ministers, as recommended by the Committee of permanent representatives to ASEAN. This, too, places potentially harmful constrictions on the work programme and activities of the Commission that could be seriously inconsistent with its independence and impartiality; and
- \* Article 4.1 is of special concern because of the suggested restriction on the protection of human rights and fundamental freedom as a “complement” to the “building of the ASEAN community”. Whilst this “complement” is a laudable aspiration, it is to be noted that the primary mandate of the Commission is not expressed as being to protect human rights as such, but to “develop strategies”. Between the actual protection of the human



rights of an individual who has complained to the Commission, and the limitation to “strategies”, lie many potential cracks in the jurisdiction of the Commission. The members of the Commission will require both courage and wisdom to fulfil its purpose as a true human rights commission, in the family of global and regional human rights institutions.

## **CONCLUSIONS**

The advance in the economic prosperity of member countries of the ASEAN region has been notable and laudable. To an important extent, economic advancement promotes knowledge and awareness of human rights. It affords the environment in which expectations of human rights and the rule of law tend to grow and flourish.

Members of the ASEAN community have lessons to teach Western countries, including my own, concerning the importance of economic, social and cultural rights. During my service as Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia, I learned of the high priority assigned by ordinary people, in one state of the ASEAN region, to such considerations as<sup>10</sup>:

- \* The availability of clean drinking water;
- \* The facility of education for female children; and
- \* The priority of landmine clearance and of emergency health care in the event of accidents and illness.

There may be wisdom in the suggestions of CSO participants in the workshop that the Commission should commence its work in such fields

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<sup>10</sup> M.D. Kirby, “Cambodia, the Struggle for Human Rights”, (1995) 67(4) *Australian Quarterly*, 26; reproduced in M.D. Kirby, *Through the World’s Eye* (Federation, 2000, 24).

where political resistance may be less vehement. The hope is that, with time, education and growing civic expectations, a more robust assertion of human rights, in all of their variety, will become common and accepted in all countries of Asia and the Pacific, notably ASEAN.

The absence, until now, of any regional mechanism for the consideration and determination of human rights issues in the Asia-Pacific region has been a source of legitimate global concern. In that context, the establishment of the ASEAN Inter-government Commission on Human Rights is to be welcomed. Some of the initial members are clearly respected by CSOs and civil society in the region. It is to be hoped that all members will insist on the respect for the independence, impartiality and integrity of the Commission.

The best way this can happen is by active engagement of the Commission with CSOs throughout the region; the promotion of the values of human rights through education, professional and media outreach; and the adoption of transparent work practices by the Commission. A great deal will depend on the way in which the initial members of the Commission construe the TOR and the image that they have of their own role. Even within the restrictions of the TOR, that role could be noble and in the high tradition of other regional human rights institutions. It is for reason that the contact between the ASEAN Commission and other such regional human rights bodies was thought to be a high priority. And so is the provision to the Commission of research assistance from impartial and respected scholars and institutions, and client assistance from courageous and principled CSOs to the peoples of ASEAN who are the ultimate judges of the Commission and the eventual source of its legitimacy and mandate.

The ABA RLI at no stage in the deliberations exceeded its role as a facilitator. For that role, and its initiative and the funding for providing the workshop, the ABA is to be thanked and praised.

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