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# Yearbook



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If 2012 was the year of furthering coherence in human rights protection, 2013 was the year of discussing new standards and their implementation in light of growing challenges to international and societal solidarity. This survey of human rights in Europe and beyond identifies an increased tension in the protection of economic, social and cultural rights. Vulnerable groups – from migrants to children, from victims of human trafficking to victims of gender-based violence – have also moved squarely into the center of both the discourse and practice of human rights protection. This volume contextualizes these trends.

Defining and discussing key developments in human rights, the six edition of the European Yearbook on Human Rights brings together more than 30 contributions by renowned human rights experts that provide a much needed overview and sought-after analysis.

Edited jointly by representatives of four major European human rights research, teaching and training institutions, the Yearbook 2014 covers extensively political and legal developments in the field of the three main organizations charged with securing human rights in Europe: EU, Council of Europe and OSCE. A further chapter contains contributions on the role of civil society in human rights protection and on cross-cutting topics.

The impressive array of authors – academics and diplomats, practioners and human rights experts – makes the book essential reading for anyone interested in human rights in Europe and beyond.

Benedek/Benoît-Rohmer/Kar/Kettemann/Nowak (Eds.) European Yearbook on Human Rights



## European Yearbook on Human Rights

edited by  
**Wolfgang Benedek**  
**Florence Benoît-Rohmer**  
**Wolfram Karl**  
**Matthias C. Kettemann**  
**Manfred Nowak**

# 14



# European Yearbook on Human Rights 2014

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**Dimitri VANOVERBEKE and Michael REITERER**

## **ASEAN's Regional Approach to Human Rights: The Limits of the European Model?**

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### **Keywords**

ASEAN, AICHR, ADHR, human rights in East Asia, European model, ASEAN way

### **A Introduction**

In the aftermath of the Cold War and the Asian Financial Crisis of 1997-1998 ASEAN (Association of Southeast Asian Nations, established 1967) had to re-establish itself and prove its political relevance<sup>1</sup> as well as its functioning based on the intergovernmental approach of consensus and the 'ASEAN Way' of operating. Putting the Association on a firm basis through the ASEAN Charter (2007) and claiming a central role in the Asia-Pacific region as a driver for regional integration ('ASEAN centrality') in developing a regional architecture (e.g. ASEAN Regional Forum (ARF), ASEAN Plus 3, the East Asia Summit ...) was the means to re-invigorate the Association which had lost some of its steam because of the lack of a formal structure.

The long standing relationship between the EU and ASEAN of more than 35 years has been beneficial for both: for ASEAN, the EU has been a source of inspiration for its integration process and for the EU, ASEAN was the means to engage in the region. Having overcome the decade long blockage because of the EU's sanction policy vis-à-vis Burma/Myanmar to protest its human rights violations and given the positive economic development in the region, the rela-

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1 See Richard Stubbs and Mark Beeson, *Routledge Handbook of Asian Regionalism*, London 2012.

tionship got more traction as the EU engaged again more forcefully and visibly in the Asia Pacific region, well before the US launched its 'pivot' to Asia in 2011.

Like ASEAN, the EU is not suspected in the region of pursuing a hegemonic policy; the EU does not have any stake in the various maritime and territorial claims in the East and South China Sea. The EU's goal to strengthen ASEAN to become a stronger independent player contributes to stability in the region. ASEAN has so far managed to establish and maintain its claim to centrality in the Asia Pacific region, conscious that this unique role is not due to its strength but to the competing claims of regional – primarily China and Japan and to a lesser degree South Korea – as well as extra-regional powers – primarily the US.

This article will briefly assess how ASEAN has taken the EU as a reference point for a new élan in its role in regional cooperation focussing on human rights and assessing the limits of the EU's approach to tackle human rights issues in South East Asia.

## **B Formalizing ASEAN – The Template of the EU as a Source of Inspiration?**

As economic prosperity is the bedrock for democracy and human security the EU strives to contribute to ASEAN's development and prosperity in line with its own policy commitment of Article 21 TFEU which obliges the EU to pursue a foreign policy based on the values and principles it is built on.<sup>2</sup> Negotiations of a free trade agreement (FTA) with ASEAN were launched in 2007 – although switched to a bilateral approach in 2009 because of the "the great diversities within ASEAN itself despite all the talk about economic community building".<sup>3</sup> The FTA with Singapore is concluded; negotiations with Vietnam, Thailand and Malaysia are on-going.

