THE ASEAN HUMAN RIGHTS DECLARATION: A LEGAL ANALYSIS

American Bar Association Rule of Law Initiative
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Abbreviations

ACWC: The ASEAN Commission on the Promotion and Protection of the Rights of Women and Children
AHRD: ASEAN Human Rights Declaration
AICHR: The ASEAN Inter-governmental Commission on Human Rights
ASEAN: Association of Southeast Asian Nations
CAT: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW: Convention on the Elimination of All Forms of Discrimination against Women
CESCR: U.N. Committee on Economic, Social and Cultural Rights
CPED: International Convention for the Protection of All Persons from Enforced Disappearance
CRC: Convention on the Rights of the Child
CRPD: Convention on the Rights of Persons with Disabilities
HRC: U.N. Human Rights Committee
ICCPR: International Covenant on Civil and Political Rights
ICERD: International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR: International Covenant on Economic, Social and Cultural Rights
ICRMW: International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ILO: International Labour Organisation
UDHR: Universal Declaration of Human Rights
VCLT: Vienna Convention on the Law of Treaties
VDPA: Vienna Declaration and Programme of Action
Foreword

The Association of South-east Asian Nations (ASEAN) consists of ten countries, varying from democracies to non-democracies. It was created in 1967 and in the first decades of its work, concentrated mainly on political and security issues. This was followed later by economic issues such as the establishment of the ASEAN Free Trade Area in the 1990s. The advent of the ASEAN Charter in 2007 opened the door to integrating human rights into the ASEAN framework.

The ASEAN Intergovernmental Commission on Human Rights (AICHR) was set up pursuant to the adoption of its Terms of Reference in 2009. One of AICHR’s major tasks was to help draft an instrument to offer a regional perspective on human rights. Thus, the ASEAN Human Rights Declaration (AHRD) was adopted in 2012.

The developments above help to legitimize human rights as part of the ASEAN agenda. Yet, the key challenge lies in the actualization and implementation of those rights, especially at the national level. The AHRD invites debate on how far it is consonant with international human rights standards and how it enriches or undermines those standards. For instance, the call to support people with communicable diseases, including HIV/AIDS, in Article 29(2) is welcome. By contrast, the Declaration omits to mention the right to self-determination and the right to freedom of association, while qualifying several rights by subjecting them to national law. The AHRD has to be read together with the subsequent statement from the ASEAN Heads of State and Government, propounded in Phnom Penh in 2012, which endeavoured to provide an assurance that the implementation of the AHRD will be in accordance with international standards.

The following publication sets the AHRD against the backdrop of international human rights law. It is an extremely valuable guide on the issues at stake and on the preferred interpretation and implementation of the AHRD to ensure its consonance with international law. It is thus a most timely and auspicious offering.

Needless to say, time will be the ultimate judge of the AHRD - an amicable premonition!

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Introduction

In November 2012, the ten Member States of the Association of Southeast Asian Nations (ASEAN) adopted the ASEAN Human Rights Declaration (AHRD or Declaration). The AHRD marked a significant step in the establishment of a formal ASEAN human rights system, which may, like its counterparts in Africa, the Americas, and Europe, help to form a solid foundation for the development of those legal instruments and independent mechanisms required to strengthen human rights protection in the region.

The AHRD text was the result of intense and protracted negotiations between the Member States, and reactions to it varied. Some commentators welcomed the Declaration, given the challenge of finding consensus on such a document among the different ASEAN states. Others, particularly human rights organizations, expressed disappointment about the omission of key rights and the inclusion of wording that appears to limit the enjoyment of rights in a manner inconsistent with international law. The AHRD reflects tensions between ASEAN governments’ interests in preserving principles of sovereignty and non-interference and in promoting the development of a credible regional human rights system. From the point of view of international law, the AHRD contains both progressive and problematic elements.

As a non-binding declaration, the AHRD does not legally undermine ASEAN Member States’ human rights obligations under United Nations (UN), International Labour Organisation (ILO) and other international treaties. Nevertheless, the AHRD represents the most recent articulation of human rights standards to which all ten ASEAN Member States have explicitly consented, and for that reason ought to carry substantial political weight and normative value. However, ASEAN governments have done little to engage with the AHRD at the national level, politically or legally. This perhaps is due to the vocal rejection of the AHRD by civil society organizations (CSOs) in the region, or reflects limited interest in applying it on the part of some ASEAN Member States. Although this does mean that Member States have not used the AHRD to actively undermine existing human rights protections, it also calls into question ASEAN’s wider commitment to developing a credible regional human rights system, and the AHRD’s utility as a foundation for such a system.

Thus, the AHRD’s significance as a human rights text comes primarily from the fact that it represents the ASEAN Inter-governmental Commission on Human Rights’ (AICHR) first attempt at human rights standard-setting. It does not create enforceable rights or protections for people within ASEAN, and does not create a body to interpret and apply the Declaration progressively, as was the case with the Inter-American Commission on Human Rights and its Declaration.

A regional human rights treaty, which members of the AICHR have already raised as a not-so-distant possibility, is another matter. A treaty, if not carefully drafted, could potentially undermine regional human rights standards by establishing lower expectations of compliance. Regional human rights treaties usually establish an independent body of experts to oversee treaty implementation and enforcement, and such lowered expectations could have an adverse impact on the development of
human rights norms in the region. Thus, while a regional treaty between ASEAN Member States would still not serve to restrict the states’ obligations under international agreements to which they are parties, as a treaty interpreted and applied amongst the Member States, it could serve to weaken human rights protection in the region.

This publication provides a legal analysis of the AHRD, which is intended to assess the extent to which it is consistent with international law and ASEAN Member States’ existing international legal obligations. It assumes that ASEAN will eventually develop a regional human rights convention similar to the American, African and European Conventions, and that the AHRD will form the basis of such a Convention. This is not to say that the development of a core, binding human rights treaty for ASEAN is a given, or even necessarily desirable at this stage, given the lack of independence of the ASEAN bodies that would lead development of such an instrument. Nonetheless, this publication integrates revisions and additions to the AHRD text into its analysis of each AHRD right in the hope that such constructive commentary will broaden the range of rights recognized by ASEAN and its associated human rights bodies, with an eye towards the development of a binding human rights instrument in the future.

The research underlying this publication arises out of a joint collaboration amongst lawyers of the American Bar Association Rule of Law Initiative (ABA ROLI), human rights experts from within the region and beyond, and researchers from the George Washington University Law School. Students from the Padjadjaran University in Indonesia, the University of the Philippines, and the National University of Singapore also provided valuable research support on constitutional protections and responses to the AHRD in their respective countries. This publication follows and supplements ABA ROLI’s Experts’ Note on the ASEAN Human Rights Declaration (May 2012), which aimed to serve as a resource in the drafting of the AHRD.

While this publication strives to be comprehensive, it is by no means exhaustive in its annotations and analysis. Its primary aim is to contribute to constructive, lively dialogue on how to promote an effective, responsive human rights system in ASEAN and beyond, where human rights are protected in practice as well as on paper.

This introductory chapter provides background on ASEAN’s approach to human rights, explains the research methodology applied in this analysis, and includes an executive summary of the publication’s main findings. The analysis proceeds with a discussion of the AHRD’s General Principles and continues numerically by Article.

Precursors to the AHRD
ASEAN was first established in 1967 as a loose security entity involving Indonesia, Malaysia, Philippines, Singapore and Thailand. Faced with numerous communist insurgencies in the region and with some Member States undergoing processes of decolonization, ASEAN was intended to prevent the proliferation of communist ideology and support national development through the promotion of economic growth, regional security alliances and promotion of strong government. Consequently,
ASEAN placed a high premium on principles of sovereignty and non-interference in internal affairs, principles which arguably suited the interests of some of ASEAN’s autocratic governments. ASEAN has expanded over the years to include Brunei, Cambodia, Laos, Myanmar, and Viet Nam.

It was not until the early 1990s that ASEAN as an institution began to cautiously adopt explicit human rights language. In April 1993, in preparation for the World Conference on Human Rights, a number of Asian nations including all the ASEAN Member States, adopted the Bangkok Declaration on human rights. The Declaration affirms the States’ commitment to the UN Charter and the Universal Declaration of Human Rights (UDHR), and stresses principles such as respect for national sovereignty, non-interference in the internal affairs of States, non-confrontation, avoidance of politicization, emphasis on social and economic progress, and the right to development. Later that year, ASEAN Foreign Ministers agreed that “ASEAN should consider the establishment of an appropriate regional mechanism on human rights” to support implementation of the Vienna Declaration and Programme of Action (VDPA).

At its General Assembly in September 1993, the ASEAN Inter-Parliamentary Organization (AIPO) adopted the Kuala Lumpur Declaration on Human Rights. The document states that human rights protection “should take place in the context of international cooperation based on respect for national sovereignty, territorial integrity and non-interference in the internal affairs of states,” and that “human rights have two mutually balancing aspects: those with respect to rights and freedom of the individual, and those which stipulate obligations of the individuals to society and state.” The Declaration additionally recognized that “each country has inherent historical experiences, and changing economic, social, political, and cultural realities and value system[s]” can influence human rights.

Both declarations reflect some resistance to claims concerning the universality of rights and the protection of individual civil and political rights, as well as an internalization of the concept of ‘Asian Values’. This concept was propounded in the early 1990s by ASEAN leaders such as Prime Minister Mahathir Mohamad of Malaysia and Prime Minister Lee Kuan Yew of Singapore. Such leaders extolled the virtue of qualities such as respect for authority and communitarianism, and suggested that the emphasis placed on individual liberty in Western-style democracies did not lend itself well to the Asian cultural context. This framework lent itself to a view that Asian societies would tolerate constraints on certain individual freedoms in order to guarantee social stability and economic growth. Though the concept of ‘Asian values’ faded as a driving policy force in the wake of the 1997 Asian Financial Crisis, a “defensive and cautious attitude” towards human rights persists within ASEAN nearly 20 years later. It is reflected in part in the low ratification rates of core UN human rights treaties and the nature of the reservations entered against their provisions. It is against this background that the establishment of ASEAN human rights bodies and the AHRD must be assessed.

At the 13th ASEAN Summit in Singapore in November 2007, the ten heads of state adopted the ASEAN Charter, which established ASEAN as a formal legal entity. The Charter recognizes a number of foundational ASEAN principles, including respect for “territorial integrity and national identity” and “non-interference in the internal affairs of Member States.” However, it also calls for adherence to
democratic principles, the rule of law, and the promotion and protection of human rights. The Charter stipulates that ASEAN shall establish a human rights body, which led to the creation of the ASEAN Intergovernmental Commission on Human Rights (AICHR) in 2009.

The AICHR consists of ten government-appointed representatives. It is an intergovernmental, consultative body, with no formal compliance or enforcement procedures. There is no mechanism through which states or individuals may submit complaints to the AICHR or pursue remedies for human rights violations, which differentiates it from the African, Inter-American and European regional systems. The AICHR’s terms of reference provide it with a broad but vague mandate, tasking the entity with the development of an “ASEAN Human Rights Declaration with a view to establishing a framework for human rights cooperation through various ASEAN conventions and other instruments dealing with human rights.”

The AICHR appointed a team of human rights experts from each of the ASEAN Member States to draft the AHRD. Once a final draft was produced, the AICHR entered into closed door discussions over its provisions. Despite repeated calls from civil society organizations (CSOs) to provide input on the AHRD text, it was not until September 2012 that a draft was formally circulated. Some individual AICHR Representatives conducted informal public consultations in their own countries, and the AICHR held two formal consultations with carefully selected CSOs in May and September 2012.

The AHRD was adopted in November 2012 at the 21st ASEAN Summit in Phnom Penh, Cambodia. Adopted alongside the AHRD was the Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration, which was designed to assuage concerns that the AHRD would weaken human rights protection in the region. In the Statement, ASEAN heads of state reaffirmed that the AHRD would be implemented “in accordance with our commitment to the Charter of the United Nations, the Universal Declaration of Human Rights, the VDPA, and other international human rights instruments to which ASEAN Member States are parties, as well as to relevant ASEAN declarations and instruments pertaining to human rights.” Notably, the principle of “non-interference in the internal affairs of ASEAN Member States” is not included in the AHRD, in contrast to previous ASEAN human rights instruments.

After its adoption, the AHRD drew criticism. The general principles relating to balancing human rights with corresponding duties, considering human rights within different regional and national contexts, and limiting human rights on the basis of national security and public safety and morality were cited as particularly problematic. According to the UN Human Rights Council’s Coordinating Committee on Special Procedures, “advocating a balance between human rights and duties creates much greater scope for Governments to place arbitrary, disproportionate and unnecessary restrictions on human rights.” Similarly, the Committee stated that with respect to restrictions on rights on grounds of morality, public order, and national security, “special procedures mandate holders are acutely aware of the risk of these terms being used as a pretext by Governments to place arbitrary, disproportionate and unnecessary restrictions on human rights.” Observers also criticized language in the Declaration that recognizes human rights only to the extent provided by national law.
Mixed responses to the AHRD have created some uncertainty over the future of ASEAN’s relatively young human rights system. Because of its weaknesses, some CSOs reject any use of the AHRD so as to undermine its legitimacy. Other observers view the AHRD as a “pragmatic compromise” among ASEAN’s diverse members and argue that “the new normative standard for human rights in the region should not be underestimated.” AICHR Representative from the Philippines, Rosario Manalo, commented, “it’s not perfect but it’s a new benchmark for ASEAN.”

The subsequent sections on Methodology and Key Findings are intended to shed light on how the AHRD can be understood, and in turn how ASEAN’s human rights system can move forward.

Methodology

This research aims to determine the extent to which the AHRD reflects ASEAN Member States’ existing international obligations under human rights law, its consistency with general international human rights standards, and its ability to advance and expand the scope of the international human rights regime.

As a statement of commitment to a regional human rights agenda, it is important that the AHRD reflect, at minimum, its signatories' pre-existing human rights obligations. This principle drives the first part of this assessment. A second dimension of our assessment recognizes that a regional instrument has the capacity to affirm and amplify the normative influence of international human rights law within a particular social and cultural framework by laying out an aspirational “common standard of achievement” which meets current international human rights standards. The AICHR Terms of Reference and the AHRD both profess to uphold those standards prescribed by the UN Charter, the UDHR, the VDPA, and international human rights treaties to which ASEAN members are parties. By rigorously comparing the AHRD to these instruments, the second prong of our analysis will help to show where there are gaps in consistency and how they can be corrected. Furthermore, by referencing variances amongst states’ current obligations as other regional rights instruments do, this analysis will show the AHRD’s capacity to elevate regional human rights standards above a minimum baseline.

The third element of analysis recognizes that, as a regional document, the AHRD can also advance human rights by addressing rights or principles of special relevance to the region which may not be sufficiently accounted for in the wider international human rights regime. The AHRD drafters intended that the Declaration provide “added value beyond well-established international instruments,” and this analysis will consider how the document contributes to the progression of human rights.

An analytical framework was developed to guide analysis of each provision. For each provision, the research and analysis is divided into three sections. The first section analyzes the differences between the AHRD and the international human rights instrument it draws from, and assesses the extent to which the AHRD either expands or limits the underlying right. Where the AHRD could be strengthened
to better reflect ASEAN Member States’ obligations under international human rights law, suggestions are provided for how this might be accomplished.

The second section will determine the extent to which the right enshrined in each AHRD provision is recognized across ASEAN by considering Member States’ constitutional protections and treaty ratifications relating to the right, as well as other ASEAN declarations which address it. It is important to note that this analysis provides only a rough indication of the importance that Member States attach to a right, let alone the existence of an ASEAN-wide human rights standard. Ratifications of human rights treaties and the existence of constitutional rights do not necessarily correspond with de facto realization of such rights, both positively and negatively; indeed, domestic legislation may provide additional protections beyond those which are established by Member States’ constitutions. However, when rights are consistently recognized in form and substance through widespread treaty ratification or constitutional endorsement, a strong basis to advocate for adequate regional protection of such rights in regional texts is provided. A more in-depth analysis of the legal systems of each ASEAN Member State was beyond the scope of this research, but would add considerably to an understanding of regional human rights norms. While this publication strives to be comprehensive in its approach, it is not exhaustive in its annotations and analysis on this issue, and further research on this matter is welcomed.

The final and third section provides a summary of the content and interpretation of the underlying right in international law. This is intended to serve as a reference for human rights analysts and advocates in providing input on the wording of ASEAN human rights texts and their subsequent interpretation. The section follows the framework articulated in the AICHR Terms of Reference and the AHRD, which both commit AICHR to upholding human rights standards as prescribed by the UDHR, the VDPA, and international human rights instruments to which ASEAN Member States are parties. The analysis considers how each right in the AHRD is reflected in the UDHR, VDPA, and regional and international human rights treaties, referring to case law where required to expand upon the right’s content.

**Key Findings**

The AHRD includes both progressive and problematic elements. As mentioned above, it does not legally act to undermine ASEAN Member States’ international treaty obligations. Article 40 of the AHRD and the Phnom Penh Statement adopted by ASEAN Heads of State alongside the Declaration furthermore require that the AHRD be interpreted in a manner consistent with the existing human rights obligations of ASEAN Member States. These elements provide grounds for reading down some of the Declaration’s problematic provisions, and interpreting terms in favor of the right.

The AHRD includes a number of positive aspects:

- Highlights the importance of the rights of vulnerable and marginalised groups;
- Reinstates the UDHR right to property and protection against arbitrary deprivation of property which was omitted in the International Convention on Civil and Political Rights (ICCPR) and International Convention on Economic, Social and Civil Rights (ICESCR);
• Contains an expanded version of the right to an adequate standard of living which explicitly recognizes clean drinking water and sanitation, and a safe, clean and sustainable environment, as well as adequate and affordable housing and food, as elements of this right;\textsuperscript{35}

• Recognizes a need to prevent discrimination against persons with HIV/AIDS and other communicable diseases;\textsuperscript{36}

• Includes the right to development, while recognizing that the right to development must be exercised in a manner consistent with other human rights;\textsuperscript{37}

• Moves beyond the lowest common denominator as a standard for ASEAN human rights instruments, which in this case would be the UDHR, the Convention on Rights of the Child (CRC) and the Convention on the Elimination of Discrimination Against Women (CEDAW). The AHRD is largely based upon the UDHR, but elements of the ICESCR (special protection of motherhood, progressive realization of social, economic and cultural rights) and ICCPR (prohibition against double-jeopardy) are integrated into the AHRD text despite only six ASEAN Member States being party to the treaties.\textsuperscript{38}

The problematic elements of the AHRD include provisions that could be invoked to undermine human rights in the region, those which represent a mischaracterisation of international human rights law, and those which present an inconsistency with the international obligations of ASEAN Member States. The negative impact of such elements on human rights protection in the region could be mitigated, however, by the establishment of an independent human rights body tasked to apply and enforce the AHRD in a manner consistent with international law.

However, there are several key points of concern:

• The AHRD’s general limitation clause in article 8 of its opening principles undermines its acknowledgement of the non-derogable or absolute nature of several human rights under customary law and the ICCPR.\textsuperscript{39} Article 8 follows the UDHR,\textsuperscript{40} but jurisprudence regarding rights limitations has developed since 1948 when the UDHR was adopted. International human rights instruments now tend to take a right by right approach, making the scope of permissible limitations narrower and more precise. In this context, the fact that the AHRD theoretically permits all enshrined rights to be limited “by law solely for the purpose of securing due recognition for the human rights and fundamental freedoms of others, and to meet the just requirements of national security, public order, public health, public safety, public morality, as well as the general welfare of the peoples in a democratic society”\textsuperscript{41} threatens to create inconsistency with ASEAN Member States’ existing obligations. For example, freedom from slavery and torture are considered rights under customary law, and no state may permit torture or slavery to exist. However, the limitation clause could be used by Member States to justify their derogation from the established principle. Although there are few circumstances in which torture could imaginably assist to “secure” the human rights of others, it is arguably safer and legally correct to specify the absolute nature of the prohibition against torture and other non-derogable rights more generally.
The AHRD calls for States to balance personal duties of an individual against their rights, and to take into account “national and regional contexts” in the realization of those rights. Articles 6 and 7 have their roots in previous Asian human rights declarations, and might constitute an attempt by ASEAN to infuse the AHRD with a regional flavour. Nevertheless, such language carries the risk of tying the realization of rights to unspecified “duties” or to social norms and mores which run counter to the requirements of international human rights treaties such as CEDAW and the CRC, both of which have been ratified by all ASEAN Member States. Whether these provisions will be interpreted and applied in a manner which violates international human rights norms remains to be seen, but the language raises some concerns.

Absent from the AHRD are the right to self-determination, the right to freedom from forced labour, a clear prohibition against enforced disappearance, the freedom to manifest and change one’s religion, and the right to freedom of association, all of which various ASEAN Member States have recognized in international declarations or treaties.

The AHRD provides that rights be regulated by law or national law. Domestic legislation is certainly an effective way of achieving human rights protections, as long as such legislation actually comports with international human rights standards. The AHRD contains no clear statement requiring this compliance or consistency, meaning that it in theory permits ASEAN Member States to, for example, “guarantee” the right to a nationality simply through compliance with domestic immigration and citizenship laws, regardless of their content, effect, and compliance with relevant international instruments.

Additionally, the AHRD could have better incorporated the more detailed obligations of Member States under ILO and UN human rights treaties to which they are all signatories or parties, but perhaps this detail is best addressed in a future convention.

The inclusion of the right to peace in the AHRD, while novel, may not necessarily be a positive development, particularly insofar as it may shield from accountability alleged perpetrators of human rights abuse. Much depends upon how this right develops in international law, and how it is applied within the ASEAN region.

Conclusion

The AHRD provides an important foundation for the development of future binding human rights instruments in the ASEAN region, both in terms of lessons that can be learned from its drafting process as well as its substantive content.

From a process-based perspective, the drafting process for any further human rights instruments should be supported with substantial legal expertise from a team of individuals with in-depth knowledge of international human rights law, at all stages of the process. Although the AICHR’s team of experts was
present during the AHRD’s initial drafting stages, they were not involved in the reformulation of the draft. Second, the process must include CSOs at all stages; such organizations bring substantial rights expertise to the table, as well as invaluable insight into the potential practical impacts of draft provisions.

From a content-based perspective, although the development of international legal texts is inevitably political and subject to negotiation, ASEAN should agree to a minimum set of human rights standards which future texts must at least meet and could conceivably surpass. This standard should be comprised of the complete international bill of human rights including the UDHR, ICCPR and the ICESCR. Additionally, explanatory notes could be provided alongside the text to allow for discussion of the meaning and interpretation of different terms, and to provide sufficient insight for human rights implementers who might look to the document for guidance.

Finally, ASEAN is fortunate in that it has decades of experience from other regional human rights systems to draw on which could serve as a model for its own. The basic components of the African, Inter-American and European regional human rights systems are:

i) a binding human rights convention;
ii) additional protocols to supplement the more general convention;
iii) an independent body, established by treaty, to interpret and apply the convention; and
iv) a range of treaty enforcement measures, including a complaint mechanism for individuals and/or states parties.

An ASEAN human rights convention must not only include a comprehensive bill of rights, but also the machinery required to establish an effective treaty enforcement mechanism. While text is an undeniably important first step, ultimately, the actual value of a human rights instrument – whether it be the AHRD or a later binding instrument – will be assessed by the role it plays in motivating concrete actions to improve human rights for the people of ASEAN.
The General Principles

The General Principles represent a problematic part of the AHRD. Although they incorporate customary human rights law principles such as universality, non-discrimination, equality, additional protection for vulnerable social groups, and state responsibility to uphold human rights, they also contain language that could be interpreted to impose unjustifiably broad limitations on rights. It is important, therefore, that the Declaration is interpreted and applied in accordance with established human rights jurisprudence which emphasizes the principle of effectiveness and the object and purpose of human rights instruments. The European Court of Human Rights has described the principle of effectiveness as one requiring the interpretation and application the European Human Rights Convention “in a manner which renders its rights practical and effective, not theoretical and illusory,” and that the Convention “must be also be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions.” These interpretive principles, together with those international human rights instruments to which the ASEAN Member States are parties, require that the AHRD’s limiting and restricting clauses be read narrowly and in a manner which gives maximum effect to the rights it enshrines.
Universality, Non-discrimination, and Equality

AHHRD Art. 1: All persons are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of humanity.

AHHRD Art. 2: Every person is entitled to the rights and freedoms set forth herein, without distinction of any kind, such as race, gender, age, language, religion, political or other opinion, national or social origin, economic status, birth, disability or other status.

AHHRD Art. 3: Every person has the right of recognition everywhere as a person before the law. Every person is equal before the law. Every person is entitled without discrimination to equal protection of the law.

AHHRD Art. 4: The rights of women, children, the elderly, persons with disabilities, migrant workers, and vulnerable and marginalised groups are an inalienable, integral and indivisible part of human rights and fundamental freedoms.

The first three articles of the AHRD mirror provisions in the UDHR. The AHRD differs slightly from the UDHR, the ICCPR, and ICESCR-prohibited discrimination grounds by removing the word “colour,” replacing “sex” with “gender,” and “property” with “economic status.” The AHRD also includes age and disability as additional grounds of prohibited discrimination. The efforts of LGBTQ activists to have “sexual orientation” included in this list were unsuccessful; however, the word “gender” can be interpreted to include transgendered persons, and the residuary language in Article 2 could be extended to cover other groups, including those within the LGBTQ framework.

Article 3 promulgates the right to recognition and equality before the law, borrowing its wording from articles 6 and 7 of the UDHR.

Article 4’s recognition that the rights of “vulnerable and marginalized groups are an inalienable, integral and indivisible part of human rights...” may have its roots in the 1993 Bangkok Declaration. The 1993 Declaration emphasizes “the importance of guaranteeing the human rights and fundamental freedoms of vulnerable groups such as ethnic, national, racial, religious and linguistic minorities, migrant workers, disabled persons, indigenous peoples, refugees and displaced persons.” Although the AHRD’s drafters did not accept CSO suggestions that Article 4 explicitly recognize minorities, indigenous peoples, persons deprived of liberty, or LGBTQ persons as those “whose human rights have been under attack both within ASEAN and globally,” read in light of the Bangkok Declaration’s language such groups would have reasonable grounds to demonstrate that they fall under the Article’s protection.
The Right to a Remedy

AHRD Art. 5: Every person has the right to an effective and enforceable remedy, to be determined by a court or other competent authorities, for acts violating the rights granted to that person by the constitution or by law.

Article 5 is almost identical to the UDHR language on the right to a remedy. The AHRD does not require signatories to provide remedies for violations of the rights recognized in the AHRD, a predictable feature for a non-binding instrument. However, in order to be consistent with Member States’ existing international legal obligations, the word “law” in Article 5 must be interpreted to include human rights recognized by customary international law and human rights treaties that Member States have ratified. For example, ASEAN Member States which are parties to the ICCPR, CRC, International Convention on the Elimination of Racial Discrimination (ICERD), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) have all agreed to ensure the right to a remedy for violations of the human rights contained in these conventions.

There is a distinction between a right inherently held by a person because they are human, and a right conferred upon a person by national law or constitutions. The ratification of an international human rights treaty does not always translate to domestic codification of the principles laid out in that treaty. As such, a narrow interpretation of Article 5 as a right to a remedy only for those rights otherwise protected by ASEAN Member States’ national laws would run the risk of undermining an ASEAN resident’s right to a remedy.

Any future ASEAN human rights convention should, like other regional human rights conventions, recognize the right to a remedy for violations of the rights it protects, and indeed facilitate the development of a tribunal to provide such a remedy. This is an important demonstration of states’ commitment to protect and enforce the rights enshrined in a treaty which they sign, ratify and bind themselves under. A convention should also recognize the two elements of the right to a remedy: access to justice before an independent and competent tribunal, on the one hand, and substantive redress, on the other. Furthermore, it should evince a commitment to investigate, prosecute and punish gross human rights violations constituting crimes under international law. Finally, the convention should contain provision for an independent oversight body to monitor implementation of treaty obligations and provide a forum where individuals can seek remedies when national-level justice mechanisms fail. In the absence of such a well-resourced and independent enforcement body, a binding convention would have no more substantive impact than a non-binding declaration like the AHRD on the actual rights enjoyed by residents and citizens of ASEAN.

ASEAN Member States’ International Legal and Constitutional Obligations

ASEAN Member States have a legal obligation to prevent and remedy violations of fundamental human rights (such as slavery and torture) which are established through customary law norms, in addition to those rights which they have agreed to protect through treaty ratification. Six ASEAN Member States
have ratified the ICCPR and ICERD, and CEDAW and the CRC have both been ratified by all the Member States. These conventions all require states parties to ensure the effective protection of people from discrimination and violations of their human rights through the mechanisms of law and the courts. The Convention on the Rights of Persons with Disabilities (CRPD), signed by all ASEAN Member States and ratified by eight, requires states parties to make changes to their domestic legal system to protect the rights of persons with disabilities, and ensure that they have access to justice.

The Constitutions of Myanmar and Thailand provide a right to a remedy for violations of constitutional rights, and the Constitutions of Lao PDR, Cambodia, and Viet Nam provide a right to complain or petition against any violation of the law. The Viet Nam Constitution includes a right to compensation for violations of citizens’ rights. The Philippine Constitution contains a right to access the courts, and the Constitution of Indonesia recognizes the right to recognition, protection, protection and certainty of the law, but not a specific right to a remedy.

Content and Interpretation of the Right in International Law

It is a long established principle that a right to a remedy exists for harm caused through breach of an international legal obligation. The UDHR recognizes a right to a remedy for “acts violating the fundamental rights granted him by the constitution or by law.” The VDPA widens this right to a remedy to include redress for all “human rights grievances or violations.” The European Convention and Arab Charter on Human Rights include a right to a remedy for the rights enumerated in the respective conventions, and the African Charter on Human and People’s Rights and the American Convention on Human Rights acknowledge a right to a remedy for both convention-established rights and those fundamental rights recognized under domestic law. States parties to these regional conventions must guarantee victims’ rights to a remedy for violations of fundamental rights, whether enshrined in national law or not, by having in place administrative or judicial mechanisms for claim investigation and victim reparation.

In 2005, the UN General Assembly, through the adoption of the Basic Principles and Guidelines on the Right to a Remedy and Reparations, affirmed victims’ right to a remedy and reparation for gross violations of international human rights law and serious violations of international humanitarian law, stressing in the preamble that the Basic Principles do not create new law but provide guidance on how states can comply with their “existing obligations under international human rights and international humanitarian law.”

An effective remedy must be accessible and, once determined, enforceable. It must provide the opportunity for domestic judicial or administrative body to consider the merits of a victim’s claim, guarantee the independence of the authority determining the remedy, include mechanisms that are able to take into account the special vulnerability of certain categories of victims, and provide access to the remedy without unreasonable delay.
The exact content of an effective remedy depends largely upon the nature and circumstances of the violation. Remedies should be proportionate to and address the actual harm suffered. For example, an adequate remedy for enforced disappearance might involve locating the victim, securing his/her release from detention when possible, and ensuring payment of compensation. For undue restrictions on freedom of religion, an effective remedy might involve amending the unduly restrictive law or laws in question.

When a human rights violation constitutes a crime under national or international law, the violation must be investigated and its perpetrators prosecuted, in addition to providing reparation for victims. The UN Basic Principles and Guidelines affirm these three elements and introduce an additional right for victims to access information about the violation. The Inter-American human rights system has recognized victims’ right to truth regarding violations suffered, particularly in cases of enforced disappearance. Both the Inter-American Court of Human Rights and the African Commission on Human and People’s Rights have held that the granting of amnesty to perpetrators of criminal violations violates victims’ right to a to the investigation of the complaint, to the prosecution of the alleged perpetrators and the right to redress.

Victim reparations include a range of different measures designed to remedy the harm caused by the human rights violation. These may include measures to assist a victim in overcoming health, discrimination, or other problems caused by the violation; reinstatement of property or civil status; monetary compensation; recognition of the harm caused through apologies or other symbolic means; changes to laws to prevent recurrence of the violation; or the satisfaction caused by punishment of perpetrators.

The right to a remedy attaches to persons who have suffered harm as a result of a human rights violation, their immediate family or dependents, and persons who have suffered harm by intervening to assist victims.
Duties and Rights

*AHRD Art. 6: 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.*

**Individual Duties**

Article 6’s use of the phrase “must be balanced” appears to subject an individual’s enjoyment of his or her human rights to the performance of unspecified “corresponding duties.” Such a broad reading of Article 6 would fundamentally conflict with the notion that human rights are universal and inalienable, and an integral aspect of one’s humanity. The principle of universality provides that all people have the same rights and is recognized in Articles 1 and 2 of the AHRD, and the principle of inalienability ensures that an individual’s human rights cannot be taken away. The suspension or limitation of human rights—even if permissible—cannot be presumed valid; rather, they must be justified by a compelling state interest, and put into place through law.

In using the term “balance” to describe the relationship between human rights and duties, the AHRD references the AICHR’s Terms of Reference, which require the body to “promote human rights within the regional context” while “taking into account the balance between rights and responsibilities.” A 1993 ASEAN Inter-Parliamentary Organization (AIPO) Declaration on Human Rights also contains similar language, providing that “the peoples of ASEAN recognize that human rights have two mutually balancing aspects: those with respect to rights and freedom of the individual, and those which stipulate obligations of the individuals to society and state.”

A January 2012 draft of the AHRD included ten variations of Article 6 under the heading “Duties and Responsibilities,” highlighting the importance that Member States attached to the inclusion of duties in the Declaration. The closest formulation to Article 6 in this early draft read,

“The parameters of the enjoyment and exercise of human rights and fundamental freedoms is dependent on the fulfilment of duties and responsibilities towards other individuals, societies, future generations and the State. The rights of persons are inseparable from their duties. The State protects these rights and the persons fulfil their duties towards the State and society.”

The Viet Nam Constitution, from which the above draft provision takes inspiration, provides that “[t]he rights of citizens are inseparable from citizen’s duties”, and the Constitutions of Indonesia and Lao PDR also identify a relationship between rights and duties. The Constitution of Thailand includes a chapter on the “Duties of the Thai People” which immediately follows the chapter on fundamental rights and freedoms, but does not suggest that the grant of rights is dependent upon the performance of duties.
The notion of “duties” has been approached in different ways across the various international and regional human rights instruments. Rather than as a clearly defined limitation on rights or as somehow weighing against rights, duties are expressed as closely related to rights, whether expressed as “rights and responsibilities” of parents or spouses, or as a general duty to promote tolerance, non-discrimination, and social welfare. For example, the UDHR states that “[e]veryone has duties to the community” but clearly states that limitations on rights are permissible only for “securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.” The preambles of both the ICCPR and ICESCR recognize that the individual has “duties to other individuals and to the community to which he belongs, and is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant.” The CRPD, which all ASEAN Member States have at least signed, contains a similar provision. 

The American Declaration on the Rights and Duties of Man and the African Charter on Human and Peoples’ Rights both contain lists of individual duties. The list in the American Declaration was not reproduced in the later American Convention on Human Rights, which instead included a general responsibility to family, community, and mankind. Neither the Inter-American Court nor the Commission on Human Rights have ever invoked the duties provisions of the Convention and Declaration.

In order to allay concerns that Article 6 will be applied to unreasonably limit the application of human rights, any future ASEAN human rights texts should omit this notion of balancing rights and duties and clearly indicate that, to the extent that individuals owe each other duties, they are general duties intended to reinforce and support human rights and fundamental freedoms. Notably, the ASEAN Charter under Article 1(7) does not refer to this act of balancing, but rather to the promotion of human rights “with due regard to the rights and responsibilities of the Member States of ASEAN.” This language supports a broad construction of duties, and could serve as a useful starting point from which to review the duty provisions in future AICHR-drafted instruments.

**State Duty to Respect, Protect and Fulfil**

All states have an obligation to respect, protect, and fulfil human rights. **Respect** requires that state agents refrain from acting in a way that negatively affects the enjoyment of human rights. **Protection** requires the state to take proactive steps to prevent human rights abuses by private actors. **Fulfilment** demands the introduction of laws, policies, and judicial or administrative measures to realize human rights.

Even though the AHRD is a non-binding instrument, Article 6 contains an unequivocal statement of the state responsibility to “promote and protect all human rights and fundamental freedoms.” This is an improvement on early Declarations such as the UDHR and American Declaration on the Rights and Duties of Man, which make no reference to such an obligation. The AHRD may have taken inspiration...
from the 1993 Bangkok Declaration, which asserts that “[s]tates have the primary responsibility for the promotion and protection of human rights through appropriate infrastructure and mechanisms.”  

Under human rights treaties, the state’s obligation to guarantee economic, social, and cultural rights differs slightly from the obligation to protect civil and political rights. States have an immediate obligation to take steps to guarantee fundamental civil and political rights, whereas economic, social, and cultural rights must be guaranteed to a minimum standard initially, after which states must work progressively towards full realization of these rights. This approach recognizes that not all states have sufficient resources to provide immediate and universal access to, for example, high-quality health and education services, but envisions that states will eventually have the capacity to do so. To that end, states are required to continuously improve enjoyment of economic, social, and cultural rights. This obligation of progressive realization is reproduced in Article 33 of the AHRD.

An ASEAN human rights convention, as a binding treaty, would require a clear statement on signatory obligations. For example, the European Human Rights Convention provides that “[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined” in the convention, while the American Convention requires that states parties “undertake to respect the rights and freedoms recognized [therein] and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination,” and requires them to adopt “such legislative or other measures as may be necessary to give effect to those rights or freedoms.”

In order to give effect to Member States’ obligations under a regional human rights convention, as mentioned above in relation to the right to a remedy, ASEAN will also need to establish a mechanism to monitor and uphold human rights treaty obligations. In the African, American and European human rights systems, this has been done through the hearing and adjudication of individual complaints by treaty-established commissions or courts.
Universality and Regional and National Particularities

AHRD Art. 7: 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 realization 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.

Article 7 is based on the Vienna Declaration and Program of Action, which states that

“All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”

International human rights discourse recognizes the “universal, indivisible and interdependent and interrelated” nature of human rights. It accepts that economic, social, and cultural rights must be accorded equal priority to political and civil rights and that the failure to guarantee the enjoyment of one right will negatively impact the enjoyment of others. The Vienna Declaration reinforces the universal nature of all human rights by making it clear that the duty of states to promote and protect human rights applies regardless of differences in their political, economic, and cultural systems. To this end, all international human rights conventions require states parties to take steps, including the alteration of domestic laws, to give effect to protected rights.

The Vienna Convention on the Law of Treaties asserts that states cannot use national law as a reason for failing to comply with their treaty obligations; nor can ‘local culture or tradition’ justify curtailing of human rights. CEDAW and the CRC particularly emphasize that states parties have an overriding obligation to uphold the principles of non-discrimination and equality and protect the rights of women and children even in the face of contrary traditional attitudes; to that end, states parties are obliged to adapt or eliminate laws that lead to violations of these principles.

In spite of this emphasis on universality in the international human rights framework, regional human rights instruments often acknowledge that local traditions, values, heritage and culture can inspire a commitment to follow international human rights precedents and strengthen regional unity. The African and European human rights systems, for example, explicitly acknowledge the importance of cultural diversity while nonetheless emphasizing the ultimate universality of human rights. In this light, the AHRD’s requirement that the realization of human rights requires consideration of regional and national contexts does not wholly depart from other regional norms. Still, civil society organizations have
criticized this language as an attempt to revive arguments of cultural relativism that pit “Asian values” against Western individual rights, and see them as diametrically opposed.\textsuperscript{105}

The practical impact of Article 7 on the implementation of the AHRD depends greatly upon how it is interpreted and applied. The realization of human rights is influenced by a country or region’s political, cultural, and economic realities. Indeed, human rights tribunals have all developed doctrines or standards of review that accord some deference to local authorities (such as the European ‘margin of appreciation’ doctrine),\textsuperscript{106} at least on issues where no regional or global consensus exists. Given the past prominence of the Asian values debate among the ASEAN Member States, however, civil society organizations are rightly wary of wording suggesting that rights be granted subject to national or regional particularities. When read together with the AHRD’s repeated endorsement of the UDHR, international human rights treaties to which ASEAN Member States are parties, and past practices in other regional rights systems, Article 7 does lend itself to an interpretation that recognizes diversity but does not allow it to trump universal rights.\textsuperscript{107}

In order to dispel any doubt regarding its commitment to universal, internationally recognized human rights, ASEAN would be wise, in a future convention, to underline the duty of states to promote and protect human rights regardless of aspects of their political, economic, and cultural systems that would otherwise serve to undermine the realization of human rights on the ground.
Limitation on Rights

AHRD Art. 8: The human rights and fundamental freedoms of every person shall be exercised with due regard to the human rights and fundamental freedoms of others.

The exercise of human rights and fundamental freedoms shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition for the human rights and fundamental freedoms of others, and to meet the just requirements of national security, public order, public health, public safety, public morality, as well as the general welfare of the peoples in a democratic society.

Article 8 is problematic, as it fails to recognize that some human rights can never, under any circumstances, be restricted by the state. Its language is borrowed from the UDHR, which states that

“In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”

Since 1948, international law on derogation from treaty obligations and limitations of rights has developed significantly through the adoption of the ICCPR, ICESCR, and regional human rights conventions, as well as the work of the bodies tasked with overseeing treaty interpretation and implementation. Derogations are temporary, emergency suspensions of certain treaty obligations. Limitations are everyday restrictions on how a right is exercised or enjoyed. Limitation clauses in the ICCPR and ICESCR are designed to prevent imposing unrealistic obligations on state parties by recognizing that most human rights are not absolute, and that the public interest does in some circumstances require restrictions on individual rights. Additionally, they allow for resolution of potential conflicts between rights, such as that which exists between the right to freedom of expression and the right to privacy.

