

REZUMAT:

Articolul este consacrat unei succinte analize, din perspectiva diplomatică, a elaborării, conținutului și punerii în practică a Declarației ASEAN privind drepturile omului (2012), primul document care reflectă o abordare regională cuprinzătoare a ansamblului problematicei drepturilor omului și înglobează prevederi specifice privind dreptul la dezvoltare și pace. Sunt prezentate, de asemenea, Comisia Interguvernamentală a ASEAN pentru Drepturile Omului cu accent pe mandatul acesteia, precum și evaluările critice sau pozitive formulate în legătură cu instrumentarul și mecanismele din domeniul drepturilor omului în Asia de Sud-Est, atât în interiorul acestei regiuni, cât și la ONU.

Cuvinte cheie: ONU, drepturi, obligații, dezvoltare, pace, mecanisme, instituții, universalitate, promovare, monitorizare, democrație, diplomație, securitate, criză

RÉSUMÉ:

L'article est consacré à une brève analyse du point de vue diplomatique, sur le développement, le contenu et la mise en œuvre de la Déclaration de l'ASEAN sur les droits de l'homme (2012), le premier document qui reflète une approche régionale globale pour toute la question des droits de l'homme et contient des dispositions spécifiques sur le droit au développement et la paix. Sont présentés également la Commission intergouvernementale de l'ASEAN sur les droits de l'homme en mettant l'accent sur son mandat et sur l'évaluations critiques ou positives exprimée dans le traitement avec les instruments et mécanismes des droits de l'homme en Asie du Sud-est, à la fois dans la région et que à l'ONU.

Mots-clés: Nations Unies, les droits, les obligations, le développement, la paix, les mécanismes, les institutions, l'universalité, la promotion, le suivi, la démocratie, la diplomatie, la sécurité, la crise

1. Preliminary observations

The United Nations Charter, which is considered to be “an embryonic global constitution”¹, stipulates in its Article 55 that “With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations ... the United Nations shall promote... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” The implementation of this generous objective demands permanent efforts at the national, regional and global levels, involving the active role of human rights diplomacy, understood as the utilisation of diplomatic negotiation and persuasion for the specific purpose of promoting and protecting human rights². In the light of professional

academic debates, it can be asserted that human rights diplomacy involving regional organizations has certain advantages over bilateral and multilateral (especially practiced at the UN) human rights diplomacy, and can complement human rights diplomacy at these two other levels. Regional bodies and procedures for the promotion and protection of human rights are frequently recognized as being more effective than global mechanisms.

The Association of Southeast Asian Nations (ASEAN) is an important component of regional architecture, specifically recognized as such by the 193 members of the United Nations (UN). Its activities, initiatives and programs in the field of human rights are attracting an active attention from the world organization.

Indeed, in the most recent resolution on the matter published under the symbol A/RES/67/110 entitled Cooperation between the United Nations and the Association of Southeast Asian Nations, a document adopted by consensus on December 17, 2012 by the UN General Assembly, this plenary body “Encourages cooperation between the United Nations and the Association of Southeast Asian Nations in the field of human rights, particularly through the Association of Southeast Asian Nations Intergovernmental Commission on Human Rights ...”. Moreover, the UN General Assembly

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¹ See *The Oxford Handbook of Modern Diplomacy*, Edited by Andrew F. Cooper, Jorge Heine and Ramesh Thakur, Oxford University Press, 2013, p. 904. The quotation is from chapter 36, *Human Rights* by David P. Forsythe, p. 658.

² *Ibidem*, p. 659. For a more comprehensive discussion about human rights diplomacy see Michael O'Flaherty, Zdzisław Kędzia, Amrei Müller and George Ulrich, *Human Rights Diplomacy: Contemporary Perspectives*, Martinus Nijhoff, 2011, p. 320. An older but useful book is Rein Mullerson, *Human Rights Diplomacy*, Routledge, 1997, p. 240. The book focuses, *inter alia*, on the raison d'être of human rights diplomacy and its future development.

puts this issue in an appropriate global context by specifying that it "*Recognizes* the value of comprehensive partnership between the United Nations and the Association of Southeast Asian Nations in providing timely and effective responses to global issues of mutual concern, in the context of partnership between the United Nations and regional organizations, and thus encourages the United Nations and the Association of Southeast Asian Nations to explore concrete measures dedicated to expanding and deepening cooperation, particularly in the areas of peace and security, including the exchange of experiences and best practices on conflict resolution and post-conflict demining activities, economic and social development towards the achievement of the Millennium Development Goals, food and energy security, sustainable development, disaster management and climate change, *the promotion of human rights and democracy...*"³.

The present article is dedicated to the most important achievement of the Association of Southeast Asian Nations Intergovernmental Commission on Human Rights (AICHR), namely the negotiation, elaboration, final drafting and adoption of the ASEAN Human Rights Declaration.