The EU is the largest donor to the ASEAN Secretariat – giving approximately € 10 million a year, most likely more in the 2014-2020 programme cycle which earmarks in total of € 170 million for ASEAN. This recognizes ASEAN's intensified regional integration efforts during the last decade: the entry into force of the ASEAN Charter in 2008, the 2015 ASEAN Single Market Project and the 2012 ASEAN Human Rights Declaration (AHRD) are the key elements which point towards more integration, institution-building and, in the long run, to more rule of law and not only by law.

The ASEAN Charter advocates in its preamble adherence to "the principles of democracy, the rule of law and good governance, respect for and protection of human rights and fundamental freedoms". In recalling where ASEAN comes from – a defensive association of autocratic regimes against communism – this reflects encouraging progress. Article 14 of the Charter stipulated the establishment of an ASEAN Human Rights Body thereby overcoming the long standing criticism

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2 See Michael Reiterer, Human Rights as Part of the EU Foreign Policy After Lisbon: In Defence of Western Values and Influence?, Wolfgang Benedek, Wolfram Karl, Anja Mihr, Manfred Nowak (eds.), in: European Yearbook on Human Rights 2010, Vienna 2010, 141-152.

3 See Lay Hwee Yeo (2013). How should ASEAN engage the EU? Reflections on ASEAN's external relations. EU Centre in Singapore, Working Paper No. 13, 3.

of showing “hostility to promoting human rights”:<sup>4</sup>

- “1. In conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN human rights body.
2. This ASEAN human rights body shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting.”<sup>5</sup>

In accordance with this article the ASEAN Intergovernmental Commission on Human Rights (AICHR) was launched on 23 October 2009. The establishment of AICHR has been called “epochal”.<sup>6</sup> It operates under terms of reference (ToR).<sup>7</sup> In these ToR AICHR’s main purpose is stipulated to be “to promote and protect human rights and fundamental freedoms of the peoples of ASEAN”. AICHR meets twice a year and is composed of one representative from each of ASEAN member states who is accountable to the appointing government but needs not be an official. AICHR held its first official meeting in Jakarta in March 2010. The AICHR working groups began drafting an ASEAN Human Rights Declaration (AHRD) in 2011. Selected civil society organizations were consulted in 2012 to find the best way to balance “human rights and fundamental freedoms with corresponding duties, considering human rights within ‘regional and national context’, subjecting human rights to limitations such as national security and ‘public morality’”.<sup>8</sup>

The AHRD was adopted by the heads of state of the ASEAN member states at Phnom Penh on 18 November 2012 emphasizing in its preamble “human rights cooperation” between the ASEAN nations but avoids mentioning any specific mechanism or making any other commitment for the protection of the human rights of the people in ASEAN.<sup>9</sup> AHRD does, moreover, not refer to the rights of indigenous peoples despite the fact that an estimated population of 100 million people identifies as indigenous in South East Asia.<sup>10</sup> The AHRD affirms that the UN Declaration of Human Rights is universal. Besides civil and political rights it also refers to economic, social and cultural rights, the right to development and the right to peace.

Parallel to the above-mentioned developments in 2007, the ASEAN Committee on the Rights of Migrant Workers (ACMW) and, in 2010, the ASEAN Com-

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4 Mathew Davies (2013), Explaining the Vientiane Action Programme: ASEAN and the institutionalisation of human rights, *The Pacific Review* 26 (2013) 4, 386.

5 The ASEAN Charter (2007), <http://www.asean.org/archive/publications/ASEAN-Charter.pdf>.

6 See Reuben Wong, Model power or reference point? The EU and the ASEAN Charter, *Cambridge Review of International Affairs* 25 (2012) 4, 675.

7 ASEAN Intergovernmental Commission on Human Rights, Terms of Reference (2009), <http://www.asean.org/images/archive/publications/TOR-of-AICHR.pdf>.

