

# Universalizing Core Human Rights in the “New” ASEAN: A Reassessment of Culture and Development Justifications Against the Global Rejection of Impunity

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## Abstract

This paper responds to the defences of “culture” and “development” rights as justifications for exceptionalism in human rights obligations in Southeast Asia, particularly against the context of the passage of the Association of Southeast Asian Nations (ASEAN) Charter. Under the new ASEAN Charter, Member States have the general obligation to abide by the Organizational Principles of “adherence to the rule of law, good governance, the principles of democracy and constitutional government”, as well as “respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice”. More importantly, it is now the specific obligation of ASEAN Member States to “take all necessary measures, including the enactment of appropriate domestic legislation, to effectively implement the provisions of the Charter and to comply with all obligations of membership”, including the above-stated Organizational Principles.

The paper shows the normative, conceptual, and empirical weaknesses of the “culture” and “development” justifications for creating exceptions to the observance and protection of core human rights norms. Assessing the right to culture as an exception to human rights observance, the paper asserts the ideological imprecision of the “right to culture” as an exception to human rights observance, noting that the porous definition of “culture” should not be equally valued in its assertion against core human rights norms which form part of general international law (e.g. *jus cogens* prohibitions, crimes against humanity, war crimes, egregious violations of human rights, obligations *erga omnes*) and which can be modified only by a subsequent norm of the same character. The cultural exception also suffers from teleological incoherence, since the protection of core human rights norms bears a greater immediacy and proximity to human dignity and personhood – a fundamental value that should be more conceptually valuable than the porous construct of culture. Turning to the “right to development” as an exception to human rights observance, the paper contends that there is empirical uncertainty and/or indeterminacy in the concept of “development” that undermines its legal-philosophical value as an exception to human rights observance. Moreover, contrary to the assertions of development exceptionalism to human rights observance, there is no linearity in the claim that human rights protection “impedes” development. Rather, as shown in

recent economic analysis, there is a stronger claim for human rights protection as a necessary precondition for development.

Further reinforcing these refutations of “culture” and “development” justifications for human rights exceptionalism is, however, the emergence of a customary international law norm rejecting impunity for serious violations of human rights (specifically, civil and political rights), which has gained recognition from the forty-year independent practice (primarily seen in treaty ratifications and implementation) of Southeast Asian states. Despite variances in the degree of ASEAN Member States’ practices, there is at least consistent *opinio juris* that redress for serious human rights violations should not be met with *non liquet* in remedial processes, whether domestic or international. The passage of the ASEAN Charter therefore marks a convergence of ASEAN towards “universalizing” core human rights norms as now seen in its Organizational Principles and the new requirements of ASEAN membership obligations.

## A. Introduction

The conclusion of a Charter for the Association of Southeast Asian Nations (ASEAN),<sup>1</sup> formalizing greater economic integration<sup>2</sup> forty years after ASEAN’s inception under the 1967 ASEAN (Bangkok) Declaration,<sup>3</sup> is indeed a landmark achievement for the Southeast Asian region. In the

<sup>1</sup> Full text of the ASEAN Charter can be found at: <http://www.asean.org> (last visited 1 December 2008). This paper is based on a public Lecture and Roundtable Discussion on the Draft ASEAN Charter held on 31 August 2007, at the University of the Philippines, with corresponding modifications based on the final Charter text. As of this writing, seven out of the ten ASEAN Member States have ratified the Charter: Brunei Darussalam, Malaysia, Singapore, Laos, Viet Nam, Cambodia, and most recently, Myanmar. Thailand, the Philippines and Indonesia publicly declared that they were withholding ratification of the Charter until Myanmar completed its ratification processes. See: Christopher Bodeen, “Myanmar Ratifies ASEAN Charter: Isolated Myanmar Regime Ratifies Regional Charter Including Human Rights Body,” Associated Press, 21 July 2008, at <http://abcnews.go.com/International/wireStory?id=5414011> (last visited 23 January 2009).

<sup>2</sup> See: Ong Keng Yong, Secretary-General of the ASEAN, “ASEAN and Pan-Asian Integration”. Found at: <http://www.aseansec.org/18861.htm> (last visited 23 January 2009).