First of all it is appropriate to clarify the complex diplomatic process leading to the adoption of this document. In our analysis we will respect the official terminology and a spelling used in the original ASEAN documents.

The establishment of an ASEAN regional mechanism on human rights became an urgent matter after the ASEAN Charter entered into force on December 15, 2008. Article 14 of this multilateral legal instrument states that "In conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN human rights body"⁴.

³ The full text of the resolution is available at http://www.un.org/depts/dhl/resguide/r67_en.shtml. It was sponsored by all ASEAN Member States (Brunei Darussalam, Burma (Myanmar), Cambodia, Indonesia, Laos, Malaysia, Philippines, Singapore, Thailand, Vietnam), as well as by some European countries, including Denmark, Finland, France and Hungary.

⁴ The ASEAN Charter is available at www.asean.org. One of the most recent books on ASEAN and human rights is Viti Muntarbhorn, *Unity in Connectivity? Evolving Human Rights Mechanisms in the ASEAN Region*, Martinus Nijhoff, 2013, p 256. The author is a Professor of Law at Chulalongkorn

To give tangibility to that article, a High Level Panel was set up to draft the Terms of Reference (TOR) of the future Association of Southeast Asian Nations Intergovernmental Commission on Human Rights (AICHR). The document containing the TOR of AICHR was adopted after diplomatic negotiations by the ASEAN Foreign Ministers Meeting in July 2009. On 23 October 2009 the ten AICHR Representatives, one from each Member State, were appointed and AICHR was officially inaugurated at the 15th ASEAN Summit in Cha-am Hua Hin, Thailand by the ASEAN Leaders.⁵

The AICHR Representatives have different professional backgrounds and experiences, including diplomacy, and are appointed for a three-year term of office.

AICHR's activities are presented in a Five-Year Work Plan 2010 – 2015, and in the annual high priority programs, approved by the ASEAN Foreign Ministers in January 2012. In accordance with its powers and functions, the AICHR has adopted the Rules of Procedure of the AICHR Fund, the Guidelines on the Operations of AICHR and the Terms of Reference for its thematic studies.

AICHR intends to conduct thematic studies on topics such as: Corporate Social Responsibility, Migration, Trafficking in Persons particularly women and children, Child soldiers, Women and children in conflicts and disasters, Juvenile justice, Right to information in criminal justice, Rights to health (includes Reproductive health of Women), Rights to education, Right to life (includes Capital Punishment), and Right to Peace.

AICHR was also involved in conducting research, trainings and workshops in the field of human rights. It has partnership relations with UN agencies and development partners. It has organized two study visits to the United States and to Europe in 2010-2011.

It should be emphasized that the AICHR has focused its major efforts on the drafting of the ASEAN Human Rights Declaration (AHRD). The

University in Bangkok. He has helped the UN in a variety of capacities, including as a consultant, expert and Special Rapporteur. A more general but useful book containing updated references to human rights is Christopher B. Roberts, *ASEAN Regionalism: Cooperation, Values and Institutionalisation*, Routledge, 2013, p. 280. The book has the merit of offering an empirical analysis of the regional integration through ASEAN and of the limitations and difficulties met in the process of creating an ASEAN identity.

⁵ See the relevant documents at [ww.asean.org](http://www.asean.org).

text of the Declaration was drafted and negotiated by the AICHR in 10 meetings hosted in different countries and was further considered and adopted unanimously by the 10 ASEAN members on November 18, 2012 at a summit conference in Phnom Penh, Cambodia and published on November 19, 2012.

This Declaration, which is the outcome of multilateral negotiations conducted in a difficult political environment, will be analyzed in detail in the next section of this article. It is considered to be a landmark political document in terms of human rights in the ASEAN area, reflecting important aspirations of the peoples represented by this regional institution with a population estimated in 2013 to 620 million. It is also the most significant guiding document for human rights cooperation in the South East Asia region.

2. A pioneer document

The first function of diplomacy being negotiation, it should be noted from the very beginning that the ten members of the AICHR have proved a remarkable professional tenacity in leading their difficult deliberations to a win-win situation illustrated by a 40 paragraphs draft Declaration introduced by a substantive preamble.⁶

In the preamble, the Heads of State/Government of the 10 Member States of the ASEAN reaffirmed their adherence to the purposes and principles of ASEAN as enshrined in the ASEAN Charter, in particular the respect for and promotion and protection of human rights and fundamental freedoms, as well as the principles of democracy, the rule of law and good governance.

Demonstrating consistency in their approach to the human rights fields, the ASEAN Leaders reaffirmed also their commitment to the Universal Declaration of Human Rights, the Charter of the United Nations, the Vienna Declaration and Programme of Action (1993), and other international human rights instruments to which ASEAN Member States are parties.