8 See Katherine G. Southwick, Bumpy Road to the ASEAN Human Rights Declaration, in: *Asia Pacific Bulletin* 197 (22 January 2013), 1.

9 ASEAN Human Rights Declaration, 19 November 2012, Phnom Penh, <http://www.asean.org/news/asean-statement-communicues/item/asean-human-rights-declaration>.

10 See Stubbs and Beeson (2012), 216; see also IWGIA (International Work Group for Indigenous Affairs), 2013, Indigenous Peoples Statement on the ASEAN Human Rights Declaration, [http://www.iwgia.org/news/search-news?news\\_id=740](http://www.iwgia.org/news/search-news?news_id=740).

mission on Women and Children (ACWC) were established. Together with AICHR and the AHRD, these are the core instruments of an emerging human rights system in South East Asia. The purpose of these first human rights institutions at the level of ASEAN was nothing more than to *promote* human rights through *cooperation* between ASEAN member states, as they did not foresee any compliance or enforcement procedures. This would entail the risk of invalidating the sacrosanct ASEAN approach of non-interference in domestic matters; remedies are only possible at the level of national states.

ASEAN members and the Western international community celebrated this 'historic event' of human rights implementation in South East Asia. However, AICHR has significant institutional weaknesses and its reach is limited. AICHR is not independent and the decision-making process is consensus-based. The main players are state actors because the representatives are nominated by and answerable to their governments. This makes it almost impossible to criticize human rights violations in one of the member states. Furthermore, AICHR's nature is non-coercive. There is no enforcement mechanism and consequently the incentive to follow AICHR's recommendations is rather limited.

Moreover, many commentators criticized that during the drafting process of the AHRD key stakeholders, such as civil society groups, were not sufficiently consulted and had to work on leaked drafts.<sup>11</sup> This top-down attitude led to considerable international criticism, including from the UN High Commissioner for Human Rights Navi Pillay.<sup>12</sup> The US reaction was also rather harsh: Deputy Assistant Secretary Daniel Baer of the Bureau of Democracy, Human Rights and Labour expressed "deep disappointment and concern" about the content of the Declaration, underlining that

"ASEAN can only reach its full potential as an organization if it, and its constituent member states, commit to observing the established universal human rights and fundamental freedoms that allow the people of the ASEAN region to think and act freely; to engage in open debate; and to live up to the noble principles of the ASEAN Charter."<sup>13</sup>

Concerns focus on the risk that some provisions in the ADHR allow governments to escape from their human rights obligations. For example, Principle 6 relativizes human rights in the following way: "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."

Furthermore, Principle 7, sets a regional yardstick as "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". Human rights can also be limited on a variety of grounds including

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11 Joint submission to the ASEAN Intergovernmental Commission on Human Rights on the ASEAN Human Rights Declaration by Civil Society Organisations and People's Movements Participating in the Civil Society Forum on ASEAN Human Rights Declaration, 10-11 September 2012, <http://www.forum-asia.org/?p=15341>.

12 See Anja Jetschke, Clara Portela (2013), ASEAN-EU Relations: From Regional Integration Assistance to Security Significance? GIGA Focus No. 2, 4.

13 Daniel Baer (2012). Keynote Address to the U.S.-ASEAN Symposium on the ASEAN Human Rights Declaration, Washington, 28 November 2012, <http://www.state.gov/j/drl/rls/rm/2012/201210.htm>.

“national security”, “public order” and “public morality” (Principle 8 of the AHRD). While exceptions related to ‘national security’ are usually part of human rights instruments, they have to be interpreted narrowly according to international law in general. This follows also specifically from Paragraph 5 of the Vienna Declaration on Human Rights which bolsters the universal approach in stating 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” (United Nations, 1993). Therefore concerns with social stability, fear of upheavals and other socio-political issues need be dealt with by political means and not by restrictive interpretations.