Derogations from civil and political rights protected in the ICCPR may only be made in strict accordance with the ICCPR itself. Some civil and political rights are non-derogable, meaning that there are no circumstances which justify states party restrictions on them. Non-derogable provisions in the ICCPR include those which cover the right to life; the right to freedom from torture or cruel, inhuman, or degrading treatment and punishment; the right to freedom from slavery and servitude; the right to not be imprisoned for contractual breach; the right to non-retroactive application of criminal law; the right to recognition as a person before the law; and the right to have or to adopt a religion or belief. In 2001, the UN Human Rights Committee stated that several other rights have become non-derogable international legal norms, including the right of detainees to be treated with humanity, as well as prohibitions against taking of hostages, abductions, or unacknowledged detention. The European
Convention on Human Rights recognizes the rights to life, freedom from torture, slavery, and non-retroactive application of criminal law as non-derogable, and the American and Arab human rights treaties contain a more expansive list of non-derogable rights surpassing even those recognized in the ICCPR. 113

States parties are permitted to temporarily suspend derogable ICCPR rights in order to respond to officially declared “public emergenc[ies] which threaten[] the life of the nation,” as long as such derogations are limited to those necessary to address the emergency at hand, do not contravene international law, and are non-discriminatory.114 Such emergencies must be of an “exceptional and temporary nature,” and must cease as soon as the threat to the life of the nation has been addressed.115 Regional human rights conventions have adopted similar criteria for justifying derogations from convention rights, with the exception of the African Charter, which does not allow for any derogation by states parties.116

Emergency situations aside, the ICCPR provides that certain rights may be limited if done so by law and in specific circumstances. The rights to freedom of movement, expression, press and public access to court proceedings, manifestation of one’s religion or beliefs, and peaceful assembly and association may generally all be limited to the extent necessary to protect national security, public order or safety, public health, morals, or the rights of others.117 The rights to freedom of movement and peaceful assembly and association also require that the restriction be “necessary in a democratic society.”118 Limitations must be precisely and narrowly defined by law, be proportional to the legitimate public aim pursued by the limitation, be interpreted in favour of the right, and cannot act to destroy the right completely.119

The AHRD does not contain non-derogation provisions, which is consistent with the AHRD’s status as a non-binding declaration. However, the absolute nature of certain civil and political rights has become a principle of customary international law, binding upon even non-parties to the ICCPR.120 Article 8, by allowing the enjoyment of all AHRD rights to be limited on grounds of national security, public order, public health, public safety, public morality, and the general welfare of the peoples in a democratic society, is inconsistent with all ASEAN Member States’ international obligations to guarantee absolutely freedom from torture, slavery and ex post facto laws.

The ICESCR does not specify circumstances in which individual convention rights may be derogated from or limited, except for the right to establish and participate in trade unions.121 Instead, the ICESCR provides that all convention rights may be limited by law but only “so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”122 During the drafting of the ICESCR, state delegates determined that the ICCPR’s permissible grounds for derogation—public order, morals, public health, and the rights of others—were not relevant to economic, social, and cultural rights.123 The European Social Charter takes a different approach, recognizing limitations on the standard ICCPR grounds.124 Subjecting all the rights in the AHRD to a broad set of limitations results in a more expansive limitation of economic, social and cultural rights than provided under the ICESCR, to which six ASEAN Member States are parties.
A future ASEAN human rights convention must clearly identify which rights are regionally perceived as important enough to be non-derogable, and clearly distinguish the conditions under which derogable rights may be suspended or limited by law. A limitation provision which applies to all enumerated rights under the AHRD would leave too much room for the possibility of state abuse, and would in addition fall below the international rights standards set by the ICCPR, ICESCR, and other regional human rights instruments. The adoption of a right-by-right approach would allow future drafters to carefully consider matters of regional importance, ensure that civil and political rights are limited in accordance with the ICCPR, and subject limitations on economic, social and cultural rights only to those to promote the general welfare in a democratic society.
Double Standards and Peoples’ Participation

AHRD Art. 9: 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 take into account peoples’ participation, inclusivity and the need for accountability.

The meaning of Article 9 is ambiguous, and nothing of its kind appears in the UDHR. The first sentence seems to reiterate the principle of non-discrimination outlined in AHRD Article 2 by further stressing impartiality, objectivity, and non-selectivity in realizing human rights. Much of the language of this sentence first appeared in the Bangkok Declaration of 1993, which was aimed at eliminating “selectivity” and guaranteeing a “non-confrontational approach” in relation to other states and the UN when addressing human rights. The Bangkok Declaration also called for the avoidance of double-standards and politicization in the implementation of human rights; this language was reproduced in U.N. General Assembly resolution 60/251 of 2006, which created the Human Rights Council.

The Vienna Declaration also includes the principles of objectivity and non-selectivity.

Much of the language of Article 9 also appears in the AICHR Terms of Reference. Article 2.2 states that a guiding principle of the Commission is “[r]espect for international human rights principles . . . impartiality, objectivity, non-selectivity, non-discrimination, and avoidance of double standards and politicisation.” The addition of non-confrontation to Article 9 reflects ASEAN’s origins as a regional security organization and the ASEAN Charter’s principles of peaceful resolution of conflict and rejection of aggression.

What is unclear, however, is whether the language of Article 9 is intended to address the formulation of domestic human rights law within AHRD signatory states, or the forces underlying the international human rights regime. “Avoidance of double standards” as a guiding principle for domestic incorporation would require that states avoid applying different standards of human rights protection to different individuals or groups within their territory. However, the AHRD’s drafters may have intended to stress that the same human rights standards be applied equally to all members of the international community. One commentary on the AHRD describes Article 9 as “an awkward negotiation of the competing interests of describing human rights standards while limiting the sovereignty costs of doing so.”

The inclusion of similar text in the UN resolution establishing the Human Rights Council demonstrates that such tension is not just of concern to the ASEAN Member States but also other nations.

The second sentence of Article 9 mentions “peoples’ participation,” with the plural “peoples’” indicating the participation of groups in realizing human rights. It is unlikely that this refers to incorporating group rights into the process of realizing human rights, as Member States refused to mention indigenous rights.
in the AHRD. Instead, it appears that this article was intended simply to indicate that popular participation in the process of realizing human rights is desirable, perhaps to counter criticism of the AICHR’s failure to engage meaningfully with civil society in the region. Finally, the meaning of “the need for accountability” is unclear in the context of this article. Grammatically, it applies to “the process of . . . realization,” but it likely simply indicates that Member States need to be held accountable for ensuring human rights in their countries, as well as the general need for transparency.

Before including this article as a general principle in a future ASEAN human rights convention, it should be more clear. If the language in the first sentence is truly directed at an external, non-ASEAN audience, then its inclusion in a regional convention is unnecessary. If it is aimed at ensuring the universal and objective application of human rights obligations to all ASEAN Member States, then it should state this fact. Alternatively, should Article 9 instead be a reiteration of the ideals of non-discrimination, impartiality, non-selectivity, and other principles of fairness in the realization of human rights within a state, then the drafters of a future convention should incorporate it into a general non-discrimination clause. If the second sentence means to emphasize the importance of broad public participation in the process of realizing the human rights and freedoms included in a convention and the need for the Member States’ governments to be held accountable for their realization, then a convention should state these concepts clearly.
The Right to Life

**AHRD Art. 11: Every person has an inherent right to life which shall be protected by law. No person shall be deprived of life save in accordance with law.**

The first statement of Article 11, which provides for the legal protection of the “inherent right to life,” reflects the text of the UDHR and other international human rights instruments. However, the second statement that “[n]o person shall be deprived of life save in accordance with law,” differs from most international instruments, which require that deprivation of life be both lawful and non-arbitrary. By omitting the prohibition on arbitrary deprivation of life which appears in the ICCPR, the AHRD leaves vague the procedural safeguards or restrictions that Member States must have in place to uphold the right to life in a meaningful way. Non-arbitrary application of the death penalty, for example, requires that the penalty not only be lawful but also reasonable in the circumstances of the case, protecting against unjust laws or the unreasonable application of the laws.

As mentioned above in relation to the AHRD right to a remedy, any reference to “law” should be interpreted broadly to include customary international law and human rights treaties ratified by ASEAN Member States; such an interpretation will help to ensure that national laws governing rights be consistent with a state’s international human rights obligations.

The right to life is a non-derogable right, but is also not absolute in the sense that there are limitations which attach to aspects of its implementation. In particular, the ICCPR establishes the right to be free from arbitrary deprivation of life, which implies that there are circumstances under which a non-arbitrary deprivation of life would not constitute a human rights violation. For example, the state may legally end a person’s life in the course of legitimate law enforcement activity or in the legitimately sanctioned application of the death penalty. However, it is inconsistent with international human rights standards to place such liberal limitations on the right to life as provided for under the AHRD.

Any future ASEAN human rights convention should provide for more robust protection of the right to life by including a prohibition against unlawful and arbitrary deprivation of life, making it clear that the law governing issues related to deprivation of life must be consistent with international customary law and respective Member States’ human rights treaty obligations. It should also include procedural protections which may include a requirement that the death penalty only be applied with respect to the most serious crimes, pursuant to a final court judgment and never applied to pregnant women or minors. Additionally, a future ASEAN human rights convention should not apply the limitations contained in the AHRD general principles to the right to life, but recognize the right as non-derogable.

**ASEAN Member States’ International Legal and Constitutional Obligations**

ASEAN Member States are obligated to protect the right to life as recognized under the UDHR provision for the right to “life, liberty and security of person,” which is widely recognized as a basis for international customary law and treaties.
In terms of human rights treaty obligations, six ASEAN Member States have ratified the ICCPR, which includes the inherent, non-derogable right to life and obligates parties to protect that right by law and prevent arbitrary deprivation of life. The ICCPR also requires Member States that continue to impose capital punishment to limit its application to only the most serious crimes and to take necessary measures that protect defendants’ dignity. ASEAN Member States, with the exception of Cambodia and the Philippines, retain the death penalty for ordinary crimes, which is inconsistent with international law and the obligations of Indonesia, Thailand, Viet Nam and Lao PDR under the ICCPR.

All ASEAN Member States must protect the child’s “inherent right to life,” as stipulated in the CRC and are prohibited from imposing capital punishment on individuals below the age of eighteen. The CRPD, which has been ratified by eight member states, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), which has been ratified by two respectively recognize the right to life of persons with disabilities and migrant workers.

Importantly, the majority of ASEAN Member States—Cambodia, Indonesia, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Viet Nam—protect the right to life in their national constitutions. While Lao PDR does not provide specifically for the right to life, the Constitution recognizes the inviolability of Lao citizens’ bodies. Only the Indonesian constitution stipulates that the right to life is non-derogable and prohibits limitations under any circumstances. The constitutions of Malaysia, Singapore, and Myanmar allow for limitations on the right of life according to law, while the Philippines permits the death penalty only for compelling reasons involving heinous crimes. The Cambodian constitution explicitly prohibits capital punishment.

**Content and Interpretation of the Right in International Law**

The right to life derives from the concept that a human being has the right to live and should not be unjustly killed by another human being, including agents of the state. It is the “supreme” human right, without which other human rights have little meaning. The right encompasses issues such as extrajudicial killings by state agents, imposition of the death penalty, and enforced disappearance. It also has special relevance in the contexts of law enforcement, prison and custodial settings, and health care.

The UDHR states that “[e]veryone has the right to life, liberty and security of person.” Building upon this principle, the ICCPR, CRC, CRPD and the ICRMW recognize this “inherent” right to life and require state protection of the right. The African, Arab, American, and European regional human rights treaties also recognize this core right.

The ICCPR and regional human rights conventions prohibit any derogation from the right to life, meaning that even in times of public emergency, the state cannot justify deprivation of life in a manner inconsistent with its human rights obligations. The UN Human Rights Committee has stated that
provisions in the ICCPR that represent customary international law, including the right not to be arbitrarily deprived of life, may not be subject to reservations.\textsuperscript{153}

Recognizing the importance of this right, international instruments impose both positive and negative obligations upon states. States must not only refrain from taking a life arbitrarily but also act to protect against the loss of life through preventive law and enforcement mechanisms.\textsuperscript{154} State actions to protect the right to life may include training security forces to use deadly force only when necessary, investigating and punishing wrongful acts resulting in death, and protecting persons in state custody. Issues such as homelessness, infant mortality, and life expectancy are also relevant to the state obligation to protect the right to life.\textsuperscript{155}

The prohibition against arbitrary deprivation of life primarily relates to controlling and limiting the circumstances in which state authorities may use lethal force, and protecting against violent crimes committed by private citizens. It incorporates a procedural obligation to assure the right to life and to guarantee that any deprivation of life by the state occurs through a process that is clearly established by law and subject to due process.\textsuperscript{156} “Arbitrary deprivation of life” includes killings committed for political reasons,\textsuperscript{157} deaths as a result of torture or any other cruel, inhuman or degrading treatment,\textsuperscript{158} and killings following kidnapping or forced disappearance.\textsuperscript{159} Alleged state violations of the right to life must be thoroughly investigated and punished in a timely manner.\textsuperscript{160}

A deprivation of life resulting from the acts of law enforcement officials must comply with the principles of necessity and proportionality.\textsuperscript{161} The UN Code of Conduct for Law Enforcement Officials establishes that "[l]aw enforcement officials may use force only in exceptional circumstances and only to the extent required for the performance of their duty."\textsuperscript{162} In addition, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials emphasize that law enforcement officials, in carrying out their duties, should apply non-violent means before resorting to the use of force and firearms.\textsuperscript{163}

The imposition of the death penalty is not universally considered a violation of the right to life, although there is a clear trend towards its abolition and human rights treaties exist both globally and regionally that bar the use of this punishment by states parties. State policies to employ the death penalty can comply with international law if the crime is sufficiently serious, due process rights are respected, and the method of execution is not deemed cruel or inhuman treatment. Nevertheless, the ICCPR and CRC, in addition to African regional human rights instruments, stipulate at minimum a highly restrictive approach to applying the death penalty.\textsuperscript{164} Additional protocols to the ICCPR and the American and European regional instruments encourage the abolition of the death penalty.\textsuperscript{165}

Most instruments provide that the death penalty can be imposed only for the “most serious crimes” in accordance with national law and in compliance with human rights provisions.\textsuperscript{166} The imposition of such a harsh sentence must be accompanied by procedural guarantees to ensure the presumption of innocence, fair hearings by an independent tribunal, guarantees for an adequate defence, and the right to appeal.\textsuperscript{167} Other requirements include accounting for whether the death penalty disproportionately
affects minorities when applied, and exempting certain protected groups from the death penalty, such as children, the elderly, or pregnant women.
Right to Liberty and Security of Person

*AHRD Art. 12: Every person has the right to personal liberty and security. No person shall be subject to arbitrary arrest, search, detention, abduction or any other form of deprivation of liberty.*

Although Article 12 does not follow the UDHR and ICCPR’s language relating to the “right to liberty and security of person,” this does not necessarily mean that it limits the application of these rights in ASEAN. Article 12 adopts the language of the American Convention on Human Rights by recognizing the “right to personal liberty and security” instead of the more common “right to liberty and security of person.” The Inter-American Human Rights system has interpreted “personal liberty and security” in a manner consistent with the UDHR and ICCPR’s sister provisions, and relies on the American Convention’s prohibitions against torture and inhuman treatment to define the right to security of person. Additionally, the AHRD’s endorsement of all UDHR rights confirms that wording in this first sentence of Article 12 should not act to limit the rights’ application.

However, the AHRD does omit the ICCPR prohibition on unlawful deprivation of liberty, which states that “[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” This places an important positive obligation on states to define by law the conditions under which an individual may be deprived of his or her liberty. Additionally, the AHRD lacks procedural protections designed to prevent unlawful or arbitrary arrest or detention, such as the right to be informed of the reasons for one’s arrest, the right to challenge the legality of one’s detention before the courts, the right to claim compensation from the state for unlawful detention, and—in the case of criminal charges—the right to a trial within a reasonable time and the right to be considered for bail.

The AHRD also subjects liberty and security of person to the limitations clauses in its general principles. The UN Human Rights Committee and the UN Working Group on Arbitrary Detention have stated that there are no circumstances that would justify derogation from the right to freedom from arbitrary detention, *incommunicado* detention, abduction, and the right to challenge the legality of one’s detention in court. Any application of the general principles to allow arbitrary detention on grounds of national security, for example, is thus likely to be inconsistent with ASEAN Member States international human rights obligations.

A future ASEAN human rights convention should rephrase the right to include freedom from unlawful as well as arbitrary deprivation of liberty, imposing a positive obligation on Member States to put in place legislation governing arrest and detention. Incorporation of procedural rights allowing individuals to challenge and seek remedy for wrongful arrest and detention would ensure that a convention more accurately describes the scope of the state obligation to guard against unlawful and arbitrary arrest or detention.

Reportedly, the AHRD’s drafting body inserted language regarding “abduction or any other form of [arbitrary] deprivation of liberty” as a compromise to offer protection against enforced disappearance.
without explicitly using the term.\textsuperscript{177} Enforced disappearance is a distinct human rights violation that cannot be equated with arbitrary detention and abduction,\textsuperscript{178} although these violations may be subsumed by it. Any future convention should include an explicit right to freedom from enforced disappearance and take associated steps associated with its prevention, including state obligations to allow detainees to communicate with their families and to maintain registers of detainees.\textsuperscript{179}

**ASEAN Member States’ International Legal and Constitutional Obligations**

Six ASEAN Member States have ratified the ICCPR, which guarantees the right to liberty and security of persons within their borders.\textsuperscript{180} Five other core human rights treaties recognize and protect the right to liberty and security of person: the ICERD, CRC, CRPD, ICRMW, and the International Convention for the Protection of All Persons from Enforced Disappearance (CPED).\textsuperscript{181} Each ASEAN member state has ratified at least one of these treaties.\textsuperscript{182}

Although only one ASEAN member state has ratified the CPED,\textsuperscript{183} the 1993 Declaration on the Protection of All Persons from Enforced Disappearance which the General Assembly adopted by consensus provides that States shall “take effective legislative, administrative, judicial or other measures to prevent and terminate acts of enforced disappearance in any territory under its jurisdiction”.\textsuperscript{184}

Eight Member States’ constitutions reinforce the international obligation to uphold liberty and security of person. With the exceptions of Brunei Darussalam and Indonesia, ASEAN Member States recognize a constitutional right to be protected against, at minimum, unlawful arrest and detention.\textsuperscript{185} National constitutions protect procedural rights designed to protect against wrongful arrest and detention to varying extents. For example, only Malaysia and Singapore recognize the right to be informed about the reasons for one’s arrest,\textsuperscript{186} and only four member state constitutions include the right to challenge the legality of one’s detention and/or be brought before a judge within a certain period of time.\textsuperscript{187}

**Content and Interpretation of the Right in International Law**

The UDHR includes the right to liberty and security in two articles. It first provides that “[e]veryone has the right to life, liberty and security of person,” and second that “no one shall be subjected to arbitrary arrest, detention or exile.”\textsuperscript{188} The ICCPR combines these into a single provision.\textsuperscript{189} The ICERD recognizes the right to security of person against violence or bodily harm in the context of eliminating racial discrimination,\textsuperscript{190} and the CRC, CRPD, and ICRMW provide additional protections related to the security of person and liberty of children, persons with disabilities, and migrant workers. For example, the CRC provides that children’s imprisonment is to be “a measure of last resort” and “for the shortest time possible,” the CRPD notes that having a disability cannot in itself justify deprivation of liberty, and the ICRMW establishes that migrant workers have rights to “protection against violence, physical injury, threats and intimidation” and consular assistance when detained.\textsuperscript{191}

“Liberty of person” concerns freedom from confinement of the body, and “security of person” concerns freedom from bodily injury for both detained and non-detained persons. Liberty of person is a key right, as detention is often the precursor or enabler to other violations, such as torture or extra-judicial
killing. Although the right to liberty is not absolute, any type of deprivation of liberty, including police, immigration, psychiatric or prison detention, must be both lawful and non-arbitrary.

Arbitrary and unlawful detentions are not the same thing. An arrest or detention is unlawful if it is not based on grounds and carried out in accordance with procedures that are clearly established in domestic law. An arrest or detention, even if in accordance with domestic law, can be arbitrary if not reasonable or necessary given the circumstances of the case. The UN Human Rights Committee has stated that “arbitrariness” involves “the inappropriateness, injustice, and lack of predictability” of the detention.

Procedural rights designed to prevent unlawful or arbitrary arrest or detention include a right to be immediately informed about the reasons for one’s arrest, to be promptly informed of any charges laid, and a right to a substantive and real review of grounds justifying detention and procedures through which a person was detained. State suspension of the right to challenge the legality of one’s detention violates the right to liberty and security of person. If an individual’s detention is found to be unlawful, then he or she is entitled to compensation.

Persons detained on criminal charges are entitled to a trial within a reasonable time and to release pending trial, if granting bail is in the public interest. An individual’s continued pre-trial detention can only be justified if there are clear public interest grounds, such as flight risk or danger to the community. The “reasonableness” of the length of legal proceedings will depend on the circumstances of each case, but both the Inter-American and European human rights courts have agreed that the complexity of the case, procedural actions taken by the accused, and the diligence of the investigating and prosecuting authorities must be taken into account.

Enforced disappearance is a distinct human rights violation that involves:

i) deprivation of liberty in any form,
ii) by the state or persons acting with the state’s authorization, support or acquiescence and accompanied by,
iii) a refusal to acknowledge the victim’s detention or provide information about his or her whereabouts or fate,
iv) which places a person outside the protection of the law.

The CPED outlines steps that states parties must take to prevent detention from leading to enforced disappearance, such as maintaining registers of prisoners, and allowing detainees to communicate with their families. The European and Inter-American human rights courts have both characterized enforced disappearance as a violation of the right to freedom from torture and the right to life.
Prohibition of Slavery, Servitude, Smuggling, and Trafficking

AHRD Art. 13: No person shall be held in servitude or slavery in any of its forms, or be subject to human smuggling or trafficking in persons, including for the purpose of trafficking in human organs.

The AHRD’s extension of the UDHR’s right to freedom from servitude and slavery to include a prohibition against trafficking in persons and human organs is commendable, it expands upon the obligation imposed upon states by African, European and Arab regional human rights to prevent and prosecute trafficking in persons. Although trafficking is often linked to the imposition of forced labor, however, there are many circumstances constituting forced labor which do not qualify as human trafficking. Although the inclusion of trafficking in the AHRD as a prohibited human rights violation is an important first step, it does not remedy the failure to recognize the broader right to freedom from forced labor.

Freedom from forced labor was included in an earlier draft of Article 13; however, it was omitted from the final document on the grounds that AICHR representatives viewed servitude and forced labor as equivalent violations, and intended for Article 13 to prohibit both. However, “forced labor” is more clearly defined in international law than “servitude,” and inclusion of forced labor in this AHRD provision would have reflected the existing legal obligations of ASEAN Member States as members of the International Labour Organization (ILO) and as signatories to the ILO Conventions on Forced and Child Labour. Article 27 of the AHRD does recognize the right to free choice of employment and just conditions of work, but the concept of forced labor in the ILO Conventions encompasses a wider range of violations than those envisaged in article 13 and 27 of the AHRD. For example, situations where a worker is not able to terminate a contract with reasonable notice, or where workers who are employed voluntarily are effectively coerced to work overtime, may constitute forced labor.

The AHRD could have contained a clearer statement regarding the absolute nature of the right to freedom from slavery and servitude. There are no circumstances under which a state can justify permitting conditions of slavery or servitude, and yet the application of the AHRD general principles to Article 13 could at least theoretically lead states to claim that they may restrict enjoyment of freedom from slavery and servitude in the name of, for example, national security.

The AHRD’s recognition of a right not to be subject to human smuggling is unique. However, it is debatable whether the creation of such a right is appropriate or provides any additional protection to migrants. Unlike trafficking, in which the victim is coerced or deceived into undertaking some form of travel or activity against his or her will, smuggling is undertaken with the migrant’s consent. Smuggling also does not necessarily involve exploitation, although the irregular nature of the migration renders smuggled migrants more vulnerable to exploitation. For many asylum seekers, being smuggled out of their country into another is the only way in which they can escape persecution. It is hard to imagine circumstances falling short of trafficking in which an individual would insist upon his or her right not to be smuggled.
A future ASEAN human rights convention should disallow slavery and servitude unconditionally, as well as include an obligation to prohibit and eliminate forced labor consistent with international law. The right to freedom from smuggling should be removed, as this right does not exist in international law, nor does it make sense to create one.

**ASEAN Member States’ International Legal and Constitutional Obligations**

*Slavery and Servitude*

All ASEAN Member States must prohibit slavery, as this is a customary international legal obligation binding all states. Slavery is prohibited in the constitutions of five ASEAN Member States, whereas the other five make no reference to slavery at all.

Forced Labor

All ASEAN Member States except Brunei Darussalam are party to the 1930 ILO Forced Labour Convention (No. 29), under which signatories commit to “suppress the use of forced or compulsory labour.” All Member States have ratified the 1999 ILO Worst Forms of Child Labour Convention (No. 182), and four Member States have adopted the 1957 ILO Abolition of Forced Labour Convention (No. 105). Singapore and Malaysia withdrew from the 1957 Convention over disagreement with the ILO view that compulsory prison labor could constitute forced labor. As members of ILO, all ASEAN Member States have subscribed to the 1944 Declaration of Philadelphia which, as part of the ILO Constitution, recognizes that “labour is not a commodity,” and the 1998 Declaration on Fundamental Principles and Rights at Work, which states that

> “...all [ILO] Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the [ILO] to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:
> (a) freedom of association and the effective recognition of the right to collective bargaining;
> (b) the elimination of all forms of forced or compulsory labour;
> (c) the effective abolition of child labour; and
> (d) the elimination of discrimination in respect of employment and occupation.”

Six ASEAN Member States have ratified the ICCPR, which also prohibits forced labor.

On the basis of the widespread ratification of the ILO conventions and the recognition of the right to freedom from forced labor in international human rights instruments, the ILO believes that the prohibition of the use of forced or compulsory labor constitutes “a peremptory norm of international law on human rights . . . of an absolutely binding nature from which no exception is permitted.”

Malaysia, Myanmar, Singapore, and Thailand prohibit forced labor in their constitutions, and the Philippines Constitution provides a right to freedom from “involuntary servitude.” The Constitution of
Indonesia recognizes the right of all citizens to work and earn a humane livelihood, which could be interpreted to prohibit forced labor for Indonesian citizens.\textsuperscript{219} Only the Constitution of Myanmar prohibits trafficking in persons.\textsuperscript{220} ASEAN Member States’ widespread ratification of the ILO Forced and Child Labour Conventions and the constitutional prohibitions in six ASEAN Member States is a strong indication of a regional consensus on the impermissibility of forced labor. As such, it would have made sense for the AHRD’s drafters to explicitly include forced labor language in the document.

\textit{Trafficking and Smuggling in Persons}

All ASEAN Member States have ratified the UN Convention against Transnational Organized Crime, and eight of the ten Member States have committed to prosecute traffickers and protect victims under the Convention’s Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the Palermo Protocol).\textsuperscript{221} Under the CRC, ASEAN Member States must take measures to prevent trafficking in children.\textsuperscript{222} Only five ASEAN Member States have ratified the Transnational Organized Crime Convention Protocol against the Smuggling of Migrants by Land, Sea and Air.\textsuperscript{223}

In 2004, the ASEAN heads of state and government adopted the ASEAN Declaration against Trafficking in Persons, Particularly Women and Children,\textsuperscript{224} followed by the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers in 2007.\textsuperscript{225} In these Declarations, ASEAN Member States commit to prevent trafficking and smuggling, but only so far as already provided for in their domestic laws.\textsuperscript{226} The ASEAN Senior Officials Meeting on Transnational Crime is currently leading the drafting of a convention on the prevention of human trafficking, which is due for adoption in 2015.\textsuperscript{227} Member States are also working to finalize the text of a binding instrument on migrant workers’ rights.\textsuperscript{228}

\textbf{Content and Interpretation of the Right in International Law}

\textit{Slavery and Servitude}

Slavery is defined in the 1926 Slavery Convention as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”\textsuperscript{229} Servitude is not clearly defined in international law, but it does differ from slavery as it does not involve any claim of ownership over a person. The Special Rapporteur on Contemporary Forms of Slavery has stated that servitude is similar to slavery in that “the victim is economically exploited, totally dependent on other individuals and cannot end the relationship at his or her own volition.”\textsuperscript{230} An early draft of the UN Protocol on Trafficking in Persons defined servitude as “the status or dependency of a person who is compelled by another person to render any service and who reasonably believes that he or she had no reasonable alternative but to perform the service.”\textsuperscript{231} The UDHR, ICCPR, the UN Slavery Conventions of 1926 and 1956, and the European, American, Arab, and African regional human rights instruments all prohibit slavery and servitude.\textsuperscript{232}

\textit{Forced Labor}

ILO Convention No. 29 defines forced labor as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”\textsuperscript{233} Forced labor is distinguished from slavery in that it omits the element of ownership; however, like
slavery, there is a degree of limitation on personal liberty which may be violently imposed. The three elements of forced labor are understood broadly. For example, “all work or service” means that the convention extends protection to all workers, including those in the informal economy. A “penalty” could include a loss of rights or privileges, physical violence or restraint, death threats addressed to the victim or relatives, threats to denounce victims working illegally to the police or immigration authorities, or economic penalties. “Voluntary” refers to an employment undertaken with the free and informed consent of the worker, and the freedom to terminate an employment relationship. Compulsory military service, normal civic obligations, work or service exacted from any person as a consequence of a conviction in a court of law, any work or service exacted in cases of emergency, and minor communal services are not considered forced labor under the 1930 ILO Convention.

The ILO Abolition of Forced Labour Convention, 1957 (No. 105) was designed to supplement but not revise or replace the 1930 convention. The 1957 convention prohibits forced or compulsory labor “as a means of political coercion or education or as a punishment for holding or expressing political views...as a punishment for having participated in strikes...[or] as a means of racial, social, national or religious discrimination,” linking forced labor to the human rights principle of non-discrimination. Complementing the ILO conventions, a number of core UN and regional human rights conventions also forbid forced labor.

*Trafficking and Smuggling in Persons*

The internationally-recognized definitions of trafficking and smuggling are contained in two supplementary treaties to the UN Convention against Transnational Organized Crime. Of the core UN human rights treaties, only the CRC and its Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography contain express prohibitions against trafficking.

Trafficking involves three elements:

1. an act of recruiting, transporting, harboring, or receiving a potential victim;
2. the use of threats, payments, abuse of power, or deception; and
3. an intention to exploit the victim.

Exploitation includes, at minimum, “sexual exploitation, forced labour, slavery or practices similar to slavery, servitude or the removal of organs.” Victim consent to the type of exploitation experienced is irrelevant if coercion, force or deceit was used in recruiting, transporting, harboring on receiving a victim. With children, there is no need to establish that there was coercion of the victim. Trafficking of children occurs when there is any recruitment, transport or receipt of a child with intent to exploit. Smuggling of persons occurs when a smuggler receives a material benefit related to migration and the migrants illegally cross an international border. Due to their irregular status, smuggled persons are vulnerable to falling victim to trafficking, servitude, or forced labor. However, as smuggling most often involves voluntary migration, there is no human right to not be smuggled, although the Optional Protocol does impose obligations on state signatories to protect smuggled migrants against
exploitation. Trafficking, on the other hand, involves an element of coercion or deception which, in situations involving migration, renders the migration involuntary.
Prohibition against Torture

*AHRD Art. 14: No person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.*

The AHRD wording of the prohibition against torture or cruel, inhuman, or degrading treatment or punishment mirrors that of the UDHR and the ICCPR. However, it is concerning that the prohibition against torture may be subject to the AHRD’s general limitations clause.\(^{246}\) International human rights law does not allow the state, under any circumstances, to place limitations on the right to freedom from torture. Indeed, the European Court of Human Rights, the Inter-American Court of Human Rights, and the International Criminal Tribunal for the Former Yugoslavia have all held that the prohibition of torture is an international *jus cogens* norm.\(^{247}\) However, though a January 2012 draft of the AHRD recognized that the freedom from torture was a non-derogable right and enshrined Member States’ non-refoulement obligations, these provisions were omitted from the final version of the AHRD. These principles should nonetheless be seen as implicit in the general prohibition against torture and cruel, inhuman or degrading treatment or punishment.\(^{248}\)

A future ASEAN human rights convention should explicitly recognize the non-derogable, absolute nature of the right to freedom from torture. The right could be further bolstered by including a prohibition on deportation of persons to countries where they are likely to suffer torture or inhuman treatment (the right to non-refoulement). Additionally, the convention should also contain a clear statement of Member States’ obligation to investigate suspected acts of torture, to punish those found guilty and to take steps to prevent torture. These obligations derive from CAT, which states that “[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”\(^{249}\)

**ASEAN Member States’ International Legal and Constitutional Obligations**

The right to freedom from torture, cruel, inhuman, or degrading treatment or punishment, like the prohibition against slavery, is a *jus cogens* norm under customary international law.\(^{250}\) All ASEAN Member States have an international legal obligation to respect, protect, and fulfil the right to freedom from torture, regardless of whether they have ratified the human rights treaties that explicitly prohibit torture.

Five international human rights treaties—the ICCPR, CAT, CRC, ICRMW, and CRPD—explicitly protect the right to freedom from torture.\(^{251}\) Only the CRC enjoys full ratification of all ten ASEAN Member States, followed by CRPD with eight, ICCPR with six, CAT with five, and ICRMW with two.\(^{252}\)

Three ASEAN Member States have constitutions that prohibit torture and cruel, inhumane and degrading treatment or punishment. Only the Constitution of Indonesia recognizes this as a non-derogable right.\(^{253}\) The right to freedom from cruel, inhumane, and degrading treatment or punishment
is expressed in three other member state constitutions as either a guarantee against physical abuse and protection of citizens’ dignity,\textsuperscript{254} or as a right to physical inviolability.\textsuperscript{255}

Content and Interpretation of the Right in International Law

Torture is defined in the CAT as the:

i) intentional infliction of

ii) severe physical or mental pain or suffering,

iii) either directly by or with the indirect involvement or acquiescence of a public official or any other person acting in an official capacity,

iv) for a specific purpose, such as to obtain information.\textsuperscript{256}

The CAT does not prevent regional human rights systems or national legislation from adopting a broader definition of torture.\textsuperscript{257}

While it does clearly define torture, international law does not provide a precise definition of cruel, inhuman or degrading treatment or punishment. The UN Human Rights Committee has stated that whether an act constitutes torture, cruel, inhuman, or degrading treatment will depend upon “the nature, purpose and severity of the treatment applied.”\textsuperscript{258} Case law from the UN and regional human rights systems has provided numerous examples of treatment or punishment that may be cruel, inhuman, or degrading. Freedom from torture or cruel, inhuman, or degrading treatment also includes freedom from medical or scientific experimentation without consent.\textsuperscript{259}

The prohibition against torture and cruel, inhuman, or degrading treatment is absolute and is not subject to derogation, even in times war or threat of war, internal political instability, or any other public emergency.\textsuperscript{260} An order from an officer or other public authority may not be used as a defense against a charge of torture.\textsuperscript{261}

States must criminalize acts of torture, provide a range of legislative, administrative, and judicial measures to prevent and punish acts of torture and cruel, inhuman, and degrading treatment,\textsuperscript{262} and ensure victims’ access to effective remedies.\textsuperscript{263} States must also prohibit the admission of evidence obtained through torture in courts.\textsuperscript{264} Furthermore, states may not grant amnesty to those who perpetrate torture.\textsuperscript{265} Lastly, states have a non-refoulement obligation, under which they may not return or extradite a person to another country where there is a significant danger that he or she will be subjected to torture.\textsuperscript{266}

States should pay particular attention to groups that are especially vulnerable to the harmful effects of torture. Certain prison conditions have been determined to amount to torture, including overcrowding\textsuperscript{267} and prolonged solitary confinement.\textsuperscript{268} To this end, states should cease practices of solitary confinement or incommunicado detention, and should create special regulations in domestic law for the treatment of detained people due to their vulnerability to acts of torture.\textsuperscript{269} The CRPD requires state parties to prevent torture and ill-treatment of persons with disabilities on an equal basis
with others.\textsuperscript{270} States should also give special consideration to the vulnerability of children, patients in medical institutions, women, and migrant workers to torture and ill-treatment.\textsuperscript{271} Specifically, the Committee against Torture has recognized rape and gender-based violence as constituting torture in some circumstances.\textsuperscript{272}
Freedom of Movement

AHRD Art. 15: Every person has the right to freedom of movement and residence within the borders of each State. Every person has the right to leave any country including his or her own, and to return to his or her country.

The AHRD mirrors the UDHR right to freedom of movement in providing for a more expansive interpretation than that which is provided under the ICCPR. The ICCPR limits the right to freedom of movement and abode within a state to “everyone lawfully within the territory,” whereas the UDHR grants this right to all people regardless of their legal status.

This right could be further strengthened in an ASEAN human rights convention by including additional protection against arbitrary, unlawful and collective expulsion from a country for both nationals and non-nationals. This would require that Member States establish predictable, transparent and fair legal procedures for determining whether an individual can stay within a country or not.

ASEAN Member States’ International Legal and Constitutional Obligations
Six ASEAN Member States have ratified the ICCPR. Therefore, they have binding international legal obligations to guarantee the right to freedom of movement of persons legally within their borders and to protect against the arbitrary expulsion of aliens. The ICERD, CRC, CRPD, and ICRMW also recognize and protect the right to freedom of movement. All ASEAN Member States have ratified at least two of these conventions, with the exception of Brunei Darussalam, which has ratified the CRC but as yet has only signed the CRPD.

The right to leave one’s country of origin in order to escape persecution and seek asylum in another country is a principle of customary international law that applies to all nations, regardless of whether they are signatory to the 1951 Convention and Protocol Relating to the Status of Refugees.

All ASEAN Member States, except Brunei Darussalam, recognize a constitutional right to freedom of movement within the country. Indonesia, the Philippines, and Thailand extend the right to freedom of movement and residence within the state to all persons. In Cambodia, Lao PDR, Myanmar, Malaysia, Singapore, and Viet Nam, the right is held exclusively by citizens. Freedom to leave one’s country and return is recognized for all persons under the Indonesian constitution, and for citizens only constitutions of Cambodia, Malaysia, Thailand, Singapore and Viet Nam.

Content and Interpretation of the Right in International Law
The right to freedom of movement is comprised of:

i. the right to move freely and choose the location of one’s residence within the state (under ICCPR, this is restricted to those lawfully within the state’s territory);

ii. the right to leave any country, including one’s own;
iii. the right to return to one’s own country; and
iv. protection from arbitrary and unlawful expulsion for aliens.²⁷⁹

The right to move freely within a state relates to the whole territory of a state and cannot be contingent upon permission from, for example, a male relative or the state authorities.²⁸⁰ Arbitrary or unlawful house arrest, exile, or unreasonable prohibition on travelling to a particular region or town constitutes a breach of the right to freedom of movement.²⁸¹ The right to freedom of movement and choice of residence within a country is particularly important for internally displaced persons to ensure that they have the freedom to choose to return to their place of origin, or resettle in another part of the country.

The rights to leave a country and return to one’s own encompass the right to travel documents. A refusal to issue a passport or travel documents or preventing an individual from leaving or returning to his or her own country can constitute a violation of the right to freedom of movement.²⁸² The UN Human Rights Committee has stated that the right to return to one’s country as laid out under ICCPR is not one held exclusively by citizens, but also by “an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien.”²⁸³

A state can only restrict freedom of movement if it is done by law, and only to the extent necessary for protecting national security, public order, public health or morals, or the rights and freedoms of others.²⁸⁴ Limitations on this right must be consistent with other civil political rights, be transparent and accessible, and not act to “impair the essence of the right [to freedom of movement], or reverse the relation between right and restriction, between norm and exception.”²⁸⁵ The right to freedom of movement is derogable and can thus be suspended or limited on a temporary basis and only so far as necessary to address a “public emergency which threatens the life of the nation.”²⁸⁶

The right to freedom of movement is recognized in the Arab, European, African, and Inter-American regional human rights charters in largely the same form as in the ICCPR, with an additional prohibition against collective expulsion of aliens.²⁸⁷
Right to Asylum

_AHRD Art. 16: Every person has the right to seek and receive asylum in another State in accordance with the laws of such State and applicable international agreements._

The right to asylum in the AHRD is most similar to that enumerated in the 1948 American Declaration on the Rights and Duties of Man.²⁸⁸

The phrase “applicable international agreements” most broadly refers to the UDHR, the Vienna Declaration, and the Asian-African Legal Consultative Organization (AALCO) Bangkok Principles on the Status and Treatment of Refugees, as only two ASEAN Member States have acceded to the 1951 Refugee Convention.²⁸⁹ The UDHR, Vienna Declaration, and Bangkok Principles affirm the fundamental right to seek and enjoy asylum from persecution in another state and uphold refugees’ right to return to their country of origin.²⁹⁰ The Bangkok Principles additionally recognize the customary legal principle of non-refoulement, or the right not to be returned to a territory where one’s life, physical integrity or liberty is threatened.²⁹¹

The reference to applicable international agreements may anticipate that ASEAN will draft a specific asylum treaty in the future. At present, however, no ASEAN instruments exist to elaborate further on the right to asylum or to clarify the extent to which refugees and asylum-seekers are entitled to other rights in the destination state.

For the AHRD to accurately reflect ASEAN Member States’ existing international legal obligations with regards to the right to asylum, the phrase “applicable international agreements” must be interpreted expansively to include customary international law and particularly the right to non-refoulement. An early draft version of the AHRD did contain a right to non-refoulement, but it was removed from the final adopted text.²⁹²

The drafters of a future ASEAN human rights convention should strengthen the AHRD right to asylum by either removing the reference to “national law and applicable international agreements,” or by replacing this with the phrase “national and applicable international law.” This modification would require national asylum procedures to be consistent with both treaty and customary law.

Additionally, a convention should explicitly recognize the principle of non-refoulement, specify the grounds upon which asylum may be sought, and articulate other rights held by refugees and asylum-seekers.²⁹³ Finally, ASEAN Member States may consider the adoption of an exclusion clause which would prevent those persons seriously suspected of having committed an international crime from being granted refugee protection.
ASEAN Member States’ International Legal and Constitutional Obligations

The right to non-refoulement, discussed more in depth below, is a principle of customary international law, binding all States, whether or not they have ratified the 1951 Refugee Convention. The right to non-refoulement is also a state obligation that arises as part of the duty to prevent torture and other cruel, inhuman or degrading treatment. Six ASEAN Member States have ratified the CAT, which prohibits expulsion, return or extradition of persons to a country where they are likely to be subjected to torture.