Regional efforts and achievements in the same field have not been not ignored. Consequently, the ASEAN Leaders reaffirmed in specific terms the importance of ASEAN's efforts in promoting human rights, including the Declaration of the

Advancement of Women in the ASEAN Region and the Declaration on the Elimination of Violence against Women in the ASEAN Region.

The preamble's last paragraph expresses an optimistic conviction that the ASEAN Declaration on Human Rights will help establish a framework for human rights cooperation in the region and contribute to the ASEAN community building process.

In its operative part, the Declaration contains six sections dealing with general principles, civil and political rights, economic, social and cultural rights, the right to development and the right to peace, and includes some final provisions related to the cooperation in the promotion and protection of human rights.

Under general principles, a number of 9 paragraphs express essential ideas about human rights on the basis of the most significant UN documents. Special mention should be made about paragraph 6, according to which "The enjoyment of human rights and fundamental freedoms must be balanced with the performance of corresponding duties as every person has responsibilities to all other individuals, the community and the society where one lives. It is ultimately the primary responsibility of all ASEAN Member States to promote and protect all human rights and fundamental freedoms".

The UN concepts and terminology of human rights, as endorsed today by its 193 members after many years of diplomatic debates and negotiations are highly visible in the text of the Declaration. Thus, paragraph 7 states that "All human rights are universal, indivisible, interdependent and interrelated. All human rights and fundamental freedoms in this Declaration must be treated in a fair and equal manner, on the same footing and with the same emphasis. At the same time, the realisation of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds".

Paragraph 9, - the last one listed under general principles, - is also fully inspired from the UN doctrine on the matter. It stipulates that "In the realisation of the human rights and freedoms contained in this Declaration, the principles of impartiality, objectivity, non-selectivity, non-discrimination, non-confrontation and avoidance of double standards and politicisation, should always be upheld. The process of such realisation shall

⁶ The full English version of the ASEAN Human Rights Declaration is available at www.asean.org. Translations in national languages have been produced and circulated in the whole area covered by ASEAN. See also the text of the AHRD and other relevant documents at www.aichr.org.

take into account peoples' participation, inclusivity and the need for accountability."

In the second section (paragraphs 10-25) of the Declaration under consideration, "ASEAN Member States affirm all the civil and political rights in the Universal Declaration of Human Rights." Specific references to ASEAN appear in paragraph 19, according to which "The family as the natural and fundamental unit of society is entitled to protection by society and each ASEAN Member State."

In conformity with paragraph 20 (3) "No person shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law and penal procedure of each ASEAN Member State."

In the third section of the Declaration (paragraphs 26-34), the very first provision reminds that "ASEAN Member States affirm all the economic, social and cultural rights in the Universal Declaration of Human Rights". Specific references to the ASEAN's practice appear in paragraph 27 (3), according to which "No child or any young person shall be subjected to economic and social exploitation. Those who employ children and young people in work harmful to their morals or health, dangerous to life, or likely to hamper their normal development, including their education should be punished by law. ASEAN Member States should also set age limits below which the paid employment of child labour should be prohibited and punished by law". In conformity with paragraph 29 (2) "The ASEAN Member States shall create a positive environment in overcoming stigma, silence, denial and discrimination in the prevention, treatment, care and support of people suffering from communicable diseases, including HIV/AIDS."

An interesting reference to ASEAN is contained in paragraph 30 (3) in conformity with which "Education shall be directed to the full development of the human personality and the sense of his or her dignity. Education shall strengthen the respect for human rights and fundamental freedoms in ASEAN Member States. Furthermore, education shall enable all persons to participate effectively in their respective societies, promote understanding, tolerance and friendship among all nations, racial and religious groups, and enhance the activities of ASEAN for the maintenance of peace". ASEAN is again

mentioned in paragraph 33 which states that "ASEAN Member States should take steps, individually and through regional and international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of economic, social and cultural rights recognised in this Declaration."

The last specific reference to ASEAN in the section dedicated to economic, social and cultural rights is contained in paragraph 34 on the basis of which "ASEAN Member States may determine the extent to which they would guarantee the economic and social rights found in this Declaration to non-nationals, with due regard to human rights and the organisation and resources of their respective national economies."

The ASEAN Declaration on Human Rights is a pioneer document in Southeast Asia not only as a result of being the first comprehensive document of this nature in the history of this regional institution, but also because it is unique by its particular attention and special approach concerning the right to development and the right to peace which are treated separately in an individual section.

Thus, the fourth section of the Declaration is entitled "Right to development" and contains three paragraphs. Their style is mostly descriptive. The exemplifications are instructive. Paragraph 35 reminds that "The right to development is an inalienable human right by virtue of which every human person and the peoples of ASEAN are entitled to participate in, contribute to, enjoy and benefit equitably and sustainably from economic, social, cultural and political development. The right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations. While development facilitates and is necessary for the enjoyment of all human rights, the lack of development may not be invoked to justify the violations of internationally recognised human rights."