As Loewen and Gerber rightly observe this regional yardstick is reminiscent of the Asian values discussion of the 1990s as “such language could be construed as a rejection of universal human rights and a return to the days when the mantra of ‘Asian values’ was often touted as justification for non-compliance with international human rights norms”.<sup>14</sup>

Despite these shortcomings the Declaration sets a process in motion and is an important step as it accomplishes that “the establishment of human rights institutions is an irreversible process, through which member states will be held to account”.<sup>15</sup> Therefore the EU chose to engage with ASEAN. Catherine Ashton, High Representative of the EU for Foreign Affairs and Security Policy, called the Declaration “an important step towards strengthening the protection of human rights in Asia”.<sup>16</sup> The test case is already on the table: Brunei decided in 2014 to introduce the Sharia law. In response to a question raised in writing in 2013 in the European Parliament,<sup>17</sup> the High Representative/Vice President of the European Commission replied that further information especially concerning the implementation modalities is not yet known but clarified that

“[t]he EU will use available opportunities to remind Brunei of its obligations under the Universal Declaration of Human Rights, the ASEAN Charter and the ASEAN Human Rights Declaration, which under Article 14 states that ‘no person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.’ The Commission is of the opinion that it would also be up to ASEAN Member States themselves to remind Brunei of its obligations under the Charter.”<sup>18</sup>

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14 See Howard Loewen (2008). *Democracy and Human Rights in the European-Asian Dialogue: A Clash of Cooperation Cultures?* GIGA Working Papers, No. 92, 15; see also P. Gerber, *ASEAN Human Rights Declaration: a step forward or a slide backwards?* *The Conversation*, 21 November 2012, <http://theconversation.com/asean-human-rights-declaration-a-step-forward-or-a-slide-backwards-10895>.

15 See Southwick (2013), 2.

16 Statement by High Representative Catherine Ashton on the Adoption of the ASEAN Human Rights Declaration’, Council of the European Union Press Release (22 November 2012), [www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/EN/foraff/133682.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/133682.pdf) (25 February 2014).

17 Parliamentary question on “Sultanate of Brunei to extend use of Sharia law”, 24 October 2013, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2013-012180+0+DOC+XML+V0//EN> (25 February 2014).

18 Answer by the HRVP, 7 January 2014, <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2013-012180&language=EN>.

The EU Special Representative for Human Rights, Stavros Lambrinidis, makes efforts to further develop the human rights dialogue with ASEAN; he met with the ASEAN Intergovernmental Commission on Human Rights which is expected to pay its second visit to Brussels in 2014, after the first one in 2010. The ASEAN Commission for the Rights of Women and Children was the other important ASEAN Commission to come to Brussels in 2012. Experts also exchanged views with the ASEAN Committee on Migrant Workers.

Comparing today's human rights system of ASEAN with that in the EU today would be misleading because of the respective different positions of the EU and ASEAN on the path of development and of integration in general as well as of the establishment of a human rights system in particular. The sophisticated European human rights protection system also took quite some time to develop: the implementation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) started rather toothless due to an "initial lack of institutional autonomy" and because of the preponderance of "national political interests".<sup>19</sup> Furthermore, the EU is only right now in the process of joining the European Convention on Human Rights of the Council of Europe thereby filling a protection gap for European citizens vis-à-vis EU institutions.<sup>20</sup>

This will however not necessarily lead ASEAN on the same path as Europe. Path dependent choices will define the future course of human rights in ASEAN but the main issue at stake is that it is too early to make final assessments on the success or failure of the human rights system in South East Asia. There are, however, further signs of ASEAN getting some inspiration from developments in the EU: The ASEAN Charter granted ASEAN legal personality like the Lisbon Treaty to the EU. It regularized a Council of Ministers and set up a Committee of Permanent Representatives (CPR) comparable to the EU's Committee of Permanent Representatives (COREPER). Institutionalising dialogue among member countries fosters peace and has a special value in a region which is still characterised by a power-based approach to international relations where territorial and maritime disputes are a real threat to peace and security and where the Association has so diverse members, in terms of economic development but also politics, e.g. democratic and non-democratic, capitalist and communist members, as well as religious diversity (Buddhism, Islam, etc.). Through the exchange of experience between the CPR and the COREPER, the central decision making organ of the EU at the official level, the EU can make a contribution in providing a concrete example of cooperation, coordination and decision making.<sup>21</sup> Like the EU, ASEAN members' embassies are flying the ASEAN flag in addition to their own national flag. While the chance for cross-fertilisation is taken up, there is some danger of "frustration and disillusionment [...] if the new institutions cannot be operated on the same assumptions as their EU counterparts".<sup>22</sup>

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19 See Mikael Rask Madsen, *From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics*, *Law & Social Inquiry* 32 (2007) 1, 138.