An individual’s right to leave his or her country of origin in order to seek asylum is likewise a principle of customary international law. However, ASEAN Member States are under no corresponding obligation to grant asylum. Receiving states may determine whether or not to grant asylum through their own procedures, as long as such procedures are fair, efficient and in accordance with applicable international standards.

All ASEAN Member States have endorsed the UDHR and Vienna Declaration and Program of Action, which recognize the right to seek and enjoy asylum from persecution. All ASEAN Member States have also ratified the CRC, which recognizes the need to provide special protections to child asylum seekers and refugees and the prohibition against non-refoulement. However, Cambodia and the Philippines are the only two ASEAN states who are signatory to the 1951 Refugee Convention, and as such are the only ones who currently have established, government-administered status determination procedures for refugees.

The right to seek asylum is guaranteed in the Constitutions of Indonesia, Lao PDR, and Viet Nam. The Constitution of Indonesia links the grant of political asylum to the right to be free from torture or inhumane and degrading treatment, while Lao PDR and Viet Nam allow asylum for those who are persecuted due to their “struggle for freedom and national independence, socialism, democracy and peace, and scientific work.”

Low ratification rates of the 1951 Refugee Convention and the absence of ASEAN instruments addressing asylum seekers or refugees reflect reluctance within the region to strengthen protections for these vulnerable groups.

Content and Interpretation of the Right in International Law

An asylum seeker is a person who, owing to a well-founded fear of persecution in his or her own country, is seeking refuge outside it, and whose formal legal status as a refugee has not yet been officially determined.

Refugees are defined in the 1951 Convention as persons who, “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion,” are unable or unwilling to return to and seek the protection of their country of nationality or “habitual residence.” The UN High Commissioner for Refugees (UNHCR) also considers as refugees
persons who cannot return to their country of origin due to “serious and indiscriminate threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order.” 302 Regional instruments such as the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa and the 1984 Cartagena Declaration on Refugees also extend the definition of refugee to persons fleeing conflict.303

Refugee instruments also commonly contain exclusion clauses preventing some individuals from claiming refugee protections. For example, under the Refugee Convention, if there are serious reasons to believe that an individual has committed an international crime, committed a serious non-political crime prior to seeking refuge in the host country, or has acted contrary to the purposes and principles of the United Nations, he or she may be refused the protection of the Convention. 304 The right of every individual to seek asylum from persecution can be found in the UDHR, the Vienna Declaration, and the core African, American, Arab and European human rights texts.305 The ICCPR does not explicitly mention the right to asylum, but instead provides for protection of the right to freedom of movement, guaranteeing the right to enter and leave one’s country.306

A key element of the right to seek and enjoy asylum is the principle of non-refoulement, which prohibits states from expelling or returning a refugee to a state where his or her life, freedom or bodily integrity would be threatened.307 Compliance with right to seek asylum and the absolute prohibition on refoulement requires states to provide asylum seekers access to a fair refugee status determination procedure.

Additionally, under the Refugee Convention, refugees have the right to free movement and access to courts within the asylum country, as well as the right to be free from punishment for illegal entry into that country. They also have the freedom to pursue work, housing, education, public relief and assistance, and the right to free religious expression. Finally, they must be issued with identity and travel documents.308 These rights are not accorded uniformly or without regard to immigration status. Rather, the enjoyment of certain rights requires a refugee to be lawfully within the host country’s territory; other rights are extended in accordance with “the most favourable treatment accorded to aliens in the same circumstances,” and in some circumstances, refugees are to be granted “the same treatment as nationals.”309
Right to Property

_AHRD Art. 17: Every person has the right to own, use, dispose of and give that person’s lawfully acquired possessions alone or in association with others. No person shall be arbitrarily deprived of such property._

The right to property as guaranteed in the AHRD is perhaps one of the clearest and most comprehensive statements of the right to property in a regional human rights instrument. An earlier draft of the AHRD included much more restrictive language, stating that the “law may subordinate such use and enjoyment in the general interest of society.” However, some states objected to the limiting language, and it was removed. The right to property is subject to the AHRD’s general limitation clause.

The AHRD’s language on the right to property is nearly identical to that of the UDHR, with the addition of the provision that everyone has the right not only to own possessions but also “use, dispose of and give” them. The AHRD guarantee of property rights in association with others is especially important in the context of indigenous peoples’ rights, because many indigenous groups view land as communally owned. All of the other regional human rights instruments guarantee the right to property, but they are either more restrictive or not as comprehensive in their articulations of the right. As with other human rights instruments, intellectual property is included in the AHRD in a separate article.

A future ASEAN human rights convention should include the right to property as articulated in the AHRD.

ASEAN Member States’ International Legal and Constitutional Obligations

Several ASEAN Member States’ constitutions recognize the right to property with qualifications. For instance, in Cambodia, only citizens have the right not only to own land but also “use, dispose of and give” them. The constitutions of Malaysia and Singapore expressly guarantee the right of religious groups to own property. The Constitution of the Philippines acknowledges the property rights of indigenous communities, corporations, and small property owners and protects intellectual property, in addition to recognizing a general, individual right to property.

Of the international human rights treaties containing the right to property, eight Member States have ratified the CRPD, six have ratified the ICERD, two have ratified the ICRMW, and none have ratified the ILO Convention on Indigenous and Tribal Peoples.

Content and Interpretation of the Right in International Law

The right to property is complex and is interrelated with civil, political, economic, social, and cultural rights. Respect for property rights is often cited as the cornerstone of a successful market economy, and many development assistance projects in developing countries aim to strengthen this part of the countries’ legal frameworks. Additionally, respect for the right to property is closely related to the right to an adequate standard of living, the right to work, and the right to development. The right of indigenous people to collective ownership and use of their lands is important for protecting their
culture, affording them an adequate standard of living, and often political control of their territories. The right is also seen as a civil and political right, particularly in the context of authoritarian regimes that solidify their hold on power through the confiscation of property and ghettoization of populations, such as Apartheid South Africa and Stalinist Russia.

While the right to property was included in the UDHR, controversy over its meaning and the obligations it implies kept it from being included in either the ICCPR or the ICESCR. The UDHR states that:

(1) Everyone has the right to own property alone as well as in association with others, and
(2) No one shall be arbitrarily deprived of his property.319

However, the ideological debate over the nature of economic and political systems during the Cold War and the large-scale nationalization of banks, railways and industries in Western Europe in the 1950s kept the right to property out of the two core UN human rights treaties.320 Several other international human rights instruments do, however, include the right to property.321 For instance, CEDAW grants women the same rights as men with regard to administering property and property within marriage but does not otherwise comment on women’s right to property outside of marriage.322

All the regional human rights systems include the right to property. In the American and European systems, there is a significant amount of case law that has helped to define the right. The European system has ruled on deprivation and compensation, unjustified limitation of property rights, discrimination in inheritance, and continues to hear property confiscation cases from the period of WWII.323 The Inter-American Court has ruled that property also includes immovable, incorporeal, and intangible objects, and that property rights extend to communal property.324
Right to a Nationality

**AHRD Art. 18:** Every person has the right to a nationality as prescribed by law. No person shall be arbitrarily deprived of such nationality nor denied the right to change that nationality.

The AHRD provision on the right to nationality is nearly identical to the UDHR’s, with the exception that the AHRD provision limits the right “as prescribed by law.” This phrasing could be interpreted to mean that ASEAN Member States can fall into compliance with this provision simply by applying current nationality laws, regardless of their content.

The ratification of human rights treaties like the ICCPR and CRC gives rise to an obligation to change national laws in order to give effect to treaty-protected rights. As such, consistency with a state’s international legal obligations requires that the word “law” in this context be interpreted to include both customary international law and those treaties which have been ratified by ASEAN Member States.

A future ASEAN human rights convention should reproduce the exact language of the UDHR and provide that national laws and procedures related to the “the acquisition, renunciation or loss of nationality” be consistent with state obligations under international law.

Furthermore, such a convention would ideally include non-discrimination provisions relating to race and religion, guaranteeing women equal rights to nationality, and taking steps to avoid and reduce statelessness by, for example, granting a child nationality at birth if he or she would otherwise be stateless. Including an additional sub-provision regarding the importance of accessible birth registration procedures would further strengthen the convention protections against statelessness.

**ASEAN Member States’ International Legal and Constitutional Obligations**

Of the ASEAN Member States, only the Philippines has ratified the 1954 Convention on the Status of Stateless Persons. No ASEAN member state has ratified the 1961 Convention on the Reduction of Statelessness; however, this does not mean that ASEAN Member States are free from nationality-related responsibilities under the international human rights regime. The 1954 Convention’s definition of a stateless person is part of customary international law. Furthermore, the ICCPR, CRC, CEDAW, CPRD, ICERD, ICRMW, and the Convention on the Nationality of Married Women all provide protection of the right to a nationality, and all ASEAN Member States have ratified at least two of these core human rights treaties.

Stateless populations are documented in six of the ten ASEAN Member States, with particularly high numbers of stateless persons in Myanmar and Thailand. Migrant and indigenous populations face nationality-related difficulties in some ASEAN Member States. Additionally, the inadequacy of birth registration services in much of the region renders children vulnerable to statelessness, because they are unable to provide proof of place of birth, parentage, or other relevant information required to establish nationality.
No ASEAN Member State’s national constitution explicitly provides for the right to nationality, though Indonesia’s comes the closest in stating that “[e]very person shall have the right to citizenship status.”334 Where stateless persons and deprivation of nationality are mentioned in state constitutions, protections seem vague or limited. The Lao PDR Constitution guarantees that the “rights and freedoms of aliens and apatris [stateless persons] are protected by [national laws].” In particular, they have the right to file claims in court and lodge petitions with government agencies.335 Under the Constitution of Cambodia, “Khmer citizens shall not be deprived of their nationality . . . unless there is a mutual agreement.”336

Content and Interpretation of the Right in International Law
The 1954 Convention and the 1961 Convention, read together with relevant provisions from other international human rights instruments, form the international legal framework addressing statelessness, and the 1954 Convention’s definition of a stateless person as “a person who is not considered as a national by any State under the operation of its law”337 is a part of customary international law. De jure statelessness occurs when an individual is “not considered as a national by any State under the operation of its law.”338 De facto statelessness occurs when individuals may have a nationality by law, but as the result of being “outside the country of their nationality and unable or, for valid reasons, unwilling to avail themselves of the protection of that country,”339 cannot meaningfully access the rights and protections which derive from their nationality.

Nationality is a key right as, in practice, access to public services are often dependent upon membership of a particular national group. Nationality also protects against undue interference in one’s family and private life, as loss of or refusal to grant nationality often leads to a loss of residency rights and vulnerability to expulsion from a state.

The UDHR states that “[e]veryone has the right to nationality” and that “[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”340 The ICCPR and CRC require that children be registered immediately after birth and have the right from birth to acquire a nationality.341 The UN Human Rights Committee has clarified that the obligation to register a birth derives partly from the need to ensure that children have legal personalities, which in turn helps to limit the risks of abduction, trafficking, or other violations. While states are not obligated to grant nationality rights to every child born in their territory, they are “required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he [or she] is born.”342

CEDAW requires that states “grant women equal rights with men to acquire, change or retain their nationality,” and to determine the nationality of their children.343 The CEDAW Committee’s General Recommendation No. 21 further elaborates that “[n]ationality is critical to full participation in society. In general, states confer nationality on those who are born in that country. Nationality can also be acquired by reason of settlement or granted for humanitarian reasons such as statelessness.”344 Women’s nationality should not be automatically altered upon marriage or a spouse’s change of
nationality, although they should have access to privileged naturalization procedures in order to adopt the nationality of their spouse.\textsuperscript{345}

The CRPD and ICERD respectively guarantee the rights of persons with disabilities to a nationality “on an equal basis with others” and prohibit racial discrimination in relation to the granting of nationality.\textsuperscript{346}

The 1954 Convention Relating to the Status of Stateless Persons establishes certain minimum standards for the protection of stateless persons. States parties to the Convention must guarantee that stateless persons have the same access as citizens to to court systems, basic education, and working conditions, and the same access as lawfully-present aliens to employment, housing, and property.\textsuperscript{347} The rights which a stateless person may access increase as their degree of attachment to their state of asylum increases. That is to say, the most basic provisions of the 1954 Convention attach to all persons who fall within the definition of ‘stateless’ and are otherwise within or subject to the jurisdiction of a State.\textsuperscript{348} Additional rights attach to stateless persons on the basis of whether they are lawfully present, lawfully resident, or habitual residents of a particular State.\textsuperscript{349}

The right to nationality encompasses the following principles:

- once born, regardless of gender, race, colour, religion, disability, or migrant status, a person has the right to acquire a nationality;
- marriage or a spouse’s change in nationality should not affect a woman’s nationality or render her stateless;
- men and women have equal rights to transmit nationality to their children;
- an individual should be granted nationality if he would otherwise be stateless; and
- an individual cannot be arbitrarily deprived of his or her nationality.

International instruments make clear that national laws must conform to certain international standards and principles. The 1930 Convention on Certain Questions Relating to the Conflict of Nationality Law provides that “[i]t is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.”\textsuperscript{350} The 1997 European Convention on Nationality provides that “each state shall determine under its own law who are its nationals,” but that such laws are acceptable so far as they are “consistent with applicable international conventions, customary international law and the principles of law recognized with regard to nationality.”\textsuperscript{351} The 2006 Resolution of the Asian-African Legal Consultative Organization on Legal Identity and Statelessness calls for a review of legislation with the purpose of reducing and avoiding statelessness “consistent with fundamental principles of international law,” and urges Member States to take measures to ameliorate the “precarious situation of stateless persons” in their countries.\textsuperscript{352}

Jurisprudence from the Inter-American human rights system emphasizes the principles of non-discrimination, gender equality, and access to effective remedies in the application of citizenship laws,
and otherwise perceives violations of the nationality right as grave offenses.\textsuperscript{353} The African system’s jurisprudence has emphasized measures to guarantee children’s rights to nationality and non-discrimination against non-nationals.\textsuperscript{354} The European system’s jurisprudence has linked deprivation of nationality, such as the erasure of 18,000 persons from the civil registry of the former Yugoslavia to violations of rights to private and family life, rights to an effective remedy, and non-discrimination.\textsuperscript{355}
Right to a Fair Trial

AHRD Art. 20: Every person charged with a criminal offence shall be presumed innocent until proved guilty according to law in a fair and public trial, by a competent, independent and impartial tribunal, at which the accused is guaranteed the right to defence.

No person shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.

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.

The AHRD contains many of the guarantees regarding the right to a fair trial that appear in international human rights instruments, including presumption of innocence, right to a fair and public trial by an independent and impartial tribunal, prohibition of ex post facto law making, and the right not to be tried or punished twice in criminal proceedings for the same offence.

While the AHRD does guarantee the right to defense, it does not specify whether this means the right of the accused to defend him or herself in person or the right to counsel. A January 2012 draft of the AHRD included the requirement that “[e]veryone charged with a criminal offence shall be presumed innocent until proven guilty according to the law and guaranteed with the right to defense, including the right to be defended by counsel of his or her choice,” but the latter part of this sentence was removed from the final version.

As a general declaration of rights, the AHRD does not include those procedural protections for individuals charged with criminal offences which have become standard fair trial requirements in human rights conventions since they first appeared in Article 14(3) of the ICCPR. These include a person’s right to:

- be informed promptly and in detail of the charges against him/her in a language he/she understands;
- have adequate time and facility to prepare a defense;
- not be compelled to testify against oneself or to confess guilt;
- examine and call witnesses under the same conditions as the prosecution;
- free language interpretation assistance in court; and
- have the case determined without undue delay and reviewed by a higher court.

Any future ASEAN human rights convention should clarify that individuals hold a right to defense
counsel, include the ICCPR’s procedural protections, take into consideration the special needs of children accused of criminal offenses, and establish a minimum age below which children shall be presumed not to have the capacity to infringe the penal code. Additionally, a convention should recognize the non-derogable nature of the prohibition against ex post facto application of the law.

Finally, this provision of the AHRD only addresses criminal proceedings, while both the UDHR and other instruments extend the right to a fair trial to civil proceedings. Any future convention should extend the right to a fair and public trial by an independent and impartial tribunal to both civil and criminal cases. In a similar vein, any future convention should incorporate provisions relating to the role and rights of victims in criminal proceedings, in line with current trends in international practice.

ASEAN Member States’ International Legal and Constitutional Obligations
Six of the ASEAN Member States have ratified the ICCPR and thus have a binding international legal obligation to guarantee the right to a fair trial. At least two other core human rights treaties recognize and protect the right to a fair trial: the CRC and the ICRMW. All ASEAN Member States have ratified the CRC, while only the Philippines and Indonesia have ratified the ICRMW.

The international obligation to guarantee the right to a fair trial is reinforced by the constitutions of six of the ASEAN Member States, which prohibit ex post facto law enforcement and double jeopardy, presume that a person is innocent until proven guilty, and guarantee the right to a speedy and public trial by an impartial tribunal. Only the Philippines Constitution guarantees that individuals hold a right to counsel of their own choosing, and the right to be provided counsel if they are indigent. Viet Nam and Thailand’s constitutions provide accused persons with the right to a defense, including assistance from a lawyer. The Philippines and Thailand recognize a constitutional right for an accused person not to be compelled to testify as a witness against him or herself, and the Philippines alone grants a right of confrontation.

Content and Interpretation of the Right in International Law
A person accused of or charged with a criminal offense has the right to be presumed innocent until proven guilty according to the law. No one shall be found guilty of a criminal offense which did not constitute a criminal offense under national or international law at the time it was committed, and no greater punishment shall be imposed than prescribed by law at the time the offense or omission was committed. Furthermore, no one shall be tried or punished again for an offense for which he or she has already been finally convicted or acquitted in accordance with the law.

Every person charged with a criminal offense has the right to have the matter determined without delay by a competent, independent, and impartial tribunal in a fair and public hearing according to law. An independent tribunal is one that has the power to make a binding decision that cannot be altered by a non-judicial authority and is free from interference by the executive. A military tribunal should be considered incompetent to try civilians, and members of the military who have committed human rights crimes should be tried in ordinary criminal courts. Impartiality requires freedom from bias on the part
of judges or jury members.\textsuperscript{368} Generally, criminal proceedings should be public, unless necessary to protect the interests of justice.\textsuperscript{369}

Every person charged with a criminal offence or omission has at least the following rights guaranteed under international law:

1. To be informed promptly, in a language which he or she understands, of the nature and cause of the accusation against him;\textsuperscript{370}
2. To have adequate time and facilities for the preparation of his or her defense;\textsuperscript{371}
3. To defend himself in person or through legal assistance of his or her own choosing;\textsuperscript{372}
4. To not be compelled to testify against him or herself or to confess guilt;\textsuperscript{373}
5. To have the decision reviewed by a higher court;\textsuperscript{374}
6. To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;\textsuperscript{375} and
7. To have the free assistance of an interpreter if he or she cannot understand or speak the language used in court.\textsuperscript{376}

The right to counsel is a fundamental right, enshrined in all major international rights systems and regional rights instruments. The ICCPR guarantees the right to counsel\textsuperscript{377} regardless of whether the accused does have sufficient means to pay for it. However, amongst regional human rights systems only the Arab Charter on Human Rights and European Convention on Human Rights require that states provide counsel it cannot be procured.\textsuperscript{378} The American Convention on Human Rights grants Member States discretion to decide whether counsel should be provided,\textsuperscript{379} though the Inter-American Court on Human Rights has held that States must provide counsel free of charge if the accused cannot afford one and the fairness of the hearing would be affected by a lack of representation, the Convention notwithstanding.\textsuperscript{380}

The freedom from the application of ex post facto laws is a non-derogable right;\textsuperscript{381} as such, some regional systems have stated that the principle of due process cannot be suspended during a state of emergency.\textsuperscript{382}

In addition to the guarantees described above, children accused of a criminal offense are afforded additional protections. Any criminal charges entered against juvenile defendants should take into account the child’s age, and focus on rehabilitation and reintegration into the child’s family and society.\textsuperscript{383} Additionally, states should establish a minimum age below which children shall be presumed not to have the capacity to violate the penal code.\textsuperscript{384}

Additionally, under the UDHR and various other human rights instruments, defendants have the right to access courts in civil proceedings, and have their rights determined through fair and public hearings.\textsuperscript{385} These rights are intrinsically linked to the realization of the right to remedy, enumerated in Article 8 of the AHRD.
Finally, developments in international law also increasingly recognize a role for victims in criminal proceedings. A requirement to enable victims to participate in their own in criminal proceedings is found in several soft law instruments and conventions.\textsuperscript{386} The European Court of Human Rights has also begun to recognize fair hearing rights for victims in criminal proceedings, at least where the proceedings will determine their right to compensation or the protection of their reputation.\textsuperscript{387}
**Article 21: The Right to Privacy**

_AHRD Art. 21: Every person has the right to be free from arbitrary interference with his or her privacy, family, home or correspondence including personal data, or to attacks upon that person’s honour and reputation. Every person has the right to the protection of the law against such interference or attacks._

Article 21 of the AHRD is nearly identical to the provision on the right to privacy in the UDHR.\textsuperscript{389}

It should be noted that core international treaties concluded after the UDHR extend protection to attacks against honour and reputation only to _unlawful_ attacks, and recognize a right to freedom from arbitrary and _unlawful_ attacks. This requires states to define by law when an invasion of privacy or attack against one’s honour or reputation is unacceptable. The final sentence of Article 21 can be interpreted to extend the right to freedom from arbitrary and unlawful interference or attacks.

The ICCPR builds on the UDHR by prohibiting interference in one’s privacy rights in the absence of legal justification.\textsuperscript{390} The prohibition against “unlawful interference” also appears in other international human rights treaties, such as the CRC,\textsuperscript{391} ICRMW,\textsuperscript{392} and CRPD.\textsuperscript{393}

While other international human rights treaties consider privacy in the context of “family, home, and correspondence,” the AHRD adds value to the existing international treaties through the inclusion of “personal data protection.” This inclusion is important given the increased use of technology that allows for greater electronic data storage and speedy dissemination, which in turn corresponds to increasing levels of misuse of personal data. ASEAN has recognized the importance of harmonizing data protection legal frameworks in the region as it moves towards creation of the ASEAN Economic Community in 2015. The ASEAN community seeks to take on and establish best practices for privacy and data protection issues through the development of a “Roadmap for Integration of the e-ASEAN Sector.”\textsuperscript{394}

A future ASEAN human rights convention could, in order to reflect recent developments in soft law surrounding the right to privacy and ASEAN’s own institutional planning documents, include a clearer formulation of Member States’ obligation to “adopt legislative and other measures” to protect personal and confidential information against interception, collection and misuse by both state and private actors.\textsuperscript{395} For example, a CSO submission regarding the AHRD draft suggested that Article 21 include the following language:

> Everyone has the right to have his or her personal data protected from arbitrary or unlawful use or interference. States may only acquire, store or access personal data in strict and narrowly construed circumstances defined in law, and access to such data shall be limited to the minimum number of officials or agencies necessary.\textsuperscript{396}
ASEAN Member States’ International Legal and Constitutional Obligations
The right to privacy is explicitly protected by four international human rights treaties, namely the ICCPR, CRC, ICRMW, and CRPD.\(^{397}\)

Six ASEAN Member States’ constitutions mention the right to privacy.\(^{398}\) However, the extent to which the right is protected is not uniform across these States. Protections against searches of the home, residence, or property,\(^{399}\) the individual’s person,\(^{400}\) undue exploitation of personal data,\(^{401}\) and protections of honour, dignity and reputation,\(^{402}\) correspondence and other communications,\(^{403}\) and the right to family life\(^{404}\) are neither consistently protected, procedurally or substantively.

Content and Interpretation of the Right in International Law
The UDHR was the first human rights instrument to recognize the right to privacy by stating that

\[
\text{No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.}\(^{405}\)
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The ICCPR expanded upon this framework by adding language prohibiting “unlawful” interference with one’s privacy, family, home, or correspondence. Furthermore, the ICCPR limited the ability of states parties to use spurious lawsuits which purportedly helped state officials to defend attacks against their reputation or honour while in fact served to silence political dissent restrict free speech by limiting the right to be free from such attacks only to those which were defined by state law as “unlawful.” The ICCPR formulation of the right to privacy has been reproduced in the CRC, ICRMW, and CRPD.\(^{406}\) The Arab, European and American regional human rights instruments also recognize the right to privacy, but the right does not feature in the African Charter.\(^{407}\)

The Human Rights Committee has explained that under the ICCPR, “the term “unlawful” means that no interference [in one’s privacy] can take place except in cases envisaged by the law. . . . [t]he introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.”\(^{408}\) Treaties recognizing the right to privacy impose positive obligations on states parties to “adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right.”\(^{409}\) The law authorizing state inference with one’s home, family or correspondence must be precise and any lawful interference “must be made only by the authority designated under the law, and on a case-by-case basis.”\(^{410}\) The state’s failure to intervene may be regarded as a violation of the right to privacy.\(^{411}\)

International and regional human rights bodies have broadly interpreted the terms “privacy” and “private life.” The UN Human Rights Committee found a violation of the right to privacy when people were not allowed to choose and change their names, which constitutes an important part of a person’s identity.\(^{412}\) The Committee also found that private relationships (including homosexual relationships) fall
under the protection of the right to privacy. The European Court of Human Rights also ruled that the concept of private life covered “the physical and moral integrity of the person, including his or her sexual life.” In other decisions, the Court has expanded the definitions of the terms “privacy” and “private life” to cover physical integrity, professional activities and the integrity of business premises, arbitrary interception of telephone conversations, interference with prisoner correspondence, and sexual orientation or sexual life. The Parliamentary Assembly of the Council of Europe has recently adopted a resolution on mass communication media and human rights, which states that “the right to privacy consists essentially of the right to live one’s own life with a minimum of interference” and recognizes the right to privacy as one which protects interference in matters of family and home life, physical and moral integrity, and honour and reputation.

Unlike the European Court of Human Rights, the Inter-American Court of Human Rights has only dealt with a small number of cases concerning the right to privacy. The Court has interpreted the privacy right to extend to the home, because “an individual’s home and private life are intrinsically connected, [and] the home is the space in which private life can evolve freely.” As such, arbitrary or unlawful invasions of an individual’s home are interpreted as a violation of the right to privacy.

The protection of the right to privacy includes the protection of personal data. The UN Human Rights Committee has stated that the right to privacy requires legal protection of personal data in both the public and private sectors. The UN Special Rapporteur for the Promotion and Protection of the Right to Freedom of Opinion and Expression notes that “privacy and freedom of expression are interlinked and mutually dependent; an infringement upon one can be both the cause and consequence of an infringement upon the other.” In a recent resolution, the UN Human Rights Council affirmed the need to protect human rights in the digital realm. The UN General Assembly further adopted the Resolution on the Right to Privacy in the Digital Age, which expresses deep concern at the “negative impact that surveillance and/or interception of communications . . . may have on the exercise and enjoyment of human rights” and calls on states to ensure that any counter-terrorism efforts comply with international laws regarding the issue of privacy. Though international laws relating to data and communications privacy are emerging, growing consensus clearly indicates that the area is one in which more robust protections will be required.
Article 22: The Right to Freedom of Thought, Conscience, and Religion

AHRD Art. 22: Every person has the right to freedom of thought, conscience and religion. All forms of intolerance, discrimination and incitement of hatred based on religion and beliefs shall be eliminated.

The AHRD departs from other international human rights instruments by omitting the freedom to manifest one’s religion or belief in teaching, practice, and worship and observance. Present in a January 2012 draft of the AHRD, the “right to practice one’s religion or belief” was subsequently removed from the final AHRD text. Without this element, the AHRD recognizes only the internal aspect of having a religion or belief and does not protect a person’s right to, for example, attend religious ceremonies, teach religion to their children, or wear clothing or symbols indicative of his or her faith. The ability to manifest one’s religion - individually or in community with others and in public or private - is crucial to enjoyment of the right to freedom of thought, conscience and religion.

The AHRD’s wording does not include a key component of the right to freedom of religion found in the UDHR and the ICCPR: the freedom to “have or to adopt a religion or belief of one’s choice,” meaning the ability to change or abandon one’s religion or beliefs without fear of sanction.

The right to freedom of religion is affected by the AHRD’s general limitation clause. The right to freedom of religion is non-derogable under the ICCPR, but it is also not absolute – the UDHR allows for limitation of the entire right through its general limitations clause, and the ICCPR and CRC allow for limitations on the freedom to manifest religion, under limited circumstances. The AHRD’s general limitation clause, however, would allow ASEAN Member States to limit individuals’ rights to have beliefs or religions at all.

For the AHRD to be consistent with Member States’ existing international human rights obligations, Article 22 must be interpreted broadly to include right to manifest religion or belief, and the right to adopt or change religion which includes freedom from forced conversion. Additionally, the General Principles must not be used to unreasonably restrict enjoyment of all aspects of the right to freedom of thought, conscience and religion.

A future ASEAN human rights convention should, at minimum, mirror the UDHR’s formulation of the right to freedom of thought, conscience and religion to bring ASEAN’s human rights texts in line with other international human rights texts. A more robust freedom of conscience provision would explicitly state its non-derogable nature, and draw on elements of the ICCPR to narrow the circumstances under which a state could permissibly limit the right to religious expression or belief, and acknowledge parents’ rights to educate their children “in conformity with their own convictions.”

The AHRD contains a further requirement that “[a]ll forms of intolerance, discrimination and incitement of hatred based on religion and beliefs shall be eliminated.” This provision was inserted upon CSO recommendations during a regional consultation in June 2012. Though a non-paper submitted by the
United States Department of State expressed concern that this language could be used to undermine freedoms of expression and religion by justifying broad bans on speech, the ICCPR contains a similar provision that prohibits “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.” Additionally, freedom of expression and opinion are independently protected in the AHRD.

ASEAN International Legal and Constitutional Obligations
All ASEAN Member States have endorsed the right to freedom of thought, conscience and religion as recognized in the UDHR, the Vienna Declaration, and other international human rights instruments to which ASEAN Member States are parties. The right to freedom of thought, conscience and religion is recognized in core human rights treaties and in the 1951 Refugee Convention. Six ASEAN Member States have ratified the ICCPR and all have ratified the CRC, which recognizes children’s rights to freedom of thought, conscience and religion and the right of their parents or legal guardians to provide guidance to their children in the exercise of these rights. However, Brunei has entered an express reservation against Article 14 of the CRC to the extent that its application conflicts with principles of Islam, and Malaysia and Singapore have entered similar reservations to the extent that the provision conflicts with national law.

In addition to general freedom of conscience provisions, all ten ASEAN Member States recognize a constitutional right to the free practice of religion. The right to freedom of religion and belief is clearly widely recognized as a fundamental human right in the region.

Content and Interpretation of the Right in International Law
The UDHR states that “[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.” These same elements are recognized in the ICCPR, and the European and American Conventions on Human Rights. The African Charter on Human and Peoples’ Rights and the Arab Charter on Human Rights do not specifically mention the right to change one’s religion.

The UN Human Rights Committee has stated that “belief” and “religion” are to be broadly construed to include atheistic beliefs as well as beliefs restricted to traditional religions. States cannot restrict an individual’s freedom to have or adopt a religion or belief, which includes the freedom to replace one’s religion with another. Additionally, the state cannot force an individual to reveal his thoughts or adherence to a religion or belief. The UN Special Rapporteur on Freedom of Religion and Belief, in his 2012 interim report to the General Assembly, highlighted the importance of the right to freedom from coercion with regards to the freedom of religion. Although forcible conversion is not permissible, freedom of religion or belief includes the right to try to persuade others in a non-coercive manner as to the validity of a particular religion or belief. The State may restrict missionary activities by law, but only under narrow circumstances provided for in the ICCPR.
“Manifestation” of religion and beliefs includes ritual and ceremonial acts giving direct expression to belief, building places of worship, displaying religious symbols, observing holidays and days of rest, observing dietary regulations, wearing distinctive clothing or head coverings, participating in rituals associated with certain stages of life, using a particular language, establishing seminaries or religious schools, and preparing and distributing religious texts or publications.447

Manifestation of a religion or belief can be limited by law but only to the extent necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others. Limitations must be specific and proportional to the aim they seek to achieve, and must utilize the minimum degrees of interference required to accommodate one of the aforementioned public goals.448 These grounds of limitation, first expressed in the ICCPR,449 have also been adopted in core regional human rights treaties. The European Convention on Humans Rights and Arab Charter on Human Rights further require that any restrictions on freedom to manifest one’s religion or belief must be “necessary in a democratic society”450 and must be “necessary in a tolerant society that respects human rights and freedoms.”451

Unacceptable limitations on freedom of religion have been held to include:

- Requirements that individuals indicate their religion on their identity cards as a de facto requirement that they disclose their religion;452
- Prohibitions of workers from wearing religious jewellery where the prohibition served no public purpose (for example, an airline worker could not be prohibited from wearing religious jewellery, but a hospital worker could on hygiene-related grounds);453
- Punishments of conscientious objectors,454 and
- Forcible removal of indigenous peoples from lands where their religious sites are located.455
Article 23: The Right to Freedom of Expression and Opinion

AHRD Art. 23: Every person has the right to freedom of opinion and expression, including freedom to hold opinions without interference and to seek, receive and impart information, whether orally, in writing or through any other medium of that person’s choice.

The AHRD recognizes the right to both freedom of expression and freedom of opinion; freedom of opinion in particular is affirmed as a right which must be held without interference. Unlike other human rights instruments, however, the AHRD does not establish a right to freely impart ideas and to seek, receive, and impart information “across frontiers.” Information is arguably broad enough to include “ideas,” but the failure to stress this important freedom to transmit information across frontiers is a significant oversight, given the importance of cross-border communications in alerting the international community of human rights abuses within a country, and the increasingly widespread use of technology by the state to block and filter internet communications.

The right to free opinion is subject to the AHRD’s general limitation’s clause; however, this right is non-derogable under the ICCPR. The AHRD is therefore inconsistent with the obligation of ASEAN states parties to the ICCPR to guarantee absolutely the freedom to hold opinions without interference. However, the AHRD’s grounds for limiting freedom of expression are quite similar to the ICCPR’s, which the single exception that the ICCPR does not permit restrictions on expressions on the grounds of general welfare. To the extent that free expression is a fundamental tenet of a democratic society, a narrowly-read general welfare restriction against free expression could result in the justification of excessive restrictions on the right; therefore, care must be taken to ensure that a more liberal view is taken on the AHRD’s language as currently drafted.

On a positive note, the AHRD differs positively from the ICCPR in that it does not permit limitations of free expression and opinion on the grounds that individuals’ reputation should be protected. Given the prolific use of defamation suits as a tool through which to stifle political speech in ASEAN, it is commendable that the AHRD’s drafters chose not to stress the need to protect reputation over freedom of expression. Unlawful attacks against honour or reputation are protected as part of the AHRD right to privacy.

The AHRD provision on freedom of expression also does not contain any language prohibiting hate speech or war propaganda, consistent with more recent human rights instruments.

The AHRD can be said to contain the most basic and necessary elements of the right to freedom of opinion and expression. A future ASEAN human rights convention, however, certainly has room to be more expansive in its conception of this right. A future convention should protect freedom of expression across frontiers, and provide a right to freedom of opinion free of any limitations. Additionally, as recommended in relation to the other civil political rights, permissible limitations on the right to freedom of expression should be right-specific. Finally, should ASEAN wish to reflect more recent developments in relation to the content of the right to seek, receive and impart information, it should
include a standalone right for individuals to access information from their government and prohibit criminal defamation.

**ASEAN Member States’ International Legal and Constitutional Obligations**

Six of the ASEAN Member States have ratified the ICCPR, which contains a thorough guarantee of the right to freedom of expression and opinion.⁴⁶¹ Eight have ratified the CRPD, which requires states parties to use technology and other methods to ensure that persons with disabilities have the ability to seek, receive, and impart information to the same extent as non-disabled persons.⁴⁶² The right to freedom of opinion and expression is also recognized in the CRC, ICERD and the ICRMW.⁴⁶³

Nine ASEAN Member States’ constitutions address the right to freedom of expression in some form.⁴⁶⁴ Of those, six guarantee the right for citizens,⁴⁶⁵ and four place significant restrictions on the right by including clauses that the speech not violate other laws regarding a wide range of functions.⁴⁶⁶ The Philippines Constitution, in addition to freedom of speech and the press, also recognizes in the same provision the right to peaceful assembly and the right to petition the government.⁴⁶⁷ Unique among the ASEAN constitutions, the Viet Nam Constitution recognizes the right to access information.⁴⁶⁸ In general, the right to freedom of expression and opinion is widely covered in the domestic legal frameworks of ASEAN Member States,⁴⁶⁹ though the grants are extremely qualified and are not always consistent with the intention of the right as guaranteed under the international human rights regime.

**Content and Interpretation of the Right in International Law**

The right to freedom of expression and opinion, first expressed in the UDHR, has come to be considered the cornerstone of a democratic society. The UDHR provides that “[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”⁴⁷⁰ The right to freedom of expression and opinion was reformulated in more detail in the ICCPR and subsequently incorporated into the text of the CRC, ICERD, CRPD and ICRMW.⁴⁷¹ Among regional human rights instruments, the right to freedom of expression and opinion is recognized in the core European American, African and Arab human rights texts.⁴⁷²

Freedom to hold an opinion protects an individual’s innermost thoughts.⁴⁷³ The UN Human Rights Committee has noted that the right to hold opinions without interference is a “right to which the Covenant permits no exception or restriction.”⁴⁷⁴ It also noted that freedom of opinion “extends to the right to change an opinion whenever and for whatever reason a person so freely chooses.”⁴⁷⁵ The Committee also affirms that all forms of opinion enjoy this unfettered protection, including scientific, political, historic, moral or religious opinions, and that it is a violation of the provision to criminalize the holding of an opinion.⁴⁷⁶ Accordingly, the Human Rights Committee found a violation of the right to hold an opinion, when the applicant had been detained for fourteen years in solitary confinement and had been forced into an “ideology conversion system” due to his political views.⁴⁷⁷
The right to freedom of expression is the right to impart information and ideas to others – both verbally and non-verbally, via any medium, and across frontiers. The protection extends “not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive, but also to those that offend, shock or disturb the State or any segment of the population.” All sorts of speech, including political views, pornography, commercial advertisements, science, and literature are worthy of protection. The UN Human Rights Committee has also affirmed that the ICCPR provides protection to “information and ideas of all kinds,” and that the prohibition of hate speech must be compatible with freedom of expression.

Human rights bodies differ in their attitude regarding the treatment of different speech types, however. Some, like the UN Human Rights Committee, refuse to differentiate between different speech types and do not afford greater protection to political speech than, for example, commercial speech. On the other hand, the European Court of Human Rights has afforded a greater margin of appreciation to states when they limit commercial speech than when they limit political speech, and the Court has traditionally emphasized the role of the media as “watchdogs” in a democratic society. Additionally, the European Court has afforded artistic speech less protection than political speech to the extent that artistic speech is not itself political (in which case it will enjoy the same level of protection). The European Court of Human Rights has allowed for a considerable margin of appreciation when it comes to speech concerning the issue of public morals and obscenity, as the Court recognizes that the boundaries of public morals may vary across European countries.

The right to freedom of expression is associated with the right to seek and receive information. Access to information held by government authorities has gained support in recent decades as a standalone right, and serves as a powerful tool for human rights activists and journalists. Several international documents in recent years have recognized the importance of the right to access of information as a core component of the right to freedom of expression. The UN Special Rapporteur on Freedom of Opinion and Expression and the OAS Special Rapporteur on Freedom of Expression have both expressed their support for the right to access to information held by public authorities, calling it “a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.” The UN Human Rights Committee has adopted a broad interpretation of the right to access to information, finding that it is a right protected on its own by Article 19 of the ICCPR. On the other hand, the European Court of Human Rights has found that access to information is protected under the European Convention only if the requested information is necessary for the fulfilment of another protected right.

Key to freedom of expression and opinion in society is the existence of a free press. Freedom of the press and media is recognized explicitly in the Charter of Fundamental Rights of the European Union, and alluded to in the ICCPR. The European Court of Human Rights has also recognized the special role of the media in cases such as _Jersild v. Denmark_ and _Observer and Guardian v. The United_
Kingdom.\textsuperscript{489} The UN Human Rights Committee has also reaffirmed the importance of an independent and diverse media.\textsuperscript{490}

To the extent that limitations on freedom of expression are permissible, they must be:

i. Prescribed by law;
ii. Pursue a legitimate aim; and
iii. Restricted to the extent necessary to attain the legitimate aim.\textsuperscript{491}

Legitimate aims under the ICCPR and the American Convention include upholding the rights and reputation of others, the protection of national security, public order and public health and morals. Under the European Convention, territorial safety, public safety, the prevention of disorder or crime, the prevention of release of information received in confidence, and the maintenance of the authority and impartiality of the judiciary are also seen as permissible aims. “Necessity” requires the state to demonstrate that a limitation is “required by a compelling public interest” or a “pressing social need,” and that freedom of expression is limited only to the extent required to achieve the public interest or need in question.\textsuperscript{492}

State censorship frequently raises questions regarding the permissible limitation of freedom of expression. The American Convention on Human Rights prohibits prior censorship with the exception of state regulation of public entertainment for the moral protection of children.\textsuperscript{493} Speech that damages reputation or is considered contrary to public order, safety or morals shall be “subject to subsequent imposition of liability . . . expressly established by law.”\textsuperscript{494} The European Court does not prohibit prior censorship on expression, but it does evaluate such restrictions on expression with rigorous scrutiny.\textsuperscript{495}

Defamation laws pose further challenges to freedom of expression and opinion, especially with respect to the criticism of public figures.\textsuperscript{496} The Human Rights Committee has shown a tendency to find violations of freedom of expression in communications challenging defamation laws.\textsuperscript{497} The Inter-American Court has also heard several cases regarding criminal defamation cases involving public officials; in each case, it has ruled that there had been a violation of the right to freedom of expression.\textsuperscript{498} The European Court of Human Rights has also recognized the need for public officials to show a greater degree of tolerance in terms of criticism aimed at them.\textsuperscript{499}

In terms of balancing freedom of religion and freedom of expression, the European Court has significant jurisprudence on this issue. It has upheld limits on speech when speech is related to religion or belief, or privileges religious belief over freedom of expression, at times to the disadvantage of minority religious groups or nonbelievers.\textsuperscript{500} Since no uniform concept or understanding of religion exists in Europe, the Court has allowed for a large margin of appreciation for states when examining interference with freedom of expression as necessitated by religious reasons.
Over a relatively short period of time, the internet has enabled millions to exercise their right to freedom of expression to an unprecedented extent. Digital technologies enable information to be sent instantly to huge numbers of people. This new “frontier” is becoming the epicentre of legal battles surrounding the right to freedom of expression.\textsuperscript{501} Developing case law from the European Court of Human Rights as well as recommendations from international organizations will be integral to the development of this new area of law.\textsuperscript{502}
Article 24: The Right to Peaceful Assembly

AHRD Art. 24: Every person has the right to freedom of peaceful assembly.