Paragraph 36 tries to put the right to development in an operational context. It states that "ASEAN Member States should adopt meaningful people-oriented and gender responsive development programmes aimed at poverty alleviation, the creation of conditions including the protection and sustainability of the environment for the peoples of ASEAN to enjoy all human rights

recognised in this Declaration on an equitable basis, and the progressive narrowing of the development gap within ASEAN.”

Finally, paragraph 37 can be characterized as a adequate example or outcome of diplomacy by declamation. Its text reads as follows: “ASEAN Member States recognise that the implementation of the right to development requires effective development policies at the national level as well as equitable economic relations, international cooperation and a favourable international economic environment. ASEAN Member States should mainstream the multidimensional aspects of the right to development into the relevant areas of ASEAN community building and beyond, and shall work with the international community to promote equitable and sustainable development, fair trade practices and effective international cooperation.”

From the political point of view the presence of the right to peace in the short sixth section of the Declaration has an undeniable symbolic value. However, the only paragraph dedicated to this right remains quite elliptic on substance and does not benefit of further elaboration, as it was the case over the years with the UN resolutions on the same topic.

Paragraph 38 is quite limited and reminds only that “Every person and the peoples of ASEAN have the right to enjoy peace within an ASEAN framework of security and stability, neutrality and freedom, such that the rights set forth in this Declaration can be fully realised. To this end, ASEAN Member States should continue to enhance friendship and cooperation in the furtherance of peace, harmony and stability in the region.”

It is surprising to see that this paragraph does not make any reference to peace-based values proclaimed in the ASEAN Charter. In this regard, it is useful to remind that in its resolution 67/173. Promotion of peace as a vital requirement for the full enjoyment of all human rights by all adopted by the UN General Assembly on December 20, 2012, the plenary forum of the world organization "Reaffirms that the peoples of our planet have a sacred right to peace; Also reaffirms that the preservation of the right of peoples to peace and the promotion of its implementation constitute a fundamental obligation of all States; Stresses that peace is a vital requirement for the promotion and

protection of all human rights for all.”⁷

Section sixth, the last one, of the Declaration contains only two paragraphs related to the process of cooperation for the promotion and protection of human rights.

In conformity with paragraph 39, “ASEAN Member States share a common interest in and commitment to the promotion and protection of human rights and fundamental freedoms which shall be achieved through, *inter alia*, cooperation with one another as well as with relevant national, regional and international institutions/organisations, in accordance with the ASEAN Charter.”

Paragraph 40 which is also the final substantive paragraph of the whole Declaration has a practical orientation. It warns that “Nothing in this Declaration may be interpreted as implying for any State, group or person any right to perform any act aimed at undermining the purposes and principles of ASEAN, or at the destruction of any of the rights and fundamental freedoms set forth in this Declaration and international human rights instruments to which ASEAN Member States are parties.”

3. Wide criticism

In a positive assessment of the Declaration formulated in an article entitled *ASEAN 'Magna Carta' universalizes human rights*, Kevin R. Villanueva, one of its drafters and negotiators from the Philippines, wrote in *The Jakarta Post* January 8, 2013 that nothing like this document has ever been adopted by any country or by any other bloc with legal personality within ASEAN area.

The diplomatic process of negotiating the Declaration is well summarized by the author of the article. Indeed, between January and September 2012, the 10 representatives of the ASEAN Intergovernmental Commission on Human Rights braved 10 tough meetings in seven different cities around Southeast Asia and gave the human rights project its autochthonous shape. Special mention is made of novel and delicate notions on the right to peace and development analyzed in the second section of the present article.

Kevin R. Villanueva believes that one iconic feature of this regional Declaration is ASEAN's imprimatur on the universality of the international human rights regime. He reminds that the longest

⁷ The full text of the resolution can be consulted at http://www.un.org/depts/dhl/resguide/r67_en.shtml.

and thorniest debates during the negotiations revolved around the word “regional particularities”. The result was article 7 mentioned in the second section of this article. The word “Particularities” was purged, putting on record the ASEAN consensus for an effective end to pretexts for selectivity.

The same author appreciates that the negotiation process of the Declaration illustrated “the exceptional ideal of ASEAN regional solidarity in full action.”

However, in spite of its achievements, ASEAN has been criticized from within and outside for the lack of an effective voting system.

During the entire drafting process and especially while negotiating the substance of article 7, the representatives invoked the ground rule to drop any issue when one or more states were in absolute disagreement.

