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**Position Paper on the proposed ASEAN Human Rights Body**

**Submitted by  
MARUAH Singapore**

## **Contents**

Preamble.....	3
MARUAH's vision for human rights in ASEAN.....	4
Proposed ASEAN Convention on Human Rights .....	5
MARUAH's proposed action plan for the ASEAN Human Rights Body .....	6
The AHRB as a Human Rights Commission.....	6
Purposes and Principles of the Commission.....	7
Establishment and location .....	7
Powers .....	7
Composition.....	8
Competence / Locus Standi of complainant parties .....	9
Procedure .....	9
Concerns.....	10
Conclusion .....	11

## Position Paper on the proposed ASEAN Human Rights Body

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### Preamble

1. MARUAH Singapore<sup>1</sup> congratulates the Association of Southeast Asian Nations (hereinafter “ASEAN”) for successfully negotiating an ASEAN Charter (hereinafter “the Charter”) to be signed by all of the ten ASEAN member states. We recognise this as an affirmative action.. This is a key milestone in ASEAN’s mission to bring about peace, freedom, prosperity and greater cohesion in the region through the rule of law.
2. In particular, MARUAH lauds ASEAN’s efforts in keeping true to its promise to establish a human rights body as finally expressed in Article 14 of the Charter. MARUAH notes that respect for human rights and fundamental freedoms have been considered integral to peace and security by member states since at least 1948.<sup>2</sup> As a regional group, ASEAN had also made a commitment to human rights as expressed in the Bangkok Declaration<sup>3</sup> and later in the 1993 Joint Communiqué.<sup>4</sup> The 2004 Vientiane Action Programme (hereinafter “VAP”) enshrined the promotion of human rights as part of a strategic thrust of the ASEAN Security Community.<sup>5</sup> The 2007 ASEAN Charter and the inclusion of Articles 2(2)(i) and (j)<sup>6</sup> and Article 14 of the ASEAN Charter have further brought human rights to the fore in ASEAN. We are heartened by the appointment of the High Level Panel (hereinafter “HLP”), tasked to draft the Terms of Reference for the proposed ASEAN Human Rights Body (hereinafter “AHRB”).
3. MARUAH is keen to contribute to this process and we humbly present our proposals for the structure and system of the AHRB in this position paper. In putting together this position paper, we have considered the opinions and preferences of other ASEAN NGOs, local NGOs and individuals<sup>7</sup> on the model to be adopted for the AHRB. Of course, the views expressed in this position paper remain those of MARUAH and our members.

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1 MARUAH Singapore is a group of individuals in Singapore who seek to contribute, from a Singapore perspective, to the establishment of the proposed ASEAN Human Rights Body. MARUAH’s coordinator, Ms Braema Mathiapparanam, is the focal point in Singapore for The Working Group on ASEAN Human Rights Mechanism.

2 Then-existing ASEAN member states (viz. Burma, Philippines and Thailand) had voted to adopt the 1948 Universal Declaration of Human Rights.

3 The Ministers and representatives of Asian States made, in 1993, a commitment through the Bangkok Declaration to affirm the principles contained in the Charter of the United Nations and the Universal Declaration on Human Rights and also reiterated the interdependence and indivisibility of economic, social, cultural, civil and political rights.

4 The ASEAN Foreign Ministers had stressed that the violations of basic human rights must be redressed and not tolerated under any pretext, and also agreed that ASEAN should consider the establishment of an appropriate regional mechanism on human rights.

5 Vientiane Action Programme, 29 November 2004, online: ASEAN, <<http://aseansec.org/VAP-10thAseanSummit.pdf>>. See page 29 of the Vientiane Action Programme for a more detailed action plan on this point.

6 Article 2(2) states that ASEAN and its member states shall act in accordance with the following principles: “respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice” (Article 2(2)(i)); and “upholding the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN member states” (Article 2(2)(j)).

7 In this regard, MARUAH had conducted a public consultation on the proposed AHRB in Singapore on 6 September 2008.

4. We have also conducted research into the various forms that existing human rights bodies take, and have included some of our findings for the HLP's reference.<sup>8</sup> We hope that the HLP will consider the best practices as embodied in these UN and regional human rights mechanisms and create the best model for ASEAN, drawing from these experiences whilst grounding the AHRB in the rules-based approach espoused in the ASEAN Charter.