Article 24 of the AHRD is identical to the UDHR’s provision regarding peaceful assembly, but omits the corresponding right to free association. The right to freedom of association was included in draft versions of the AHRD, but was removed shortly before the Declaration’s adoption in November 2012. The two rights are “interrelated, interdependent and mutually reinforcing.” The exclusion of a specific right to association undermines the ability of the AHRD to support the development of truly healthy democratic societies in the ASEAN region.

Nonetheless, like free expression, the right of free association is a derogable right. Legal impositions on the right to peaceful assembly are permissible when they protect a state’s interest in national security, public order, or public health. A future ASEAN human rights convention should specify, in accordance with the ICCPR, the circumstances under which the right may be limited. A convention should also include the right to freedom of association; however, the analysis of this omission is covered later.

ASEAN Member States’ International Legal and Constitutional Obligations

Six ASEAN Member States have ratified the ICCPR, six the ICERD and all the CRC, meaning that all have a binding international obligation to recognize the right to peaceful assembly in some form.

Nine ASEAN constitutions address the right to freedom of peaceful assembly; Brunei Darussalam is the only ASEAN Member State which does not enshrine a right to free assembly in any form in its Constitution.

Content and Interpretation of the Right in International Law

The right to freedom of assembly is one of those rights which is essential for a healthy, functioning democracy; it also serves as a conduit for other rights.

The Special Rapporteur on the Right to Freedom of Assembly and of Association defines peaceful assembly as “an intentional or temporary gathering in a private or public space for a specific purpose” and asserts that “[a]ssemblies play a vibrant role in mobilizing the population and formulating grievances and aspirations, facilitating the celebration of events and, importantly, influencing States’ public policy.” Assemblies fulfil a critical role for civil society, and help to address important social issues spanning the entire spectrum of human rights. The right to participate in and hold peaceful assemblies entails a positive state obligation to take steps that facilitate the exercise of this right.

The right to peaceful assembly and right to freedom of association are closely related but separate rights, often appearing in separate legislation or separate articles within the same legal instrument. However, they are distinct enough to warrant separate analytical treatment. The UDHR recognizes the right to freedom of assembly and the right to freedom of association in the same article, stating simply
that “[e]veryone has the right to freedom of peaceful assembly and association.” In the ICCPR, the right to assemble peacefully appears in a separate article, as it does in the CRC and ICERD. Among regional human rights instruments, the right to freedom of peaceful assembly is recognized in the European Convention on Human Rights, the African Charter, the African Charter on the Rights and Welfare of the Child, the Arab Charter, the American Declaration of the Rights and Duties of Man, and the American Convention on Human Rights.

The right to freedom of assembly is not an absolute right and certain restrictions may be placed on it “in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.” This provision establishes a three-part test when evaluating the lawfulness of restrictions placed on freedom of assembly:

i. the restriction must be prescribed by law,
ii. must be based on a legitimate interest, such as public order, and
iii. must be necessary in a democratic society.

According to the Special Rapporteur on the right to freedom of assembly, laws which require state authorization for assembly are problematic. At best, national laws may have a requirement for prior notification, and even such provisions should be subject to a proportionality assessment to ensure that the right to free assembly is not unduly burdened. The European Court of Human Rights has found that even unlawful demonstrations, where the participants did not comply with police orders, enjoyed protection as long as they were peaceful did not evince danger to the public order. In addition to the duty not to interfere unduly with peaceful assemblies, states also have a duty in general to protect the right to peaceful assembly from undue interference by third parties.

One of the contexts in which the right to freedom of assembly gains particular significance is that of elections. As the Special Rapporteur notes, the “right to freedom of peaceful assembly and of association are pertinent to the democratic process, both during the election period and between elections.” The freedom to assemble peacefully is a prerequisite of effective campaigning, and serves as a primary means through which citizens can participate in public affairs. The right to freedom of assembly is implicit in one’s right to take part in the government of one’s country, as recognized by the UDHR and the ICCPR.

The right is also particularly important in terms of workers’ rights, including migrant workers and trade unions, and for those who are expressing a dissenting and minority view. The principle of non-discrimination and equal protection are extremely significant in the context of dissent. With regard to right of workers to assemble peacefully, the UN Human Rights Council has repeatedly reaffirmed the importance of the International Labour Organization’s mandate.
Article 25: The Right to Participate in Government

AHRD Article 25: (1) Every person who is a citizen of his or her country has the right to participate in the government of his or her country, either directly or indirectly through democratically elected representatives, in accordance with national law.

(2) Every citizen has the right to vote in periodic and genuine elections, which should be by universal and equal suffrage and by secret ballot, guaranteeing the free expression of the will of the electors, in accordance with national law.

The right to participate in government under international law has evolved into the right to democracy, and it is generally acknowledged that human rights can only be fully realized under democratic governance. The content of the right to participate in government as specified in the AHRD is generally consistent with the rights guaranteed in the UDHR and the ICCPR. However, a key difference is that the AHRD’s grant is restricted to the terms of “national law.” Some restrictions on political participation can be reasonable; for instance, many countries prohibit convicted or incarcerated felons from voting or running for office, and impose age requirements for enfranchisement. The AHRD provision here is problematic, however, because it allows states to pass national laws relating to political participation without regard to consistency with international human rights law. Consequently, a Member State may enact requirements for voting or running for office that significantly disadvantage a particular group and still act in compliance with Article 25 of the AHRD. Rather than including the qualification “in accordance with national law,” a convention could require this right is exercised “without unreasonable restrictions” or “in accordance with national and relevant international law”.

The AHRD also omits a key component of public participation: the right of access to employment in public services. The UDHR and ICCPR, and the Arab, American, and African instruments, guarantee the right of equal access to work in the public service of one’s country. This right is integral to ensuring that government services and bureaucratic systems are not captured by political forces such that public positions are dispensed as rewards to supporters or bars to rivals; furthermore, the right ensures that privileged classes or groups cannot dominate public services and undermine other rights, such as minority group rights. The right guarantees that interested, able, and qualified citizens have the opportunity to serve their country as civil servants without undue restrictions.

Any future ASEAN human rights convention should include a provision regarding the right to equal access to employment in the public service of one’s country which specifies that objective and reasonable criteria for appointment, promotion, suspension and dismissal be clearly stated.

ASEAN Member States’ International Legal and Constitutional Obligations

Of the ASEAN Member States, six have ratified the ICCPR without reservation regarding the right to participate in government. Those states are obligated to ensure that all citizens are accorded the right to stand for office, vote in genuine periodic elections, and have equal access to public service. All ASEAN
Member States have ratified CEDAW, and eight the CRPD, which require them to take steps to ensure women and persons with disabilities have equal opportunities to participate in government.\textsuperscript{528}

The constitutions of ASEAN Member States vary widely with regard to specific provisions for the right to participate in government and decision-making processes. Both the Philippines\textsuperscript{529} and Myanmar\textsuperscript{530} constitutionally guarantee all three components of the right in the ICCPR. Indonesia’s provision for “equal opportunities in government”\textsuperscript{531} may broadly be interpreted as the right to stand for office and equal access to public service, but the language is vague. The right to vote is governed by other legislation. The Constitutions of Cambodia, Lao PRD, Malaysia, Thailand and Viet Nam all include the right to vote and the right to stand for election but do not include the right to equal access to public service.\textsuperscript{532} Thailand’s Constitution provides for compulsory voting, which may violate other rights, such as freedom of expression, depending on how the requirement is implemented.\textsuperscript{533}

Content and Interpretation of the Right in International Law
The right to democracy has its roots in the UDHR, which states that:

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right of equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.\textsuperscript{534}

The first provision protects the right of individuals to participate in governance directly through elected or other public office and to engage indirectly by choosing their public representatives. The second provision articulates that all individuals have the right to equal access to employment in the public service. The third provision asserts that government authority comes from the “will of the people,” providing an expansive conceptualization of public participation in the form of democracy. Following this statement, the UDHR provides specific requirements which support an understanding of “will,” such as holding genuine and periodic elections in which all qualified individuals are equally allowed to vote and polling choices are kept secret.

The ICCPR provides for the rights outlined in the UDHR, though it diverges from the UDHR’s principles in key areas. While both instruments include the right to participate in government, the ICCPR expressly guarantees the right “to be elected.”\textsuperscript{535} The ICCPR and UDHR stipulate that elections shall be periodic, genuine, universal and equal in suffrage through secret balloting, but the text of the ICCPR does not explicitly refer to the “will of the people” as the basis for the authority of government.\textsuperscript{536} However, the UN Human Rights Committee has since asserted that, to realize the right to participation intended by the ICCPR, states should conduct elections to “ensure that the authority of government continues to be based on the free expression of the will of electors.”\textsuperscript{537} In addition, while the UDHR refers to the individual’s right to participate in public life of “his country,”\textsuperscript{538} the ICCPR specifically limits the scope of
these rights to citizens. Additionally, unlike the UDHR, the ICCPR grants these rights “without unreasonable restrictions.” This provision allows states to impose practical limitations, such as a minimum age for voting or running for office.

The UN Human Rights Committee has highlighted that the right to vote also enables citizens to hold elected officials accountable through elections and that officials may only exercise constitutionally granted powers. It also specifies that requiring candidates for election to be members of political parties violates their right to stand for election. Additionally, the Committee affirms the need to “[base] access to public service on equal opportunity and general principles of merit, and [provide] secure tenure, ensure that persons holding public service positions are free from political interference or pressures.” It asserts that affirmative measures are necessary to open access for all citizens, and requires that the state must protect the working environment of public servants.

Several other core human rights instruments also guarantee the right to participate in government in more specific contexts. CEDAW mandates not only that women be able to vote in elections, stand for election, and hold public office, but also that they must also have the right to vote in referenda, to participate in policy formulation and implementation, and to participate in non-governmental organizations. ICERD guarantees all people without distinction the right to vote, stand for election, and participate in public service. Under CRPD, persons with disabilities have equal rights to participate in government, and the Convention provides that states should ensure that technologies and facilities are accessible to all voters and public office holders.

All the regional human rights instruments contain provisions granting the right to participate in government, and three also grant the right to equal access to public service. While the American Convention allows for restrictions on the right to access to public service, to vote, and to be elected based on age, nationality, language, and education, the Inter-American Democratic Charter specifically prohibits discrimination limiting citizen participation in government. The African Charter grants the right to participate but does not mention voting or elections specifically; this is instead dealt with in a separate Charter on Democracy, Elections and Governance. Both the African and Arab human rights instruments include the requirement that these rights are granted in accordance with Member States’ laws, which may weaken them substantially. While the European Convention does not provide for access to public service, it does outline “conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

International case law has clarified the contours of the right to participate in government. The African Commission on Human and Peoples’ Rights has decided six cases that relate to the right to participate in government. The Commission found violations of the African Charter where states have required that both parents be nationals to qualify an individual to stand for election or prohibited naturalized citizens from being elected. Additionally, the Commission has found that excluding persons with mental disabilities from political participation violates their rights, has affirmed that election results must be respected by the government, and has ruled that all political parties cannot be banned.
The European Court of Human Rights has held that limitations on voting rights of citizens who have not been resident in a country for a number of years are consistent with a right to participate in government,\textsuperscript{558} that states are not required to make arrangements for citizens living abroad to vote,\textsuperscript{559} and that restricting the ability of individuals to stand for election based on their connection to a country’s past authoritarian regime is legitimate.\textsuperscript{560} The European Court has also ruled that blanket bans of the right to vote of those with mental disabilities are unacceptable.\textsuperscript{561} The Inter-American Court, too, has ruled that requiring individuals to be members of political parties violates the right to participate in government\textsuperscript{562} and that restrictions that limit representation of large populations of people, particularly indigenous populations, also violates the right.\textsuperscript{563}

As the right to participate in government has evolved, it has gone beyond the minimal rights guaranteed in the core human rights texts and has become a right to democracy. Most regional organizations in their founding documents require Member States to adhere to the principles of democracy, rule of law, and human rights, as does ASEAN in the ASEAN Charter.\textsuperscript{564} Additionally, the Vienna Declaration invokes democracy fifteen times in asserting the link between respect for human rights and democratic governance, asserting that they are interdependent and mutually reinforcing.\textsuperscript{565} In the American context, in addition to the Charter and Convention, Member States have also adopted the Inter-American Democratic Charter, which enshrines democratic principles within the system and calls for punitive measures for unconstitutional alterations of political regimes.\textsuperscript{566} The Inter-American Commission on Human Rights has recently taken an active role in protecting democracy by monitoring the attempt to limit competition by political dismissal of rivals by sitting politicians.\textsuperscript{567}
Article 27: The Right to Work

AHRD Art. 27:

(1) Every person has the right to work, to the free choice of employment, to enjoy just, decent and favourable conditions of work and to have access to assistance schemes for the unemployed.

(2) Every person has the right to form trade unions and join the trade union of his or her choice for the protection of his or her interests, in accordance with national laws and regulations.

(3) 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.

The AHRD is not particularly specific with regards to its approach to the right to work. Other human rights instruments explicitly recognize components of the right to just, decent and favorable conditions of work such as equal pay for work of equal value, remuneration sufficient to ensure a life of dignity, a healthy work environment, and limited working hours that allow for rest and leisure. The failure to include the right to equal pay for equal work represents a significant departure from international labor and human rights standards.

In relation to forced and child labor, although Article 27 prohibits the exploitative labor of children and provides a right to “free choice of employment,” this still falls short of ASEAN Member States’ obligations under the ILO conventions and core human rights treaties. The AHRD recognizes a need to punish persons complicit in exploitative child labor, but does not address stronger requirement to take action to eliminate such labor practices, as the ILO Convention requires.

It is problematic that the AHRD subjects the right to form and join trade unions to national law without requiring that law to be consistent with international labor standards. This provides room for Member States to use national law to weaken the already limited freedom of association provided for in the AHRD.

ASEAN Member States which are members of the ILO commit, through that membership, to respect and promote freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labor, the abolition of child labor and the elimination of discrimination in respect of employment and occupation. However, the AHRD does not adequately reflect these commitments. A future ASEAN human rights convention should recognize the same labor rights as contained in the ILO Conventions ratified by ASEAN Member States and the 1998 ILO Declaration on the Fundamental Principles and Rights at Work. To achieve this, the ASEAN human rights convention must include provisions on equal pay for work of equal value, just and adequate remuneration, limited working hours, non-discrimination, and the need to guarantee a healthy and safe
work environment. The right to form and join trade unions should be made subject to national law and applicable international law, and a right to collective bargaining explicitly recognized and protected.

Forced and the worst forms of child labor should also be prohibited in an ASEAN human rights convention, using language that accurately reflects the commitment made by ASEAN Member States to “suppress” and “eliminate” these types of exploitation. Reference should also be made to the ILO Conventions, which require ASEAN Member States to specify a minimum age for different types of work.

ASEAN Member States’ International Legal and Constitutional Obligations
All ten ASEAN countries are members of the ILO and have ratified at least two of the eight ILO fundamental labor conventions. Member States have universally ratified the Worst Forms of Child Labour (No. 182) Convention, and nine out of ten the Forced Labour Convention (No. 29). All except Myanmar are signatories to the Minimum Age Convention (No. 138) and have specified the age at which a child may begin work as 14, 15 or 16 years. Four ASEAN Member States have ratified the Freedom of Association and Protection of the Right to Organise Convention (No. 87) and five the Right to Organise and Collective Bargaining Convention (No. 98). These two conventions encompass the right to join and form trade unions, and engage in collective bargaining and industrial action. The Equal Remuneration (No. 100) and Discrimination Conventions (No. 111), which address equality and non-discrimination in relation to work, have been ratified by eight and six ASEAN Member States respectively.

Of those international human rights instruments which are not part of the ILO rights framework, the ICESCR provides the fullest explanation of states’ obligations regarding the right to work and associated labor rights and has been ratified by six ASEAN Member States. Six ASEAN Member States have also ratified the ICCPR and ICERD, which recognize freedom from forced labor, just, favorable and decent conditions of work, and the right to form and join trade unions. All Member States are bound by CEDAW and CRC, and eight have ratified the CRPD. Together, these treaties require states parties to eliminate discrimination in the area of employment against women, persons with disabilities, and recognize the right of the child to freedom from economic exploitation and work harmful to his or her development. Indonesia and the Philippines are signatories to the ICRMW, which recognizes migrant workers’ labor and other human rights.

The right to work is guaranteed in eight ASEAN constitutions. In general, the right to work is expressed as the right to work in humane conditions, the right to receive fair and equal opportunity and compensation, and the right to conduct business freely. The right to choose one’s employment and the right to rest are only guaranteed in two constitutions. The Constitution of the Philippines is unique in affording full protection to labor, both local and overseas, as well as organized and unorganized labor, and in guaranteeing the right to strike.

Content and Interpretation of the Right in International Law

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Article 23 of the UDHR states that,

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.
3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
4. Everyone has the right to form and to join trade unions for the protection of his interests.

Additionally, the UDHR also includes a separate article granting the right to rest and leisure through limitation of working hours.\(^5\)

The ICESCR describes the right to work as “the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts,” and the right to enjoy just and favourable conditions of work, which include: wages sufficient to provide a decent standard of living; equal remuneration for work of equal value; merit-based promotion; safe and healthy working conditions; rest and leisure time; and the right to form and join labor organizations and strike.\(^6\)

The ILO has identified four fundamental principles and rights of work, which include:

(a) freedom of association;
(b) the elimination of all forms of forced or compulsory labor;
(c) the effective abolition of child labor; and
(d) the elimination of discrimination in respect of employment and occupation.\(^7\)

Details on the content of these fundamental principles can be found in ILO core conventions.

*Freedom of Association*
Workers and employers have a right to establish and join labor organizations of their own choosing and to draw up the constitutions and rules of these organizations, elect their representatives freely, and to organize their administration and activities.\(^8\) The right to strike is protected in the ICESCR, and the ILO Committee of Experts has implied a right to strike in the ILO Freedom of Association Convention (No. 87).\(^9\) Freedom of association includes protections of collective bargaining agreements, which occur when worker and employer organizations freely negotiate conditions of employment and regulate them through collective agreements.\(^10\)

*Non-Discrimination and Decent Work*
Equality and non-discrimination are fundamental human rights. The ILO Equal Remuneration Convention promotes the right to ‘equal pay for work of equal value.’ It goes beyond protecting ‘equal pay for equal work’ or ensuring the same pay to those who are doing the same jobs. Women’s work – such as domestic work – tends to be undervalued. Different jobs may have a similar value, but with vastly different pay-scales, with higher pay for a job traditionally done by men, and lower pay for that done by
women. Overcoming gender inequality requires that work is valued and paid accordingly. The ILO Equal Remuneration Convention applies to all workers, both nationals and non-nationals, working in the public and private sectors and the formal and informal economy. These principles of non-discrimination in remuneration are also recognized in the ILO Convention concerning Discrimination, as well as the ICESCR, ICERD, CEDAW, and ICRMW, and finally the Arab and European regional human rights texts. The ICRMW and case law from the European Court of Justice provide that non-nationals are entitled to the same working conditions as nationals, although they do not have the same right to obtain work as nationals. The African Court of Human and Peoples' Rights has ruled that the right to work applies to citizens and non-citizens alike.

The U.N. Committee on Economic, Social and Cultural Rights (CESCR) includes, as elements of the right to decent work, the right to worker safety, remuneration sufficient to support a family, and respect for the physical and mental integrity of the worker in the exercise of his or her employment. The ILO concept of decent work is somewhat broader, involving the realization of four decent work strategic objectives of, “full and productive employment, social protection, social dialogue, and rights at work.”

Elimination of Child Labor
There is general agreement in international law that children should not be required to perform certain types of exploitative labor. The ILO Minimum Age Convention provides flexibility in allowing signatories to specify a slightly lower age for the minimum age at which children can generally work, and to make specific provisions for particular industries. The ILO prohibition against the worst forms of child labor is absolute and states parties must abolish such labor practices for all persons under 18 years of age. The worst forms of child labor include: slavery or practices similar to slavery, the use, offer or procurement of children for prostitution, pornography, illicit activities such as drug trafficking, and work which is likely to harm the health, safety or morals of children.
Article 28: The Right to an Adequate Standard of Living

AHRD Art. 28: Every person has the right to an adequate standard of living for himself or herself and his or her family including:

a. The right to adequate and affordable food, freedom from hunger and access to safe and nutritious food;
b. The right to clothing;
c. The right to adequate and affordable housing;
d. The right to medical care and necessary social services;
e. The right to safe drinking water and sanitation;
f. The right to a safe, clean and sustainable environment.

This section serves as an introduction to Article 28, and the various subsets of the right to an adequate standard of living are discussed separately.

The formulation of the right to an adequate standard of living in the AHRD follows the lead of several core human rights documents in its affirmation that the right to an adequate standard of living must necessarily entail certain basic subsistence rights. The UDHR mentions everyone’s right “to a standard of living adequate for the health and well-being of himself and his family.” The elements of the right set out in the UDHR are in essence the same as under the AHRD (right to food, clothing, housing, medical care and necessary social services), but the AHRD, recognizing the evolution of human rights law that has taken place since 1948, adds the right to safe drinking water and sanitation, the right to food, and the right to a safe, clean, and sustainable environment. The inclusion of the right to a safe, clean and sustainable environment is particularly progressive, as this right is newly emerging in international human rights law.

The ICESCR also recognizes every person’s right to an “adequate standard of living,” and the CESC has elaborated on the specific sub-rights which are subsumed by it. These include the right to adequate housing, the right to food, the right to water, and the right to social security. The CRC, CEDAW, and ICERD also recognize the right to an adequate standard of living. In addition, several regional human rights instruments also affirm the human right to an adequate standard of living. Prohibiting discrimination of any kind with regard to the right to clothing, housing, food, water, social security and medical services, and a clean and safe, sustainable environment, on grounds of race, color, sex, language, age, religion, political or other opinion, national origin, or other status is essential for the realization of the right to an adequate standard of living. The prohibition on discrimination also entails an immediate obligation for states. Even though some aspects of these rights allow for progressive realization, the prohibition on discrimination is not one of them. Certain segments of the population, such as women, children, or indigenous peoples, may be particularly vulnerable to violations of the right to adequate standard of living or might be particularly dependent on the state to ensure complete fulfillment of the right. In these cases, states parties may be obliged to take on special protective measures to ensure the fulfillment of the right.
In order to ensure that the elements of the AHRD right to an adequate standard of living are extended to non-nationals and other vulnerable groups, Article 28 must be read alongside the AHRD non-discrimination provision and Article 4, which stresses that the “rights of women, children, the elderly, persons with disabilities, migrant workers, and vulnerable and marginalised groups” are an essential part of human rights.⁶⁰⁸
Article 28(A): The Right to Adequate and Affordable Food, Freedom from Hunger and Access to Safe and Nutritious Food

The AHRD’s provision regarding the right to food is largely consistent with other binding and non-binding international and regional human rights instruments. By providing for the right to freedom from hunger and emphasizing that the right to food means access to safe, nutritious, and adequate food, the AHRD is progressive and moves beyond the scope of most other regional and international human rights instruments and towards the Millennium Development Goals’ (MDGs’) mission. However, Art. 28 (a) makes no mention of availability, which is another important facet of the right to food.

Additionally, international and regional cooperation is an important aspect of the realization of the right to food and could have particular relevance in the ASEAN context, particularly given the extent to which agricultural production in the region is interrelated. The AHRD refers to cooperation in relation to the realization of social economic rights in Article 33, and in relation to all rights in Article 39. A future ASEAN Human Rights Convention could improve upon the already progressive-nature of the articulation of the right to food and include the following provisions: special measures for certain vulnerable groups such as children, a requirement for states parties to ensure the availability of food, and specifically highlight the need for international and regional cooperation in guaranteeing the right to food.

ASEAN Member States’ International Legal and Constitutional Obligations

Six ASEAN states have ratified the ICESCR, which includes the right to food. All have ratified the CRC, which requires states parties to fight disease and malnutrition of children “through the provision of adequate nutritious foods and clean drinking-water,” and CEDAW, which provides that pregnant and lactating women must have access to adequate nutrition. Eight have ratified the CRPD, which guarantees the right to adequate food for persons with disabilities. The right to food also appears in a few ASEAN instruments, including the Ha Noi Declaration on the Enhancement of Welfare and Development of ASEAN Women and Children (2010), and the Joint Declaration on the Attainment of the Millennium Development Goals in ASEAN (2009).

Among the ASEAN member state constitutions, several mention the regulation of food, but none guarantee it as a right. The Philippines Constitution mentions the state’s obligation to “establish and maintain an effective food ... regulatory system,” and the Malaysian Constitution has a similar provision. The Constitution of Brunei refers to the state’s powers in a state of emergency to issue orders regarding the supply of food. The Myanmar Constitution guarantees the right to “security and sufficiency of food” for civil servants and includes the responsibility of preventing the adulteration of foodstuffs in the list of duties of the social sector. All fall far short of a meaningful constitutional guarantee of the right to safe, nutritious, and adequate food for everyone.

Content and Interpretation of the Right in International Law
The UDHR includes the right to food as an element of the right to an adequate standard of living: “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food.”619 Similarly, in the ICESCR, the right to food appears under the right to an adequate standard of living.620 The ICESCR, however, goes further than the UDHR by adding an additional section in which state parties recognize “the fundamental right of everyone to be free from hunger” (the only instance in which the expression “fundamental right” is used). 621 State parties to the ICESCR are also called upon to “take, individually and through international cooperation, the measures, including specific programmes, which are needed” to ensure the right to food, including “methods of production, conservation and distribution of food, . . . disseminating knowledge of the principles of nutrition . . . developing or reforming agrarian systems in such a way as to achieve the most effective development and utilization of natural resources, [and aiming to ensure an] equitable distribution of world food supplies in relation to need.”622 It is worth noting that international cooperation with regard to the right to food occupies a prevalent place in the international human rights agenda.

A definition of the right to food can be found in CESC R General Comment No. 12, according to which “the right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement.”623 General Comment No. 12 affirms that the right to food is “indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights . . .”624 The realization of the right to food entails the adequacy, availability, accessibility, safety, nutritional quality, and acceptability of food. 625

The adequacy of food should be interpreted in a broad rather than a narrow sense. States have an obligation to mitigate and alleviate hunger even in times of natural and other disasters.626 Additionally, “the notion of sustainability is intrinsically linked to the notion of adequate food or food security,” which is particularly important in the context of climate change and environmental protection.627 This provision also implies that food should be accessible for both present and future generations. Availability means food is available in a “quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture.”628 It is important to emphasize that there is also a notion of cultural acceptability attached to the right to food, implying the need to take into account the “non-nutrient-based values attached to food and food consumption.”629

Of course, the right to food is interrelated with several of the other sub-rights which together comprise the adequate standard of living. CESC R’s General Comment No. 15 on the Right to Water states that the realization of the right to adequate food requires sustainable access to water resources for agriculture, thereby establishing the connection between the right to food and water.630 In addition to the General Assembly Resolution on the Right to Food,631 General Assembly Resolution 54/175 on the right to development reaffirms that the full realization of the right to development creates a “moral imperative for both national Governments and for the international community . . . to full[y] realiz[e] . . . the rights to food and clean water.”632 The Commission on Human Rights links clean water and food together as
fundamental rights. Freedom from hunger is also the first MDG, with the target of halving the proportion of people who suffer from hunger by 2015.

The core normative aspects of the right to food apply with equal force to vulnerable groups, such as refugees, prisoners, indigenous and tribal peoples. Accordingly, the right to food appears in the CRPD, and the Refugee Convention and the Convention Relating to the Status of Stateless Persons, specifically in regard to rationing.

Among the regional human rights treaties, the African Charter on Human and Peoples’ Rights asserts the individual’s right to “enjoy the best attainable state of physical and mental health,” though it makes no specific reference to a right to food. The Arab Charter, like the AHRD, mentions the right to food under the more general right to an adequate standard of living. The American Declaration of the Rights and Duties of Man also recognizes the link between the right to the preservation of health and the right to food, though limits it to the extent permitted by public and community resources. The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights has a separate article dealing with right to food, linking the right to adequate nutrition with the right to enjoy “the highest level of physical, emotional and intellectual development.”

It is important to emphasize that the right to food is inextricably linked to other human rights, such as the right to life, the right to health, the right to water, the right to work and social security, the right to education, the right to adequate housing, the right to information, the right to freedom of association, the right to take part in public affairs, and freedom from torture, cruel, inhuman, and degrading treatment. The U.N. Human Rights Committee found a violation of the right to life when a detainee died in an overcrowded detention center without access to adequate food or health services. The Commission found that denying detainees food over the course of several days constitutes cruel, inhuman, and degrading treatment. The African Commission on Human and Peoples’ Rights has found that destroying a group’s food sources violates the right to food. Although the right to food is not explicit in the African Charter, the Commission held that it is implicit in such provisions as the rights to life, health, and economic, social, and cultural development. The Inter-American Court on Human Rights has also emphasized the link between the right to life and the right to food. In addition, both the Inter-American Court and the Inter-American Commission on Human Rights have developed extensive jurisprudence on the right to food as it applies to indigenous peoples, especially indigenous communities’ claims to ancestral lands go unrecognized by the government and oblige such communities to turn to the government for subsistence. In such cases both the Court and the Commission have established the state’s obligation to provide adequate food assistance.
Article 28(B): The Right to Clothing

The AHRD’s specific inclusion of the right to clothing as a subset of the general right to an adequate standard of living is mirrored in the UDHR, the Arab Charter, and the American Declaration of human Rights. In so doing, it reinforces the interconnectedness of the right to clothing with other rights, such as the right to health and the right to life. However, the right to culturally appropriate clothing as well as the right to wear religious clothing are important and much contested facets of the right, and are not specifically mentioned in the AHRD. A future ASEAN human rights convention should address the right to culturally appropriate clothing.

ASEAN Member States’ International Legal and Constitutional Obligations

As mentioned above, six Member States have ratified the ICESCR and all the CRC, both which recognize the right to clothing as part of the right to an adequate standard of living. In terms of ASEAN regional obligations, the Ha Noi Declaration on the Enhancement of Welfare and Development of ASEAN Women and Children, while not making a specific reference to the right to clothing, mentions improving “the proportion of women and children with access to . . . basic necessities.” Arguably, access to clothing is a basic necessity, though no ASEAN Constitution mentions the right to clothing specifically.

Content and Interpretation of the Right

The right to clothing represents part of the more general right to an adequate standard of living. As such, it is often subsumed under this more general right, failing to receive specific mention in many human rights instruments. The right to clothing as a separate element of the right to an adequate standard of living does appear in the UDHR, which recognizes that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services.” The ICESCR mentions the right to clothing as part of the “right of everyone to an adequate standard of living for himself and his family.”

The CRC talks of “the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development” and the state’s obligation in terms of assisting parents and others responsible for the child to implement this right and “in case of need provide material assistance and support programmes, particularly with regard to . . . clothing.”

The Arab Charter and the American Declaration are the only regional human rights instruments which mention the right to clothing specifically. The American Declaration asserts the right to clothing in the context of the right to health and well-being through sanitary and social measures, while the Arab Charter places the reference to clothing in the general context of the right to an adequate standard of living. Among non-binding international or regional instruments, The Cairo Declaration on Human Rights in Islam mentions the right to clothing in two contexts: the right of an individual to a decent living and in the context of armed conflict, emphasizing the right of prisoners of war to clothing.

As noted, the right to clothing is strongly connected to other core human rights, such as the right to life and health and the right to an adequate standard of living. As the CESCR noted in General Comment
14, “the right to health is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights.” While Committee does not refer to the right to clothing specifically in this context, without access to basic clothing the right to health as well as the right to life may be in danger.

The right to adequate clothing is particularly relevant for certain vulnerable groups, such as the elderly, children, detainees, prisoners of war, and women, and it can have special relevance for workers, including migrant workers, in terms of adequate and appropriate clothing for work to provide for a safe and healthy work environment. The right to adequate clothing as it relates to refugees means that it must be suitable for the climate of the host state and should not stigmatize them. Since clothes can serve as a means to identify one as belonging to a certain religion, ethnicity, or culture, it is important to emphasize the importance of non-discrimination provisions in terms of the right to clothing, as well as the importance of the right as it relates to human dignity, especially with regard to vulnerable groups.

The right to culturally adequate clothing is a relevant element of the right, especially as it relates to the right to freedom of expression and freedom of religion. For example, the European Court of Human Rights has addressed this issue, upholding Turkey’s ban on wearing the head scarf in universities, emphasizing the wide margin of appreciation of the national authorities as well as the importance of maintaining secularism. The Human Rights Committee considered a communication regarding the wearing of head covering on passport photos and, by reference to General Comment 22 concerning Article 18 of the ICCPR, which discusses freedom of expression and religion, held that the freedom to manifest one’s religion encompasses the wearing of distinctive clothing or head coverings. The Committee found that because the wearing of the Sikh turban is not only a religious duty but is also tied in with a person’s identity, wearing it in passport photos is a religiously motivated act, and the French law requiring bareheaded passport photographs is a disproportionate restriction on the freedom of religion. Although the right to clothing is not the explicit basis for these decisions, it shows the strong link between the right to religious freedom and culture and the right to clothing. The right to clothing is strongly tied to the realization of other rights, and a lack of fulfilment of the right to clothing can jeopardize other core rights.
Article 28(C): The Right to Adequate and Affordable Housing

The AHRD states that the right to housing should be “adequate” and “affordable,” and thus distinguishes itself from other international regional instruments. However, this AHRD provision is still consistent with the view of the CESCR that ‘the right to housing’ should refer not just to housing but *adequate housing.*

The Committee has interpreted adequate housing to include the principle of affordability, which requires that financial costs associated with housing should not threaten or compromise the attainment and satisfaction of other basic needs. The emphasis on the aspect of affordability in the AHRD suggests that ASEAN Member States should provide subsidized housing for those unable to obtain affordable housing.

If ASEAN wishes to further strengthen the right to housing in a future human rights convention, it could specifically draw on those principles elaborated by the CESCR to add to its list of housing rights legal security of tenure, availability of services, materials, facilities, and infrastructure, habitability, accessibility, location, and cultural adequacy.

**ASEAN International Legal and Constitutional Obligations**

Six ASEAN Member States are parties to the ICESCR and are obliged to achieve progressively the full realization of the right to adequate housing. Additionally, under CEDAW, all ten ASEAN Member States shall undertake all appropriate measures to ensure women’s rights to housing.

Unlike the other constitutions of the ASEAN Member States, the Constitutions of the Philippines and Viet Nam provide explicit guarantee of the enjoyment of the right to housing. The Constitution of the Philippines is also noteworthy for its inclusion of provisions on “affordable and decent housing” and the prohibition against forced eviction.

**Content and Interpretation of the Right in International Law**

The ICCPR does not explicitly mention the right to housing, but it links the realization of the right to adequate housing to other basic human rights, such as the right to protection of one’s private life, family, and home. The right to adequate housing is integrally linked to other human rights and thus cannot be viewed in isolation from other human rights, such as the concept of human dignity and principles of non-discrimination.

The right to housing is also included in several regional human rights instruments, including the European Social Charter, the Charter of Fundamental Rights of the European Union, the Charter of the Organization of American States, and the American Declaration of the Rights and Duties of Man. The African Charter contains no specific guarantee of the right to housing, however.
International and regional instruments also pay particular attention to the housing rights of specific groups, including women, children, the elderly, refugees, persons with disabilities, migrant workers, and other minorities.

In interpreting the right to housing, the CESCR states that the right to housing should not be interpreted in a narrow or restrictive sense. The Committee further elaborates that arbitrary or unlawful interference with privacy, family, or home life would undermine the right to adequate housing. The Committee further notes that the concept of adequacy includes seven key aspects:

- legal security of tenure;
- availability of services, materials, facilities, and infrastructure;
- affordability;
- habitability;
- accessibility;
- location; and
- cultural adequacy.

Additionally, it asserts that “adequate shelter means . . . adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities - all at a reasonable cost.”

Protection against forced evictions is recognized as one of the key elements of the realization of the right to adequate housing, as forced evictions can have implications to the enjoyment of other human rights, such as the right to life, the right to personal security, and the right to health. The African Commission on Human and Peoples’ Rights recalls that “the United Nations Commission on Human Rights has recognized that forced evictions constitute gross violations of a range of human rights, in particular the right to adequate housing.”

The African Commission has also held that although the right to housing is not explicitly guaranteed under the African Charter, the combined effect of violations of the right to health, the right to property, and the right to protection of the family constitute a violation of the right to housing. The European Committee of Social Rights has found that “the right to housing permits the exercise of many other rights (civil and political as well as economic, social and cultural) and is of central importance to the family.” This ruling also noted that “adequate housing requires a dwelling of suitable size.” Similarly, the Committee held that “in order to meet the criteria of adequacy, a dwelling must provide occupants with adequate space and protect them from harsh weather conditions or other threats to health.”
Article 28(D): The Right to Medical Care and Social Services

While the AHRD’s language on the right to social services and medical care mirrors that in the UDHR, it is important to acknowledge that the provision of social services and medical care to individuals who are at particular risk due to their vulnerable status merits special consideration, as is reflected in a number of regional and international instruments. The right to social services and medical care is particularly important for people living in rural areas and migrant workers, in addition to other vulnerable groups. For these groups, the non-discriminatory provision of medical care and social services is an absolute necessity, and governments may need to take positive measures to fulfil their obligations in implementing this right. As mentioned in the introductory section for Article 28, the right to social services and medical care must be read alongside the AHRD’s non-discrimination and “vulnerable groups” provisions to ensure that persons with disabilities, refugees, migrant workers, indigenous and other groups are afforded equal and adequate access to this right.

ASEAN Member States’ International Legal and Constitutional Obligations

Six ASEAN Member States have ratified the ICESCR, which requires states parties to “assure to all medical service and medical attention in the event of sickness” as part of the right to health, and to guarantee the right to social security. All Member States have ratified the CRC and CEDAW, and eight the CRPD, which respectively recognize the importance of medical assistance and social security for children, particularly disabled children, women’s need for medical care in relation to pregnancy, and the need to make medical facilities accessible for persons with disabilities.

The right to medical care and social services appears in some form in the constitution of seven ASEAN Member States. Several of these constitutions have provisions regarding special measures to provide certain vulnerable groups with social services and medical care or to provide these services without any form of discrimination. The constitutions of Myanmar, Lao PDR, Viet Nam, and Cambodia mandate the provision of health care or social services only for their own citizens.

Among ASEAN legal instruments, the Ha Noi Declaration on the Enhancement of Welfare and Development of ASEAN Women and Children, the Declaration on the Commitments for Children in ASEAN, and the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers mention the right to social services and medical care. These declarations all reflect ASEAN Member States’ intentions to provide social services and medical care to certain at-risk individuals by providing additional protective measures as necessary.

Content and Interpretation of the Right in International Law

The right to medical care and necessary social services is closely connected to the rights to life, health, and a dignified existence. It is also tied to the right to an adequate standard of living and often appears either as part of a more general right to an adequate standard of living – as in the AHRD – or as an aspect of the right to health or social security.
The right was first recognized in the UDHR, under the more general right to an adequate standard of living. The UDHR notes that “everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services.” While no firm definition of the right to medical care and necessary social services exists in international human rights law, aspects of the right that are particularly important include availability and accessibility, dignity, quality, non-discrimination, and participation.

The ICESCR recognizes the universal right to the highest attainable standards of health. States parties must take steps to realize this right through the prevention, treatment, and control of epidemic, endemic, occupational, and other diseases, and the creation of conditions which would ensure medical service and medical attention for all in the event of sickness. The ICCPR recognizes state parties’ obligations to protect every human being’s inherent right to life. The CRC recognizes every child’s right to life, calls on states to establish the necessary social programs for the protection and support of the child, and recognizes the child’s right to the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. CEDAW also has several articles dealing with the right of women to necessary social services, medical care and healthcare services, and social security programs. The ICERD also recognizes the rights to public health, medical care, social security and social services, without discrimination.

The European Social Charter contains provisions on the right to protection of health, the right to social and medical assistance, and the right to social welfare services. The African Charter on Human and Peoples’ Rights contains no specific provision regarding medical care and social services, though it does enshrine the individual’s right to the best attainable state of physical and mental health. The Arab Charter mentions the right to an adequate standard of living, including “services,” and recognizes everyone’s right to the enjoyment of the highest attainable standard of physical and mental health, the right of the citizen to free basic healthcare services, and non-discriminatory access to medical facilities. The Arab Charter also mentions states’ duty to provide social services and health services free of charge for all people with disabilities. The American Declaration of the Rights and Duties of Man states that “every person has the right to the preservation of his health through sanitary and social measures relating to . . . medical care,” but only to the extent permitted by public and community resources.

The right has particular significance for vulnerable groups such as women (for whom reproductive rights are particularly important), the elderly, people with disabilities, children, minorities and indigenous and tribal peoples, refugees, detainees, and stateless persons (for whom the non-discriminatory aspect of the right is especially relevant). States must also recognize the importance of free, prior, and informed consent for the provision of medical care. In addition, gender sensitivity is an important facet of the right to medical care.
Article 28(E): The Right to Safe Drinking Water and Sanitation

In light of wide recognition of the right to safe drinking water and sanitation in recent regional and international human rights instruments and the heightened profile of the right to water and sanitation as a result of the MDG, the AHRD’s specific recognition of these rights is progressive and in line with recent binding and non-binding international human rights instruments. The acknowledgement of the right to water and sanitation is particularly important in the ASEAN contexts, given the region’s many shared riparian systems and borders. However, the right to water and sanitation does not stand alone – it is protected only by ensuring that aspects of the right including access, availability, adequacy, sustainability and inter-generational equity are fulfilled.