<sup>3</sup> See Declaration of ASEAN Concord, Bali, Indonesia, 24 February 1976. Found at: <http://www.aseansec.org/1216.htm> (last visited 23 January 2009).

words of the ASEAN Secretary-General, Mr. Ong Keng Yong, the new ASEAN closely tracks ASEAN’s record of increasing economic integration, but would still be well short of the economic union envisaged under the European Union:

“ASEAN economic integration is currently in progress, but the results are not as fast as what the ASEAN Leaders and the business sector wants. The problems of implementation and coordination of ASEAN economic initiatives requires urgent attention. Deeper and accelerated economic integration entails deeper and broader cross-sectoral coordination as well as expeditious implementation of economic integration initiatives. [...]

Although the end goals of the ASEAN Economic Community have been defined in ASEAN Vision 2020 and Bali Concord II, it is crucial to underscore that ASEAN is not constructing an economic community along the lines of the European Union (EU). While EU ensures the free movement of goods, services, capital (including investment) and people across the territories of its Member States, ASEAN seeks to create a unique single ASEAN market where there is a free flow of goods, services, investment, skilled labour, and a freer flow of capital.

While ASEAN pursues economic integration, it is also committed to making the region attractive to its partners for economic activities. Indeed, ASEAN integration will open up more opportunities for these partners. At the same time, it will further strengthen ASEAN’s external trade with them. The commitment to open regionalism and inclusive approach to its external economic engagement has made ASEAN attractive to many countries, both in the region and beyond. ASEAN is currently at different stages of FTA and EPA negotiations with its partners namely, China, India, Japan, Republic of Korea and Australia/New Zealand.”

The passage of the ASEAN Charter carves new directions for, and bears serious implications to, the political-economic rights and duties of ASEAN Member States. For an international organization long accustomed to abiding by the rule of

“consensus,”<sup>4</sup> the sovereign equality of states, and non-interference with “internal” or domestic matters,<sup>5</sup> a more “integrated” ASEAN implies a marked retooling of ASEAN’s unique status as an international organization. More importantly, the passage of the ASEAN Charter and the creation of a “new” ASEAN, opportunely provoke analytical discourse on ASEAN Member States’ commitments to uphold international human rights obligations.<sup>6</sup>

These developments in the Southeast Asian region lend urgency to the reassessment of a debate long dormant since the last decade. Should the envisioned “new” ASEAN – refashioned towards tighter integration and oriented towards global participation – “universalize” core human rights now, and veer away from the exceptionalism of cultural relativist and developmental justifications of “Asian culture and values” and “Asian development”?

The controversy between the “universality” of human rights (as well as their enforcement) and claims to “exceptions” in the form of the competing “right to culture” and the “right to development” first drew a worldwide audience in 1993, when several Asian delegations at the Vienna World Conference on Human Rights declared that human rights have to be seen “in the context of particular cultures.”<sup>7</sup> However, the final text of the Vienna Declaration and Program of Action, which was approved by a consensus of the representatives of the 171 participating States (including the Asian delegates), ultimately affirmed the universality of human rights.

<sup>4</sup> The conventional basis for ASEAN is found in the Treaty of Amity and Cooperation in Southeast Asia, Indonesia, 24 February 1976. Found at: <http://www.aseansec.org/1217.htm> (last visited 23 January 2009). The twenty (20) provisions of the TAC map out the parameters of ASEAN cooperation since 1976.

<sup>5</sup> See Declaration of ASEAN Concord II (Bali Concord II), Bali, Indonesia, 7 October 2003, which emphasizes the principles of sovereign equality of states and non-interference as a key principle governing the ASEAN Community, composed of the ASEAN Security Community, ASEAN Economic Community, and ASEAN Socio-Cultural Community.” Found at: <http://www.aseansec.org/15159.htm> (last visited 23 January 2009).

<sup>6</sup> See *Amando Doronila*, “Out of Step with ASEAN”, *Philippine Daily Inquirer*, 3 August 2007. Found at: <http://www.inquirer.net/specialreports/40amm/view.php?db=1&article=20070803-80298> (last visited 23 January 2009), which criticizes that during the 40<sup>th</sup> ASEAN Ministerial Meeting hosted by the Philippines, ASEAN Member States merely agreed by consensus to establish, “in principle”, a human rights commission – without providing for its composition, functions, or sanctions.