#### **MARUAH's vision for human rights in ASEAN**

5. MARUAH believes that the AHRB cannot exist in a vacuum. Instead, it is important to first articulate a vision for human rights in ASEAN, and then to ascertain how to achieve that vision. In our view, the ASEAN Charter, through Article 14 providing for the establishment of the AHRB, provides the platform through which our vision for human rights in ASEAN can be realised.
6. MARUAH submits that a fully-fledged human rights system would require at least three components, viz. a human rights commission, a human rights court and a human rights convention. The commission would be responsible for promoting human rights (including conducting human rights education), undertaking investigations and monitoring compliance with human rights norms. The court would be the forum for adjudicating on whether human rights norms have been contravened. The human rights court would also include a prosecutor's office, to bring charges against suspected human rights offenders. The convention would enshrine a common basis of human rights norms applicable to the ASEAN member states that the commission and court would refer to.
7. All three components are essential for a fully-fledged human rights system. For instance, a court and a convention, without a commission, could be a punitive system that is unable to engender an over-arching environment of respect for human rights. Similarly, a commission and/or a court without a convention would not have determinate human rights norms and laws to refer to, when considering whether an abuse has taken place. Any educational efforts may also lack legitimacy, due to the absence of an instrument to buttress the human rights norms being promoted. Finally, a commission and/or a convention without a court would have no teeth, and in the long run are unlikely to result in an effective mechanism to, in the words of the ASEAN Charter, promote and protect human rights.
8. The above is recognized in other regional systems. For instance, the Inter-American, the European and the African human rights systems have differing mechanisms, but all three premise action on a universal set of human rights through the reporting and complaints mechanisms, with subsequent adjudicative action through the human rights courts.
9. We nevertheless acknowledge that the ten ASEAN member states are a diverse group with different histories and positions on human rights. For instance, only four ASEAN member states have national human rights institutes (hereinafter "NHRIs"). Similarly, not all of the ASEAN member states are party to the International Bill of Rights (comprising the Universal Declaration of Human Rights 1948 (UDHR), the International Covenant on Civil and Political Rights (ICCPR) 1966 and the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966), or to all of the 9 core international human rights treaties as stipulated by the Office of the High Commissioner on Human Rights (OHCHR). It will therefore be politically

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<sup>8</sup> See Annex A for a comparative table of existing United Nations, regional and national human rights bodies in ASEAN.

unrealistic at this time to secure agreement from all ten member states on a court and a convention.

10. Accordingly, MARUAH proposes that the AHRB be initially constituted as a commission, on the explicit understanding that the roadmap of its establishment includes the creation of a human rights court at an appropriate juncture. We also propose that the Terms of Reference for the AHRB spell out the need for an ASEAN Convention on Human Rights based on the international system of universal human rights. This approach strikes an appropriate balance between the establishment of a strong and effective human rights system in ASEAN on the one hand, and present political realities on the other.
11. While MARUAH appreciates the concepts of national sovereignty, non-interference and responsibilities accompanying rights, and the existence of differing political systems and cultural traditions, we would emphasise that the aim of the ASEAN Charter is to transform ASEAN into a “rules-based” entity and to “*place the well-being, livelihood and welfare of the peoples at the centre of the community-building process in ASEAN*”.<sup>9</sup> These words must be supported by the necessary political will if they are to become reality, instead of remaining as mere lofty aspirations. The member states of ASEAN have to understand that the proposed AHRB to be established under Article 14 of the ASEAN Charter has to stand for something, if these ideals in the ASEAN Charter are to be actualized.
12. Therefore this entails the acceptance by member states of the universality of human rights. Otherwise, there could arise a lack of clarity in the decision-making processes of ASEAN in relation to its consensus approach, which would be challenging for the region’s efforts to give the ASEAN Charter and the AHRB credibility. Any attempt to insist on a relativistic notion of human rights relying on subjective national interpretations of human rights, may compromise or limit the ability of ASEAN and the AHRB to respond appropriately and effectively to humanitarian disasters and gross human rights abuses. Hence, MARUAH strongly strives towards the adherence to the universal body of human rights. MARUAH also highlights the member states’ commitment to international humanitarian law and the Responsibility to Protect – both of which strive to define when national sovereignty takes on a secondary role, so as to protect the people who are in dire circumstance.
13. Additionally, MARUAH also urges that the Charter be interpreted in an internally self-consistent manner, such that the Charter is not interpreted in any way that runs contrary to the eventual implementation and working of an effective AHRB.