The cultural aspect of the right to water is also important, as is the right to water in the development context. Free, prior, and informed consent and participation in decision-making processes regarding bodies of water and the right to effective review mechanisms and remedies are integral to the realization of the right.

A future ASEAN human rights convention could strengthen this right to clean drinking water and sanitation by specifying that the right requires persons have sufficient, safe, acceptable, physically accessible, and affordable water for personal and domestic uses, and highlighting the need for sustainable water usage.

ASEAN Member States’ International Legal and Constitutional Obligations

Although not explicitly recognized in the ICESCR, the right to water has been recognized as an integral part of the right to an adequate standard of living. Additionally, all ASEAN Member States have ratified the CRC and CEDAW, which require states parties to ensure children have access to clean drinking water and that women have equal access to sanitation and water supply.724 The CRPD obligates states parties to “ensure equal access by persons with disabilities to clean water services.”725

The right to safe drinking water and sanitation does not appear in any of the ASEAN state constitutions, though several regional instruments address the right to water. Among ASEAN legal instruments, the Ha Noi Declaration on the Enhancement of Welfare and Development of ASEAN Women and Children (2010)726 and the Joint Declaration on the Attainment of the Millennium Development Goals in ASEAN727 contain references to this right. The Ha Noi Declaration aims to “improve the proportion of children and women with access to housing, improved sources of safe drinking water and adequate sanitation facilities,”728 while the Joint Declaration on the Attainment of the Millennium Development Goals in ASEAN mentions the goal of achieving “a balance between economic growth and social development and environmental sustainability in order to reduce and not to create negative impacts to the attainment of the Millennium Development Goals.”729
Content and Interpretation of the Right in International Law
The right to water includes the right of access to water. Access to water means water in the amount and quality that is sufficient for vital human needs, such as drinking, food production, and sanitation. Accessibility also requires that the water be within safe physical reach, affordable for all, and provided without discrimination. The obligation to provide access to sufficient water also entails an obligation to manage water resources effectively and in a sustainable manner.\textsuperscript{730}

The right to water, like the right to food, is fundamentally interconnected with various other rights. It is associated with the right to life, the right to seek, receive, and impart information concerning public decisions and policies that impact the right to water, and the right to effective review mechanisms and remedies. The rights to food and health\textsuperscript{731} are also relevant to the right to water. The right to an adequate standard of living also includes the right to basic sanitation and access to safe drinking water, as recognized in the AHRD.

The situation of vulnerable individuals, including people with disabilities,\textsuperscript{732} women,\textsuperscript{733} children,\textsuperscript{734} minorities, indigenous peoples,\textsuperscript{735} refugees, stateless people, prisoners, migrant workers,\textsuperscript{736} those living in rural areas, and detainees also bears special recognition in relation to the right to water since they depend more—and sometimes completely—on the state to provide them with such resources.

The right to water resources is significant as a cultural right, especially as it relates to the rights of religious groups, indigenous communities, and cultural minority groups to the conservation and use of water-related sanctuaries.\textsuperscript{737} This element of the right has been addressed by the ICESCR, which calls for the recognition of water as a social and cultural good, rather than an economic good.\textsuperscript{738} The Human Rights Committee has also alluded to the cultural dimensions of the right\textsuperscript{739} In the context of a broader ‘right to development,’ the right to water has special meaning for indigenous communities. When it comes to the planning and implementation of large development projects,\textsuperscript{740} the right to information, the right to participate in decision-making processes, the right to effective review mechanisms, and the right to remedy can also be directly relevant. The principle of free, prior, and informed consent as it applies to indigenous peoples is becoming more and more relevant in the context of the right to water and development.\textsuperscript{741}

The right to water does not appear in the UDHR, but the right to an adequate standard of living encompasses the right to water due to its link with health. “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”\textsuperscript{742}

Neither the ICCPR nor the ICESCR contains a specific mention of the right to water, but the ICESCR’s provisions regarding the right to life, the right to an adequate standard of living, and the right to health are relevant here. The CESCR has elaborated on the right to water under the ICESCR. It reinforces that
the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible, and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease, and to provide for consumption, cooking, personal and domestic hygienic requirements. It also recognizes that the right to water includes both freedoms and entitlements. Freedoms include the right to maintain access to existing water supplies necessary for the right to water and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies, while entitlements include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water. The CESCR also reaffirmed that the right to water must be adequate for human dignity and health; that the right to water should be treated as a social and cultural good, not primarily an economic good; and that the manner of realization of the right to water must be sustainable, thus ensuring the realization of the principle of intergenerational equity. The CESCR has also reinforced the importance of an adequate supply of safe and potable water and basic sanitation for the improvement of all aspects of environmental and industrial hygiene.

Although there are only few references in international human rights instruments to a right to water, there are a number of General Assembly resolutions recognizing the right to water as a human right. General Assembly Resolution 54/175 on the right to development reaffirms that in the full realization of the right to development, “the rights to food and clean water are fundamental human rights and their promotion constitutes a moral imperative for both national Governments and for the international community.” Indeed, the MDGs include as a priority the need to halve the proportion of people who live without sustainable access to safe drinking water. By 2012, the proportion of people without sustainable access to safe drinking water had been halved, rendering the water access right the first MDG to reach its target. However, the sanitation goal has not yet been achieved.

Among regional human rights instruments, the European Social Charter does not speak of the right to water and sanitation specifically, though it does contain a right to housing. According to the European Committee of Social Rights, this right encompasses specific obligations related to the access to safe drinking water and sanitation. While the African Charter does not contain a specific mention of the right to water and sanitation, the African Charter on the Rights and Welfare of the Child does include a right to safe drinking water, and the Protocol to the African Charter on Human’s and Peoples’ Rights on the Rights of Women in Africa requires states to provide women access to safe drinking water. The Arab Charter contains an obligation not only to provide safe drinking water for all, but also proper sanitation systems. The American Declaration on the Rights and Duties of Man mentions the right to preservation of health through “social and sanitary measures,” but only to the extent permitted by public and community resources. Both the African Commission on Human and Peoples Rights and the Inter-American Court of Human Rights have established a link between the right to health and/or the right to life and the right to water in their jurisprudence.
**Article 28(F): The Right to a Safe, Clean and Sustainable Environment**

By adopting the right to a safe, clean, and sustainable environment, ASEAN states have joined the African, Arab, and American systems as well as many national constitutions in recognizing the right to a clean and healthy environment. This recognition is progressive, since the right to a clean and healthy or safe environment is not yet firmly recognized in international law as a human right.

The right to a *sustainable* environment is an important inclusion in the AHRD, recognizing the inter-generational dimension of the right as well as the now well-established place of sustainability in the environmental law canon. The concept of sustainability is not new in the ASEAN context, however. In the ASEAN Declaration on Environmental Sustainability, Member States vow to “honour and implement commitments to multilateral and regional sustainable development and environmental agreements, so as to achieve the common goal of a clean and green ASEAN.”

A future ASEAN convention should reproduce this right to a safe, clean and sustainable environment, and may even specify the content of this right through reference to the work of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment.

**ASEAN Member States’ International Legal and Constitutional Obligations**

There are hundreds of multilateral treaties providing for environmental protection, many of which have been ratified by all ten ASEAN states, including the Convention on Biological Diversity, the Convention on the International Trade in Endangered Species of Wild Flora and Fauna, and the Framework Convention on Climate Change.

Five ASEAN Member States’ constitutions have provisions regarding environmental protection though only the Indonesian constitution formulates a right to environment *per se*. It states that “[e]very person shall have the rights to live in physical and spiritual prosperity, to have a home and to enjoy a good and healthy environment.” The constitutions of Lao PDR, Myanmar, Thailand, and Cambodia contain provisions that mandate a duty for either citizens or the government to protect the environment, without granting a human right to safe, clean, and sustainable environment.

Among ASEAN legal instruments, the ASEAN Charter recognizes the promotion of sustainable development, as one of the purposes of ASEAN is to “ensure the protection of the region’s environment and the sustainability of its natural resources.” The Joint Declaration on the Attainment of the Millennium Development Goals in ASEAN talks of a “continuous effort towards a balance between economic growth and social development and environmental sustainability in order to reduce and not to create negative impacts to the attainment of the Millennium Development Goals.” Additionally, as mentioned above, the ASEAN Declaration on Environmental Sustainability states that a clean and green ASEAN is a common goal of all Member States.
Content and Interpretation of the Right in International Law

While the interrelationship of human rights and environmental protection is widely recognized, the existence of a right to an environment of a specified quality is a source of debate. The UDHR does not contain a human right to a clean environment. It broadly speaks of everybody’s right to a “standard of living adequate for the health and well-being of himself and of his family.” The ICESCR talks of the commitment of states to improve “all aspects of environmental and industrial hygiene.” It was not until the 1972 Stockholm Declaration on the Human Environment that a human right to environment first emerged under Principle 1: “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”

Several recent regional conventions, including the African Charter, the Arab Charter, and the San Salvador Protocol have since similarly recognized a human right to a clean environment, as have more than a hundred national constitutions. While the European Convention on Human Rights does not contain a right to a clean environment, the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) mentions the “right of every person of present and future generations to live in an environment adequate to his or her health and well-being.”

Most instruments that provide for a right to a clean environment, with the exception of the Arab Charter, do not provide standards as to how a state must implement the right. Nor do they define what constitutes a “clean” or “healthy” environment. That said, there are hundreds of multilateral treaties that impose specific norms on states regarding environmental protection, and international case law suggests that compensation is required for environmental damage that meets a significant threshold. Any right to an environment of a specified quality must necessarily fall back on substantive environmental standards and would likely eventually require extensive international regulation of certain environmental sectors. This would help to fill the right to a clean environment with meaning while simultaneously its adaptability and dynamic nature. This approach is not unique in human rights law; similar standard-setting is used, for example, in the ILO’s labour regulations.

As noted, major UN human rights conventions and several regional conventions do not recognize a right to a clean environment. Interpretations of these conventions suggest that the right to a clean environment may be a precursor to or element of other rights such as the right to health or the right to life, which is recognized by all major human rights instruments. The International Court of Justice jurisprudence summarizes the linkages between environmental protection and other rights:

“The protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage
to the environment can impair and undermine all the human rights spoken of in the
Universal Declaration and other human rights instruments. 779

Despite the lack of a specific right to a clean environment in the European Convention, the European
Human Rights Court recognized the right to compensation for environmental harm under the European
Convention as a violation of the right to life and right to private life. 780 Other regional adjudicatory
bodies have similarly resolved complaints related to environmental damage on the basis of rights to life, property, health, information, family, and life. 781

There is also an argument that the right to a clean environment should not be recognized. Critics of the
right have argued, inter alia, that the identity of the right-holder, and thus her or his responsibilities, is
ambiguous, and a simple right to the environment cannot address all the complexities associated with
environmental issues. In addition, some argue that human rights bodies are not appropriate organs to
supervise environmental protection obligations 782 and that the right to protect the environment is not
enforceable in the same way as the right to vote, the right to freedom, or the right to freedom of
movement. 783 While the right to a clean and safe environment must necessarily be defined by referring
to substantive standards that are by nature variable, this does not render the right so volatile or unfixed
as to be without normative content. Rather, this variability gives the right dynamism and acknowledges
that it must be able to react to changing circumstances as well as leave room for shifting economic and
social priorities, within certain limits. 784

Assuming the right to a clean environment exists, there is debate about what it encompasses. Based on
his assessment of UN instruments, regional conventions, and case law, one scholar notes three broad
categories of rights encompassed in the expansive human right to environment. First, the right to
environment encompasses “a human right to live in an environment of minimum quality that still allows
for the realization of a life of dignity and well-being.” Second, the right of environment “articulates the
philosophical theory that the environment is entitled to rights based on its own intrinsic value, separate
and distinct from those attributed to it through human use.” Finally, procedural environmental rights
are a prerequisite for implementing the substantive components of the expansive right to
environment. 785 Procedural environmental rights include the right to information, the right to
participate in decision-making relevant to environmental issues, the right to legal redress, and the right
to effective remedies, among others. 786 The importance of procedural environmental rights has been
reaffirmed in the Aarhus Convention, 787 Principle 10 of the Rio Declaration, 788 and ILO Convention No.
169. 789 The Rio Declaration also recognizes the role of certain vulnerable groups, such as women,
indigenous peoples, and youth, in environmental policy-making. 790 Regional human rights bodies have
also reaffirmed the importance of procedural environmental rights. 791 Since environmental harm may
affect certain vulnerable segments of the population more acutely, such as women, children, and
indigenous peoples, non-discrimination provisions as well as possibly special procedural and substantive
rights with respect to these groups may be in order; unfortunately human rights law is still not
absolutely clear on this matter. 792
Article 29: The Right to Health

AHRD Art. 29: (1) Every person has the right to the enjoyment of the highest attainable standard of physical, mental and reproductive health, to basic and affordable health-care services, and to have access to medical facilities.

(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.

Article 29(1) of the AHRD replicates the ICESCR right to “enjoyment of the highest attainable standard of physical and mental health,” adding to the ICESCR wording by also recognizing the right to the highest attainable standard of reproductive health. The explicit recognition of reproductive rights is consistent with ASEAN Member States obligations under CEDAW, thought a CSO submission calling for inclusion of sexual health in article 29(1) was rejected by the AHRD’s drafters. While reproductive health refers solely to reproductive functions, sexual health is a broader concept which encompasses “a state of physical, emotional, mental and social well-being in relation to sexuality; it is not merely the absence of disease, dysfunction or infirmity.”

The CESR’s General Comment on the Right to Health notes that the right contains four elements: these are availability of a sufficient quantity of functioning public health and health care facilities, accessibility to health facilities, goods and services in a non-discriminatory way, acceptability of standards of medical ethics and cultural sensitivity, and quality of care. The AHRD explicitly recognizes the availability and accessibility prongs of the right to health; however, it makes no mention of the notion that such services, facilities and goods be also acceptable and of a sufficient quality.

ASEAN has been progressive in terms of recognizing an international obligation to halt the spread of HIV/AIDS and end discrimination against those affected by it. The non-discrimination clause in article 29(2) is a positive addition to the right to health, but could be further strengthened. The provision commits ASEAN Member States to the creation of a non-discriminatory environment, but does not create affirmative obligations for the state, and applies only to individuals suffering from communicable diseases.

A future ASEAN human rights convention would ideally recognize of all four elements of the right to health – availability, accessibility (which includes nondiscrimination, affordability, physical access and access to information regarding health and health services), acceptability and quality. A convention should establish a clear state obligation to eliminate discrimination against and ensure care for those suffering from stigma-inducing diseases, whether communicable or not. In addition, to reflect the evolution of the right to health over the past few decades, the convention should include the individual’s right to access information regarding personal or public health matters. Finally, a convention should recognize a broader right to sexual health which falls in line with the liberal understanding.
espoused by the World Health Organization (WHO), and includes access to family planning or post-natal health services.  

It is also important that a convention recognize the particular health-related needs of vulnerable populations. For instance, children are entitled to special treatment in relation to the right to health.  

Though the AHRD prohibits discrimination against persons with disabilities, it does not allude to their rights to particular health services related to their disability as required by CRPD, which all ASEAN members have signed and most have ratified. The rights of migrant workers and their families should also be given special consideration. Migrant workers are entitled to the same treatment as nationals in relation to access to health services and have the right to receive any medical care that is urgently required to preserve their life or to avoid irreparable harm. Similarly, indigenous peoples have an equal right to enjoy the highest attainable standard of physical and mental health, and may face problems with accessibility that would need to be addressed.  

**ASEAN Member States’ International Legal and Constitutional Obligations**  
All ASEAN Member States have endorsed the UDHR, which recognizes the right to an adequate standard of living that includes the right to health. All ten Member States have also accepted the WHO Constitution, which states that “enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being.” Six ASEAN Member States have ratified the ICESCR and acknowledged the right to health in relation to children, women, migrant workers, and disabled persons as recognized in the CRC, CEDAW, ICRMW, and CRPD respectively. All ASEAN Member States, with the exception of Brunei Darussalam, Singapore and Malaysia recognize a right to health or corresponding state obligation to provide health services in their constitutions. In Lao PDR, Viet Nam and Myanmar, only citizens’ right to health is guaranteed by the state. Many ASEAN constitutions also recognize the need to respond to the particular health requirements of social groups such as children, women, persons with disabilities, the elderly, people in remote or rural areas, and ethnic minorities.  

Lao PDR, the Philippines, and Thailand all expressly recognize the need for health care to be affordable or accessible, while the universal nature of the right to health in Indonesia—that “every person” has the right—implies this accessibility.  

**Content and Interpretation of the Right in International Law**  
The right to health predates many of the other human rights in international law, as it is enshrined in the WHO Constitution that entered into force in 1948. The right is also included in the UDHR as “a standard of living adequate for . . . health and well-being.” The ICESCR requires state parties to recognize everyone’s right to enjoy the highest attainable standard of physical and mental health. It also lays out the specific steps states parties must take to realize this right:  

“(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of
environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.”

The right to health encompasses both physical and mental well-being and sometimes a right to spiritual or moral well-being.

The right to health is closely linked to and interdependent with the realization of many other human rights, such as the rights to food, housing, work, education, life, non-discrimination, privacy, access to information, and the prohibition against torture. The right is not a right to be healthy per se, but a right to have access to medical facilities, goods, services, and conditions that are conducive to attaining a high standard of physical and mental health. The right to health includes the freedom to make independent choices about one’s health and body as well as the right to a system of healthcare that provides equal opportunity for all people to enjoy a standard of health.

The right to health contains four essential elements: (1) availability: states must run a functioning public healthcare system; (2) accessibility: health facilities, goods, and services must be available to everyone on a non-discriminatory basis and be both physically accessible and affordable; (3) acceptability: health facilities, goods, and services must be respectful of medical ethics and individual cultures; (4) quality: health facilities, goods, and services must be scientifically and medically appropriate and of good quality.

Medical services must be affordable and accessible. The CESCR has found that state parties are required to provide affordable healthcare for all, which means that poorer individuals should not be disproportionately burdened by healthcare expenses. Medical care must also be culturally sensitive. The Declaration on the Rights of Indigenous Peoples includes their right to use traditional medicine and maintain cultural healthcare practices. Lastly, the right to health includes a right to access information, meaning that everyone has the right to seek, receive, and impart information concerning health.

Women’s right to health further includes a right to access to services and information regarding reproduction, family planning, and sexual health. Women maintain the right to make their own decisions about their reproductive health and future, including the right to utilize reproductive technology such as in vitro fertilization. Women’s right to appropriate medical services extends natal and post-natal care. Additionally, women have a right to be free from traditional harmful practices that have a detrimental effect on their health.

The right to health also encompasses a state’s duty to prevent, treat, and control epidemic, endemic, occupational, and other widespread diseases, such as HIV/AIDS, by establishing prevention and educational programmes. The General Assembly has on several occasions recognized that in order to
attain a high standard of health, states must provide persons infected with HIV/AIDS with effective, affordable, and quality medication and treatment.⁸³⁰
Article 30: The Right to Social Security

**AHRD Art. 30:**

(1) Every person shall have the right to social security, including social insurance where available, which assists him or her to secure the means for a dignified and decent existence.

(2) Special protection should be accorded to mothers during a reasonable period as determined by national laws and regulations before and after childbirth. During such period, working mothers should be accorded paid leave or leave with adequate social security benefits.

(3) Motherhood and childhood are entitled to special care and assistance. Every child, whether born in or out of wedlock, shall enjoy the same social protection.

The language of article 30(1) is largely borrowed from the ICESCR, but includes a proviso that social insurance is subject to availability. This suggests that states are not under any obligation to provide such insurance. If so interpreted, this AHRD provision would be inconsistent with ASEAN Member States’ obligations under the ICESCR and the CRC.  

Article 30(2) is identical to article 10(2) of the ICESCR in providing special protection to mothers before and after childbirth as well as paid maternity leave. The AHRD arguably should have incorporated the more detailed CEDAW provisions on social security, given that all ASEAN Member States are party to CEDAW. For example, states parties to CEDAW are required to eliminate discrimination against women by prohibiting dismissal on the grounds of maternity leave, and ensuring that when women take maternity leave it does not result in loss of former employment, seniority or social allowances. During the drafting process of the AHRD, civil society organizations submitted that the AHRD should additionally recognize paternity leave for working fathers, which is important for promoting gender equality in the rights and responsibilities of parents.

The AHRD differs from the ICESCR by allowing the nature of this protection to be determined by national laws and regulations. This in itself is not a problem, provided national laws are consistent with the international legal obligations of the ASEAN Member States.

Article 30(3) is identical to article 25(2) of the UDHR. The “protection extended to motherhood and childhood” in article 30(3) complements the right to health in article 29 of the AHRD, and the right to social services in article 28.

A future ASEAN human rights convention should strengthen the social protections afforded to women, and better reflect Member States’ obligations under CEDAW, by containing more detailed provisions on the elimination of discrimination related to motherhood. By recognizing paternity leave, ASEAN could make a progressive move in recognizing the equal rights and responsibilities of parents in child-rearing. A convention should also provide more guidance to ASEAN Member States as to the circumstances under which states must provide social security. In addition to motherhood, these circumstances include
unemployment, sickness, disability, widowhood, orphans, old age or other lack of livelihood in circumstances beyond an individual’s control.\(^{835}\)

With regard to social insurance, a convention should reflect the state duty to ensure access to social insurance, rather than recognizing this obligation only if there are social insurance services already in existence. “Special protections” provided to mothers before and after childbirth should be subject to national law and regulations consistent with applicable international law.

**ASEAN Member States’ International Legal and Constitutional Obligations**

Six ASEAN Member States are state parties to the ICESCR; all ten have ratified or acceded to CEDAW, six are parties to ICERD and eight are parties to CRPD.\(^{836}\) These four core human rights treaties require states parties to guarantee the enjoyment of the right to social security without discrimination\(^{837}\) and to take steps, including through international assistance and cooperation, to progressively achieve the realization of the right with the maximum available resources.\(^{838}\)

All ASEAN Member States, with the exception of Brunei Darussalam and Singapore, recognize the importance of social security in their constitutions.\(^{839}\)

**Content and Interpretation of the Right in International Law**

The right to social security is well established in international law. The UDHR specifically guarantees the right to social security:

“Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”\(^{840}\)

The UDHR also states that “[e]veryone has . . . the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”\(^{841}\) The ICESCR mandates that states parties “recognize the right of everyone to social security, including social insurance.”\(^{842}\) It also gives special protection to mothers before and after childbirth, asserting that “[d]uring such period working mothers should be accorded paid leave or leave with adequate social security benefits.”\(^{843}\)

The CESCR has stated that the right to social security requires states parties to the ICESCR to establish a social security system administered by public authorities that is sustainable, so it is available to present and future generations, and provides benefits that mitigate against the impact of relevant social risks and contingencies.\(^{844}\) These social risks and contingencies include “health care, sickness, old age, unemployment, employment injury, family and child support, maternity, disability, and survivors and orphans,”\(^{845}\) and the benefits received in such cases must be adequate in amount and duration and accessible to all.\(^{846}\) The CESCR also calls for international assistance to states to realize the right.\(^{847}\) When
administering social security benefits, states may not discriminate against non-nationals, refugees, or migrant workers.

Numerous other conventions provide for social security for the unemployed, the aged, people with disabilities, pregnant and post-natal mothers, and children.

Other regions have handled the right to social security differently. In the European and American regional human rights systems, the right to social security, as an autonomous human right, is not contained in the core human rights conventions, but rather in their treaties on economic, social, and cultural rights. The African Charter does not specifically mention “social security” but provides special protection for the aged and people with disabilities, and alludes to assisting the family. The Arab Charter does include a brief but direct provision guaranteeing every citizen the right to social security and social insurance. Only the American Convention on Human Rights and the African Charter on the Rights and Welfare of the Child specifically provide for the welfare of children born to unmarried parents.

The right to social security is not a right to be free from poverty, although this may be a goal of instruments providing for social security. For example, the Inter-American Human Rights Court has found that state reductions in old-age pension entitlements are not necessarily a violation of the right to social security, but that arbitrary termination of employment resulting in complete denial of social security benefits otherwise owed does constitute a violation. Conversely, European cases concerning Greece’s reductions in pensions have found that because workers have an expectation of getting a specific pension based on the laws in place, a state can change laws governing pensions only for compelling reasons.
Article 31: The Right to Education

AHRD Art. 31:
(1) Every person has the right to education.
(2) Primary education shall be compulsory and made available free to all. Secondary education in its different forms shall be available and accessible to all through every appropriate means. Technical and vocational education shall be made generally available. Higher education shall be equally accessible to all on the basis of merit.
(3) 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.

The AHRD provisions regarding the right to education are in harmony with relevant international and regional human rights canons. The language of the AHRD regarding the right to education is almost identical to that of the UDHR. It contains the core elements of the right recognized by the majority of human rights instruments including the ICESCR, in that it provides for compulsory and free primary education that is available to all, secondary education that is available and accessible to all through different means, and education directed to the full development of the human personality and strengthening respect for human rights and fundamental freedoms.

The requirement in article 33(3) that education be directed towards development of an individual’s sense of dignity should be interpreted in light of the CRC which requires states parties to “take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child’s human dignity.”

Several aspects of the right to education that are missing from the AHRD include:
- The parents’ right to choose the kind of education that is to be given to their children;
- The state obligation to encourage or intensified fundamental education as far as possible for those persons who have not received or completed the whole period of their primary education;
- The state’s obligation to improve teachers’ training and conditions of work, which is fundamental to guaranteeing an education of good quality;
- Requirements under the CRC to make education and vocational information available to children, and take steps to encourage school attendance and reduce drop-out rates.

Some instruments, such as the CRC, contain a provision regarding the importance of international cooperation in matters relating to education, emphasizing the importance of such cooperation particularly with regard to the needs of developing countries. While such an explicit provision is absent from the AHRD, it does allude to education strengthening the rights and fundamental freedoms in ASEAN as well as the education enhancing the activities of ASEAN for the maintenance of peace.
The AHRD right to education could be expanded on in a future ASEAN human rights convention to include the specific aspects noted above.

ASEAN Member States' International Legal and Constitutional Obligations
The ICESCR and the CRC together recognize all those aspects of the right to education which are protected in international human rights law. The ICESCR has been ratified by six ASEAN Member States, and all have ratified the CRC. Singapore has entered a reservation against the CRC, stating that it “...does not consider itself bound by the requirement to make primary education compulsory because such a measure is unnecessary in our social context where in practice virtually all children attend primary school; and (b) reserves the right to provide primary education free only to children who are citizens of Singapore.”

Malaysia has entered a similar reservation against same article, but has clarified that primary education is compulsory under Malaysian law and that monetary aid is available to “those eligible.”

Under CEDAW, which also enjoys universal ratification amongst ASEAN Member States, signatories commit to eliminate discrimination in order to afford women equal rights with men in education. The ICERD, ratified by six Member States, prohibits racial discrimination in education and training, and requires that education promote racial tolerance, while the CRPD, ratified by eight Member States, requires states parties to take steps to facilitate persons with disabilities's right to education.

Brunei Darussalam, Indonesia and the Philippines have ratified the UNESCO Convention against Discrimination in Education, which provides additional guidance with regards to ensuring equal access to quality education.

All ASEAN countries’ constitutions, with the exception of Brunei Darussalam's, recognize the right to education in some form, usually in detailed provisions. Among ASEAN legal instruments, the Declaration on the Commitments for Children in ASEAN, the Ha Noi Declaration on the Enhancement of Welfare and Development of ASEAN Women and Children, and the Resolution on the ASEAN Plan of Action for Children all contain provisions relevant to the right to education.

Content and Interpretation of the Right in International Law
THE CESCR notes that “[e]ducation is both a human right in itself and an indispensable means of realizing other human rights.” While in the past it has been characterized as a social right, an economic right, and a cultural right, the CESCR rightly notes that it is, in addition to all of these, a civil and political right which epitomizes “the indivisibility and interdependence of all human rights.”

The right appears in the UDHR, which states that:

“(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children.”

The UNESCO Convention against Discrimination in Education of 1961 was the first binding international human rights instrument which specifically addressed educational needs, and it provided inspiration for the recognition and expansion of the right to education under the ICESCR in 1966. The ICESCR adds to the UDHR’s provision on the right to education in three respects. First, it sees education as one of the keys to human dignity; second, it is seen as a tool through which inter-cultural understanding across ethnic, national, racial and religious lines can be promoted; and third, it enables all to participate effectively in a free society. Article 13 of the ICESCR, which discusses the right to education, is the longest provision in the entire Convention and one of the most detailed provisions on the right to education in human rights law. Article 14 of the ICESCR requires states parties, within two years of ratification, to adopt a plan of action for progressive implementation of compulsory and free primary education for all. Such action plans must be detailed enough to guarantee effective implementation of the right, and should be developed through participatory processes which include CSOs. This obligation is seen as absolute, and scarcity of allocatable resources is not viewed as a valid reason for failing to produce such an action plan.

The right to education also appears in five other core human rights treaties, the UN Declaration on the right of Indigenous Persons, and the UN Refugee and Stateless Persons Conventions. The Arab, American, European and African human rights texts all recognize a right to education. The CESCR in General Comment No. 13 elaborates on the content of the right to education, emphasizing its role as an empowerment right. It states that education is “the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty.” The Committee notes that the right to receive education contains such elements as availability, accessibility, adaptability and acceptability. Availability means that functional educational institutions and programmes must be available in sufficient quantity. Accessibility has three dimensions: non-discrimination against any group, physical accessibility, and economic accessibility. Acceptability means that the form and substance of education must be acceptable (be of good quality and culturally appropriate), while adaptability means flexibility with regards to the changing needs of societies and communities.

While the right to education generally provides for progressive realization, certain aspects of the right are immediate, such as the guarantee of non-discrimination and the prohibition on retrogressive steps. The prohibition against discrimination applies to all levels of education, encompasses all internationally prohibited grounds of discrimination, and allows for the use of temporary special measures to assist certain vulnerable groups in realizing their right to education. A considerable amount of international jurisprudence exists regarding the tension between providing equal
opportunities for education and adhering to the principle of non-discrimination.\textsuperscript{888} However, it is acknowledged that the right to education for certain vulnerable groups – such as persons with disabilities or girl children – necessarily involves the privileging of certain communities with regards to certain types of access.\textsuperscript{889}

Another area of contest within the right to education involves minority rights and language rights.\textsuperscript{890} The European Court of Human Rights has held that the right to education does not guarantee the right to education in a particular language, nor does it entail an obligation for states to subsidize education of a particular type.\textsuperscript{891}

The right to education is firmly entrenched in the human rights canon. While there is some variation regarding its normative content, the basic notions of free, compulsory primary education, the full development of the human personality, and the interdependency of the right with other human rights are recognized in most international human rights instruments.
Article 32: The Right to Cultural Life

AHRD Art. 32: Every person has the right, individually or in association with others, to freely take part in cultural life, to enjoy the arts and the benefits of scientific progress and its applications and to benefit from the protection of the moral and material interests resulting from any scientific, literary or appropriate artistic production of which one is the author.

The AHRD reproduces the text of the UDHR right to cultural life and right to intellectual property, but additionally recognizes the collective aspect of these rights. The AHRD does not specifically provide for the cultural rights of minorities and indigenous groups. However, if Article 32 is read with ASEAN Member States’ obligations under the ICCPR and CRC and their Constitutional protections of minority rights, it could be construed to cover such rights.

As discussed previously, article 7 of the AHRD recognizes the potential for culture and tradition to conflict with human rights but does not contain a clear statement that culture and cultural diversity are not legitimate grounds upon which to deny fundamental rights and freedoms. As parties to CEDAW, ASEAN Member States are obliged to take measures “to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.” A state may take measures to curtail cultural practices that infringe on other rights if the measures have a legitimate aim and are proportional.

A future legal instrument should stress the universality of fundamental rights of national and regional particularities, including local cultural and religious practices. In addition, the rights of tribal and indigenous peoples and minorities to freely enjoy their own culture must be clearly recognized, including a reinforcement of positive obligations on the governments’ part to take steps to ensure the fulfilment of the right.

ASEAN Member States’ International Legal and Constitutional Obligations

Six ASEAN Member States have ratified both the ICESCR and the ICCPR, which respectively recognize a general right to participate in cultural life, and a specific protection for ethnic, religious or linguistic minorities to enjoy their own culture. All Member States have ratified CEDAW and the CRC, under which they must take steps to eliminate discrimination against women that prevents women’s full participation in all aspects of cultural life, and the right of all children, including those from minority groups, to enjoy and participate freely and fully in a cultural life. Under the CRPD, the eight ASEAN states parties must guarantee that persons with disabilities can “take part on an equal basis with others in cultural life.”

Among the ASEAN Constitutions, only Myanmar and Indonesia recognize the right to culture as a right belonging to individuals. The constitutions of Viet Nam and Lao PDR recognize the concept of a national, uniform culture, and Indonesia, Lao PDR, the Philippines, Singapore and Thailand recognize a
constitutional right to culture for local groups, indigenous groups, tribes, or minorities. Malaysia and Brunei Darussalam do not recognize a constitutional right to cultural life.

The ASEAN Declaration on Cultural Heritage recognizes the right of traditional communities to have access, protection, and rights of ownership to their own heritage. It asserts that:

“Cultures with global reach must not deprive local, national and regional cultures of their own development dynamics and reduce them to relics of the past. Member Countries shall ensure that cultural laws and policies empower all peoples and communities to harness their own creativity towards human development.”

The Declaration on the Commitments for Children expresses an intention to protect, respect, and recognize the rights of all children, including those in indigenous cultures, with the caveat that the different religious, cultural, and social values of different countries must be taken into consideration.

**Content and Interpretation of the Right in International Law**

The UDHR, ICCPR, ICESCR, the African and Arab Charters, the American Declaration, and the San Salvador Protocol all recognize the right to cultural life. The European Convention does not explicitly provide for a right to cultural life or traditional lifestyle, though the right to respect for private and family life has been interpreted to include this right.

While there is not a clearly recognized definition of “cultural life” in international law, the CESCR has interpreted it to include ways of life, language, oral and written literature, music and song, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, and customs and traditions through which individuals, groups of individuals, and communities express their humanity and the meaning they give to their existence.

The right to cultural life is closely associated with (1) the right of access to cultural activities, entertainment, and monuments; (2) the right of a cultural (often indigenous) group to its traditional land or practices (such as hunting), which is often challenged by State-sponsored economic development; (3) the right of a cultural (often indigenous) group to participate in decisions about its welfare; (4) intellectual property rights belonging to an individual or cultural (often indigenous) group. The right to cultural life is related to the responsibility to protect cultural properties such as world heritage sites and indigenous artefacts.

The right takes on a communal aspect in the context of indigenous peoples and their relationship to land and traditional practices. The ICESCR, the United Nations Declaration on the Rights of Indigenous Peoples, the ILO Convention on Indigenous Rights, the African Commission, the Inter-American Commission, and the Inter-American Court have all recognized indigenous peoples’ cultural rights associated with their ancestral lands and their way of life, including their means of subsistence and dependence on natural resources. The right to cultural life and the right to property are seen as
intertwined in the case of indigenous peoples, giving them the right to prior consultations and, in some instances, prior informed consent for development projects concerning their ancestral lands.\textsuperscript{915}

The right requires states to take positive action, ensuring preconditions for participation, facilitation, and promotion of cultural life and access to and preservation of cultural goods.\textsuperscript{916} The ASEAN Declaration on Cultural Heritage calls on each ASEAN state to identify and to conserve cultural heritage within its territory.\textsuperscript{917} Conversely, states must refrain from interfering with the exercise of cultural practices and with access to cultural goods and services.\textsuperscript{918} International conventions including the ICCPR, the ICESCR, and the CRC\textsuperscript{919} provide that the state must not deny minorities the right to practice their culture.
Article 33: State Obligations: Economic, Social, and Cultural Rights and Non-Nationals

AHRD Art. 33: 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.

Article 34: 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.

Article 33 and 34 are a variation on the ICESCR’s characterization of states parties’ obligations to implement convention-protected rights. AHRD Art. 33 is identical to ICESCR article 2(1), except that it omits the requirement for states parties to take steps to realize economic, social and cultural rights through “all appropriate means, including particularly the adoption of legislative measures.” This imposes an important obligation on states parties to take steps to protect ICESCR-espoused rights, particularly though legislation.

Article 34 likewise reproduces the ICESCR text with omissions of several key terms. Article 2(3) of the ICESCR provides that developing countries may choose the extent to which they will guarantee ICESCR rights to non-nationals, whereas the AHRD allows all ASEAN Member States, no matter how prosperous, to do the same. The AHRD also extends this state discretion to economic and social rights, whereas the ICESCR only permits it with regards to economic rights.

A future ASEAN human rights convention should strengthen and clarify ASEAN member state obligations in relation to social economic and cultural rights by making it clear that: (a) the discretion to deny economic rights to non-nationals is dependent upon resources, not political will; (b) discretion cannot be applied discriminatively – for example, to deny Muslim non-nationals access to work permits but provide them to Buddhist non-nationals; (c) discretion cannot operate to rob economic, social and cultural rights of their entire content; and (d) regardless of a nation’s economic standing, the obligation to guarantee social, economic and cultural rights requires each State “to move as expeditiously and effectively as possible” using all available resources towards realization of these rights.

The convention should additionally recognize the rights of certain vulnerable groups of non-nationals such as refugees, stateless persons, migrant workers and victims of trafficking to some minimum guarantees. The 1951 Refugee Convention, the ICRMW, the Convention on Statelessness, and the Palermo Protocol provide guidance on such guarantees. The AHRD’s recognition of migrant workers as a
group of non-nationals requiring state protection is positive, but could be built upon with recognition of the need to protect stateless persons and refugees.  

ASEAN Member States’ International Legal and Constitutional Obligations

Six ASEAN Member States have ratified the ICESCR, from which articles 33 and 34 are taken. Six ASEAN Member States have ratified the ICERD, which allows states to make distinctions between citizens and non-nationals. Such distinctions, however, cannot operate to undermine the basic prohibition against discrimination, and states parties must “guarantee equality between citizens and non-citizens in the enjoyment of [their civil, political, economic, social and cultural] rights to the extent recognized under international law.” Two ASEAN Member States have ratified the 1951 Refugee Convention and the ICRMW, obligating them to afford certain rights to non-nationals such as asylum seekers, refugees, and migrant workers. The Philippines is the only ASEAN state party to the 1954 Convention relating to the Status of Stateless Persons. In addition, though not a binding instrument, the ASEAN Declaration on the Rights of Migrant Workers requires Member States to safeguard the fundamental rights and dignity of migrant workers across the region.

The constitutions of several ASEAN Member States—Indonesia, Malaysia, Myanmar, Philippines, and Thailand—do not articulate any distinction between citizens and non-nationals, referring to “person” or “people,” instead of “citizen,” in their respective bills of rights. In contrast, the Cambodian and Lao PDR constitutions contain a bill of citizen rights and duties, while Viet Nam recognizes both human and citizen rights. The Lao PDR Constitution guarantees that the “rights and freedoms of aliens and apatrids [stateless persons] are protected by [national laws].” In particular, non-nationals have the right to file claims in court and lodge petitions with government agencies.

Content and Interpretation of the Right in International Law

Although economic, social and cultural rights are to be fully realized progressively over time, the ICESCR states parties—including six ASEAN Member States—are required to devote all available resources to move “expeditiously and effectively as possible” towards realizing convention rights for every person within their territory. States parties have a core obligation to ensure minimum compliance levels with each ICESCR right, and may violate the convention if a “significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education.” Resource constraints do not justify derogation from this minimum core obligation.

International law allows for some distinctions between the economic, social and cultural rights of nationals and non-nationals but at the same time prohibits discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The CESCR has defined discrimination as “any distinction, exclusion, restriction or preference or other differential treatment . . . based on the prohibited grounds of discrimination and which has the intention
or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of [ICESCR] rights. 938

Under the ICESCR, developing countries may determine the “extent to which they guarantee economic rights to non-nationals,” but must take into account their national economic needs and human rights in making this decision. 939 This provides a narrow exception to the non-discrimination clause, allowing poorer countries to make a distinction between nationals and non-nationals (national origin) in provision of economic rights when: (a) state resources do not permit the granting of equal rights to non-nationals, and (b) this distinction would not operate to nullify the content of these rights, or breach minimum core obligations under the ICESCR. Differentiation between nationals and non-nationals may still constitute discrimination if a state restricts the economic rights of a particular nationality, as opposed to those of all non-nationals. 940 Article 2(3) of the ICESCR does not permit a complete denial of economic rights to non-nationals, and it does not allow well-resourced, developed states to exercise this discretion.

The ICERD allows states parties to make distinctions between citizens and non-citizens, provided this does not constitute discrimination against a particular nationality. The Committee on the Elimination of Racial Discrimination has stressed that human rights are universal and that states parties must “guarantee equality between citizens and non-citizens in the enjoyment of [civil, political, social, economic and cultural] rights to the extent recognized under international law.” 941

Regional human rights systems also provide for the general principle of equality, with the African, American and European instruments and case law articulating that states should make no distinction between citizens and non-nationals on fundamental human rights. 942 The African Commission on Human and Peoples’ Rights has stated that, “[i]n the face of such [economic] difficulties, States often resort to radical measures aimed at protecting their nationals and their economies from non-nationals. Whatever the circumstances may be, however, such measures should not be taken at the detriment of the enjoyment of human rights.” 943 The American Court of Human Rights has asserted that the principles of equality and non-discrimination have achieved the status of a jus cogens norm, such that neither the nationality nor the migratory status of an individual is relevant for the purpose of requiring the state to respect and ensure these principles. While states can still make distinctions on the basis of nationality or migratory status, these distinctions should be reasonable, objective, and proportionate, and should not harm human rights. 944

The Arab Charter of Human Rights, on the other hand, guarantees certain economic and social rights only to citizens. 945

While not binding, the UN Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they Live provides an expansive conceptualization for the rights of non-nationals. 946 Non-nationals are entitled to the same treatment with respect to the rights to, inter alia, life and
security of person; protection against arbitrary or unlawful interference with privacy, family, home or correspondence; equality before the courts; family; freedom of thought, opinion, and religion; and language, culture, and tradition. The Declaration also specifies rights that must be granted to non-nationals to the extent that they do not interfere with national security, public safety, public order, public health or morals, or the rights and freedoms of others. As long as they observe the state’s laws, non-nationals lawfully residing in the country should be granted safe, fair, and healthy working conditions, the right to join trade unions, as well as access to social services, health care, education, and social security. Importantly, the Declaration asserts that regardless of immigration status—that is, whether or not an individual is in the country legally—states are obligated to ensure protections from torture, inhuman, or degrading treatment; arbitrary or unlawful expulsion from the country; and arbitrary deprivation of lawfully acquired assets.