20 Cf. the contribution of Gregor Heißl, in this volume, at 301.

21 Another visit of the CPR to Brussels is planned for 2014.

22 See Philomena Murray, Edward Moxon-Browne, *The European Union as a Template for Regional Integration? The Case of the ASEAN and Its Committee of Permanent Representatives*, *Journal of Common Market Studies* 51 (2013) 3, 534.

Enhancing the citizens' participation has become a common goal outlined in the ASEAN Vision 2020 which wants ASEAN nations "being governed with the consent and greater participation of the people with its focus on the welfare and dignity of the human person and the good of the community".<sup>23</sup> In this respect the European systems, the one of the EU and the other one of the Council of Europe can still be a source of inspiration – but not for copying – while Jürgen Rüländ judges that "ASEAN is still far from a people-oriented regional body".<sup>24</sup>

### **C A Human Rights Body for ASEAN: Why Now?**

The establishment of AICHR first and of the ADHR second was certainly the culminating point of a path-dependent process that had been set into motion at the beginning of the 1990s. At that time, Singapore and Malaysia increasingly stressed the need for building a South East Asian Community based on 'Asian values' different from so-called Western values with a more universal reach. Asian values would be fitting the 'ASEAN Way' of informality, consensus and the protection of national sovereignty and a more particularistic approach to rights and duties. The claim from Malaysia's Prime Minister Mohammad Mahatir, for example, in 1990 to establish an East Asian Economic Grouping and, in October 1991, an East Asian Economic Caucus met with US resistance and eventually faded away. It was realized that a more gradual approach would be the only way to move towards a new identity for ASEAN in the wider East Asian context. The need for a gradual process combined with the emphasis by ASEAN leadership on being faithful to the 'ASEAN Way' made outside observers sceptical about the feasibility of a human rights mechanism for the region. Yet, the regional informal Working group on human rights was established soon after the 26<sup>th</sup> annual ASEAN Ministerial Meeting in Singapore in 1993. The discourse on human rights entered ASEAN's political arena but remained in a rather general, calm and non-committal manner.

In March 1993, ASEAN leaders met in Bangkok to discuss human rights with other Asian leaders.<sup>25</sup> Asian governments acknowledged the universality of human rights and the United Nations Human Rights Charter. However, the Bangkok Declaration also emphasized the principles of sovereignty and non-interference. It advocated that in ASEAN human rights should be in line with "national and regional particularities and various historical, cultural and religious backgrounds".<sup>26</sup> The Bangkok meeting was held in preparation for the World

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23 See ASEAN, ASEAN Vision 2020, <http://www.aseanhrmech.org/downloads/Asean-Vision-2020.pdf>.

24 See Jürgen Rüländ (2013), ASEAN Citizens' Rights: Rule of Law, Judiciary and Law Enforcement. Directorate General for External Policies of the European Parliament, 7, [http://www.europarl.europa.eu/RegData/etudes/note/join/2013/433716/EXPO-AFET\\_NT\(2013\)433716\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2013/433716/EXPO-AFET_NT(2013)433716_EN.pdf). This report commissioned by the Foreign Affairs Committee of the European Parliament offers a comprehensive and critical overview of the state of play of human rights instruments in ASEAN.

25 See Mahdev Mohan (2011), Rule of Law for Human Rights in the Asean Region: A Base-line Study, The Human Rights Resource Centre, [http://hrrca.org/system/files/Rule\\_of\\_Law\\_for\\_Human\\_Rights\\_in\\_the\\_ASEAN\\_Region.pdf](http://hrrca.org/system/files/Rule_of_Law_for_Human_Rights_in_the_ASEAN_Region.pdf).

26 Report of the Regional Meeting for Asia of the World Conference on Human Rights, para. 8, Bangkok, 29 March to 2 April 1993, [www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/9d23b88f115fb827802569030037ed44](http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/9d23b88f115fb827802569030037ed44).