<sup>7</sup> *Louis Henkin*, *Human Rights* (1999), 107.

The one hundred-article Vienna Declaration categorically dispensed with the asserted “exceptions” of culture and development, stating in no uncertain terms that:

“5. 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.

[...]

10. The World Conference on Human Rights reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights.

As stated in the Declaration on the Right to Development, the human person is the central subject of development.

**While development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights.”<sup>8</sup> (Emphasis supplied)**

This paper does not intend to resurrect old themes and tensions already extensively treated in the wealth of literature on universalist-cultural relativist/development theories on human rights.<sup>9</sup> Rather, the intention is to recast these twin justifications of “culture” and “development” in light of

<sup>8</sup> Vienna Declaration and Programme of Action, Distr. GENERAL A./CONF.157/23, 12 July 1993. Found at: [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument) (last visited 23 January 2009).

<sup>9</sup> For a broad spectrum of universalist and cultural relativist claims, see *Jack Donnelly*, *Universal Human Rights in Theory and Practice*, 2<sup>nd</sup> ed. (2003), 89-106; *Randall P. Peerenboom* (ed.), *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian countries, France, and the U.S.* (2004), Preface (x-xxiii), and 1-55; *Li Xiarong*, *Asian Values and the Universality of Human Rights*, *Philosophy and Public Policy Quarterly*, 16 (1996) 2, 18-23.

ASEAN's new status as a more integrated international organization alongside its corresponding obligations in the enforcement and protection of human rights. The fundamental argument here is that, apart from the inherent normative, conceptual, and empirical weaknesses of the "culture" and "development" justifications, ASEAN's internal and external spheres of international human rights obligations have altered radically since ASEAN's inception forty years ago. A potent customary international law norm rejecting impunity for serious violations of "core" human rights (specifically, civil and political rights) has emerged, one that even most ASEAN Member States themselves acknowledge as express obligations under the major human rights treaties (especially the International Bill of Rights), most of which ASEAN Member States have already ratified. Accordingly, the challenge for the new ASEAN is to ascertain if it can "universalize" these core human rights (by way of recognition, codification, heightened multilateral enforcement, or any combination of these processes throughout the ASEAN regional framework), and ultimately dispense with cultural and developmental "exceptions" used to justify individual nations' selective (or non)enforcement of human rights norms. In this manner, the individual human rights compliance of ASEAN Member States can be monitored and modulated through the prism of specific ASEAN membership obligations mandating compliance with international human rights norms. The ASEAN Charter is the litmus test for the capacity of ASEAN Member States to adapt to their new roles under an international organization subject to international human rights law.

I submit that ASEAN's new status as a more integrated international organization foregrounds ASEAN's acceptance of the customary international law norms on "core" human rights (international civil and political rights). The acceptance of these core human rights norms is not an alien concept to the region, particularly in light of ASEAN's record over the past forty years. As will be subsequently shown, most, if not all, of the ASEAN Member States themselves already recognize these norms, expressly (by signature, treaty ratification, accession) or in individual or collective practice. This "internal sphere" of ASEAN, therefore, already reflects ASEAN Member States' *opinio juris* on the obligation to comply and observe international human rights law, and a concomitant obligation of states to reject impunity for core human rights violations (and/or *jus cogens* violations) such as torture, crimes against humanity, war crimes, apartheid, racial and sexual discrimination, and serious violations of child and women's rights. For "impunity," I adopt the threshold of *de jure* or *de facto* impossibility in bringing human rights violators to account - whether civilly,



criminally, or administratively – either under: 1) the ASEAN Member States’ own legal orders through a comparable Bill of Rights set forth in their respective Constitutions; 2) through the international processes and mechanisms available or accessible from the major human rights treaties some, any or all of which have been ratified by ASEAN Member States (e.g. ICCPR’s Human Rights Committee, the ICESCR’s Committee on Economic, Social and Cultural Rights, the CERD’s Committee on the Elimination of Racial Discrimination, CEDAW’s Committee on the Elimination of Discrimination against Women, the CAT’s Committee Against Torture, CRC’s Committee on the Rights of the Child).; or 3) through emergent joint initiatives for prosecution coordinated or facilitated between ASEAN, the member State, and the United Nations (e.g. most recently seen in the Cambodia War Crimes Tribunal and the Commission for Reception, Truth and Reconciliation in East Timor). Undoubtedly, these mechanisms are not without their attendant limitations, particularly in the scope and types of relief afforded. Nevertheless, these limitations do not militate against the proposition that the rejection of impunity reflects the ASEAN Member States’ deliberate refusal to condone a situation of *non liquet* in remedial processes for obtaining redress against human rights violations.<sup>10</sup>