#### **Proposed ASEAN Convention on Human Rights**

14. In order that the AHRB (both as a Human Rights Commission and as a Human Rights Court, once it is constituted) may conduct its activities from a common platform, we have proposed that the Terms of Reference for the AHRB call for an ASEAN Convention on Human Rights (which may be drawn up by the HLP with appropriate public consultation if it is so empowered by the ASEAN Foreign Ministers Meeting) that sets out the substantive human rights provisions which the Commission will rely on.
15. The Convention should be modelled after the Universal Declaration of Human Rights and all of the treaties that constitute the International Bill of Rights. It should also take into account

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9 Preamble, The ASEAN Charter

the principles stated in the major human rights treaties that ASEAN states are parties to, to the extent that such treaties do not form part of the International Bill of Rights.<sup>10</sup> We also recommend that the proposed Convention pay special heed to the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC), which are presently the common denominators between all ASEAN states and have been recognized in the VAP.

16. We further believe that the list of substantive human rights principles upheld in the ASEAN Convention on Human Rights should not be exhaustive, so as to allow it to remain flexible and stay relevant to changing circumstances.
17. Finally, MARUAH proposes that compliance with the ASEAN Charter and the ASEAN Convention on Human Rights should be made a fundamental condition of future ASEAN trade agreements. We believe that doing so will reinforce the paramount nature of human rights in ASEAN.

### **MARUAH's proposed action plan for the ASEAN Human Rights Body**

#### **The AHRB as a Human Rights Commission**

18. MARUAH affirms that the promotion and protection of human rights is only effectively achieved through a multi-pronged, "bottom-up" approach. Hence we have proposed that the AHRB should first take the form of a non-judicial Human Rights Commission, which should incorporate the best practices and features of both promotional and implementation human rights regimes.
19. Promotional regimes focus largely on the educational aspect of promoting human rights and fundamental freedoms. Some of the activities that may be carried out by promotional institutions include public education campaigns, conducting studies on the status of human rights implementation in various states and. Institutions in promotional regimes may make recommendations and promote further respect for human rights through conciliatory methods.
20. In addition to the powers exercised by promotional regimes, non-judicial institutions in implementation regimes are usually imbued with investigatory powers. Their activities usually include formal reviews of government reports on the status of human rights implementation in their states and investigations initiated independently to assess situations where human rights principles has allegedly been violated. Although implementation regimes seem to be more intrusive than promotional regimes, this is not the case since they do not actually impose standards or enforce compliance with human rights principles through judicial institutions.
21. We believe that the establishment of a Commission with both educational and investigatory powers as described above will show ASEAN's genuine efforts to heighten regional respect for human rights.

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<sup>10</sup> See Annex B for a table of the major human rights treaties that each ASEAN Member State has ratified to date.

## Purposes and Principles of the Commission

22. In addition to the proposed ASEAN Convention on Human Rights (which is further detailed below), MARUAH also submits that the Commission should be premised on the following principles:
- (i) *Natural justice* – persons who have had their rights violated should have recourse to redress through the law;
  - (ii) *Access to justice* – rights complainants should have access to justice through the state mechanism, such as the filing of complaints with state bodies such as the police, legal aid and representation;
  - (iii) *Rule of Law* – procedural rights must be adhered to and the rights complainant must have the chance to exhaust all local remedies before recourse to the Commission, and the Commission and all those involved in the ASEAN human rights redress process must abide by the human rights norms as prescribed in the proposed Convention or otherwise set down by the Commission;
  - (iv) *Transparency* – the human rights norms that the Commission are to uphold must be clear and known by the general population, all steps in the decision-making process must be clear to the complainants, and the appointment of neutral and impartial persons to the Commission must be fair and impartial; and
  - (v) *Accountability* – the Commission should be held accountable for its actions and there should therefore be a reporting process for the cases it decides and gives recommendations upon. There should also be a regular review of the Commission's work by external and independent auditors.

## Establishment and location

23. MARUAH proposes that the Commission should be a permanent body with its own independent secretariat. It should preferably be based in Jakarta since proximity with the ASEAN Secretariat will allow for smoother working processes and synergies. This will also ensure that the cost of access to the Commission would not be prohibitive.