Conference on Human Rights, which took place the same year in Vienna and resulted in the first important communiqué by ASEAN on Human Rights, very cautiously stating that human rights in ASEAN should always be protected and promoted “with due regards for specific cultural, social, economic and political circumstances”.<sup>27</sup>

The Communiqué emphasized that “the protection and promotion of human rights in the international community should take cognizance of the principles of respect for national sovereignty, territorial integrity and non-interference in the internal affairs of states”.<sup>28</sup> That Ministers called for “the establishment of an appropriate regional mechanism on human rights” in the Communiqué was a noteworthy step forward although it took more than 13 years before this claim became reality.<sup>29</sup> While the top-down implementation of these declarations proceeded slowly, civil society acted on this call and started a discussion process on how to best protect and promote human rights. Ginbar refers to the establishment of the ‘Working Group for an ASEAN Human Rights Mechanism’<sup>30</sup> by the Human Rights Committee of LAWASIA<sup>31</sup> in 1995 and various other civil society organizations such as ‘Solidarity for Asian People’s Advocacy’ (SAPA).<sup>32</sup>

According to Mathew Davies the slow and bottom-up process took a turn in 2004 when the Vientiane Action Programme (VAP)<sup>33</sup> was launched by ASEAN - it turned out to be crucial for getting human rights inserted in the ASEAN Charter. The VAP’s Working Group for the Establishment of an ASEAN Human Rights Mechanism “acted as a norm entrepreneur and helped to frame, legitimize and localize human rights to a sceptical South East Asian audience”.<sup>34</sup> VAP succeeded in rendering human right important for ASEAN’s interstate peace and security. Davies stresses that this is a remarkable turn considering the previous aversion of ASEAN to human rights.<sup>35</sup> Framing the human rights initiatives as “congruent with existing ASEAN practices”<sup>36</sup> so that they fitted the existing ASEAN model and became more acceptable for leaders, was a smart tactical move by the VAP Working Group. The VAP was able to deliver because of its elite membership and the leverage it drew from its access to the government representatives of their respective member states.

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27 Joint communiqué of the twenty-sixth ASEAN Ministerial Meeting, Singapore, 23-24 July 1993, [http://www.aseanhrmech.org/downloads/1993\\_Joint\\_Communique.pdf](http://www.aseanhrmech.org/downloads/1993_Joint_Communique.pdf).

28 See *ibid.*

29 See Yuval Ginbar, Human Rights in ASEAN: Setting Sail or Treading Water?, *Human Rights Law Review* 10 (2010) 3, 506.

30 Working Group for an ASEAN Human Rights Mechanism, <http://www.aseanhrmech.org>.

31 LAWASIA, <http://lawasia.asn.au/profile-of-lawasia.htm>.

32 SAPA, <http://www.stopcorporateimpunity.org/?p=2344>.

33 2004 Vientiane Action Programme 2004-2010 Adopted by the Heads of State/Government at the 10<sup>th</sup> ASEAN Summit in Vientiane, Laos on 29 November 2004, <http://cil.nus.edu.sg/rp/pdf/2004%20Vientiane%20Action%20Programme%202004-2010-pdf>.

34 See Davies (2013), 386.

35 See *ibid.*, 389.

36 See *ibid.*, 397.

## D The EU as a Model?

During the drafting process the various members of the working groups and committees were examining human rights systems in other regions. The 'EU as a model' for other regions was often discussed but the appropriateness of the EU as a role model for East Asia was often rejected. This, however, does not mean that the EU was not relevant for the development of ASEAN's human rights protection and promotion system. Reuben Wong regards the EU as an important reference point for recent developments of ASEAN.<sup>37</sup> The ASEAN Eminent Persons Group (EPG) visited Brussels in 2006, the High Level Task Force in April 2007. George Yeo, then Singapore's Foreign Minister, remarked at this occasion:

"The European colonial legacy is partly the reason why ASEAN countries find in European integration an inspiration for our own integration. Some members of the High Level Task Force drafting our ASEAN Charter have visited Berlin and are now in Brussels, precisely to learn from the EU experience. I don't think our integration will ever go as far as Europe's but your footsteps, including your missteps, are a guide to us in our journey. The European Commission has been most helpful to us. Last year, the Eminent Persons appointed by the ASEAN Leaders received excellent briefings on the European Union in Brussels which influenced them in the way they crafted their recommendations."<sup>38</sup>

Reuben Wong regards the EU's influence on ASEAN as passive and not active, a source of inspiration when ASEAN "attempts to learn from the EU's experience for its own institutionalization".<sup>39</sup> This interpretation contradicts other scholars<sup>40</sup> arguing that the EU has more actively exercised pressure on ASEAN leading to "an imitation of the EU form, without the substance".<sup>41</sup> Wong's conclusion is more in line with the arguments put forward by Davies analysing the VAP's drafting process of ASEAN's human rights system. He asserts that "[m]imicry then was not simply a blind adoption of European forms, but instead a creative process of reinterpretation and localization where states and the Working Group interacted to create new institutional possibilities".<sup>42</sup> Other regional organizations like the African Union and Mercosur are 'learning' from the EU but not neglecting to actively pursue solutions to their specific problems of collective action and policy coordination.<sup>43</sup> The EU played an important role as a point of

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37 See Wong (2012).

38 MFA (2007) Transcript of reply by Singapore Foreign Minister George Yeo to questions in Parliament (on Myanmar). Singapore Ministry of Foreign Affairs, 22 October 2007, [http://www.mfa.com.sg/content/mfa/overseasmission/washington/newsroom/press\\_statements/2007/200710/press\\_200710\\_02.html](http://www.mfa.com.sg/content/mfa/overseasmission/washington/newsroom/press_statements/2007/200710/press_200710_02.html).

39 See Wong (2012), 671 and 674.

40 David Martin Jones and Michael LR Smith (2002), 'ASEAN's imitation community', *Orbis* 46 (2002) 1, 93-109; see also Anja Jetschke (2009), *Institutionalizing ASEAN: celebrating Europe through network governance*, *Cambridge Review of International Affairs* 22 (2009) 3, 407-442; and Hiro Katsumata, *ASEAN and human rights: resisting Western pressure or emulating the West?*, *The Pacific Review* 22 (2009) 5, 619-637.

41 See Wong (2012), 671.

42 See Davies (2013), 398.

43 See Javier Solana (2005), *Shaping an effective EU foreign policy*, speech by the High Representative for the Common Foreign and Security Policy at the Konrad Adenauer Foundation, Brussels, 24 January 2005, [http://www.eu-un.europa.eu/articles/fr/article\\_4251\\_fr.htm](http://www.eu-un.europa.eu/articles/fr/article_4251_fr.htm).

reference for ASEAN on its path to draft a human rights system – model might be too strong of an expression.

## **E AICHR and the ADHR: Limits of the European Model?**

The ASEAN Human Rights Declaration is not a legally binding convention and promotes human rights rather than protecting them<sup>44</sup> (AICHR (2012); Gerber (2012)). Like the UN Universal Declaration of Human Rights it carries moral weight and influences the way human rights are promoted and nationally protected in the ASEAN member states.

Despite its institutional weaknesses most scholars see the establishment of AICHR as a big step forward to a better protection of human rights in South East Asia creating political dynamics which offers the perspective for further development. Thus, “there will come a period of review, 2015 at the earliest, when the AICHR may be imbued with greater enforcement capabilities”.<sup>45</sup> According to Arendshorst, ASEAN has three different options regarding human rights infringements in ASEAN countries: firstly, stick to the ‘constructive engagement’ approach; secondly, create a Human Rights Court in AICHR; or thirdly, take sanctions outside of the human rights mechanisms.<sup>46</sup> We hold the view that the creation of a transnational mechanism for the protection of human rights in form of a Human Rights Court is presently the most unlikely way the human rights protection mechanism in ASEAN will develop in the future due to the prevalence and tenacity of the ‘ASEAN way’. Constructive engagement will remain the preferred path to tackle infringements against human rights in the region. It also resonates well with the EU as demonstrated with Myanmar (e.g. EU-Myanmar Task Force and the financing of a Peace Institute). The Task Force<sup>47</sup> engages a broad scope of actors in a sort of public-private-partnership, inviting for instance the private sector to live up to its corporate social responsibility on the ground. The ‘carrot and stick’ approach outside of human rights mechanisms with an emphasis on the first element comes in form of human rights and good governance clauses in trade and related framework agreements. They are part of the diplomatic tool kit of negotiators in general of which also the EU makes use of (e.g. ‘conditionality’, the link between trade and framework agreements).<sup>48</sup>