Kevin R. Villanueva reveals that in consonance with ASEAN informality, the representatives/negotiators convened a series of what they call “retreats” in the course of the negotiations. It should be recalled that ASEAN officials, ministers and bureaucrats alike use this unique regional custom when they agree that protocol must give way to straight and intimate talks between peers. The drafters of the document, who were ultimately responsible for every word in the Declaration, managed to negotiate away from the public eye, combining first the requirements of confidentiality (not secrecy), and last, but not insignificantly, the ubiquitous value of saving face in Southeast Asian ethos.

The final conclusion of Kevin R. Villanueva about the drafting process as a whole is quite positive. In his opinion “we can also choose to look differently at this Declaration: One small step for ASEAN but one giant leap for humanity. The reverse is no less true: One small step for humanity, one giant leap for ASEAN. It is no small wonder that we now all stand to benefit either way.”⁸

However, it is necessary to remind that the above optimistic assessment is not generally shared in ASEAN area. The AICHR has been widely criticized for the lack of transparency and failure to consult with ASEAN civil society during the drafting process of the Declaration. Criticism from

⁸ The article by Kevin P. Villanueva is available on the site of The Jakarta Post at www.thejakartapost.com/.../asean-magna-carta-universalizes-human-rights.html.

NGOs and representatives from the UN’s Office of the High Commissioner on Human Rights had poured in prior to the adoption of this historic document. The main concern of the critics was that the standard of the ASEAN Human Rights Declaration could fall below international standards. The content of the Declaration itself has been also criticized by ASEAN civil society, international human rights organizations such as Amnesty International and Human Rights Watch, the U.S. Department of State, and the UN High Commissioner for Human Rights.

ASEAN civil societies have noted that “The Declaration fails to include several key basic rights and fundamental freedoms, including the right to freedom of association and the right to be free from enforced disappearance.” Further, the Declaration contains clauses that many fear could be used to undermine human rights, such as “the realization of human rights must be considered in the regional and national context” (Art. 7)⁹, or that human rights might be limited to preserve “national security” or a narrowly defined “public morality” (Art. 8)¹⁰.

The US Department of State welcomed the Declaration, but with substantive reservations. The US State Department issued a statement of support, “in principle”, for “ASEAN’s efforts to develop a regional human rights declaration”, but expressing concern for “the use of the concept of ‘cultural relativism...’, stipulating that domestic laws can trump universal human rights, incomplete descriptions that are mentioned elsewhere, introducing novel limits to rights, and language that could be read to suggest that individual rights are subject to group veto”¹¹.

⁹ For the criticism on AHRD see http://en.wikipedia.org/wiki/ASEAN_Human_Rights_Declaration.

¹⁰ See note 9 *supra* as well as article “ASEAN leaders adopt lame-duck rights declaration”. The Jakarta Post. Retrieved 4 January 2013.

From the criticism formulated by non-governmental organizations relevant aspects can be found in Amnesty International. “Civil society rejects flawed ASEAN Human Rights Declaration”. Retrieved 17 January 2013. Human Rights Watch. “Civil Society Denounces Adoption of Flawed ASEAN Human Rights Declaration”. Retrieved 17 January 2013.

¹¹ See U.S. Department of State. “ASEAN Declaration on Human Rights” at <http://www.state.gov/r/pa/prs/ps/2012/11/index.htm>. See also ASEAN Approves Controversial Human Rights Declaration”. Voice of America at www.voanews.com/content/asean-summit-opens-in-.../1548305.html, Nov 18, 2012.

The UN High Commissioner for Human Rights "welcomed the renewed commitment by leaders of the Association of Southeast Asian Nations to universal human rights norms" noting that "Other regions have shown how regional human rights systems can evolve and improve over time" and that "it is essential that ASEAN ensures that any language inconsistent with international human rights standards does not become a part of any binding regional human rights convention."¹²

In an article entitled *The ASEAN approach to human rights* published by Ronald Eberhard, Groningen, Netherlands, in *The Jakarta Post* dated December 6, 2012, there is a more balanced and practice-oriented critical analysis of the Declaration.

According to this article, the long-awaited Declaration had become the center of attention among human rights observers and activists across the region. Ronald Eberhard believes that the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights serve a good comparison for the ASEAN Human Rights Declaration. He finds merits in the AHRD, as there is a certain development that exceeds international expectations, such as an acknowledgement of the right to development and the right to peace.

The right to peace is considered to be even more interesting since there are no similar provisions in the other international conventions on human rights. The presence of this right in the Declaration suggests that ASEAN wishes to create a secure, stable and harmonious Southeast Asian region.

In Ronald Eberhard's opinion the right to development in the AHRD is an inalienable human right from economic, social, cultural and political development for the benefit of present and future generations. He reminds that there are at least two interpretations concerning this right. First is the inalienable human right for political development. This somehow has a broad interpretation. It could be interpreted as the right of citizens to participate in the political development of ASEAN member states, including enjoying its benefits or it could be interpreted in a narrow way of participating in democracy.