## Powers

24. MARUAH suggests that it would be appropriate for the Commission to possess the powers set out below.
25. The Commission should have jurisdiction over all territories in ASEAN and have the power to conduct investigations and on-site visits upon receipt of a complaint and on its own initiative. The jurisdiction of the Commission in respect of its investigatory powers should also expressly extend to all official state organs of ASEAN Member States, as well as ASEAN and its institutions, without exception. This will demonstrate the principles of the rule of law and good governance, as embodied in Article 2 of the ASEAN Charter.
26. The Commission should be able to commence investigation either upon receipt of a formal complaint of human rights being breached, or on its own initiative into a situation where it

determines that human rights are likely to have been breached. The Commission should seek the cooperation of the government concerned in its investigation and conduct a thorough investigation of the matter within 3 months. It should then submit a report of its findings and recommendations to the ASEAN Summit, which will then be tabled on the agenda for debate and discussion. MARUAH believes that the ASEAN Summit is a forum where Member States will be able to resolve such issues in an appropriate manner.

27. The Commission should have the power to appoint Special Rapporteurs to monitor and report on human rights issues that are pressing and of grave concern in ASEAN, such as migrant workers and the freedom of expression. Special Rapporteurs should submit a report of their findings to the ASEAN Summit after a thorough investigation of 6 months or such other period as may be prescribed by the Commission. The Commission should meet twice a year, to consider reports resulting from investigations into formal complaints, its own investigations and the investigations of Special Rapporteurs. In the interests of transparency, all such reports and the Commission's deliberations, conclusions and responses should be publicly available to the public.
28. The Commission may, upon request, render an advisory opinion to ASEAN institutions and the Governments of ASEAN who wish to clarify issues pertaining to human rights in state and ASEAN policy.
29. The Commission's work should be aligned with the international human rights regime. It should not unnecessarily duplicate the work of the UN Office of the High Commissioner on Human Rights, the Human Rights Council or the reporting mechanisms under the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) of which all ASEAN states are members, as this will make the task of complying with reporting requirements more onerous on member states. The Commission should instead buttress the international regime by equipping and encouraging ASEAN member states to comply with the international regime and their reporting commitments to the Human Rights Charter as well as other treaty bodies.
30. By the same token, the Commission should also fill the gaps where the international regime does not effectively ensure the promotion and protection of human rights in ASEAN. To this end, the Commission should pay special heed to aggrieved persons who are unable to bring a complaint against their government for human rights violations at an international level because the costs are too prohibitive. It should provide avenues for these complaints to be adequately addressed at a regional level based on international standards.
31. Finally, the Commission should actively promote human rights public education through the organization and conducting of seminars, symposia, conferences and talks at a sub-regional level and at national levels to propagate universal human rights principles. This can be done independently or in cooperation with NHRIs in ASEAN states. The Commission should also spearhead public education campaigns at a national level to educate the ASEAN peoples about their human rights.

#### Composition

32. MARUAH makes the following proposals for the HLP's consideration, with regards to the composition of the Commission.



33. No elected government representatives should form any part of the nomination and appointment process, so as to reflect the quasi-judicial nature and independence of the Commission.
34. The number of members in the Commission does not need to reflect the number of members in ASEAN. In fact an odd number of Commissioners – such as seven – can prove ideal. The ASEAN member states are to nominate their own nationals who will then be elected by member states. Elected Commissioners should act as principals in their own right, and not as representatives of their states.
35. Candidates for Commissioners shall be nominated by the NHRI of the member state from which they are citizens. Each NHRI may nominate three citizens, and ideally the government of that member state should not play a part in the nomination.
36. In respect of member states which do not have a NHRI at the time of nomination, an independent ASEAN Human Rights Commissioners Nominating Body (comprising eminent persons from ASEAN member states) should be formed for the purpose of nominating candidates for Commissioners. The criteria for nomination by the ASEAN Human Rights Commissioner Nominating Body should include expert understanding and work in the area of human rights, experience in judiciary and reporting processes and ideally with international experience.
37. The appointment of the Commissioners should be made by an ASEAN Human Rights Commissioner Appointments Committee, comprising formed mainly of Supreme Court Judges and/or eminent persons from member states with expert knowledge of human rights.
38. The term of office of the Commissioner could be four years and not be held for more than two terms.

#### Competence / Locus Standi of complainant parties

39. MARUAH proposes that ASEAN states and other complainants (i.e. individuals, corporate entities, societies and NGOs) who are nationals or residents of ASEAN states should be able to lodge a complaint with the Commission. In order for aggrieved persons to bring a complaint to the Commission, they must have exhausted all domestic avenues of complaints and appeals. MARUAH proposes that the exhaustion of local remedies should be defined on a *de facto* basis, and should include the lack of recourse to legal aid in the plaintiff's state.
40. We also suggest that the HLP consider making a decision as to the minimum age at which an aggrieved person may bring a complaint to the Commission.