Conventions regarding migrant workers and their families, stateless people, and refugees affirm the human rights of non-nationals. The Conventions on Stateless Persons and Refugees do allow certain rights to be recognized only for those non-nationals lawfully residing or present in the host country. Furthermore, the extent to which states parties must recognize certain rights of refugees and stateless persons varies between the same treatment afforded to aliens and that provided to nationals.
Articles 35 - 37: The Right to Development

AHRD Art. 35: 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.

AHRD Art. 36: 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.

AHRD Art. 37: 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.

By adopting these three articles, ASEAN has joined the African and Arab systems in recognizing a specific right to development.

The language of the right to development in the AHRD largely mirrors that included in the Vienna Declaration, with a few important exceptions. The AHRD emphasizes the need for equity in realization of the right to development as well as the need for sustainability. The inclusion of sustainability implies that the right to development contains an intergenerational dimension, which is progressive among human rights instruments. It states that development is necessary for the enjoyment of all human rights, that development programs should be gender-responsive, and that there is a need for regional and international cooperation to encourage development. Given the amount of manufacturing of products for foreign export, the inclusion of fair trade practices is also an important provision.

What is noticeably absent from the AHRD formulation of the right to development is the right to self-determination as well as rights of indigenous and tribal peoples. While the absence of the right to self-determination is discussed elsewhere in this document, several of the main international treaties and human rights instruments link the right to self-determination to the right to development, including the UN Charter, the ICCPR, the ICESCR, the Vienna Declaration, and the Declaration on the Right to
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The AHRD grants the right to development to “every human person and the peoples of ASEAN,” which could be interpreted as applying to indigenous groups, but is ambiguously worded. At minimum, this provision indicates that the Member States view development as both an individual and collective right, which is consistent with existing international standards.

This right to development could be strengthened through the inclusion of provisions that recognize the importance of consultation with communities affected by large-scale development projects, and the requirement that the free, prior and informed consent of indigenous peoples’ is obtained prior to proceeding with a project affecting their lands or way of life. Importantly, there is a need to recognize an individual right to adequate and just remedy for harm or loss arising from such development projects.

ASEAN Member States’ International Legal and Constitutional Obligations
Although no binding international human rights treaties guarantee development as a specific right, many of them include social, economic, and cultural development as an important goal, creating soft law regarding the right to development. Additionally, several non-binding international and regional declarations do include the right to development as a specific right, most notably the 1986 Declaration on the Right to Development. Asian states endorsed this Declaration and the right to development as “a universal and inalienable right” in the 1993 Bangkok Declaration, which was incorporated also into the Vienna Declaration at the 1993 World Conference on Human Rights.

Several ASEAN Member States’ constitutions recognize the responsibility of the state to promote development in some way, but none explicitly guarantees the right to development. The ASEAN Charter makes a strong statement about development in its preamble and includes the promotion of sustainable development as one of the purposes of the organization. Member States also committed themselves to achieving the MDGs in a joint statement. The Ha Noi Declaration recognizes the importance of development for women and children, and the Declaration on Cooperation specifically recognizes the right to development.

Content and Interpretation of the Right in International Law
While the concept of a right to development emerged in the 1950s, it was not until relatively recently that it has come to be recognized as a specific right, and it remains controversial. As decolonization proceeded following World War II and an increasing number of developing countries joined the UN system as members, they pushed for greater recognition of the right to development. However, wealthier countries resisted, fearing that a right to development would burden them with funding the development of the poorer countries. As the Cold War unfolded, the importance of civil and political rights became pitted against economic, social and cultural rights, and little progress regarding the right to development occurred.

In the 1980s, the right to development regained momentum. In 1986, the UN Declaration on the Right to Development provided detailed normative content to the right. It defines development as “a
comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom. It places the human person at the center of the right, states that development implies self-determination, places responsibility for creating conditions and policies favorable to development on states, and recognizes that all rights are interdependent. The Vienna Declaration affirmed the principles and rights in the Development Declaration. It even exceeded the scope of the Development Declaration by linking environmental and developmental needs and adding that future generations were also entitled to the right to development, introducing the notion of sustainability and intergenerational equity into the right to development. In addition to recognizing the interdependence of all rights, the Vienna Declaration proclaimed that democracy is interdependent with development and respect for human rights. It also called on states to protect the right to development for indigenous peoples and to involve them in decisions on all matters that might concern them.

Whether the right to development is recognized under international law, and what the components of the right actually are, are subject to debate. Some contend that the right to development could conflict with the right to a clean environment. In response to this argument, advocates for the right to development have reframed it as a right to sustainable development, as reflected in the AHRD and implied in the Vienna Declaration. Others contend that it is unclear who is entitled to the right, who has obligations to fulfill the right, and what those obligations might be. The Development Declaration assigns to all states “the primary responsibility for the creation of national and international conditions favorable to the realization of the Right to Development,” but elsewhere indicates that “all human beings have a responsibility for development, individually and collectively.” The declaration suggests that developed countries must provide developing countries “with appropriate means and facilities to foster their comprehensive development.” The Rio Declaration also suggests that developed countries have greater duties in fulfilling the rights to development and the environment than developing countries. This progressive position remains highly controversial.

Among the regional human rights instruments, both the African and Arab Charters specifically grant the right to development. The African Charter recognizes the right to development as a collective right, stating “[a]ll peoples shall have the right to their economic, social and cultural development. . . .” and calls on states individually and collectively to ensure the right. However, it does not specify by what means. The Arab Charter grants the right to development to individuals, calls on states to establish development policies to guarantee the right, and calls for regional and international cooperation.

The right to development encompasses the rights of indigenous and local groups to be consulted regarding the development process. The group should give “free, prior, informed consent” (FPIC) prior to development. The FPIC standard was recognized for projects sponsored by the World Bank Group International Finance Corporation, was discussed in UN documents as well as the Saramaka case from the Inter-American system, and occupies a central place in the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.
Additionally, The Committee on the Elimination of Racial Discrimination calls on state parties to not only promote the sustainable economic and social development of indigenous peoples but also take “no decisions directly relating to their rights and interests . . . without their informed consent.”

The right of indigenous or local people to benefit from resource exploitation on lands that they have traditionally used has been set forth on several occasions but is primarily recognized in the regional context. The ILO Convention on Indigenous Peoples notes that “peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.” This principle has also been promulgated by the African Commission and the Inter-American Court of Human Rights. The African Commission has found that the state should ensure “reasonable equitable compensation resulting from the exploitation of traditionally owned lands and of those natural resources necessary for the survival” of the indigenous community. Similarly, in the Saramaka case, the Inter-American Court said that the state must “reasonably share the benefits” of development with the affected community. Aside from these pronouncements, the right of indigenous and local communities to share in the benefits of development has not been firmly established. The UN Declaration on Indigenous Rights does not clearly address sharing economic benefits from development, although it does state that indigenous peoples have the right to redress or compensation for the lands and resources that have been used or damaged without their free, prior, informed consent.
Article 38: The Right to Peace

AHRD Art. 38: 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.

The AHRD recognizes that because armed conflict restricts peoples’ enjoyment of other human rights, peace is linked to exercise of the full range of rights. Recognizing an individual’s as well as a “peoples’” right to peace implies that both individuals and peoples can invoke the right. The AHRD does not impose clear obligations on the state to uphold peace. It simply says that states “should” continue to enhance friendship and cooperation in the region. The recognition of the right to peace in the AHRD is not surprising, given ASEAN’s historical focus on preserving peace and stability in the region, and the UN Human Rights Council’s push over the last few years to develop a UN Declaration on the Right to Peace.999

However, the exact content of the right to peace has not been defined in international law, leading to ambiguity as to what this right entails. During the development of the AHRD, CSOs raised concerns about the potential for ASEAN Member States to use this provision to justify reprisals against dissident groups on the grounds that they pose a threat to other peoples’ right to peace. The argument that violence must be used to secure “peace” is frequently used by states involved in internal or international armed conflict. Furthermore, an examination of ASEAN constitutions reveals that some Member States use the term “peace” to refer to something more akin to the maintenance of domestic law and order, and as legitimate grounds for limiting constitutional rights, giving credence to CSO concerns that this language could give rise to misinterpretation or anti-democratic usage.

The concept of regional peace in ASEAN has long been associated with the principle of non-intervention, meaning that Member States are able to do as they like within their own borders, including commit gross human rights violations, without fear of criticism or interference from their neighbors. Attempts to ensure accountability for past conflicts in the region through truth commissions, prosecutions, or reparations have also met with strong opposition from governments. One of the arguments against such transitional justice mechanisms is that revisiting past conflicts risks reopening old wounds and reigniting conflict.

To address these issues, the “ASEAN Peoples’ Declaration,” a civil society alternative to the AHRD, states that the right to peace cannot be used as a justification for state avoidance of its duty to protect against and remedy human rights abuses.1000 An additional sub-provision regarding the use of force in the maintenance of law and order stipulates that such force must always be exercised in compliance with international human rights law.
The international community is only just beginning to discuss mechanisms for enforcement of an individual and collective right to peace in the context of the UN Draft Declaration. Since the content of the right to peace is still in flux and without clear contours, its inclusion in a binding human rights instrument might be premature, particularly as certain interpretations of the right can even lead to the sanctioning of human rights abuses by governments. A more prudent solution might be to keep the right to peace as a guiding principle for the purposes of a future binding legal instrument.

**ASEAN Member States’ International Legal and Constitutional Obligations**

Although there is no distinct “right to peace” in international law, ASEAN, which was initially established as a regional security group, has made the maintenance of peace and stability within the region one of its founding principles. The 2008 ASEAN Charter that a part of ASEAN’s purpose is to:

- maintain and enhance peace, security and stability and further strengthen peace-oriented values in the region;
- preserve Southeast Asia as a Nuclear Weapon-Free Zone and free of all other weapons of mass destruction; and
- ensure that the peoples and Member States of ASEAN live in peace ... and a harmonious environment.

In fact, the Treaty of Amity and Cooperation in Southeast Asia mentions “peace” 12 times, and it established the “ASEAN principles,” including the principle of non-interference, the settlement of differences or disputes by peaceful manner, and the renunciation of threat or use of force. In addition to the Treaty of Amity and Cooperation, the ASEAN Charter, the Declaration on the Commitments for Children, and the ASEAN Peoples’ Declaration mention the right to peace, firmly embedding it in the ASEAN legal landscape.

ASEAN Member States have universally ratified the Treaty on the Non-Proliferation of Nuclear Weapons and have concluded their own regional treaty on the topic. In addition, both ASEAN human rights commissions, the AICHR and ACWC, have a declared their purpose of upholding the right of the peoples, and in the case of ACWC, the right of women and children, to live in peace.

“Peace” is referred to in the ASEAN member state constitutions primarily in relation to the conduct of foreign affairs and ensuring peaceful relations with other nations. None of the constitutions recognize a right to peace for individuals, and only the Lao PDR Constitution comes close to recognizing a collective right by declaring support for “the struggle of the world’s people for peace, national independence, democracy and social progress.” The Constitutions of Lao PDR, Myanmar, Singapore, and the Philippines refer to “peace” in the sense of national community, or public peace, with the Myanmar Constitution recognizing the maintenance of this peace as a citizen obligation and, along with the Singapore Constitution, a justification for restriction of constitutional rights.
Content and Interpretation of the Right in International Law

One of the first references to the right to peace appeared in the 1978 UN Declaration on the Preparation of Societies for Life in Peace, which states that every nation as well as every individual has a right to peace. The right of “peoples” to peace appeared in the 1984 UN Declaration of the Right of Peoples to Peace. There is no clear requirement under international law for states to take measures to uphold the peace of an individual, although several instruments suggest that states are obliged to refrain from actions that would disrupt regional or international peace.

While many regional and international instruments recognize rights related to peace (such as the right to security), there is debate regarding the existence of a specific right to peace. The AHRD is the first regional instrument to recognize an individual person’s right to peace within the individual’s society, in addition to providing a right to peace for “ASEAN peoples.” Aside from the AHRD, the only other regional human rights instruments to refer specifically to a right to peace are the African Charter (granting all peoples the right to peace) and its Maputo Protocol (granting women the right to a peaceful existence).

Some states view peace not as a human right, but as a goal that can be best realized through the enforcement of existing identifiable and distinguishable human rights. There is concern that a specific right to peace would undermine the UN Charter, which sets out the legitimate reasons for the use of force, and that the issues of disarmament, peacekeeping, and weapons of mass destruction should be addressed by specialized bodies such as the UN Security Council. There are currently efforts underway within the UN to create a draft Declaration on Peace, but the right to peace currently has no clear contours.

The right to security of an individual is clearer than the right to peace. The UDHR, ICCPR and all of the regional conventions provide that everyone has the right to liberty and security of person. As stated by the Human Rights Committee, “[s]ecurity of person concerns freedom from injury to the body, or bodily integrity.” The right to security is an individual right, whereas the right to peace implies duties to individuals as well as “peoples” and nations.

Other rights of “peoples” (as opposed to just individuals) have achieved recognition in international human rights law, including the rights to development, cultural life, a clean environment, and self-determination. As has been the case with these rights, there will likely be debate as to which “peoples” are entitled to assert the right. One potential aspect of the right to peace that is clearly individualistic is the right to conscientious objection. This concept, which is not well established in international law, was proposed in Article 5 of the draft Declaration on the Right of Peace. Many delegations did not support this proposal, although some linked conscientious objection to freedom of thought, conscience, and religion.
Article 40 Savings Clause

AHRD Art. 40: 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.

Article 40 is a “savings clause” often included in human rights instruments to prevent states parties from interpreting the text of a Convention or Declaration in a manner that undermines existing human rights obligations. Article 40 is taken from a provision in the UDHR, which reads:

“Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.”

The ICCPR and the ICESCR contain similar provisions prohibiting interpretation of the conventions in a manner that justifies acts aimed at either the “destruction” of Convention rights or limiting rights to a greater extent than provided for in the Convention. The European and American Conventions on Human Rights contain comparable provisions, and the American Convention and Arab Charter, like the AHRD, provide that their provisions cannot be interpreted to undermine rights recognized under signatories’ domestic law or existing international treaty obligations.

A joint CSO submission to the AICHR on the AHRD recommended that Article 40 be reworded to also prohibit of interpretations of the AHRD that “undermine the UDHR, the Vienna Declaration and Programme of Action or international law subscribed to by Member States.” Although the AHRD was not amended to reflect this suggestion, ASEAN Member States responded to criticism by adopting the Phnom Penh Statement alongside the AHRD. The statement stresses that the AHRD will be implemented “in accordance with [Member States’] commitment to the Charter of the United Nations, the Universal Declaration of Human Rights, the Vienna Declaration and Program of Action, and other international human rights instruments to which ASEAN Member States are parties, as well as to relevant ASEAN declarations and instruments pertaining to human rights.” The AHRD itself explicitly endorses all rights recognized in the UDHR in its preamble, article 10 (civil political rights) and article 26 (social, economic and cultural rights).

Article 40, read together with articles 10, 26, the AHRD preamble, and the Phnom Penh Statement, provide strong grounds for reading down problematic limitations imposed on rights in the General Principles and for interpreting rights such as the right to freedom of religion expansively to include elements not explicitly recognized in the AHRD (such as the freedom to adopt, change and manifest religion).
As a non-binding Declaration, the AHRD has no legal effect on the existing international obligations of ASEAN Member States. However, there still exists the risk that ASEAN governments will seek to use the ambiguous, and at some places restrictive, language of the AHRD to justify impermissible derogations from their human rights treaty responsibilities. Such attempts could be countered by arguing that the AHRD’s affirmation international human rights law requires it to be interpreted in line with international standards. It would be preferable, however, if such arguments over interpretation are avoided through the development of a binding human rights convention accurately reflecting the human rights obligations of ASEAN Member States. This would require taking into account the contents of all core human rights and ILO conventions as each convention has been ratified by at least one or more member state.
The Missing Rights

Two rights present in the international bill of rights and conspicuously absent in the AHRD are the right to self-determination and the right to freedom of association. Both rights were included in initial drafts of the AHRD but failed to make it through negotiations between the ASEAN member state representatives over the AHRD text. A consideration of the importance and content of both rights is included here with the expectation that both rights will be explicitly recognized in future ASEAN human rights texts.

The Right to Self-Determination

There is no provision for the right to self-determination under the AHRD, though the declaration recognizes several rights connected to the right of self-determination, including the right for individuals to take part in cultural life in association with others and the right to development.\(^{1033}\) Certainly, as recognized under article 7 of the AHRD, all human rights are “interdependent and interrelated.”\(^{1034}\) Yet, while these specific rights are related, they do not exemplify the general nature of the right of self-determination. Nor do they capture the core components of the right as defined under international law, namely for people to assert collectively their political and social rights within a state as well as to decide their own destiny in the international order.\(^{1035}\) Self-determination refers to the right for peoples to determine freely their political status and freely pursue their economic, social and cultural development.\(^{1036}\) Without the inclusion of a specific provision for the right of self-determination, the AHRD maintains a critical gap in the human rights framework of the Southeast Asian regional system. This suggests that groups – racial, ethnic, indigenous, etc. – seeking to protect rights to political freedoms, control over lands and natural resources, and economic autonomy will have to rely on related provisions of AHRD, including those related to cultural life and development.

Notably, the AHRD also fails to mention ethnic groups, minority groups or indigenous populations. An early draft of the AHRD from January 2012 did include multiple references to the rights of these groups. This certainly would have bolstered the interpretations of self-determination provided above. However, several states objected to the inclusion of these groups specifically. Given the diversity of the ASEAN region, and some of the contemporary tensions that Member States have had with ethnic, minority or indigenous groups within their territories, the source of these apprehensions are clear. However, failing to include these groups and excluding the right to self-determination does not absolve Member States of their international legal obligations.

Any future ASEAN human rights convention should contain a specific and distinct provision regarding the right of self-determination. A meeting of CSOs in Manila in September 2012 recommended not only that a universal right to self-determination be included in the AHRD, but also that this right should apply broadly to individuals and groups that were not mentioned in the document. Such a provision would make it clear that this right applies to indigenous, ethnic and minority groups, none of whom are specifically mentioned in the AHRD. Articulating the right of self-determination for all groups would reaffirm the commitment to implement the instrument “in accordance with our
commitment to the Charter of the United Nations, the Universal Declaration of Human Rights, the Vienna Declaration and Program of Action, and other international human rights instruments to which ASEAN Member States are parties.”

**ASEAN Member States’ International Legal and Constitutional Obligations**

ASEAN Member States are obligated to protect the right of self-determination of peoples, as it is recognized as a fundamental principle of international human rights law. In terms of treaty obligations, ASEAN Member States have ratified several international human rights instruments that explicitly provide for the right to self-determination. All Member States have ratified the UN Charter, through which states commit to, *inter alia*, realizing the “principle of equal rights and self-determination of peoples.” Six Member States have ratified the ICERD, which recognizes self-determination of peoples and obligates states to take measures for adequate development and protection of racial and ethnic groups. The same six countries have also ratified the ICCPR and the ICESCR, which both explicitly recognize the right to self-determination. While not binding, all ASEAN Member States signed on to the UN Declaration on the Rights of Indigenous Peoples (UNDPRIP), which explicitly guarantees the right to self-determination to indigenous peoples.

Member States also have obligations in the ASEAN legal framework. Both the ASEAN Charter and the mandate of the ASEAN Inter-Governmental Commission on Human Rights include upholding the UN Charter as a guiding principle, and the UN Charter includes the principle of self-determination of peoples.

There is also some support for the right to self-determination within the national constitutions of some Member States, and more recognition of the general rights of indigenous, ethnic and minority groups. Five Member States’ constitutions articulate the rights of traditional communities and cultural identity in general. These constitutions refer to peoples’ right to conserve or restore their customs, local knowledge, languages, arts and culture of their communities.

The recognition of *principles* of self-determination is narrower, however. The Lao PDR Constitution affirms that the constitutive document is the “first time in the history of our nation that the right of self-determination of the people has been defined in the fundamental law of the country.” However, this reference applies to the Lao people as a whole and does not apply to individual nationalities within the country. Myanmar and the Philippines, on the other hand, provide for recognition of self-administered or autonomous regions. The Philippines also recognizes the rights of indigenous communities to their ancestral lands. Additionally, Thailand provides for the right of local traditional communities to preserve and exploit natural resources and their environment in a sustainable manner.

**Content and Interpretation of the Right in International Law**

The right to self-determination of all peoples is established in international law. “[R]espect for the principle of self-determination of peoples” was established as a core purpose of international cooperation a fundamental tenet of international law in the UN Charter. The principle enables a people to choose its own political status and to determine its own form of economic, cultural and social development. Both the ICCPR and ICESCR provide in a common article that “All peoples
have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." As such, self-determination is a right on its own; yet, it is also recognized that compliance with the right of self-determination is a fundamental condition for the enjoyment of other human rights and fundamental freedoms, be they civil, political, economic, social or cultural. The right to self-determination may be subject to limitations. Under the ICCPR, for instance, states may derogate from certain obligations “in time[s] of public emergency . . .” but such measures may only be taken “to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”

The definition of this right is, nevertheless, subject to debate; in particular, there is controversy regarding the identity of rights holders (sovereign states or “peoples” within states) and which outcomes are justified by the exercise of this right. The UN Charter, ICESCR, and ICCPR recognize the right of “peoples” to self-determination but do not clarify what constitutes a “people.” “People” may be equivalent to members of a nation-state, or to a group formerly colonized by Europeans; alternatively “people” may constitute ethnic minorities or indigenous groups within a nation-state. The ILO Convention on Indigenous Peoples and the Proposed American Declaration on the Rights of Indigenous Peoples refer to “peoples” as those whose social, cultural and economic conditions distinguish them from others within a state, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations. Both instruments state that self-identification is the fundamental criterion for determining whether someone is part of a “people.” However, both specify that the term “people” used in the instrument is not the same as the term used elsewhere in international law (presumably in the ICESCR and ICCPR). The right to self-determination has also been referenced in the context of rights of minorities to political participation. ICERD refers specifically to “certain racial groups or individuals belonging to them,” as well as to indigenous peoples. While self-determination is not recognized within the European Convention, the European Court of Human Rights has reviewed the right as it pertains to minority groups. Alternatively, the Human Rights Committee distinguishes the right to self-determination from the rights of minorities under article 27 of the ICCPR.

Exercise of the right to self-determination can result in a variety of different outcomes, ranging from political independence through to full integration within a state. While claims to cultural autonomy may be more readily recognized by states, they are more likely to reject political claims. For some groups, particularly occupied or colonized nations, the only acceptable outcome is full political independence. For other groups, the goal is a degree of political, cultural and economic autonomy, sometimes in the form of a federal relationship. For others yet, the right to live on and manage a people’s traditional lands and resources, free of external interference and incursion, is the aim of a struggle for self-determination.

The Committee on the Elimination of Racial Discrimination refers to an “internal aspect” of self-determination, meaning that peoples have the right to pursue freely their economic, social and cultural development without outside interference. One element of this right is to retain some measure of control over governance, which may range from increased participation in public affairs
to autonomous government. The Human Rights Committee suggests that states describe in their reports “the constitutional and political processes which in practice allow the exercise of this right.” Another element concerns participation in the development of a state’s natural resources.

The external aspect of self-determination indicates that all peoples have the right to determine freely their political status and their place in the international community — in other words, people must be free from foreign domination, exploitation, and colonialism. The Committee on the Elimination of Racial Discrimination emphasizes that self-determination does not mean taking action that would impair the territoriality of a sovereign state. The Committee suggests that there is no unilateral right to secede from a state, but secession may be appropriate when there is mutual agreement. On the other hand, a 2010 ICJ advisory opinion states that international law does not prohibit unilateral secession, suggesting that there may be cases where unilateral secession is appropriate. In addition, the African Commission, which has considered claims of external self-determination, has held that secession could be permissible when the will of a people is denied through massive human rights violations. Overall, there seems to be more acceptance of the disruption of territorial integrity when it relates to a former colony seeking independence than when it concerns an ethnic or indigenous group seeking to carve out its own state, absent some grave human rights violation. Thus, while the world has accepted the independence of former European colonies since World War II, there is less willingness to accept unilateral claims of sovereignty by ethnic groups within these states.

Recognizing the importance of this right, international instruments impose both positive and negative obligations upon states with respect to a peoples’ right to self-determination. The Human Rights Committee suggests that the right to self-determination imposes an obligation on state parties to people within and outside of their borders who have been deprived of exercising their right to self-determination. At the same time, states are obligated not to interfere in the internal affairs of other states. An important obligation of the state is to ensure that people are able to participate, and benefit from, natural resource development on their traditional or demarcated lands. This concept is outlined in the Convention on Indigenous People, the UN Declaration on Development, the UN Declaration on the Rights of Indigenous Peoples, and the jurisprudence of the Inter-American Court and the African Commission. In this sense, the right to self-determination is closely tied to the rights to development and property discussed by the Inter-American Court and the African Commission. This connection is expressed in the Development Declaration that the right to development indicates the “full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.”

**The Right to Freedom of Association**

The AHRD does not contain a general right to freedom of association. It does recognize several rights connected to the freedom of association, such as the right for individuals to use property in association with others; the right of individuals to participate in peaceful assembly; the right of
workers to join trade unions; and the right for individuals to take part in cultural life in association with others. While these specific rights are related, they do not exemplify the general nature of the right to freedom of association; nor do they capture the core components of the right as defined under international law, namely the individual’s freedom to join or leave groups – whether cultural, economic, political, or social – and the freedom of such groups to take collective action to pursue the interests of its members. Without the inclusion of a specific provision for the right to freedom of association, the AHRD maintains a critical gap in the human rights framework of the ASEAN regional system.

The right to individual or collective property ownership, use, and dispossession is related to the freedom of association, as it pertains to organizing collective economic interests; the right to property, however, is inherently limited to such economic interests and cannot extend to the individual’s choice to join groups for other purposes. Similarly, while the AHRD provides for the individual’s right to join trade unions, the article is confined to associations within the scope of employment and labour, particularly for the purpose of collective bargaining and organizing. It is important to note that, under the AHRD, the right to join trade unions can be limited by “national laws and regulations,” which may or may not sufficiently protect the right.

Because the right to assembly is often stipulated in conjunction with the right freedom of association, the AHRD’s specific provision for the right to peaceful assembly could be interpreted to include freedom of association. Nevertheless, the freedom of association is a separate and distinct right, which should be given its due recognition in a human rights instrument.

In addition, the AHRD’s provision for the individual’s right to “freely take part in cultural life,” individually or in association with others, could be interpreted to include the right to freedom of association. Coupled with the recognition that individuals are “entitled to participate in, contribute to, enjoy and benefit equitably and sustainably from economic, social, cultural and political development,” the right to take part collectively in cultural life could support a broad interpretation of the right to freedom of association within the AHRD for the purpose of development. Yet, as with other relevant rights discussed in this section, this provision does not extend to the general concept of an individual’s right to associate freely, for any legal purpose, and for the freedom of association to organize collective interests.

Thus, although there may be a legal basis for exercising the right under other articles, by excluding the right to freedom of association the AHRD falls short of international standards. Specifically providing for this right and extending it to all individuals – beyond the status of property ownership, peaceful assembly, trade union membership, or cultural life – would be consistent with ASEAN states’ obligations under international law, and specifically the statements made upon signing the AHRD. Articulating the right to freedom of association would reaffirm the commitment to implement the instrument “in accordance with [their] commitment to the Charter of the United Nations, the UDHR, the Vienna Declaration and Program of Action, and other international human rights instruments to which ASEAN Member States are parties, as well as to relevant ASEAN declarations and instruments pertaining to human rights.” Any future ASEAN human rights instrument should, therefore, contain a specific, and distinct, provision right to freedom of association.
ASEAN Member States’ International Legal and Constitutional Obligations

ASEAN Member States have ratified several international human rights instruments which specifically provide for the right to association. Six Member States have ratified the ICCPR, which recognizes the right to freedom of association and specifically limits any restrictions to this right to those that are “necessary in a democratic society in the interest of national security or public safety, public order . . . or the protection of the rights and freedoms of others.” All Member States are obligated to protect the child’s right to associate freely with others, as stipulated in the CRC.

Under CEDAW, all Member States are obligated to take appropriate measures to ensure that women can equally participate in non-governmental organizations and associations “concerned with the public and political life of the country.” With respect to this right within the scope of labour, four Member States have ratified the ILO Freedom of Association Convention (No. 87) and five the Right to Organise and Collective Bargaining Convention (No. 98), which recognizes the freedom of association for workers and employers, similarly the ICESCR, to which six Member States are party, provides for the obligation to ensure the right to form, join, and leave trade unions, as well as the right to strike and bargain collectively.

Importantly, the overwhelming majority of ASEAN Member States provide within their national constitutions for the general right to freedom of association, as well as the right of association within the scope of political parties, trade unions, and property ownership. Nine Member States’ constitutions articulate the individual’s right to form, join, and leave associations, in general. Indonesia further provides for the individual’s right to “improve him/herself” through “collective struggle for his/her rights to develop his/her society, nation and state.” In addition to the general provision for the right to freedom of association, the majority of Member States’ articulate that the right extends to the freedom to join political parties, trade unions, collective property ownership, and other community organizations. While all Member States providing for freedom of association require that the exercise of that right be in accordance with the law, several states articulate limitations on the right for purposes such as national security, public order, morality, friendly relations with other countries, and preventing economic monopoly as well as requirements for imposing such limitations. The Constitution of the Philippines stipulates that the right to assembly and association “shall not be abridged.” Given that the majority of ASEAN Member States recognize the right to freedom of association as well as the breadth of the right as defined in state constitutions, AHRD’s exclusion of that right is particularly problematic, because it does not comport with state practice within the region.

Content and Interpretation of the Right in International Law

The UDHR provides that “(1) [e]veryone has the right to freedom of peaceful assembly and association. (2) No one may be compelled to belong to an association.” The ILO Freedom of Association Conventions, ICERD, ICCPR, ICESCR, CEDAW, CRC, and ICRMW provide for the right to freedom of association, including the right to join trade unions and community organizations. In addition to these international instruments, the African, Arab, American, and European regional human rights instruments incorporate this right. Now widely recognized as a fundamental human right in international and regional human rights instruments, the freedom of association...
pertains to the right to join or leave groups upon the individual’s choice, and for groups to take collective action to pursue the interests of members.\textsuperscript{1109}

As such, the freedom of association is recognized as both an individual and collective right, applying to individuals wishing to form a group as well as to the group formed.\textsuperscript{1110} The ability to organize is an important means by which citizens can influence their governments and leaders. The right enables individuals to join together through associations or peaceful gatherings in order to express their views on matters of public concern and to protect their economic, legal, political, and social interests.\textsuperscript{1111}

Recognizing the importance of this right, international instruments impose both positive and negative obligations upon states with respect to the freedom of association. This right guarantees associations formed have rights to operate freely and without interference.\textsuperscript{1112} The UN Human Rights Council calls upon states to:

“... respect and fully protect the rights of all individuals to assemble peacefully and associate freely, including in the context of elections, and including persons espousing minority or dissenting views or beliefs, human rights defenders, trade unionists and others, including migrants, seeking to exercise or to promote these rights . . .”\textsuperscript{1113}

Thus, states should ensure that public authorities do not prevent, hinder or restrict the formation, membership, or departure from an association or arbitrarily interfere with associations. States are also required to take reasonable and appropriate measures to secure the right to freedom of association in “public and political life.”\textsuperscript{1114} States must extend the right to all individuals, including non-citizens.\textsuperscript{1115}

In addition, international instruments and case law specifically extend the right to freedom of association to trade unions, political parties, religious groups, and other associations. The ILO Freedom of Association Convention, ICCPR, ICESCR, and ICRMW articulate that the right freedom of association includes the right to form and join trade unions, to strike, and to engage in collective bargaining.\textsuperscript{1116} Alternatively, the UDHR, the African Charter, the American Convention, and international case law recognize that freedom of association includes the right not to join a union or association.\textsuperscript{1117}

The right to freedom of association is, nevertheless, subject to limitations. The ICCPR, ICESCR, and American Convention recognize narrow exceptions to the freedom of association: any restriction must be lawful and in pursuit of a legitimate aim such as national security, public safety, the prevention of disorder or crime, or the protection of the rights and freedoms of others.\textsuperscript{1118} The UN Human Rights Committee states that the restriction “must cumulatively meet the following conditions: (a) it must be provided by law; (b) it may only be imposed for one of the purposes set out in paragraph 2; and (c) it must be ‘necessary in a democratic society; for achieving one of these purposes.’”\textsuperscript{1119} It is not enough for a state party to have a reasonable objection for limiting the freedom of association. The state party must further demonstrate that the restriction is “necessary
to avert a real, and not only hypothetical danger to the national security or democratic order and that less intrusive measures would be insufficient to achieve this purpose.

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1 The ten Member States of ASEAN include Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam.


4 Bangkok Declaration, Preamble (April 2, 1993). Article 4 discourages “any attempt to use human rights as a conditionality for extending development assistance.”

5 Joint Communique of the 26th ASEAN Ministerial Meeting (AMM), para. 18 (July 23-24, 1993).


7 Kuala Lumpur Declaration, at para. 6.

8 Kuala Lumpur Declaration, at para. 5.


12 Among the purposes of ASEAN is “[t]o strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN.” See ASEAN Charter, art. 1 (2008) for the complete list of principles.


14 ASEAN Intergovernmental Commission on Human Rights (AICHR), Terms of Reference, Jul. 20, 2009, arts. 3, 4.2 & 7.1 [hereinafter AICHR TOR].

15 See, e.g., Forum Asia, “Civil Society Demands Transparency and Consultation on the ASEAN Human Rights Declaration” (Apr. 8, 2012), at http://www.forum-asia.org/?p=12449. This press release references a joint statement of 122 civil society organizations and networks across Southeast Asia calling for release of the draft ASEAN Human Rights Declaration. Yap Swee Seng, Executive Director of the Bangkok-based Asian Forum for Human Rights and Development (FORUM-ASIA), stated that, “[The peoples of ASEAN] are not being given any meaningful way to ensure that their concerns are presented, received and reflected in the Declaration.” As stated in the press release, although civil society groups had submitted recommendations on the Declaration, they had received no official response from the AICHR. See also International Federation for Human Rights Joint Statement, “The ASEAN Human Rights Declaration: Drafts Must Be Published and Subject to Meaningful Consultations with Local, National and Regional Civil Society and Human Rights Defenders” (May 2, 2012), at http://www.fidh.org/en/asia/asean/The-ASEAN-Human-Rights-Declaration (joint statement of 14 organizations noting that AICHR “has yet to take the necessary steps to ensure that the process of drafting the [AHRD] is transparent and fully consultative with civil society organizations” and stating that “Consultations will be meaningless if the draft declaration is kept confidential and out of reach of the peoples”).
ABA ROLI co-sponsored meetings for civil society groups in Kuala Lumpur, Malaysia and Manila, Philippines in preparation for these formal consultations.

Phnom Penh Statement, art. 2.

Phnom Penh Statement, art. 3. The carefully worded “in accordance with our commitment to . . .” instead of simply stating, “in accordance with the Vienna Convention . . .”

See Renshaw, C “The ASEAN Human Rights Declaration 2012,” 13(3) HUMAN RIGHTS L.R. 557, 563 (2013), available at http://hrlr.oxfordjournals.org/content/13/3/557.full.pdf+html (observing that “[i]t is significant that the Preamble specifically reaffirms only those principles in the ASEAN Charter that are positively related to human rights” and that previous ASEAN human rights instruments included provisions which are adverse to human rights, citing in particular that non-interference is listed among the principles of the AICHR TOR).


Coordination Committee Letter at 2. The Committee therefore encouraged “inclusion of language which makes explicit that the restrictions must be provided by law and conform to the strict tests of necessity and proportionality, and that these restrictions may not put in jeopardy the right itself or apply to rights that are non-derogable under international law.” Id. The Committee further expressed hope that the declaration would address “human rights concerns that are particularly pertinent to the region,” such as rights of asylum seekers and the principle of non-refoulement “(to prevent persons from being returned to countries where, for instance, they will be subjected to torture),” as well as norms against statelessness, providing access to citizenship and “birth registration for children who would otherwise be stateless.” Id. See also “ASEAN Human Rights Declaration should maintain international standards, urge key U.N. expert group,” United Nations Office of the High Commissioner for Human Rights Press Release (Nov. 16, 2012), available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12796&LangID=E.


See AICHR TOR, art. 1(6); ASEAN Human Rights Declaration [hereinafter AHRD], Preamble (2012).
ABA ROLI, *Experts’ Note on the ASEAN Human Rights Declaration* 6 (May 2012). The non-binding quality of the AHRD recognizes that the ASEAN human rights system, like other regional systems, will evolve over time.

30 See American Bar Association Rule of Law Initiative, *Experts’ Note on the ASEAN Human Rights Declaration* 5-6 (May 2012). This assessment approach tracks the purposes of a declaration originally identified in ABA ROLI’s 2012 publication on the AHRD. As noted in that publication, a regional declaration “can first, affirm and consolidate international and national human rights obligations already subscribed to by ASEAN Member States; second, articulate a ‘common standard of achievement’ for the region; and third, show leadership in the advancement of human rights through reference to rights and principles of special relevance to the region” (quoting UDHR, at Preamble (1948)).


32 See AICHR TOR, art. 1(6); AHRD, Preamble (2012). These texts also reaffirm ASEAN Member States’ commitment to the UN Charter.

33 AHRD, art. 4.

34 AHRD, art. 17.

35 AHRD, art. 28.

36 AHRD, art. 29(2).

37 AHRD, art. 35-37.

38 AHRD, art. 30(2)-(3); art. 33, art. 20(2).

39 AHRD, art. 8.

40 UDHR, art. Need to insert full citation here


43 Art. 31(1) of the 1969 Vienna Convention on the Law of Treaties provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” In ascertaining the purpose of a treaty, reference should made to the treaty text, including the preamble and annexes, and any agreement made by all parties in relation to that treaty. Context that may aid interpretation includes relevant rules of international law, including the Vienna Convention on the Law of Treaties [hereinafter VCLT], May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969), art. 31(2). The VCLT has been recognized as a codification of customary international law and applied in regional human rights systems. See *Loizidou v. Turkey* (preliminary objections), Application No. 15318/89, Mar. 23, 1995, para. 72, European Court of Human Rights, available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57920 (“... the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective.”)


47 Civil Society Organisations and People’s Movements Participating in the Civil Society
Forum on ASEAN Human Rights Declaration, Joint submission to the ASEAN Intergovernmental Commission on Human Rights on the ASEAN Human Rights Declaration, Sep. 12, 2012 (referencing art. 4 of the AHRD).

48 UDHR, art. 8.

49 This interpretation would also be consistent with the AHRD’s savings clause (art. 40) and the ASEAN Phnom Penh Statement, adopted alongside the AHRD, by which ASEAN member states affirmed that the AHRD would not be interpreted so as to undermine their existing human rights treaty obligations.


52 The International Court of Justice in the Barcelona Traction Case: Belgium v Spain (Second Phase) ICJ Rep 1970 3 at 34 recognized freedom from slavery and racial discrimination as erga omnes rights, meaning rights so fundamental that they enforceable against all states. See also Yearbook of the International Law Commission, 1999, vol. II, part II, UN Doc. A/CN.4/SER.A/1999/Add.1 at para. 311. The ICTY, European and Inter-American courts have recognized the prohibition against torture as either a jus cogens norm or fundamental right from which no derogation is ever permissible. See Furundzija Case, JL/PIU/372-E, The International Criminal Tribunal for the former Yugoslavia, December 10, 1998, at 144; Soering v. United Kingdom, Application no. 14038/88, 7 July 1989, para. 88, European Court of Human Rights; Goiburu and Others v Paraguay, I/A Court H.R, Merits, Reparations and Costs, Judgment of Sept. 22, 2006, para. 128.

54 ICCPR, arts. 2(3), (9)[5]; ICERD, art. 6 (ratified by Cambodia, Indonesia, Lao PDR, the Philippines, Thailand, and Viet Nam.)

55 CEDAW, art. 2; CRC, art. 39.


58 Constitution of Viet Nam, art. 30(2)-(3).

60 Permanent Court of Arbitration, Chorzow Factory Case (Ger. V. Pol.), (1928) P.C.I.J., Sr. A, No.17, at 47 (September 13); International Court of Justice: Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), Merits 1986 I.C.J. Report, 14, 114 (June 27); Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J Reports 1949, p. 184
61 UDHR, art. 8.
66 U.N. Basic Principles on the Right to a Remedy and Reparation, at Preamble.
68 See, e.g., El-Masri v. The Former Yugoslav Republic of Macedonia, Application No. 39630/09, para. 255, ECHR 2012, available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115621%22; [%22itemid%22:[%222001-115621%22]], noting that “[t]he right to a remedy require[s] the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief.”
70 Id.


73 Human Rights Committee, General Comment No. 31 (2004), paras. 15–18. In Aksoy v. Turkey, Application No. 21987/93, 18 December, ECHR 1996-VI, available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58003, the Court held that the serious nature of torture required Parties to the European Human Rights Convention to carry out a thorough and effective investigation of torture incidents, even though this was not specified in the Convention.

74 U.N. Basic Principles and Guidelines on the Right to a Remedy and Reparation, art. 11, recognizes a victim’s right to a remedy as including: (a) Equal and effective access to justice; (b) Adequate, effective and prompt reparation for harm suffered; (c) Access to relevant information concerning violations and reparation mechanisms.