In accordance with a second interpretation, the recognition of the principle of intergenerational

¹² UN High Commissioner for Human Rights. "UN official welcomes ASEAN commitment to human rights, but concerned over declaration wording" at www.un.org/apps/news/story.asp?NewsID=43536.

equity is related to the sustainable development concept. As some ASEAN member states are blessed with mega biodiversity, it has to be developed in a sustainable manner to meet the needs of future generations.

The final conclusion of the article signed by Ronald Eberhard is a realistic one. The AHRD is characterized as "just an initial step for establishing a human rights mechanism in Southeast Asia. ... ASEAN should aim to develop a binding human rights document while, at the same time, playing a harmonizing role amid the political development gap between ASEAN member states so that the relevant human rights provisions can be enforced effectively in the region."¹³

4. Future efforts

In a study entitled *A New Political Cooperation Treaty for ASEAN?* its author, Termsak Chalermpananupap, a visiting research fellow at the ASEAN Studies Centre of the Institute of Southeast Asian Studies (ISEAS) in Singapore, develops some critical but realistic opinions about the future of ASEAN's activities in the field of human rights.¹⁴

In Termsak's view, the terms of reference (TOR) of AICHR reveal traces of struggle to develop a feasible balance between sovereignty (non-interference) and promotion of regional human rights cooperation. Ultimately, those in favor of upholding the primacy of national sovereignty seemed to have prevailed in the drafting of the TOR. Point 2.3 of the TOR, for example, states that AICHR shall be guided by the "Recognition that the primary responsibility to promote and protect human rights and fundamental freedoms rests with each Member State;" Point 3 of the TOR states that AICHR "is a consultative body", which means it has no authority to ensure respect for human rights or enforce ASEAN agreements on human rights in any Member States. On the other hand, the first purpose of AICHR is to "promote and protect human rights and

¹³ The full text of the article by Ronald Eberhard is available at www.thejakartapost.com/.../the-asean-approach-human-rights.html.

¹⁴ See the study signed by Termsak Chalermpananupap at www.iseas.edu.sg/ISEAS/upload/files/final_programme_art20_13.pdf. See also by the same author *Promoting and Protecting Human Rights in ASEAN*, a well-documented study available at <http://www.aseansec.org/wp-content/uploads/2013/07/HLP-OtherDoc-2.pdf>.

fundamental freedoms of the peoples of ASEAN”. Another idealistic purpose is to “uphold international human rights standards as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Program of Action, and international human rights instruments to which ASEAN Member States are parties.”

There is no doubt about the recognition of the obvious fact that the primary responsibility to promote and protect human rights and fundamental freedoms rests on individual ASEAN Member States. It is reiterated in the already analyzed ASEAN Human Rights Declaration (AHRD). Irrespective of this fact, critics have expressed serious disappointment with the AHRD, which they see as a renewed effort in ASEAN to curb human rights and fundamental freedoms rather than to limit government powers and prevent violation of human rights and fundamental freedoms. Moreover, for the time being there seems to be no consensus among ASEAN Member States to move on, towards a legally-binding ASEAN convention on human rights.

The limitations of the AHRD are well explained by Termsak Chalermpananupap. Neither the AHRD nor the TOR of AICHR make clear how and what ASEAN shall do in case of a serious violation of human rights in one Member State. It is true that the Secretary-General of ASEAN, may obtain information from ASEAN Member States on the promotion and protection of human to the attention of the AICHR and may bring relevant issues to the attention of the AICHR. In so doing, the Secretary-General of ASEAN shall concurrently inform the ASEAN Foreign Ministers of these issues. The practical conclusion is that the ASEAN Foreign Ministers, not AICHR, are expected to take cognizance of human rights violation issues in a member state.¹⁵

In a much more critical article entitled *Reviewing the ASEAN Charter* by Roby Arya Brata, published in *The Jakarta Post* on March 7, 2013, it is categorically asserted that “There are no ASEAN legal bodies to legally enforce and protect human rights and the environment. The institutional design and powers of the ASEAN human rights body created by Article 14 of the Charter are not strong enough to promote and protect human rights and fundamental freedoms of

ASEAN’s peoples.”¹⁶

The UN Security Council has paid a lot of attention to the promotion and protection of human rights and fundamental freedoms and has used its functions and powers to encourage a better partnership in this field with regional and sub-regional organizations. The most recent example is offered by the text of presidential statement S/PRST/2013/12 issued on August 6, 2013, after a meeting of the Security Council under then presidency of Argentina. In the first paragraph of this document “The Security Council recalls its previous relevant resolutions and statements of its President which underscore the importance of developing effective partnerships between the United Nations and regional and sub-regional organizations, in accordance with the Charter of the United Nations and the relevant statutes of the regional and sub-regional organizations”.