While the lack of an enforcement mechanism in East Asia is regrettable from the point of view of the efficiency of the system one has to see it in the historical

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44 “AICHR works under the spirit of consultation and consensus. However, it is not an obstacle to the promotion and protection of human rights, especially on educating and raising awareness on human rights to the people of ASEAN [...]”, FAQ section of the AICHR Booklet, 20, <http://aichr.org/documents>.

45 See Theoben Jerdan C. Orosa, ASEAN Integration in Human Rights: Problems and Prospects for Legalization and Institutionalization, *Asian Regional Integration Review* 4 (2012), 82.

46 See John Arendshorst (Fall 2009), The Dilemma of Non-Interference: Myanmar, Human Rights, and the ASEAN Charter, *Northwestern Journal of International Human Rights* 8 (2009) 1, 102-121.

47 See for more information, EEAS, EU-Myanmar Task Force, [http://eeas.europa.eu/top\\_stories/2013/191113\\_eu-myanmar\\_task\\_force\\_en.htm](http://eeas.europa.eu/top_stories/2013/191113_eu-myanmar_task_force_en.htm).

48 See Michael Reiterer, Interregionalism as a New Diplomatic Tool: The EU and East Asia, *European Foreign Affairs Review* 11 (2006), 232-239.

and political context: it took Europe decades to develop its human rights protection system and ASEAN will need further time to establish its own system, in line with its culture, traditions and the diverse states of development of its members and as well as ASEAN as an institution. It is important, however, not to embark on cultural relativism and to resort to interpretations which diminish the universality of human rights thereby undermining the principles of the Declaration. The Phnom Penh Statement by ASEAN leaders when adopting the Declaration was quite clear that the implementation has to be "in accordance to the Charter of the United Nations, the Universal Declaration of Human Rights and the Vienna Declaration and Program of Action".

Madsen argues convincingly that the Human Rights regime in Europe gradually developed through hybrid dynamics of law and politics and developed only recently in the effective legal institution thanks to "an all-star cast of lawyers and politicians".<sup>49</sup> Policy entrepreneurs like Pierre-Henri Teitgen and Sir Hersch Lauterpacht were important in Europe in "pushing the project forward when it encountered its first substantial problems".<sup>50</sup> This helped to gradually getting the European Court of Human Rights accepted by states. While this individualistic approach worked in the European context, it is not necessarily in line with the more collectivist approach dominant in ASEAN.

## **F Conclusion: The Future of Human Rights in East Asia**

The 'epoch-making' human rights declaration of ASEAN is a step in a longer process towards a human rights regime in East Asia. Europe is not the model for the further development of the human rights regime but it certainly has been a point of reference for establishing the stepping-stone for further developments. In further developing dialogues on human rights and more general the rule of law the EU will live up to its commitment to a value-based foreign policy built on respect for human rights and fundamental freedoms. Watching over the implementation of commitments taken whether legally or politically is an important feature of this policy.

While lawyer-politicians have been instrumental in bringing the human rights regime in Europe to the next step, policy entrepreneurs in East Asia will play an important role in the development of human rights in East Asia. The European model for the protection and the promotion of human rights meets its limits in East Asia for the time being. However, the comprehensive European human rights protection system e.g. the complementary ones of the Council of Europe and the European Union is recognised as the most sophisticated mechanism world-wide and will therefore remain a reference point and source of inspiration for ASEAN as ASEAN is constructing gradually its own system. To this end an open, respectful and not overly didactic exchange of views, experiences and best practices needs to be established without falling into the pitfall of condescend. Such a cooperative approach would serve best the cause of universality of human rights and their protection in the interest of the individuals concerned.

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49 See Madsen (2007), 141.

50 See *ibid.*, 142.