75 Velasquez Rodriguez Case, I/A Court H.R. (1988), at para. 75; The Inter-American Court has resisted Commission efforts to find an autonomous right to truth in the Convention. See Barrios Altos v. Peru, I/A Court H.R., Merits, Judgment (2001), Series C No. 75, para. 48, available at http://www1.umn.edu/humanrts/iachr/C/75-ing.html, and Case of the Pueblo Bello Massacre v. Colombia I/A Court H.R., Merits, Reparations and Costs (2006), Series C No. 140, para. 219, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_140_ing.pdf (“The right to the truth is subsumed in the right of the victim or the next of kin to obtain from the competent State bodies the clarification of the illegal facts and the corresponding responsibilities, by investigation and prosecution.”)


79 AHRD, art. 1, stating that “All human beings are born free and equal in dignity and rights”, and art. 2, non-discrimination clause.

80 Discussed further below in relation to art. 9 of the AHRD.

81 AICHR TOR, at art. 1.4.

82 Kuala Lumpur Declaration, at para. 4.


84 AHRD Draft, January 2012, art. 27.

85 Constitution of Viet Nam, art. 15.

86 Constitution of Indonesia, art. 28J(1); Constitution of Lao PDR, Chapter IV; Constitution of Thailand, Chapter IV.

87 UDHR, arts. 29(1)-(2).

88 ICCPR, Preamble, para. 6; ICESCR, preamble para. 6.

89 CRPD, preamble para. w.


91 American Convention on Human Rights, art. 32.

92 Bangkok Declaration, para. 9.
the doctrine was first recognized in the member states some discretion between art. 7 and the 1993 Bangkok Declaration, of the European Union, Oct. 26, 2012, domestic law, including any local or customary law, is brought into CRC/GC/2003/5 (2003), para. 20 ("[i]mplementation of the Co-ercion is a doctrine developed by the European Human Rights Court that provides member states some discretion with regards to legislative or other measures taken with regards to Convention Rights. The doctrine was first recognized in the Handside v. United Kingdom, Application no. 5493/72, 7 December 1976, paras 48-49, European Court of Human Rights.. See Open Society Justice Initiative summary of this doctrine at http://www.opensocietyfoundations.org/sites/default/files/echr-reform-margin-of-appreciation.pdf.

The Margin of Appreciation is a doctrine developed by the European Human Rights Court that provides member states some discretion with regards to legislative or other measures taken with regards to Convention Rights. The doctrine was first recognized in the Handside v. United Kingdom, Application no. 5493/72, 7 December 1976, paras 48-49, European Court of Human Rights.. See Open Society Justice Initiative summary of this doctrine at http://www.opensocietyfoundations.org/sites/default/files/echr-reform-margin-of-appreciation.pdf.

For example, ICCPR, art. 2; ICESCR, art. 2; American Convention on Human Rights, art. 2.

VCLT, art. 27.


CEDAW, art. 5; UN Committee on the Rights of the Child, General Comment No. 5, General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), U.N. Doc. CRC/GC/2003/5 (2003), para. 20 ("[i]ncorporation by itself does not avoid the need to ensure that all relevant domestic law, including any local or customary law, is brought into compliance with the Convention.").


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AHHRD, preamble, arts. 10, 26 (affirming all rights in the UDHR) & 40 (savings clause).

UDHR, art. 29(2).


ICCPR, art. 5. Derogations are temporary, emergency suspensions of certain treaty obligations. Limitations are everyday restrictions on how a right is exercised.

ICPPR, art. 4(2). No derogation is permitted from arts. 6, 7, 8 (1)(2), 11, 15, 16 & 18.


100 For example, ICCPR, art. 2; ICESCR, art. 2; American Convention on Human Rights, art. 2.

101 VCLT, art. 27.


103 CEDAW, art. 5; UN Committee on the Rights of the Child, General Comment No. 5, General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), U.N. Doc. CRC/GC/2003/5 (2003), para. 20 ("[i]ncorporation by itself does not avoid the need to ensure that all relevant domestic law, including any local or customary law, is brought into compliance with the Convention.").


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111 ICPPR, art. 4(2). No derogation is permitted from arts. 6, 7, 8 (1)(2), 11, 15, 16 & 18.

European Convention on Human Rights, art. 15(2); American Convention on Human Rights, art. 27(2); Arab Charter on Human Rights, art. 4(2).

Human Rights Committee, *General Comment No. 29 (2001), para. 2.*


Limitations on the right to freedom of movement must also be consistent with other rights in the ICCPR.


Only the right to life, freedom from torture, freedom from slavery, and freedom from ex post facto laws are universally held as non-derogable.

ICESCR, art. 8 (“subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others”).

ICESCR, art. 4.


Vienna Declaration, para. 32.

Charter of the Association of Southeast Asian Nations, at art. 2, Nov. 20, 2007 [hereinafter ASEAN Charter].


UDHR, art. 3; ICCPR, art. 6; CRC, art. 6.


Vienna Declaration, para. 32.


Bangkok Declaration, para. 3.

Charter of the Association of Southeast Asian Nations, at art. 2, Nov. 20, 2007 [hereinafter ASEAN Charter].


should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.”


133 Open Letter from the Coordination Committee of the Special Procedures of the Human Rights Council on the draft ASEAN Human Rights Declaration, November 12, 2012. “In relation to the right to life,” the Committee Chair warned, “provisions such as ‘in accordance with national law’ could be used to shield States against scrutiny by international human rights mechanisms concerning the excessive use of force by law enforcement officers, state failure to protect people against non-state actors and the continuation of the use of the death penalty.” Also see analysis of article 5, right to a remedy above on this point.


135 AHRD, art. 8. See also discussion of article 8 in this document.

136 As contained in ICCPR, arts 6(2)-(5).

137 UDHR, art. 3.

138 ICCPR, arts. 6(1), 4; ratified by Cambodia, Indonesia, Lao PDR, Philippines, Thailand, and Viet Nam.

139 ICCPR, arts. 6(2-6).

140 Serious crimes include crimes under international criminal law, and exceptional crimes such as those such those under military law. Murder and drug-related offences are considered, ‘ordinary’ crimes. Amnesty International classifies Lao PDR and Myanmar as, “Abolitionist in practice”, meaning that they retain the death penalty for ordinary crimes but have not executed prisoners in over 10 years. Brunei, Indonesia, Malaysia, Thailand, Singapore and Viet Nam retain and apply the death penalty for ordinary crimes. See http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries.

141 CRC, art. 6; CRC, art. 37(a). Malaysia submitted a declaration, stipulating that art. 37(a) is applicable only in “conformity with the Constitution, national laws and national policies of the Government of Malaysia.” Singapore issued a declaration noting that Article 37 does not prohibit that application of “prevailing measures prescribed by law for maintaining law and order” or any measures “necessary in the interests of national security, public order, the protection of public health or the protection of the rights and freedoms of others . . .”.

142 CRPD, art. 10, ratified by eight ASEAN member states and signed by Singapore and Brunei Darussalam; ICRMW, arts. 26 & 40, ratified by Indonesia and the Philippines.

143 Constitution of Cambodia, arts. 32, 38; Constitution of Indonesia, arts. 28A, 28I(1); Constitution of Malaysia, art. 353, Constitution of the Philippines, arts. III(1) & III(19-1); Constitution of Singapore, art. 9(1); Constitution of Thailand, art. 32, Constitution of Viet Nam, art. 19.

144 Constitution of Lao PDR, art. 42.

145 Constitution of Malaysia, art. 5(1); Constitution of Myanmar, art. 353; Constitution of Singapore, art. 9(1); Constitution of Philippines, arts. III(1) & III(19-1).

146 Constitution of Cambodia, art. 32.

147 UDHR, art. 3; ICCPR, art. 6(1); Vienna Declaration, para. 63. International law generally does not take a position on when life begins - see Hegarty & Leonard, Human Rights: An Agenda for the 21st Century, Routledge-Cavendish; 1 edition (July 1, 1999), pp xxviii.

148 Human Rights Committee, General Comment No. 6 (1982), para. 1.

149 UDHR, art. 3.

150 ICCPR, art. 6(1); CRC, art. 6; CRPD, art. 10; ICRMW, arts. 26, 40.

151 African Charter on Human and Peoples’ Rights, art. 4; American Convention on Human Rights, art. 4; Arab Charter on Human Rights, art. 5; European Convention on Human Rights, art. 2.

152 ICCPR, art. 4(2); American Convention on Human Rights, art. 27(2); European Convention on Human Rights, art. 15(2); Arab Charter on Human Rights, arts. 4(2). The African Charter does not permit derogation from any charter obligations. Also see Human Rights Committee, General Comment No. 29 (2001).

154 Human Rights Committee, General Comment No. 6 (1982), para. 5.

155 Human Rights Committee, Concluding observations of the Human Rights Committee; Canada, U.N. Doc CCPR/C/79/Add.105( 1999), available at http://www.refworld.org/docid/3df378764.html; Human Rights Committee, General Comment No. 6: Article 6 (1982), paras. . 3 & 5 (“It would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.”).


157 See U.N. Economic and Social Council, Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary, and Summary Executions, U.N. Doc. E/1989/89 (1989), available at http://www1.umn.edu/humanrts/instree/i7pepi.htm (“In cases in which the established investigative procedures are inadequate because of lack of expertise or impartiality, because of the importance of the matter or because of the apparent existence of a pattern of abuse, and in cases where there are complaints from the family of the victim about these inadequacies or other substantial reasons, Governments shall pursue investigations through an independent commission of inquiry or similar procedure”).


', U.N. Doc. A/HRC/7/2, January 10, 2008 at para. 3 (“Although States are not bound to follow the definition contained in the Declaration strictly in their criminal codes, they shall ensure that the act of enforced disappearance is defined in a way that clearly distinguishes it from related offences such as abduction and kidnapping”).

175 CPED, art. 2 contains the definition of enforced disappearance.

176 Cambodia, Indonesia, Lao PDR, the Philippines, Thailand, and Viet Nam.

Brunei has lodged a reservation against all provisions in the CRC “which may be contrary to the Constitution of Brunei Darussalam and to the beliefs and principles of Islam, the State, religion...” CRPD has been ratified by eight ASEAN member states. Malaysia and Singapore have lodged reservations against article 37 of the CRC recognizing a child’s right to freedom from torture and unlawful or arbitrary detention, so far as article 37 conflicts with national law.

Cambodia has ratified CPED while Indonesia, Lao PDR and Thailand have signed but not yet ratified.

Constitution of Cambodia, art. 32 (right to freedom and personal security), art. 38 (protection against unlawful arrest and detention); Constitution of Malaysia, arts. 5(1-4), Constitution of Myanmar, art. 21; Constitution of Singapore, art. 9(1); Constitution of the Philippines, art. III, sect 2; Constitution of Viet Nam, art. 20(2). The Constitution of Indonesia, art. 28G(1), contains a right to “protection of his/her person” but makes no mention of arrest or detention. The Constitutions of Viet Nam, Lao PDR and Myanmar restrict protection from wrongful arrest and detention to citizens, which is inconsistent with Lao PDR and Viet Nam’s ICCPR treaty obligation to grant this right universally.

Constitution of Malaysia, art. 5(3); Constitution of Singapore, art. 9(3).

Constitution of Malaysia, art. 5(4); Constitution of Myanmar, art. 376; Constitution of Singapore art. 9(4); Constitution of Thailand, art. 32. The Viet Nam Constitution includes right to a lawyer if detained, art. 31(4).
ICCPR, art. 9(3); Human Rights Committee, Draft General Comment No. 35 on Article 9 (2014); Yagci and Sargin v. Turkey, Application No. 16419/90, 8 June 1995, para. 52, European Court of Human Rights, Series A, No. 319-A.


CPED, art. 2.


UDHR, art. 18.


A January 2012 draft of the AHRD read, “No one shall be held in slavery, servitude [forced labour] or be subjected to human smuggling or trafficking or any other forms of slavery”, suggesting that inclusion of the words ‘forced labour’ was, at the time, still under negotiation or that servitude was indeed considered equivalent to forced labor.


Under art. 4 of the ICCPR the right to freedom from slavery and servitude is non-derogable.

It is difficult to conceive of any circumstances that would justify servitude or slavery upon grounds of non-performance of individual duties (art. 6), a particular culture (art. 7) or for the purposes of “securing due recognition for the human rights and fundamental freedoms of others, and to meet the just requirements of national security, public order, public health, public safety, public morality, as well as the general welfare of the peoples in a democratic society” (art. 8).

The International Court of Justice in the Barcelona Traction Case: Belgium v Spain (Second Phase) ICJ Rep 1970 3 at 34 recognized freedom from slavery and racial discrimination as erga omnes rights, meaning rights so fundamental that they enforceable against all states. Also see Yearbook of the International Law Commission, 1999, vol. II, part II, UN Doc. A/CN.4/SER.A/1999/Add.I at para. 311

Slavery is prohibited in the Constitution of Cambodia, art. 46; Constitution of Indonesia, art. 28(1); Constitution of Malaysia art. 6(1); Constitution of Myanmar, art. 328; Constitution of Singapore, art. 10(1).


ILO Worst Forms of Child Labour, 1999 (No. 182). Myanmar was the last ASEAN Member State to ratify the convention in December 2013. The ILO Abolition of Forced Labour Convention, 1957 (No. 105), has been ratified by Cambodia, Indonesia, the Philippines and Thailand.

Ed. Crawford, J The British Yearbook of International Law, 2008, p. 180. Article 1 of the 1953 ILO Abolition of Forced Labour Convention prohibits forced or compulsory labour as a punishment for expressing a political opinion, for participation in a labor strike and as a means of discrimination against a particular group. It also does not permit the forced mobilization of labour for purposes of economic development.


ILO Declaration on Fundamental Principles and Rights at Work, art. 2.

ICCPR, art. 8(3). Cambodia, Indonesia, Lao PDR, the Philippines, Thailand and Viet Nam are parties to the ICCPR.

Constitution of Indonesia, art. 27(2).

Constitution of Myanmar (2008), at art. 358.


CRC, art. 35.

Cambodia, Indonesia, Lao PDR, Myanmar, and the Philippines.


ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, para. 17, 2007.

For example, the ASEAN Declaration against Trafficking states that, “All Member Countries reaffirm their commitment to accomplish the elements of this Declaration through maximum efforts by such appropriate instruments as may be necessary and consistent with their respective national laws and policies.” The ASEAN Declaration on Migrant Workers similarly states, “For purposes of protecting and promoting the rights of migrant workers, ASEAN Member Countries in accordance with national laws, regulations and policies, will...”


The ASEAN instrument on migrant worker rights has stalled because some host countries which host a large number of migrant workers are either unwilling to commit to a binding legal instrument, or do not wish to extend protections to the families of migrant workers or undocumented migrants.

Convention to Suppress Slavery and the Slave Trade [hereinafter the Slavery Convention], 60 LNTS 253 (1926), entered into force Mar. 9, 1927, at art. 1.


UDHR, art. 4; ICCPR, art. 8; the Slavery Convention (1926), art. 2; Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, (1956), 226 U.N.T.S. 3, entered into force Apr 30, 1957; African Charter on Human and Peoples’ Rights, art. 5; Arab Charter on Human Rights, art. 10(1); American Convention on Human Rights, art. 6(1); Convention for the Protection of Human Rights and Fundamental Freedoms, art 4(1).

ILO Forced Labour Convention (1930) art. 2(1). ILO Convention No. 29 has been ratified by 177 of the 185 ILO member countries.


ILO Forced Labour Convention (1930), art. 2(2) lists exceptions to the prohibition of forced labour.


ICCPR, art. 8(3)(a); ICRMW, art. 11(2); Arab Charter on Human Rights, art. 10(2); American Convention on Human Rights, art. 6(2); European Convention on Human Rights, art. 4(2) (prohibition of forced or compulsory labour); ICESCR, art. 10(3) and CRC art. 32 (protection against economic and social exploitation of children).


CRC, art. 35.

Palermo Protocol, art. 3(a) contains the internationally recognized definition of trafficking in persons.
Palermo Protocol. art. 3(b).
Palermo Protocol. art. 3(c).
Protocol against Smuggling, art. 3(a).
Protocol against Smuggling, art. 16 on protection and assistance measures for smuggled migrants.
AHRD Articles 6, 7, and 8 permit limitations on all the rights included in the Declaration.

Soering v. United Kingdom.
ICCPR, art. 7; CAT, art. 2; CRC, art. 37(a); CRPD, art. 15; ICRMW, art. 10.
Brunei and Viet Nam have signed but not ratified the CRPD. Malaysia made a reservation against article 15 of the CRPD, which provides for the freedom from torture or cruel, inhuman or degrading treatment or punishment. Cambodia, Indonesia, Lao, Philippines, and Thailand have ratified and Viet Nam has signed the CAT.
Constitution of Indonesia, art. 28(G)(2); Constitution of the Philippines, at art. III sect. 12(2), art. 19(1); Constitution of Thailand, art. 32; Constitution of Indonesia, art. 28I.
Constitution of Cambodia, art. 38.
Constitution of Lao PDR, art. 42; Constitution of Viet Nam, art. 20(1).
CAT, art. 1.
Human Rights Committee, General Comment No. 20, Article 7 (Prohibition of Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment), U.N. Doc. HRI/GEN/1/Rev/1 at 30 (1994) para. 4, available at http://www1.umn.edu/humanrts/gencomm/hrcom20.htm.
ICCPR, art. 7; Vienna Declaration, para 50; CRPD, art. 15(1); Arab Charter on Human Rights, art. 9.
CAT, art 2(3).
ICCPR, art. 2(3); CAT, art. 14.
CAT art. 15; Human Rights Council Committee, General Comment No. 20 (1994), para. 12.
ICCPR, art. 1; CAT, arts. 2 & 3; UN Committee Against Torture, General Comment No. 2 on the Implementation of Article 2 by States Parties, para. 2.
CAT, art. 3; Robben Island Guidelines art. 15; European Convention on Human Rights, art. 19(2).
Human Rights Committee, General Comment No. 20 (1994), paras. 6, 11.. CRPD, art. 15(2).
The State of the Right of Asylum in International Law


272 UN Committee against Torture, General Comment No. 2 on Implementation of Article 2 by States Parties, at 18.

273 Cambodia, Indonesia, Lao PDR, the Philippines, Thailand, and Viet Nam.

274 ICERD, art. 5(b); CRC, art. 37; CRPD, art. 14(1)(b); ICRMW, art. 16


276 Add citation here

277 Constitution of Cambodia, art. 40; Constitution of Indonesia, art. 28E (1); Constitution of Lao PDR; art. 40; Constitution of Malaysia art. 9; Constitution of Myanmar, art. 355; Constitution of the Philippines art. Ill, sect. 6; Constitution of Singapore, art. 13; Constitution of Thailand, art. 34, Constitution of Viet Nam, art 23.

278 Constitution of Indonesia, art. 28E (1); Constitution of Cambodia, art 40; Constitution of Malaysia art. 9; Constitution of Singapore, art. 13; Constitution of Thailand, art. 34, Constitution of Viet Nam, art 23.

279 ICCPR, art. 12 & 13 A non-national refers to “any individual who is not a national of a State in which he or she is present.” U.N. Declaration on the human rights of individuals who are not nationals of the country in which they live, A/RES/40/144 (13 Dec. 1985), art. 1, available at http://www.un.org/documents/ga/res/40/a40r144.htm. There are different categories of non-nationals, including permanent residents, migrants, refugees, asylum-seekers, victims of trafficking, foreign students, temporary visitors, other kinds of non-immigrants and stateless people.

280 Human Rights Committee, General Comment No. 27 (1999), paras. 5, 6.


283 Human Rights Committee, General Comment No. 27 (1999), para. 20.

284 ICCPR, art. 12(3).

285 Human Rights Committee, General Comment No. 27 (1999), para. 13..

286 ICCPR, art. 4. The public emergency must be officially proclaimed and derogations cannot be inconsistent with other state obligations under international law or involve discriminatory measures.

287 Arab Charter on Human Rights, arts. 26 & 27 (prohibiting collective expulsion in general); African Charter, art. 12; American Convention on Human Rights, art. 22(9); European Convention, Protocol 4, 1963, arts. 2 (freedom of movement); 3 (prohibition on expulsion of nationals) & 4. (prohibition on collective expulsion of aliens).

288 American Declaration of the Rights and Duties of Man, art. 27. The AHRD does not, like the American Declaration, specifically exclude ordinary criminals fleeing pursuit from seeking asylum. This exclusion was not included in the subsequent American Convention on Human Rights.


AHRD draft dated January 2012, art. 50. Article 12, in its current form, appeared in a September 2012 draft. A Joint-CSO submission on this second draft recommended that the text, “in accordance with the laws of such State and applicable international agreements,” be removed and that an explicit right to non-refoulement be included. Submission is available at http://www.forum-asia.org/?p=15341.

For example, the 1951 Refugee Convention recognizes the rights of refugees to: housing (art. 21), education (art. 22), public relief and assistance (art. 23), freedom of religion (art. 4); access the courts (art. 16), freedom of movement within the territory (art. 26); and to be issued identity and travel documents (art. 27 and 28).

ICCPR, art. 7; Human Rights Committee, General Comment No. 20 (1994), para. 9. Also see Soering v. the United Kingdom (Application no. 14038/88), European Court of Human Rights, Judgment July 7, 1989 at 111. The Court held that extradition to the U.S., where the applicant could face a long period on death row, violated the European Convention’s prohibition against inhuman and degrading treatment and punishment.

CAT, art. 3. Cambodia, Indonesia, Lao PDR, the Philippines and Thailand have ratified and Viet Nam has signed the CAT.


ASEAN member states affirm all rights in the UDHR through articles 10 and 26 of the AHRD. The preamble of the AHRD reaffirms ASEAN member state commitment to the UDHR and the Vienna Declaration.

CRC, art. 22. Also see UN Committee on the Rights of the Child, General Comment No 6 - Treatment of unaccompanied and separated children outside their country of origin, UN Doc CRC/GC/2006/6 (2005), para 27.

Thailand previously operated Provincial Admissions Boards (PABs) to assess whether asylum-seekers from Myanmar were eligible to be registered as displaced persons and admitted into temporary shelters or camps. This process was not equivalent to a refugee status determination. Also see UNHCR 2012 Global Report, available at http://www.unhcr.org/51b1d6410.html.

Constitution of Indonesia, art. 28G(2); Constitution of Lao PDR, art. 51; Constitution of Viet Nam, art. 49.

Refugee Convention, art. 1 A.


Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984, art III(3) and the Organization of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, 1001 U.N.T.S. 45, art. 1(2).

Refugee Convention, art. 1F. The OAU Convention contains the same exclusion clause but also allows for exclusion of those who act contrary to the purposes and principles of the OAU.

UDHR, art. 14; Vienna Declaration, para. 23; African Charter on Human and Peoples’ Rights, art. 12; Arab Charter on Human Rights, art. 28; American Convention on Human Rights, art. 22(7)&(8); Charter of Fundamental Rights of the European Union, arts. 18, 19. The European Human Rights Convention does not include a right to asylum but provides that aliens may not be expelled from a country without due process.

ICCPPR, art. 12.

Refugee Convention, art. 33; CAT, art. 3.


The Refugee Convention affords the same treatment accorded to aliens in similar circumstances with respect to: property rights for all refugees (art. 13), right of association for lawful refugees (15), right to wage earning and self-employment–lawful (art. 17 & 18), housing–lawful (art. 21); public education other than
primary education—all (art 22(2)), labor conditions and social security—lawful (art 24), administrative assistance—all (art 25). Refugees are to be afforded the same treatment as nationals for: intellectual property rights—all (14), access to the courts—all (art 16); rationing— all (art. 20), primary education—all (art. 22(1)), public relief—lawful refugees (art 23), freedom of movement—lawful refugees (art. 26). Refugee specific rights include the right to identity (art. 27) and travel documents — lawful ( art. 28); and fiscal charges — all (art. 29).


AHRD Articles 6, 7, and 8 permit limitations all the rights included in the Declaration.


AHRD, art. 32.

Constitution of Cambodia, art. 44; Constitution of Indonesia, art. 28H(4); Constitution of Lao PDR, art. 16; Constitution of Malaysia, art. 13; Constitution of Myanmar, art. 37(c); Constitution of Thailand, part 5; Constitution of Vietnam, art. 22 and 23.

Constitution of Cambodia, art. 44.

Constitution of Malaysia, art. 11(3)(c); Constitution of Singapore, art. 15(3)(c).

Constitution of the Philippines, art. XII(5), art. XII(6), art. XIII(9), art. XIV(13).

CRPD: Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore and Thailand; ICERD: Cambodia, Indonesia, Lao PDR, the Philippines, Thailand, Viet Nam; ICRMW: Indonesia and the Philippines

UDHR, art. 17.


CEDAW, art. 15(2) and 16(1)(h); ICERD, art. 5(d)(v); ICRMW, art. 15; CRPD, art. 12(5).

CEDAW, arts. 15(2), 16(1)(h).


UDHR, art. 15.

ICCPP art. 2; CRC, art. 4; VCLT, art. 26. See Human Rights Committee, General Comment No. 31 (2004), para. 13 (“... unless Covenant rights are already protected by their domestic laws or practices, States Parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant. Where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant’s substantive guarantees.” Also see Olmedo-Bustos et al. v. Chile, I/A Court H.R., Judgment of February 5, 2001, Merits, Reparations and Costs, Series C 73, paragraph 87. Also, the Convention on Certain Questions Relating to the Conflict of Nationality Law [hereinafter Hague Convention], April 3, 1930, Treaty Series, vol. 179, p. 89, No. 4137, entered into force Jul. 1, 1937, at art. 1 provides that, “It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.”

See UN Human Rights Council, Resolution, Human rights and arbitrary deprivation of nationality, 16 July 2012, A/HRC/RES/20/5, preamble, “Recognizing the authority of States to establish laws governing the acquisition, renunciation or loss of nationality in accordance with international law.”


UDHR, art. 10; African Charter on Human and Peoples’ Rights, art. 7(1); European Convention on Human Rights], art. 6(1).

Cambodia, Indonesia, Lao PDR, the Philippines, Thailand, and Viet Nam.


ICCPR art. 14(3)(f); ICRMW art. 18(3)(f).

ICCPR art. 14(3)(d).

Arab Charter on Human Rights art. 13; European Convention on Human Rights art. 6(3)(d).


Exceptions to the Exhaustion of Domestic Remedies [Articles 46 (1), 46 (2) (a) and 46 (2) (b) American Convention on Human Rights ] [Advisory Opinion] IACtHR Series A No 11 [10 August 1990] paras 25–27.


Report on Terrorism and Human Rights of 22 October 2002 (paras 245 and 247); Judicial Guarantees in States of Emergency [Arts 27 (2), 25 and 8 of the American Convention on Human Rights] [Advisory Opinion] IACtHR Series A No 9 [6 October 1987]; Civil Liberties Organization v. Nigeria, Communication 129/94, African Commission on Human and People’s Rights, Ninth Annual Activity Report (1995), Annex V, p. 34 . The European Court of Human Rights has not had the opportunity to consider the issue of derogability of the right to a fair trial directly as no Member State has tried to derogate from article 5 of the ECHR during a state of emergency.


CRC art. 40(3); African Charter on the Rights and Welfare of the Child art. 4.

UDHR, art. 10; African Charter on Human and People’s Rights, art. 7(1); European Charter on Human Rights, art. 6(1); American Declaration, art. 18.

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Article 6; Updated Set of principles for the protection and promotion of human rights through action to combat impunity, principle 19; Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 4.

United Nations Convention against Transnational Organized Crime, Article 25; Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Article 6(2). See also regarding practice in international courts: Rome Statute for the International Criminal Court, Article 68(3); Statute of the Special Tribunal for Lebanon, Article 17.

Rantsev v Cyprus and Russia, App. No. 25965/04 (European Court of Human Rights, Judgment of 7 January 2010).

UDHR, art. 12, “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks”.

UDHR, art. 17.

CRC, art. 16.

ICRMW, art. 14.

CRPD, art. 22.


Civil Society Organisations and People’s Movements Participating in the Civil Society Forum on ASEAN Human Rights Declaration, Joint submission to the ASEAN Intergovernmental Commission on Human Rights on the ASEAN Human Rights Declaration, Sep. 12, 2012 on AHRD, art. 15.

ICCPR, art. 17; CRC, art. 16; CRPD, art. 22; ICRMW, art. 14.

Constitution of Cambodia, art. 40; Constitution of Lao PDR, art. 42; Constitution of Myanmar, art. 357; Constitution of the Philippines, art. III(2–3); Constitution of Thailand, arts. 33, 35 & 36; and Constitution of Viet Nam, art. 73.

Constitution of Cambodia, art. 40; Constitution of Lao PDR, art. 42; Constitution of Myanmar, art. 357; Constitution of the Philippines, art. III(2); Constitution of Thailand, art. 33; and Constitution of Viet Nam, art. 73.

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Constitution of Cambodia, art. 40 and Constitution of Lao PDR, art. 42.

Constitution of Thailand, art. 35.

Constitution of Lao PDR, art. 42 and Constitution of Thailand, art. 35.

Constitution of Cambodia, art. 40; Constitution of Myanmar, art. 357; Constitution of the Philippines, art. III(3); Constitution of Thailand, art. 36; and Constitution of Viet Nam, art. 73.

Constitution of Thailand, art. 35.

UDHR, art. 12.

ICCPR, art. 17; CRC, art. 16; ICRMW, art. 14; CRPD, art. 22.

American Declaration of the Rights and Duties of Man, arts. V, IX & X; American Convention on Human Rights, art. 11; European Convention on Human Rights, art. 8; and Arab Charter on Human Rights, arts. 16(8) & 21.

Human Rights Committee, General Comment No. 16 (1988), paras. 3 & 4

Id, para. 1.

Id, para. 8.


X and Y v. Netherlands, European Court of Human Rights (1985), at para. X?


Human Rights Committee, General Comment No. 16 (1988), paras. 7 & 10.


A January 2012 version of the AHRD read, “Everyone has the right to freedom of thought, conscience and the right to practice one’s religion or belief.” A Joint Civil Society Submission to the AICHR on a subsequent
draft highlighted article 12’s omissions but the AHRD was not amended accordingly. The full submission is available at http://www.forum-asia.org/?p=15341.

425 Human Rights Committee, General Comment No. 22 (1993), para. 4.

426 The Human Rights Committee has interpreted article 18 of the ICCPR to include the right to change one’s religion. This right has always been contentious due to Islam’s restrictions on apostasy and its omission may be at the behest of Brunei, Malaysia and Indonesia.

427 Ratified by six (ICCPR) and all ten ASEAN member states (CRC).

428 AHRD, art. 8.

429 UDHR, art. 18; ICCPR, art. 18.

430 ICCPR, arts. 18(3) (limitation clause), 4(2) (non-derogation clause) & 18(4) (rights of parents).

431 AHRD, art. 16.

432 The non-paper is not available online but the U.S. Department of State’s reaction to the AHRD is available at, http://www.state.gov/r/pa/prs/ps/2012/11/200915.htm.

433 ICCPR, art. 20(2).

434 AHRD, art. 23.

435 AHRD, art. 10 and the Phnom Penh Statement on the Adoption of the ASEAN human Rights Declaration (AHRD), 18 November 2012.

436 ICCPR, arts. 9 & 27; CRC, art. 14; ICRMW, art. 12; Convention Relating to the Status of Refugees, art. 4.

437 Cambodia, Indonesia, Lao PDR, the Philippines, Thailand, and Viet Nam.

438 CRC, art. 14. The CRC does not explicitly recognize a child’s right to change his or her religion but instead provides for legal guardians to provide direction on religious matters, “in a manner consistent with the evolving capacity of the child”, recognizing that as a child develops, he or she is increasingly able to make independent decisions regarding religion.


440 Constitution of Brunei, art. 3(1); Constitution of Cambodia, art. 43; Constitution of Indonesia, art. 28E; Constitution of Malaysia, art. 11(1); Constitution of Myanmar, art. 34; Constitution of the Philippines, art. III sect. 5; Constitution of Singapore, art. 15; Constitution of Thailand, art. 37; Constitution of Viet Nam, art. 70. Article 9 of the Lao PDR Constitution permits all “lawful religious activities”, leaving room for criminalization of religions or acts of worship.

441 UDHR, art. 18.

442 ICCPR, art. 18; European Convention on Human Rights, art. 9; American Convention on Human Rights, art. 12.

443 African Charter on Human and Peoples’ Rights, art. 8; Arab Charter on Human Rights, art. 30.

444 Human Rights Committee, General Comment No. 22 (1993), para. 2.

445 Id., at para. 3.


447 Human Rights Committee, General Comment No. 22 (1993), para. 4.

448 Id. para. 8.

449 ICCPR, art. 19(3)(b).

450 European Convention on Human Rights, art. 9 (2).

451 Arab Charter on Human Rights, art. 30(2).

452 Sinan İşik v Turkey, Ct. Hm. Rts. No.21924/05, (2 February 2010).

453 Eweida and Others v. The United Kingdom Application No. 48420/10, 59842/10, 51671/10 and 36516/10, European Court of Human Rights, 2013.

ICPR, art. 19(1).

However, AHRD, art. 22 on freedom of religion does call on the state to eliminate incitement to hatred related to religion and beliefs.

ICCPR, art. 19, ratified by Cambodia, Indonesia, Lao PDR, the Philippines, Thailand, and Viet Nam.

CRPD, art. 21, ratified by all ASEAN member states except for Singapore and Viet Nam.

CRC, art. 13; ICERD, art. 5(d)(viii); ICRMW, art. 13.

Constitution of the Republic of Philippines, art. III; Constitution of the Kingdom of Cambodia, art. 41; Constitution of the Republic of Indonesia, art. 28; Constitution of the Lao PDR, art. 44; Constitution of Malaysia, art. 10; Constitution of the Republic of Myanmar, art. 354(a); Constitution of the Republic of Singapore, art. 14; Constitution of the Kingdom of Thailand, arts. 36 & 45; Constitution of the Socialist Republic of Viet Nam, art. 69. Brunei is the one ASEAN member state that does not contain a right to freedom of expression and opinion in any form in its constitution.

Constitutions of Cambodia, Lao PDR, Myanmar, Malaysia, Viet Nam and Singapore.

Constitutions of Lao PDR, Myanmar, Singapore and Thailand.

Constitution of the Republic of Philippines, art. III.

Constitution of Viet Nam, art. 25.

With the exception of Brunei.

UDHR, art. 19.

ICPR, arts. 19 & 20; CRC, arts. 12 & 13; ICERD, arts. 4 & 5; ICRMW, art. 13.

European Convention on Human Rights, art. 10; American Declaration of the Rights and Duties of Man, art. IV; American Convention on Human Rights, arts. 13 & 14; African Charter on Human and Peoples’ Rights, art. 9; Charter on the Rights and Welfare of the Child, art. 7; Arab Charter on Human Rights, art. 32.


Human Rights Committee, General Comment No. 34 (2011), para. 10.


Wenzel, supra.


1; Shelton, Balancing Rights and Responsibilities.

See Alinak v. Turkey, Application No. 40287/98, European Court of Human Rights 2005(finding a violation when the work was a novel with limited mass appeal). For more on artistic speech enjoying more protection if


487 Human Rights Committee, General Comment No. 34 (2011), para. 18; European Court of Human Rights judgments on the right to freedom of expression: Bulletin 7, 2012, 16 December 2012. The most important judgments from the ECHR on access to information are: Kenedi v. Hungary, Application No. 31475/05, 26 May 2009; Társaság a Szabadságjogokért v. Hungary, Application No. 37374/05, 14 April 2009. These decisions concern the right to access to information that is held by public bodies other than private information, which is protected under Article 8 (respect for private life). See id.

488 Charter of Fundamental Rights of the European Union, art. 11.


490 Human Rights Committee, General Comment No. 34, para. 14.

491 ICCPR, art. 19(3); European Convention on Human Rights, art. 10(2); and American Convention on Human Rights, art. 13(2).


493 American Convention on Human Rights, art. 31(2), 31(4).

494 American Convention on Human Rights, art. 31(2).

495 See Shelton, D Balancing Rights and Responsibilities; see e.g., ErdalTas v. Turkey, Application No. 77650/01, European Court of Human Rights (2006); Selisto v. Finland, Application No. 56767/00, European Court of Human Rights (2004); Colombani v. France, Application No. 51279/99, European Court of Human Rights 2002-V.

496 See e.g. Desacato laws, or insult/contempt laws that criminalize an expression that offends, insults or threatens a public functionary in the performance of his or her duties, Shelton, Balancing Rights and Responsibilities.


See Bowman v. The United Kingdom, Application No. 24839/94, European Court of Human Rights 1998-I.

Id. at 232; Otto Preminger - Institut v. Austria, Application No. 13470/78, 20 September 1994, European Court of Human Rights, Series A No. 295.


Id., referencing ECHR cases regarding republishing information found on the internet; blocking and filtering internet access and websites; political debate and the internet; trademark and copyrights violations online; license to provide internet access; jurisdiction; protection of minor; access to government information.

International organizations that have developed guidelines for this area of the law include the Council of Europe and the Permanent Council of the Organisation for Security and Cooperation in Europe (OSCE), among others. See id.

UDHR, art. 20(1).


ICCPR, art. 21; ICERD, art. 5(d)(ix); CRC, art. 15. The ICCPR and ICERD have been ratified by Cambodia, Indonesia, Lao PDR, the Philippines, Thailand and Viet Nam, the CRC by all ASEAN member states.

Constitution of the Philippines, art. III sect. 4; Constitution of Cambodia, art. 41; Constitution of Indonesia, art. 28; Constitution of Lao PDR, art. 44; Constitution of Malaysia, art. 10; Constitution of Myanmar, art. 354(a); Constitution of Singapore, art. 14; Constitution of Thailand, art. 63; Constitution of Viet Nam, art. 25.


ICCPR, art. 20

ID., at para. 4.

UDHR, art. 20

ICCPR, art. 21; CRC, art. 15; ICERD, arts. 4 & 5.

European Convention on Human Rights, art. 11; African Charter on Human and Peoples’ Rights, art. 11; African Charter on the Rights and Welfare of the Child, art. 8; Charter on Human Rights, art. 32; American Declaration of the Rights and Duties of Man, art. XI; American Convention on Human Rights, art. 15.

ICCPR, art. 21.


Oya Ataman v. Turkey, Application No. 74552/01, European Court of Human Rights 2006-XIV.

See e.g. HRC Resolution 24/5, at para. 2; Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/68/299, 7 August 2013, at para. 1.

Id., at para. 6.

UDHR, art. 21(3); ICCPR, art. 25.

HRC Resolution 24/5, at para. 2.


UDHR, art. 21; ICCPR, art. 25.

UDHR, art. 21(2); ICCPR, art. 25(c); Arab Charter on Human Rights, art. 24(4); American Convention on Human Rights, art. 23(1c); and African Charter on Human and Peoples’ Rights, art. 13(2).

Cambodia, Indonesia, Lao PDR, the Philippines, Thailand, and Viet Nam.

Cambodia, Indonesia, Lao PDR, the Philippines, Thailand, and Viet Nam.

CEDAW, art. 7; CRPD, art. 29.


Constitution of Myanmar, arts. 349 & 391.

Constitution of Indonesia, art. 28D(3).
Constitution of Cambodia, art. 34; Constitution of Lao PRD, arts. 4 & 36; Constitution of Malaysia, arts. 119 & 120; Constitution of Thailand, art. 72; Constitution of Viet Nam, arts. 27 & 29.

UDHR, art. 21.

UDHR, art. 21.

ICCPR, art. 25(b).

UDHR, art. 21(3).


UDHR, art. 21.

ICCPR, art. 25.

UDHR, art. 21.

Human Rights Committee, General Comment No. 25 (1996), para. 7.

Id., at para. 17.

Id., at para. 23.


CEDAW, art. 7.

CERD, art. 25(c).

African Charter on Human Rights, art. 24(4); American Convention on Human Rights, art. 23(1c); African Charter on Human and Peoples’ Rights, art. 13(2).

American Convention on Human Rights, art. 23(2).

Inter-American Democratic Charter, art. 9.


Protocol 1 to European Convention, art. 3.


Council of Europe Statute, preamble para. 3., OAS Charter, preamble para. 3., arts. 2., 3 & 9.; Constitutive Act of the African Union, arts. 3(g) and (h) & 4(m); ASEAN Charter, preamble para. 8., art. 2(2)(h).

Vienna Declaration, para. 8.

Inter-American Democratic Charter, arts. 18-22.


UDHR, arts. 23 (2)( everyone, without any discrimination, has the right to equal pay for equal work), 23 (3) (everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection) & art. 24 ( “everyone has the right to rest and leisure…”); ICESCR, arts. 7 & 8; ILO, Equal Remuneration Convention, 1951 (No. 100), June 29, 1951, entered into force: May 23, 1953, art. 2.

ILO Forced Labour Convention, 1930 (No. 29); ILO Worst Forms of Child Labour, 1999 (No. 182); ILO Abolition of Forced Labour Convention, 1957 (No. 105); ILO Equal Remuneration Convention, 1951 (No. 100), entered into force: 23 May 1953; ILO Minimum Age Convention, 1973 (No. 138), entered into force: 19 Jun 1976; CCPR, art. 8(3)(a); ICRMW, art. 11(2); ICESCR, art. 10(3) and CRC, art. 32.

ILO Declaration on Fundamental Principles and Rights at Work, 1998.

ILO Forced Labour Convention 1930 (No. 29), ratified by 9 ASEAN member states, art. 1(1) “Each Member of the ILO which ratifies this Convention undertakes to suppress the use of forced or compulsory labour in all its forms within the shortest possible period”. ILO Worst Forms of Child Labour Convention 1999 (No. 182), ratified by all ASEAN member states, art. 1 “Each Member which ratifies this Convention shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour ..”.


Brunei Darussalam has not ratified the Forced Labour Convention 1930 (No. 29).

16 years: Brunei Darussalam; 14 years: Cambodia, Lao PDR; 15 years: Indonesia, Malaysia, the Philippines, Singapore, Thailand, and Viet Nam.