The last three paragraphs of the presidential statement S/PRST/2013/12 are encouraging for the future of human rights diplomacy involving ASEAN and other regional organizations. Thus, “The Security Council highlights the importance of the role of regional and sub-regional organizations and arrangements and of cooperation with them, consistent with Chapter VIII of the United Nations Charter, with regard to conflict prevention, conflict resolution, peacekeeping, peace-building, *including the maintenance of constitutional order, the promotion of human rights, democracy, the rule of law, and the fight against impunity*. The Security Council encourages cooperation between the United Nations and regional and sub-regional organizations and arrangements to cooperate across a broad agenda of mutual concern”

In a broader context, but closely linked to the topic of the present article, “The Council further encourages enhanced cooperation between the United Nations and the regional and sub-regional organizations and arrangements to foster a global dialogue for the promotion of tolerance and peace, to promote better understanding across countries, cultures and civilizations”¹⁷.

The diplomatic role of the UN Secretary-General is specifically mentioned in the last paragraph of presidential statement

¹⁶ The full text of the article by Roby Arya Brata is available at www.thejakartapost.com/news/2013/03/07/reviewing-asean-charter.html.

¹⁷ The presidential declaration can be consulted at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PRST/2013/12.

¹⁵ See Termsak Chalermpananupap, the first study mentioned in note 14, *supra*.

S/PRST/2013/12. According to it, "The Security Council commends the Secretary-General's efforts to include in his regular reporting to the Security Council assessments of progress on the cooperation between the United Nations and relevant regional organizations, and requests that he continues such efforts. The Council further requests that the Secretary-General includes in his next biannual report to the Security Council and the General Assembly on Cooperation between the United Nations and regional and other organizations recommendations on ways to enhance cooperation between the United Nations and relevant regional and sub-regional organizations and arrangements."

The work to be done or continued in this field is immense. With particular reference to human rights diplomacy, the UN General Assembly in its resolution A/RES/67/110 of December 17, 2012, "Encourages cooperation between the United Nations and the Association of Southeast Asian Nations in the field of human rights" not only through the AICHR, but also, as specifically mentioned in this document, through the Association of Southeast Asian Nations Commission on the Promotion and Protection of the Rights of Women and Children, to enhance the promotion and protection of human rights, including the rights of women, children, the elderly and persons with disabilities, as well as the rights of migrant workers in accordance with national laws, regulations and policies of member States of the Association of Southeast Asian Nations and the principles contained in the Association of Southeast Asian Nations Declaration on the Protection and Promotion of the Rights of Migrant Workers.¹⁸

In his Remarks at Security Council meeting on Cooperation between the UN and Regional and Sub-Regional Organizations in the Maintenance of Peace and Security on August 6, 2013, Secretary-General Ban Ki-moon, speaking as a chief diplomat of the world organization, said that "Regular joint consultations between the UN and the Association of Southeast Asian Nations continue to create important opportunities for mutual cooperation, including promoting peace-building, reconciliation and political reform in Myanmar, and preventive diplomacy in Mindanao"¹⁹.

¹⁸ See note 3 *supra*.

¹⁹ The full statement of Ban Ki-moon is available at www.un.org/sg/statements/index.asp?nid=7001.

In the same context, Ban Ki-moon reminded that cooperation with the European Union is geographically and substantively wide-ranging. With the Organization for Security and Cooperation in Europe, the UN partners to advance human rights, confidence-building, counter-terrorism and disarmament in southeastern Europe, the Caucasus and Central Asia.

From a diplomatic perspective, it is rewarding to note Ban Ki-moon's strong belief "in the combined value of our respective strengths. In his opinion, "Regional and sub-regional organizations have deep knowledge, unique insights and strong local networks. These elements are critical for mediation, planning a peacekeeping operation or helping a country to build lasting peace. To this equation, the United Nations adds its universal membership and legitimacy, long experience and operational capacity in the area of international peace and security".

Therefore, Ban Ki-moon advocated for building "ever more innovative and flexible partnership arrangements that draw on our respective strengths", because, in his view, "only through cooperation will we meet our shared aspirations for a more peaceful world"²⁰.

This assessment should be understood in the light of the current sad realities from the field of human rights. As pointed out in 2005 by Louise Arbour, the UN High Commissioner for Human Rights, "Without the implementation of widely ratified international treaties, there is no point in reaffirming or refining the meaning of human rights...They simply cease to exist...the world's approach to human rights diplomacy remains unsatisfactory, sporadic and selective". Therefore, in her opinion leadership is needed "in bringing about dispassionate analysis, focused calls for action, and sustained attention to human rights violations"²¹.