#### Procedure

41. MARUAH invites the HLP to consider implementing the following procedure for the Commission.
42. To ensure accessibility, the national languages of all member states should be the official languages of the Commission. Given the diverse language of ASEAN and the fact that English is the working language of ASEAN in the Charter, English should also be one of the

official languages of the Commission. All complaints lodged, decisions, reports and directives should be published, as far as possible and practicable, in the official languages of ASEAN.

43. To ensure that the principles of transparency, accountability and the rule of law are adhered to, reports of the Commission's findings after investigations are completed should be written and published within 3 months. Given the diverse legal traditions and backgrounds of ASEAN, it should be clear that all such findings, including dissenting opinions, should be reasoned and published.
44. In recognition of the costs that will be incurred by aggrieved persons in the lodgement of complaints, the Terms of Reference for the AHRB should provide for a legal aid scheme for complainants to the AHRB.

### **Concerns**

45. We now set out some concerns concerning the process in the establishment of the AHRB, and across the workings of ASEAN in general.
46. MARUAH is perturbed that human rights has been located in the Socio-Cultural Community Blueprint in the ASEAN Blueprint documents.<sup>11</sup> The draft Political Security Community Blueprint contains some references to human rights but the ASEAN Economic Community Blueprint has none. Human rights are indivisible and cross-cutting. As the Blueprint documents are strategic directives governing the approach of ASEAN moving forward, we urge the HLP to consider the need for internal coherence in ASEAN's operations and approach to human rights. Human rights, as a cross-cutting issue, needs to be mainstreamed across the three pillars of ASEAN. It would be helpful if the HLP explicitly addresses this issue in the course of its work.
47. We note that the VAP already provides for a process on the establishment of a Commission on Women and Children. Similarly, there is also a process on the creation of a Committee under the 2007 Declaration to Protect Migrant Workers and their Families. We hope that the HLP will recognize these ongoing efforts, and will encourage the setting up of these mechanisms in parallel with the AHRB but with a long-term road map providing for the subsuming of these organs under the AHRB after it has been set up and operationalised. Furthermore, we believe that there is a strong argument that migrant workers' rights would be better addressed by way of a Commission instead of a Committee, given that migrant workers' rights is a cross-cutting challenge facing all member states at national, regional and international levels. A Commission on Migrant Workers' Rights may also be better placed to address violations of trafficked persons, pending the establishment of the AHRB.
48. In making our recommendations on the AHRB as set out above, we hope that the HLP will recognize that existing ASEAN treaties, declarations and other instruments may have to be reviewed or recast, such that they remain relevant to and consistent with the objectives and principles of the ASEAN Charter. For instance, it may be necessary to review the Treaty of Amity and Cooperation (1976) in the course of establishing human rights norms under the ASEAN Convention on Human Rights, so as to better reconcile the need to promote and protect the rights of the peoples of ASEAN and the interest in respecting national sovereignty.

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<sup>11</sup> These observations are based on sightings of the ASEAN Economic Community Blueprint document and draft Political Security and Socio-cultural Community Blueprint documents.

49. We note that some ASEAN member states have established NHRIs consistent with the Paris Principles, which function in an advisory role to the state. We therefore urge the Terms of Reference of the AHRB to call for the other ASEAN member states to work towards establishing their own NHRIs, which is a desirable objective already recognized in the VAP.
50. In setting out a road map for the AHRB, we hope that the Terms of Reference will include a deadline stipulated for the transitioning of the AHRB from an inter-governmental organization to an independent body akin to the UN bodies such as the CEDAW Committee. It is also imperative that the Terms of Reference include a review mechanism, for instance every five years as in the ASEAN Charter, so that it can evolve in a timely fashion.
51. We urge the HLP to remain open to feedback from NGOs and CSOs, and to recognize the important role of public consultations with such groups and of their feedback.

### **Conclusion**

52. MARUAH wishes to highlight that we are not naïve in this process. We are realistic and cognizant of the myriad challenges facing this process. However, this position paper seeks to outline a model that will stay true to a course of human rights observance and an effective mechanism for dealing with abuses and recalcitrant lapses.
53. As we have mentioned in this paper, MARUAH does appreciate and acknowledge that the task is not an easy one, given the diversity and histories of respective ASEAN member states. It is our view that the AHRB needs to be set on the right path of evolution where ASEAN is concerned, such that it is a body that will have “teeth” (to protect), “vision” (to investigate), and “intuition” (to promote and prevent). If so, then the AHRB will be a body that the peoples of ASEAN can be proud of, and truly appreciative of the HLP for a job well done.