ASEAN removed the right to freedom of association from the AHRD shortly before adopting the final text. As such, the AHRD recognizes freedom of association only in this right to form and join trade unions. ILO, Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), entered into force Jul 4, 1950, at art. 8(1) In exercising the rights provided for in this Convention workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land; (2) The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.”

ILO Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) ratified by Cambodia, Indonesia, Myanmar and Philippines and overall ratified by 153 out of 185 ILO Members; ILO Right to Organise and Collective Bargaining Convention, 1949 (No. 98) ratified by Cambodia, Indonesia, Malaysia, Philippines and Singapore and overall ratified by 164 out of 185 ILO Members.

ILO Equal Remuneration Convention, 1951 (No. 100), entered into force Jun 29, 1951 ratified by all except for Brunei Darussalam and Myanmar and overall ratified by 171 of 185 ILO Members; ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111), entered into for June 15, 1960, ratified by Cambodia, Indonesia, the Philippines, Lao PDR and Viet Nam. Five of the 13 members who have not ratified No. 111 are ASEAN member states.

ICESCR, arts. 6-8. Cambodia, Indonesia, Lao PDR, Philippines, Thailand, and Viet Nam have ratified the ICESCR.

ICCPR, art. 8(3)(a) and ICERD, art. 5(e)(i) & (ii). The same six ASEAN Member States have ratified or acceded to the ICCPR and ICERD, namely Cambodia, Indonesia, Lao PDR, Philippines, Thailand, and Viet Nam.

CEDAW, art. 11; CRC, art. 32; CRPD art. 27. Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, and Thailand have ratified or acceded to the CRPD.

ICRMW, arts. 11, 25, 52 & 54. Two ASEAN Member States have ratified the ICRMW, namely Indonesia and Philippines.
Constitutions of Cambodia, Indonesia, Lao PDR, Myanmar, Philippines, Singapore, Thailand, and Viet Nam.

Constitution of Indonesia, art. 27(2); Constitution of Philippines, art. XIII, section 3; and Constitution of Thailand, art. 44.

Constitution of Cambodia, art. 36; Constitution of Indonesia, art. 28(2); and Constitution of Myanmar, arts. 349 & 350.

Constitution of Myanmar, art. 370; Constitution of Singapore, art. 12(2); and Constitution of Viet Nam, art. 33 (but note that freedom of enterprise is permitted only in “branches and trades not banned by the law”).

Constitution of Indonesia, art. 28(E)(1) and Constitution of Lao PDR, art. 39.

Constitution of the Philippines, art. XIII, section 3:

UDHR, art. 24.

ICESCR, arts. 6, 7 & 8.

ILO Declaration on Fundamental Principles and Rights at Work, 1998.

ILO Freedom of Association and Protection of the Right to Organise Convention, 1948 (No.87), art. 2 & 3; ILO Right to Organise and Collective Bargaining Convention, 1949 (No. 98). The right to join and form labor organisations is also recognized in ICESCR, art. 8; Arab Charter on Human Rights, art. 34(1); American Convention on Human Rights, art. 16(1).


ILO Right to Organise and Collective Bargaining Convention, 1949 (No. 98), art. 54.

ILO Constitution, Annex I, art. 5; CEDAW, art. 11(1); ICRMW, art. 7 & 25; Arab Charter on Human Rights, art. 34(4); European Social Charter (Revised), arts. 2, & 4; Charter of Fundamental Rights of the European Union, art. 23; ILO Equal Remuneration Convention, 1951 (No. 100); Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

ICRMW, art. 25. See also Ruiz Alberto Pereira Roque v His Excellency the Lieutenant Governor of Jersey, Case No. C-171/96 (1997), European Court of Justice, Opinion of Mr Advocate General La Pergola, para. 39.


ICESCR, art. 10(3); CRC, art. 32; Arab Charter on Human Rights, art. 10(2); European Social Charter (Revised), art. 7. See also ILO Declaration on Fundamental Principles and the Right to Work, art. 2(c); ILO Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, art. 1; ILO Convention No. 138, Convention concerning Minimum Age for Admission to Employment art. 1; Maputo Protocol, art. 13(g); African Charter on the Rights and Welfare of the Child, art. 15(1), July 11, 1990, CÂB/LEG/24.9/49.

ILO Minimum Age Convention, 1973 (No. 138), art. 2(3) & (4); art. 4, art. 8.

ILO Worst Forms of Child Labour, 1999 (No. 182), art. 1 & 2.

Id., at, art. 3.

UDHR, art. 25(1).

ICESCR, art. 11.


European Social Charter, arts. 4(1) &31. (Art 4(1) talks about the recognition of the right of workers to remuneration that will give them and their families a decent standard of living, while Art. 31 recognizes the right to housing). While the African Charter does not contain a right to an adequate standard of living, the African Commission has found violations to the right to housing and food, neither recognized specifically in the Charter, through an expansive interpretation of existing rights in the Charter, such as the right to life and health. See The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, Communication 155/96, African Commission on Human and Peoples’ Rights, Fifteenth Annual Activity Report (2001-2002), Annex V, pp. 31-44 available at http://www.achpr.org/files/activity-reports/15/achpr30and31_actrep15_20012002_eng.pdf. The American Convention on Human Rights does not contain a specific right to an adequate standard of living, but the Protocol of San Salvador does at art. 12(1).

AHHRD, arts. 2 & 4.

ICESCR, art. 11. Cambodia, Indonesia, Lao PDR, Malaysia, the Philippines, Thailand and Viet Nam have ratified the ICESCR.

CRC, arts. 24(1)(c) & 27(3); CEDAW, art. 12(2).

CRPD, art. 28(1).

ASEAN, Ha Noi Declaration on the Enhancement of Welfare and Development of Women and Children, No. 9, Ha Noi, 28 October 2010.

ASEAN, Joint Declaration on the Attainment of the Millennium Development Goals in ASEAN (Mar. 1 2009).

Constitution of the Republic of Philippines, art. XIII.

Constitution of Malaysia, art. 8(a).

Constitution of Brunei Darussalam, art. 83(4)(f).

Constitution of Myanmar, art. 26(b).

Constitution of Myanmar, art. 9(k).

UDHR, art. 25(1).

ICESCR, arts. 1, 11 & 12.

Id., art. 11(2).

Id., art. 11.

Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999), para. 6.

Id., para. 4.

Id., para. 8.

Id.

Id., para. 7.

Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999), para. 8.

Id., para. 11.

Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2003).


Resolution adopted by the General Assembly on the Right to Development 54/175, arts 8 & 12(a), A/RES/54/175.


indigenous peoples, the Court found a violation of the right to life and to food); *Yakye Axa Indigenous Community v. Paraguay*, I/A Court H.R., Merits, Reparations and Costs, Judgment (2005), Series C No 125, (case concerned loss of access to ancestral lands and thus means of subsistence; the Court obliged the state to adopt positive measures towards a dignified life, particularly when vulnerable groups were concerned); *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples’ Rights (2001) (The Nigerian government violated the right of the Ogoni communities by destroying their food sources, the Commission stated that the government should neither destroy, nor contaminate food sources. The Commission found that although the right to food is not explicit in the African Charter, it is there implicitly in such provisions as the right to life, health and to economic, social and cultural development). See *Saramaka People v. Suriname*, I/A Court H.R., Preliminary Objections, Merits, Reparations and Costs, Judgment (2007), Series C No. 172. The Saramaka people are a tribal group, not indigenous to the region in question, but share similar characteristics with indigenous peoples, including a special relationship with their land and territories.

630 CRPD, arts. 25 & 28.
631 Refugee Convention, art. 20.
632 Stateless Persons Convention, art. 20.
633 African Charter on Human and Peoples’ Rights, art. 16.
635 American Declaration of the Rights and Duties of Man, art. XI.
637 Office of the High Commission for Human Rights, The Right to Adequate Food, Fact Sheet No. 34.
644 UDHR, art. 25(1); Arab Charter on Human Rights, art. 38; American Declaration of the Rights and Duties of Man, art. XI.
645 ICESCR, art. 11; CRC, art. 27(3).
647 UDHR, art. 25(1).
648 ICESCR, art. 11.
649 CRC, art. 27(3).
650 Arab Charter on Human Rights, art. 38.
651 American Declaration of the Rights and Duties of Man, art. XI.
653 *Id.*, at art. 3.
654 Matthew Craven notes that the right to adequate clothing is part of the right to an adequate standard of living that is “of paramount importance not least because at minimum levels it represents a question of


663 CRC, art. 27.

664 Id., at art. 5.

665 UDHR, art. 2. “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

666 See e.g. UDHR, art. 1.

667 James, S A Forgotten Right? The Right to Clothing in International Law, p. 3.

668 Leyla Sahin v. Turkey, Application no. 44774/98, European Court of Human Rights 2005-XI.


670 The European Court of Human Rights’ jurisprudence diverges from this view. See e.g.: Mann Singh v. France, Application no. 24479/07, European Court of Human Rights 2008.

671 Committee on Economic, Social and Cultural Rights, General Comment No. 4 (1991), para. 7.

672 Id., at para. 8.

673 Cambodia, Indonesia, Lao PDR, Philippines, Thailand, and Viet Nam.

674 ICESCR, art. 2(1).

675 CEDAW, art. 14(2)(h).

676 Constitution of the Philippines, art. XIII (9); Constitution of Viet Nam, arts. 32(1) & 59(3).

677 Constitution of the Philippines, art. XIII (9).

678 Constitution of the Philippines, art. XIII (10).

679 ICCPR, art. 17(1).

680 European Social Charter, art. 31; Additional Protocol to the European Social Charter, art. 4(2)(a).

681 Charter of Fundamental Rights of the European Union, art. 34(3).

682 Charter of the Organization of American States, art. 34(k).

683 American Declaration of the Rights and Duties of Man, art. XI.


685 CRC, art. 27(3); African Charter on the Rights and Welfare of the Child, art. 20(2)(a).

686 European Social Charter (revised), art. 23; Additional Protocol to the European Social Charter, art. 4(2)(a); Committee on Economic, Social and Cultural Rights, General Comment No. 6 (1995).

687 Refugee Convention, art. 21.


689 ICRMW, art. 43(1)(d); European Convention on the Legal Status of Migrant Workers, (ETS No. 093), entered into force May 1, 1983, art. 13.

690 Committee on Economic, Social and Cultural Rights, General Comment No. 4 (1991), para. 7.

691 Committee on Economic, Social and Cultural Rights, General Comment No. 4 (1991), para. 8.

692 Id., at para. 7.


UDHR, art. 25(1).

AHRD, arts. 2 & 4.

ICESCR, arts. 12 (2)(d) & 9. Ratified by Cambodia, Indonesia, Lao PDR, the Philippines, Thailand and Viet Nam.

Constitution of the Republic of Philippines, art. XIII; Constitution of Thailand, arts. 51-55; Constitution of Viet Nam, arts. 34 & 38; Constitution of Myanmar, art. 367; Constitution of Lao PDR, art. 25; Constitution of Indonesia, arts. 28H & 34; and Constitution of Cambodia, arts. 36, 46, & 72-75.

Constitution of the Philippines, art. XIII, sect. 11 & 13; Constitution of Thailand, arts. 51-55; Constitution of Cambodia, arts. 46, 72-74; Constitution of Indonesia, art. 34.

Constitution of Myanmar, art. 367; Constitution of Viet Nam, art. 38; Constitution of Cambodia, art. 36, Constitution of Lao PDR, art. 39.


UDHR, art. 25(1).

The WHO’s Declaration of Alma-Ata defines primary health care as “essential health care based on practical, scientifically sound and socially acceptable methods and technology made universally accessible to individuals and families in the community through their full participation and at a cost that the community and country can afford to maintain at every stage of their development in the spirit of self-reliance and self-determination. It forms an integral part both of the country’s health system, of which it is the central function and main focus, and of the overall social and economic development of the community. It is the first level of contact of individuals, the family and community with the national health system bringing health care as close as possible to where people live and work, and constitutes the first element of a continuing health care process.” See WHO, Declaration of Alma Ata, art. VIII, 6-12 September 1978.

Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), paras. 12 & 17. On aspects of the right to health and health-care facilities, such as availability, accessibility, acceptability, affordability and non-discrimination.

ICESCR, art. 12. The CESCR has elaborated on the this right to encompass the right to medical care as well as the underlying determinants of health in General Comment No. 14. See Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000).

ICCPR, art. 6.

CRC, arts. 6, 19 & 24.

CEDAW, arts. 11, 12, 14(2).

ICERD, art. 5.

European Social Charter, art. 4.

‘African Charter on Human and Peoples’ Rights, art. 16.


Id., at art. 40.

American Declaration of the Rights and Duties of Man, art. XI.

UN Commission on Human Rights, Human Rights Resolution 2005/24: The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, 15 April 2005, E/CN.4/RES/2005/24. The Commission calls upon states to guarantee that the right of everyone to the enjoyment of the highest attainable standard of physical and mental health will be exercised without discrimination of any kind; to pay attention to the health of vulnerable groups, including positive measures, and calls on them to recognize the particular needs of people with disabilities by reflecting their needs in national health and social policies and presses for community-based health care for them.
services under the Attainable Standard of Physical and Mental Health, 15 April 2005, para. 28. For the connection to the right to health, see e.g. UN Commission on Human Rights, Human Rights Resolution 2005/24: The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, 15 April 2005, E/CN.4/RES/2005/24. The Commission on Human Rights affirmed that access to a sufficient amount of safe, clean water for personal and domestic use “is fundamental to the realization of the right of everyone to the enjoyment of the highest attainable standard of health.” Also see, Free Legal Assistance Group and others v. Zaire, Communications 25/89, 47/90, 56/91 and 100/93, African Commission on Human and Peoples’ Rights, Ninth Annual Activity Report (1995-1996), Annex VII, available at http://www1.umn.edu/humanrts/cases/71-03.html. In this case, an indigenous woman was forcibly sterilized in a state hospital and then denied medical care for her post-operation infection from which she died.

CRPD, arts. 25 & 28.

CRPD, arts. 25 & 28.

United Nations Declaration on the Rights of Indigenous Peoples, arts. 7, 21, 23-24; ILO Indigenous and Tribal Peoples Convention, art. 25 (affirms the commitment of governments to ensure adequate health services to indigenous and tribal peoples, and maintains that such services must be community-based, and indigenous and tribal peoples must be provided with resources that allow them to design and deliver such services under their own responsibility and control). For regional jurisprudence regarding the right of indigenous and tribal peoples to social services and medical care, see Yanomami v. Brazil, Case No. 7615, Resolution 12/85, I/A Commission H.R., 8 March 1985; Lamenxay and Kayleyphapopyet (Riachito) v. Paraguay, Case No. 11.713, Report No. 90/999, I/A Commission H.R.; Sawhoyamaza Indigenous Community v. Paraguay, I/A Court H.R., Merits, Reparations and Costs, Judgment (2006), Series C No. 146; The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, I/A Court H.R., Merits, Reparations and Costs, Judgment (2001), Series C No. 79 (2001); Xákmok Kásek Indigenous Community v. Paraguay, I/A Court H.R., Merits, Reparations and Costs, Judgment (2010), Series C No. 214; Yakye Axa Indigenous Community v. Paraguay, I/A Court H.R., Merits, Reparations and Costs, Judgment (2005), Series C No 125.


CRC, art. 24(2)(c); CEDAW, art. 14(2)(h).

For the connection to the right to health, see e.g. CRPD, art. 28(2)(a).

ASEAN, Ha Noi Declaration on the Enhancement of Welfare and Development of Women and Children, No. 9, Ha Noi, 28 October 2010

Joint Declaration on the Attainment of the Millennium Development Goals in ASEAN (Mar. 1 2009).


Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2003), para. 11. For the connection to the right to health, see e.g. CRPD, art. 28.


CRC, art. 24. See also CRC, General comment No. 7 on implementing child rights in early childhood, CRC/C/GC/7/Rev.1 (2006).

United Nations Declaration on the Rights of Indigenous Peoples, at art. 21. For relevant regional jurisprudence, see e.g.: Xákmok Kásek Indigenous Community v. Paraguay, I/A Court H.R., Merits, Reparations and Costs, Judgment (2010), Series C No. 214 (Inter-American Court of Human Rights dealt with the state’s international responsibility for the lack of a guarantee regarding the indigenous community’s right to their ancestral land. As a result of the community being unable to access the property, its members were kept in a vulnerable state as far as food, medicine and sanitary needs were concerned. The State did not provide the basic assistance necessary for protecting the community’s right to a dignified existence, and thus violated the
right to life. The water supplied by the state was not sufficient to meet all basic needs per person and the
government failed to provide the community with water of sufficient quantities and adequate quality. The Inter-
American Commission on Human Rights has recently admitted a case from Chile concerning the Diaguita Huascoaltinos indigenous population’s right to water and the impact of mining upon wetlands and freshwater resources on their ancestral lands. See: http://protestbarrick.net/article.php?id=570.

736 ILO Convention concerning Occupational Health Services (No. 161), art. 5(b).
738 Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2003), para. 11.
740 Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2003), para. 11.
743 UDHR, art. 25(1).
744 Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2003), para. 2.
745 Id., at para. 10.
746 Id., at para. 11.
750 European Social Charter, art. 31(1).
751 “Article 31 (1) guarantees access to adequate housing, which means a dwelling which is structurally secure; safe from a sanitary and health point, i.e., it possesses all basic amenities, such as water, heating, waste disposal, sanitation facilities, electricity; not overcrowded and with secure tenure supported by law.” European Roma Rights Centre v. Italy, Complaint No. 27/2004, European Committee of Social Rights, Decision on the Merits, 7 December 2005.
755 American Declaration of the Rights and Duties of Man, art. XI.
Constitution of Cambodia, art. 59; Constitution of Indonesia, art. 28H; Constitution of Lao PDR, art. 19; Constitution of Myanmar, art. 45; Constitution of Thailand, arts. 66, 67, 73, 85 & 290.


ASEAN Declaration on Environmental Sustainability (20 Nov. 2007).

Anton, D & Shelton, D Environmental Protection and Human Rights, 2011, at p. 131-132.

ICECSR, art. 12(2)(b).


Gabcikovo-Nagymaros Project, I.C.J. (25 Sep. 1997); The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, African Commission on Human and Peoples’ Rights (2001) (the African Commission found that the Charter’s guarantee of the right to a healthy environment or “a general satisfactory environment” imposed a number of “clear obligations upon a government” which it framed as obligations to respect, protect, and fulfill).

Anton & Shelton, supra, at p. 132-133.

Id., at 133.

Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), para. 11 (“The Committee interprets the right to health ...as an inclusive right extending not only to timely and appropriate health care but also to the determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health.”)

From the perspective of advocates for a stand-alone right, these linkages should not negate a stand-alone right, since all human rights are linked. See Vienna Declaration, para. I(5); Rio Declaration at 25; Draft Principles on Human Rights and the Environment (1994) at 2.


Anton & Shelton, supra at 133.


Anton & Shelton, supra at 137.
Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ["Aarhus Convention"].


ILO Indigenous and Tribal Peoples Convention (No. 169).


See Knox, supra para. 46.


See generally 7th ASEAN Summit Declaration on HIV/AIDS Brunei Darussalam, 5 November 2001; 9th ASEAN Summit 2003; Declaration on the Elimination of Violence against Women in the ASEAN Region; Hanoi Call to Action for Children and HIV/AIDS in East Asia and the Pacific Region, March 2006; ASEAN Vientiane Action Programme; ASEAN Declaration of Commitment: Getting to Zero New HIV Infections, Zero Discrimination, Zero AIDS-Related Deaths.

Under the CRC and CEDAW, which all ASEAN member states have ratified, states must provide access to family planning education and services. See CRC, art. 24(2)(f); CEDAW, art. 10(h).

UDHR, art. 25(2); ICESCR, art. 12(2)(a); CRC, arts. 23 & 24; African Charter on the Rights and Welfare of the Child, art. 14.

CRPD, art. 25.

Vienna Declaration, para. 24.

ICRMW, arts. 28, 43 & 45.

United Nations Declaration on the Rights of Indigenous Peoples, art. 24(2).


Cambodia, Indonesia, Lao PDR, the Philippines, Thailand and Viet Nam.

CRC, arts. 24 & 23(3) regarding children with disabilities; CEDAW, art. 12; CRPD, art. 25 and ICRMW, art. 25, same right to health as nationals

Constitution of Cambodia, art. 72; Constitution of Indonesia, art. 28H(1); Constitution of Lao PDR, art. 25, Constitution of Myanmar arts. 28 & 367; Constitution of the Philippines, art. III, sect. 11; Constitution of Thailand, arts. 51 & 80; Constitution of Viet Nam, arts. 38 & 58.

Constitution of Cambodia, art. 48; Constitution of Lao PDR, art. 25; Constitution of Thailand, art. 52.

Constitution of Lao PDR, art. 25; Constitution of Viet Nam, art. 58.

Constitution of Cambodia, art. 74; Constitution of the Philippines, art. III, sect. 13; Constitution of Thailand, art. 54 (right to welfare and appropriate aid); Constitution of Viet Nam, art. 59(2).

Constitution of Viet Nam, arts. 37(3) & 59(2).

Constitution of Lao PDR, art. 25; Constitution of Cambodia, art. 72; Constitution of Viet Nam, art. 58(1).

Constitution of Viet Nam, art. 58(1).

Constitution of Cambodia, art. 72; Constitution of Lao PDR, art. 25; Constitution of Thailand, art. 51.


UDHR, art. 25.

ICESCR, art. 12.
Refugee Convention, art. 24 (child survivors); CRC, art. 26; ILO Convention on Social Security, art. 61 (child survivors); on the Rights and Welfare of the Child, art. 18 (child support); Arab Charter on Human Rights, art. 33; European Social Charter (revised), art. 17.

European Social Charter (revised), art. 12; Protocol of San Salvador, arts. 9 & 15.

African Charter on Human and Peoples’ Rights, art. 18.

Arab Charter on Human Rights, art. 36.

American Convention on Human Rights, art. 17(5); African Charter on the Rights and Welfare of the Child, art. 18.

Committee on Economic, Social and Cultural Rights, General Comment No. 19 (2008), para. 2 (“3. Social security, through its redistributive character, plays an important role in poverty reduction and alleviation...”); see also Charter of the Association of Southeast Asian Nations, at art. 1(6), Nov. 20, 2007 [hereinafter ASEAN Charter] (“[The Purposes of ASEAN are: To alleviate poverty ...”).


CRC, art. 28(2). Singapore has not entered a reservation against art. 28(2) but has declared that, “the judicious application of corporal punishment in the best interest of the child.” See https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en

UDHR, art. 26(3); ICESCR, art. 13(3).


ICESCR, art. 13(2)(e); UNESCO Convention against Discrimination in Education, art. 4(d).

CRC, art. 28(1)(d) & (e).

CRC, art. 28(3).

ICESCR, art. 13; CRC, arts. 28 & 29.


Brunei Darussalam maintains a sweeping reservation against any provision in the CRC or CEDAW that conflicts with the constitution and the beliefs and principles of Islam. This reservation has been rejected by several states parties as acting to defeat the purpose and object of the Conventions, and allowing national law to be used as a grounds for escaping Brunei’s international treaty obligations.

CEDAW, art. 10.

ICERD, arts. 5 & 7. Ratified by the same ASEAN member states who have also ratified the ICCPR and the ICESCR: Cambodia, Indonesia, Lao PDR, the Philippines, Thailand and Viet Nam.


Constitution of the Philippines, arts. II & XIV; Constitution of Cambodia, arts. 48, 65-68; Constitution of Indonesia, arts. 28 & 31; Constitution Lao PDR, art. 22; Constitution of Malaysia, arts. 12 & 94; Constitution of Myanmar, arts. 22, 28, 366 & 368; Constitution of Viet Nam, arts. 37 & 61; Constitution of Thailand, arts. 49, 50, 52 & 73.


ASEAN, Resolution on the ASEAN Plan of Action for Children, Manila, Philippines, 2 December 1993.


UDHR, art. 26.

UNESCO Convention against Discrimination in Education, art. 3 (non-discrimination in education), art. 4 (equal opportunity, access primary, secondary and tertiary education, and quality of education), & art. 5 (education to promote human rights and the rights of parents regarding their child’s education); ICESCR, arts 13 & 14.

Committee on Economic, Social and Cultural Rights, General Comment No. 13 (1999), para. 4.

Committee on Economic, Social and Cultural Rights, General Comment No. 11 (1999), paras. 8 & 9.

CRC, arts. 28 & 29; ICERD, arts. 5 & 7; CEDAW, arts. 10 & 14; CRPD, art. 24; ICCPR recognizes parent’s right to determine religious and moral education of children; ICRMW arts. 12(4) & 30 (Each child of a migrant worker shall have the basic right of access to education on the basis of equality of treatment with nationals of the State concerned); 1956 Stateless Persons Convention, art. 22; Refugee Convention, art. 22 (stateless persons and refugees have same rights as nationals with regards to primary education, and are entitled to the same treatment as aliens in similar circumstances for other types of education) United Nations Declaration on the Rights of Indigenous Peoples, General Assembly Resolution, adopted Oct. 2, 2007, U.N. Doc. A/RES/61/295, at art. 16.


Committee on Economic, Social and Cultural Rights, General Comment No. 13 (1999), para. 1.

Id., at para. 6.

Id., at paras. 43 & 45.

Id., at para. 31.


UDHR, art. (1) “Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”

Arab Charter on Human Rights, art. 25.

The Vienna Declaration cautions that “[w]hile the significance of ... cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms”. The UNESCO Universal Declaration on Cultural Diversity, adopted 2 November 2001, art 4, states that no one may invoke cultural diversity to infringe upon human rights guaranteed by international law or to limit their scope.

CEDAW, arts. 11, 12 & 14(2).
The term “intellectual property rights” in this document is shorthand for the material and moral rights of authors and creators recognized in instruments such as UDHR. These human rights are not necessarily the same as the temporal rights afforded by a State’s patent or copyright regime. For a discussion on this distinction, see Committee on Economic, Social and Cultural Rights, General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author (Art. 15, Para. 1 (c) of the Covenant), U.N. Doc. E/C.12/GC/17 (2005), available at http://www1.umn.edu/humanrts/gencm/escgencm17.html.

Committee on Economic, Social and Cultural Rights, General Comment No. 21 (2009), paras. 2-3.

Id.

United Nations Declaration on the Rights of Indigenous Peoples, arts. 5, 8, 10, 11, 12, 13, 15, 25, 26, 29, 31 & 32.

ILO, Indigenous and Tribal Peoples Convention (No. 169).


Committee on Economic, Social and Cultural Rights, General Comment No. 21 (2009).

ASEAN Declaration on Cultural Heritage, art. 3.

ICESCR, General Comment No. (2009).

ICCPR, arts. 1(1) & 27; ICESCR, arts. 1(1) & 15(1); and CRC, arts. 6, 19, 24 & 27.

ICESCR, art. 2.

Committee on Economic, Social and Cultural Rights, General Comment no. 3 (1990), para. 9.

A non-national refers to “any individual who is not a national of a State in which he or she is present.” U.N. Declaration on the human rights of individuals who are not nationals of the country in which they live, A/RES/40/144 (13 Dec. 1985), art. 1. There are different categories of non-nationals, including permanent residents, migrants, refugees, asylum-seekers, victims of trafficking, foreign students, temporary visitors, other kinds of non-immigrants and stateless people. See U.N. High Commissioner for Human Rights, The Rights of Non-Citizens, United Nations, 2006.

Committee on Economic, Social and Cultural Rights, General Comment No. 3 (1990), para. 9.

AHRD, art. 4., “The rights of women, children, the elderly, persons with disabilities, migrant workers, and vulnerable and marginalized groups are inalienable, integral and indivisible part of human rights and fundamental freedoms”.

ICESCR, arts. 2(1) & 2(3); ratified by Cambodia, Indonesia, Lao PDR, the Philippines, Thailand, and Viet Nam.

ICERD, arts. 1(2) & 1(3); ratified by Brunei, Cambodia, Indonesia, Lao PDR, the Philippines, Thailand.


Refugee Convention, ratified by Cambodia and the Philippines; ICRMW, ratified by Indonesia and the Philippines.


ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, adopted 13 Jan 2007.

Constitution of Indonesia, Chapter. XI; Constitution of Malaysia, art. 10(1); Constitution of Myanmar, art. 347; Constitution of the Kingdom of Thailand, Chapter. III; Constitution of Philippines, art. III.


Constitution of the Lao PRD, art. 50.


Id.

Emphasis added.

UDHR, art. 2; ICCPR, art. 2; ICESCR, art. 2(2).


ICESCR, art. 2(3).

ICERD, art. 2(2); Committee on the Elimination of Racial Discrimination, General Recommendation No. 30 (2004), para. 1.

ICERD, arts. 1(2) & 1(3); Committee on the Elimination of Racial Discrimination, General Recommendation No. 30 (2004), para. 3.

African Charter on Human and Peoples’ Rights, arts. 2, 3 & 19; American Declaration of the Rights and Duties of Man, at preamble art. XXXVIIIdoes provide that aliens should refrain from political activities reserved for citizens; American Convention on Human Rights, at preamble arts. 1(1) & 24; European Convention on Human Rights, art. 14 (art. 16 allows state parties to place restrictions on the political activities of aliens); European Social Charter, arts. 12(4) &13(4); Charter of Fundamental Rights of the European Union, arts. 15(3)
& 21(2). See also, Lithgow and Others v. The United Kingdom, Eur. Ct. Hm. Rts. Nos. 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81 (24 June 1986); Rui Alberto Pereira Roque v His Excellency the Lieutenant Governor of Jersey, Eur. Ct. J., Case C-171/96, Opinion of Mr Advocate General La Pergola (23 Sep. 1997).


945 Arab Charter on Human Rights, arts. 34, 36, 39 & 41(2).


947 U.N. Declaration on Human Rights and Non-Nationals, art. 5.

948 U.N. Declaration on Human Rights and Non-Nationals, art. 2. These rights include: right to leave the country; right to freedom of expression; right to peaceful assembly; right to own property individually or in association with others; Liberty of movement and freedom to choose their place of residence within the borders of the country; and right of spouse and minor or dependent children to join a lawful alien, as provided by national law.


950 U.N. Declaration on Human Rights and Non-Nationals, arts. 6-7.

951 See the text of the 1951 Refugee Convention; 1954 Stateless Persons Convention; ICRMW

952 Vienna Declaration, paras. 10-11.

953 AHRD, arts. 35-37.

954 AHRD, arts. 35, 36, & 37, respectively.

955 AHRD, art. 37.

956 See “Omitted Rights.”

957 UN Charter, art. 55.

958 ICCPR, art. 1(1).

959 ICESCR, art. 1(1).

960 Vienna Declaration, para. 2.

961 UN Declaration on the Right to Development, art. 1(2).

962 AHRD, art. 35.

963 UN Charter, art. 55; ICCPR, art. 1(1); ICESCR, art. 1(1); CEDAW, art. 14; CRPD, Preamble (g); ILO Indigenous and Tribal Peoples Convention, art. 7.

964 Vienna Declaration, paras. 8-14 & 72-74; UN Declaration on the Right to Development, arts. 1 & 2; UN Millennium Declaration, para. 11.

965 Bangkok Declaration, art. 17; Vienna Declaration, para. 10.

966 Constitution of Cambodia, art. 61; Constitution of Indonesia, art. 28(c); Constitution of Lao PDR, art. 21; Constitution of Malaysia, art. 92; Constitution of Myanmar, art. 22; Constitution of Philippines, arts. XIV & XX; Constitution of Singapore, arts. 142 & 148; Constitution of Thailand, arts. 57 & 258; Constitution of Viet Nam, arts. 50, 51, 54 & 62.

967 ASEAN Charter, art. 9.

968 Joint Declaration on the Attainment of the Millennium Development Goals in ASEAN, March 2009.

969 Ha Noi Declaration on the Enhancement of Welfare and Development of ASEAN Women and Children.

970 Declaration of the Cooperation among the Four Human Rights Institutions in ASEAN.


973 UN Declaration on the Right to Development, Preamble.

974 Id., at art. 2(1).

975 Id., at art. 1(2)

976 Id., at art. 3(1) & 4(1).

977 Id., at art. 6(2).
Vienna Declaration, para. 11.  
979 Id., at, para. 8  
980 Id., at, para. 20.  
982 Green & Randolph, para. 54 (“Despite these advances, however, the right is in many ways still in a formative stage, with views not yet entirely fixed about the meanings and practical implications of some of its provisions.”)  
983 UN Declaration on the Right to Development, art. 3.  
984 Id., at, art. 2.  
985 Id., at, art. 4.  
986 Rio Declaration, Principle 7.  
987 The right to development faces many of the same challenges to international acceptance as the right to a clean environment. Both have been recognized in numerous UN declarations and some regional conventions, but not explicitly in an international human rights treaty. Both can be seen as individual as well as collective rights, and both impose duties on actors other than the state in which an individual resides. Finally, both are closely intertwined with and may be inseparable from other rights. The right to development is linked to the concepts of sustainable development, the right of peoples to participate in the decision-making process, and the right to share the benefits of development related to lands and resources they have traditionally used.  
988 African Charter on Human and Peoples’ Rights, art. 22.  
989 Arab Charter on Human Rights, art. 37.  
998 United Nations Declaration on the Rights of Indigenous Peoples, art. 28.  
1000 Id.  
1001 The Treaty of Amity and Cooperation in Southeast Asia, 24 February 1976, at art. 2 In their relations with one another, the High Contracting Parties shall be guided by the following fundamental principles: (d) Settlement of differences or disputes by peaceful manner, and (e) renunciation of the threat or use of force.  
1002 ASEAN Charter, art. 1(1), (3) & (4).  
1003 Treaty of Amity and Cooperation in Southeast Asia, arts. 1, 2, 4, 6, & 13.
Charter of the Association of Southeast Asian Nations, Singapore, 20 November 2007, at art. 1; Declaration on the Commitments for Children in ASEAN, Singapore, 2 August 2001, No (16); and Declaration of the Basic Duties of the ASEAN Peoples and Governments, at art. 45.


The Southeast Asian Nuclear-Weapon-Free Zone Treaty (SEANWFZ) or the Bangkok Treaty of 1995

Declaration on the Commitments for Children in ASEAN, Singapore, 2 August 2001, No (16);

DiECPCO Terms of Reference, 2010, art. 2.2.

Constitution of Indonesia, preamble, Constitution of Cambodia, art. 53; Constitution of Lao PDR, art. 12; Constitution of Myanmar, preamble & art. 41; Constitution of the Philippines, art. ?, section 2; Constitution of Viet Nam, arts. 12 & 64.

Constitution of Lao PDR, art. 12.

Constitution of Lao PDR art. 32; Constitution of the Philippines, art. ?, section, 5 & 21 refer to “peace and order” within the Philippines.

Constitution of Myanmar, arts. 278 & 354
Constitution of Myanmar, art. 387 & 21(c); Constitution of Singapore
Constitution of Myanmar, art. 21(c); Constitution of Singapore, arts. 9 &129(3).


Declaration on the Preparation of Societies for Life in Peace, art. 1. 15 December 1978, A/RES/33/73.


Charter of the United Nation (UN Charter) s, 24 24 October 1945, 1 UNTS XVI.

Report of the Open-ended Intergovernmental Working Group on the Draft UN Declaration on the Right to Peace (2013) (“23.Delegations debated as to whether the right to peace is an individual or collective right. Some believed that there is no legal basis for the right to peace either as an individual or a collective right. ...). A/RES/33/73/ATS3/7 ILM 8809 (1968).

UDHR, arts. 3 & 28; ICCPR, art. 9(1); African Charter on Human and Peoples’ Rights, art. 6; American Convention on Human Rights, art. 7; Charter of Fundamental Rights of the European Union, 7 December 2000; Official Journal of the European Communities, 18 December 2000 (OJ C 364/01), art. 6.

Human Rights Committee, Draft General Comment No. 35 on Article 9 (2014).

African Charter on Human and Peoples’ Rights, arts. 23(1) & 18(2) (“All peoples shall have the right to national and international peace and security. ...”); Declaration of the Right of Peoples to Peace, art. 1; Draft declaration on the right to peace, art. 1, 16 April 2012, A/HRC/20/3.

Declaration on the Preparation of Societies for Life in Peace, art. 1 (“Every nation and every human being, regardless of race, conscience, language or sex, has the inherent right to life in peace.”). Report of the Open-ended Intergovernmental Working Group on the Draft UN Declaration on the Right to Peace (2013), at 54-56.

UDHR, art. 30.

ICCP, art 5(1).

European Convention, art. 17; American Convention, art. 29; Arab Charter on Human Rights, art. 43.

Civil Society Organisations and People’s Movements Participating in the Civil Society Forum on ASEAN Human Rights Declaration, Joint submission to the ASEAN Intergovernmental Commission on Human Rights on the ASEAN Human Rights Declaration, Sep. 12, 2012.

UN Charter, art. 1(2). The purpose of the Charter is to “develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.”.


UN Declaration on the Rights of Indigenous Peoples, arts. 3 & 4.

ASEAN Charter, preamble & art. 2(2); UN Charter, arts. 1(2) & 55.

Constitution Indonesia, arts. 18B & 28I(3); Constitution of Lao PDR, art. 8; Constitution of Philippines, art. XIV, sect. 17; Constitution of Thailand, art. 66; Constitution of Viet Nam, art. 5.

Constitution of the Lao PDR, Preamble.

Constitution of Myanmar, art. 17(C); Constitution of the Philippines, art. X, sections. 15-21.

Constitution of the Philippines, art. XIII, sect. 6.

Constitution of Thailand, Ch. III, Part 12, sect. 66.

UN Charter, arts. 1(2) & 73; ICCPR, art. 1(1); ICESCR, art. 1(1); Indigenous and Tribal Peoples Convention (No. 169), Gen. Con. ILO (June, 27 1989), entered into force Sep. 5, 1991, at art. 1.

U.N. Charter, art. 1(2).

ICPR, art. 1; ICESCR, art. 1.

UN Declaration on the Right to Development, at art. 1(2).

ICCPR, art. 4.

Indigenous and Tribal Peoples Convention (No. 169), art. 1(1).


Proposed American Declaration on the Rights of Indigenous Peoples, at art. 1(2); ILO Convention No. 169, at art. 1(2).

Proposed American Declaration on the Rights of Indigenous Peoples, at art. 1(3); ILO Convention No. 169, at art. 1(3).


See ICERD, art. 2(2).


Human Rights Committee, General Comment No. 23 (1994).


1068 Id., at para. 6.
1069 Id.

1070 International Court of Justice, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, (22 July 2010).


1072 Loizidou v. Turkey, Application No. 15318/89, 18 December 1996, ECHR, Series A No. 310, concurring opinion of Judge Wildhaber.


1074 Human Rights Committee, General Comment No. 12 (1984), para. 6.

1075 Id.


1078 Id.

1079 AHRD, arts. 17, 24, 27 & 32.

1080 See, UDHR, art. 20; Freedom of Association and Protection of the Right to Organize Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organize, Gen. Con. ILO (9 July 1948), effective 4 July 1950; ICCPR, art. 22; ICESCR, art. 8.

1081 See AHRD, art. 17.

1082 See, e.g., UDHR, art. 20; ICERD, art. 5; CRC, art. 15; U.N. General Assembly, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms [hereinafter Declaration on Human Rights Defenders], March 8, 1999, U.N. Doc A/RES/53/144, at art. 5.

1083 See AHRD, art. 24.

1084 See AHRD, art. 32.

1085 See AHRD, art. 35.

1086 Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration (AHRD) (19 Nov. 2012).

1087 Cambodia, Indonesia, Lao, the Philippines, Thailand and Viet Nam.

1088 See ICCPR, art. 22.

1089 See CRC, art. 15(1).


1091 ILO Freedom of Association and Protection of the Right to Organise Convention (No. 87), arts. 1-3; ratified by Cambodia, Indonesia, Myanmar and the Philippines, and the ILO Right to Organise and Collective Bargaining Convention (No. 98), ratified by Cambodia, Indonesia, Malaysia, the Philippines and Singapore.

1092 Cambodia, Indonesia, Lao, the Philippines, Thailand and Viet Nam.

1093 ICESCR, art. 8.

1110 Huilca Tecse v. Peru, I/A Court H.R., Merits, Reparations and Costs, Judgment (2005), Series C No. 121; Interights and Others v. Mauritania, African Commission on Human and Peoples’ Rights (2004); Manuel Cepeda Vargas v. Colombia, I/A Court H.R., Merits, Reparations and Costs Judgment (2010), Series C No. 213; Commentary to the Declaration on Human Rights Defenders, UN Special Rapporteur on the Situation of Human Rights Defenders, July 2011, (“The right to freedom of association has an individual and a collective dimension.”).


1114 CEDAW, art 7. The Committee on the Elimination of Discrimination Against Women defines political and public life as including: “many aspects of civil society, including public boards and local councils and the activities of organizations such as political parties, trade unions, professional or industry associations, women’s organizations, community-based organizations and other organizations concerned with public and political life” (CEDAW, General Recommendation No. 23: Political and Public Life, A/52/38 (1997).

1115 UDHR art. 2(1); ICCPR art. 2(1); ICRMW, art. 26.

1116 Sidiropoulos and Others v. Greece; United Communist Part of Turkey (TBKP) and Others v. Turkey; Interights and Others v. Mauritania; Church of Scientology Moscow v. Russia; Commentary to the Declaration on Human Rights Defenders, UN Special Rapporteur on the Situation of Human Rights Defenders, July 2011, p. 35; ILO Freedom of Association Convention, arts. 2-3 & 11; ICCPR, art. 22; ICESCR, art. 8; ICRMW, arts. 26 & 40. 1117 UDHR, arts. 20(2) & 23(4); Young v. United Kingdom, Application Nos. 7601/76, 7806/77, Aug. 13, 1981, European Court of Human Rights; Baena Ricardo v. Panama, I/A Court H.R., Merits, Reparations and Costs, Judgment (2001) Series C No.7; Report Submitted by the UN Special Representative of the Secretary-General on Human Rights Defenders, Hina Jilani, in Accordance with General Assembly Resolution 58/178, 21 (Oct. 1, 2004).

1118 ICCPR, art. 22 (2); ICESCR, art. 8(a.); ACHR, art. 16(2).


1120 Id.