In this connection both the UN and regional organizations, including ASEAN, should benefit from the guidelines contained in the comprehensive resolution 67/169. *Enhancement of international cooperation in the field of human rights* adopted by the UN General Assembly on December 20, 2012. In conformity with two paragraphs of this document, the UN General Assembly "Calls upon Member States, the

²⁰ See note 19 *supra*.

²¹ For the full text of the statement by Louise Arbour see www.un.org/News/briefings/docs/2005/db050314.doc.htm

specialized agencies and intergovernmental organizations to continue to carry out a constructive dialogue and consultations for the enhancement of understanding and the promotion and protection of all human rights and fundamental freedoms, and encourages non-governmental organizations to contribute actively to this endeavour; *Urges* States to take necessary measures to enhance bilateral, regional and international cooperation aimed at addressing the adverse impact of consecutive and compounded global crises, such as financial and economic crises, food crises, climate change and natural disasters, on the full enjoyment of human rights”²².

The most recent regional diplomatic assessment about ASEAN and human rights was formulated in general terms in the Chairman’s Statement on the 23rd ASEAN Summit on October 10, 2013. It reads as follows: “In the promotion and protection of human rights in the region, we expressed satisfaction with the work of the ASEAN Intergovernmental Commission on Human Rights (AICHR). We welcomed the on-going efforts of the AICHR in implementing its initiatives and programmes, including the implementation of the Priority Programme/Activities of AICHR 2013 and the ASEAN Human Rights Declaration (AHRD)”²³.

From a larger perspective, it is useful to note that the 5th ASEAN-UN Summit of October 10, 2013 expressed a more detailed and specific assessment about the progress achieved in the field of human rights. Thus, the ASEAN-UN Summit “welcomed the work of the ASEAN Intergovernmental Commission on Human Rights (AICHR) and the ASEAN Commission for Promotion and Protection of the Rights of Women and Children (ACWC). The Summit encouraged the AICHR to enhance its activities, including the implementation of the AHRD, in close coordination with the various ASEAN sectoral bodies and where appropriate, in collaboration with relevant United Nations organisations as well as the ACWC’s ongoing initiatives to promote public awareness through an annual public campaign to stop violence against women and children”.

In the same document “The Summit welcomed the outcomes of the International Workshop on

Enhancing Cooperation between the UN and Regional Mechanisms for the Promotion and Protection of Human Rights held on 12-14 December 2012 in Geneva, Switzerland, where the AICHR was also invited to participate. The Summit encouraged the continuous engagement and support from the various UN human rights bodies in enhancing the work of the AICHR and ACWC”²⁴.

As emphasized in various occasions by Le Luong Minh, Secretary-General of ASEAN, the AHRD is a standard setting document for future ASEAN instruments on human rights as well as future cooperation on human rights between ASEAN and its partners. The AHRD contains added values such as its recognition of the right to peace and the right to development, and ASEAN and its members have to ensure that commitments contained in this document are translated into genuine and concrete actions²⁵.

The implementation of these appeals and requirements incorporated in the most authoritative ASEAN and UN documents is very important and, in some respects, has to be treated on an urgency basis. However, significant positive outcomes are not possible in a predictable future without developing a more energetic and skilful human rights diplomacy which, as reminded in the specialized literature²⁶, is expected to become a crucial part of a holistic approach to human rights protection, thus complementing, *inter alia*, other means such as legal remedies, public advocacy, political pressure and technical assistance. Under such circumstances, the gradual and credible progress of human rights diplomacy remains an imperative prerequisite for a successful role of regional organizations in the sensitive field of human rights both in ASEAN area and in other geographical regions.

²⁴ The 5th ASEAN-United Nations (UN) Summit was held on 10 October 2013 in Bandar Seri Begawan, Brunei Darussalam, and was attended by the Heads of State/Government of ASEAN and Ban Ki-moon, Secretary-General of the UN. For the Chair’s Statement see <http://www.asean2013.gov.bn/>

²⁵ See Remarks by Le Luong Minh, Secretary-General of ASEAN, under the title “*Contributing to the ASEAN Community Building through the Implementation of the ASEAN Human Rights Declaration (AHRD)*”, ASEAN Hall, ASEAN Secretariat, August 23, 2013 at http://www.asean.org/images/2013/resources/speech/asean_day_2013/sg%20remarks%20aichr.pdf.

²⁶ See Michael O’Flaherty, Zdzisław Kędzia, Amrei Müller and George Ulrich, *Human Rights Diplomacy: Contemporary Perspectives*, Martinus Nijhoff, 2011, p. 320.

²² The text of the resolution is available at http://www.un.org/depts/dhl/resguide/r67_en.shtml

²³ All documents of the 23rd ASEAN Summit can be consulted at <http://www.asean2013.gov.bn/>