On the other hand, ASEAN forty years from inception finds itself in an international sphere that more strictly emphasizes the United Nations Charter’s purpose of “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”.<sup>11</sup> With the proliferation of international criminal prosecutions for war crimes, torture, crimes against humanity, and other serious breaches of “core” human rights norms on civil and political rights and codification of various international instruments outlawing these breaches, an international consensus has largely emerged towards the rejection of impunity for these serious human rights violations. ASEAN’s “external sphere” itself descriptively expands the scope of ASEAN and its

<sup>10</sup> Jorge E. Viñuales, *Impunity: Elements for an Empirical Concept*, *Law & Inequality* 25 (2007) 1, 115-145, 117-119; see also Milena Sterio, *Seeking the Best Forum to Prosecute International War Crimes: Proposed Paradigms and Solutions*, *Florida Journal of International Law* 18 (2006) 3, 887-906, 889; M. Cherif Bassiouni, *International Recognition of Victims’ Rights*, *Human Rights Law Review* 6 (2006) 2, 203-279, 218-223.

<sup>11</sup> Charter of the United Nations, Chapter I, Article 1(3), full text in Ian Brownlie, *Basic Documents in International Law*, 5<sup>th</sup> ed. (2002), 2-26.

Member States' international legal obligations towards human rights protection.

The “push-and-pull” effect,<sup>12</sup> therefore, of ASEAN's “internal” and “external” spheres reinforces an equilibrium-imperative upon ASEAN to reject impunity by “universalizing” core human rights norms. Under this equilibrium-imperative, the new ASEAN should be expected to rely less (or not at all) on the twin exceptions of “culture” and “development” to the universality of human rights.

Part I of this paper examines ASEAN as an international organization under its current framework, and synthesizes distinct innovations under the ASEAN Charter, specifically in aspects of recognition, enforcement, and/or protection of human rights in the Southeast Asian region. Parts II and III then respectively scrutinize the twin justifications of “culture” and “development” from an interdisciplinary orientation, showing the inherent philosophical-conceptual and empirical weaknesses of these justifications as normative standards or “exceptions” to “core” human rights norms. Part IV describes the respective “internal” and “external” spheres in which the new ASEAN will operate as an international organization. The present “internal” sphere of ASEAN is depicted in light of ASEAN Member States' recent express and implied recognition of “core” human rights norms (*jus cogens* norms and/or first generation civil and political rights) alongside ASEAN's wider international human rights obligations due to its retooled nature as an international organization subject to international human rights law. Thereafter, I depict ASEAN's “external” sphere considering the emergence of customary international law rejecting impunity for violations of “core” human rights violations. Despite variances in degree, ASEAN Member States' separate practices of recognition and/or enforcement of these core human rights norms - combined with the acceptance of broader human rights obligations and firmer commitments to democracy under the new rule-based ASEAN – should be seen an inevitable path towards, or mode of universalism in normative rights discourse and institutional protection.

The conclusion drawn is deliberate. Considering ASEAN's “internal” and “external” spheres, the new ASEAN cannot afford to maintain its previous position of virtual silence on international obligations concerning the recognition and enforcement of “first generation”<sup>13</sup> rights such as civil

<sup>12</sup> The heuristic is analogized from the interplay of Keynesian economic concepts of “cost-push inflation” and “demand-pull inflation”. For an illustration of the interplay of these two forces, see also *Joseph E. Stiglitz, The Roaring Nineties* (2003), 3-28.

<sup>13</sup> For a thorough synthesis of the provenance and distinctions between “first generation” rights (civil and political rights such as those codified under the International

and political rights. While mutual respect for diversity remains a keystone in the *realpolitik* between ASEAN members, the recognition and enforcement of these core human rights need not be seen as a radical departure from ASEAN’s consensus-building orientation. The universalization of core human rights in ASEAN is not incompatible with the duties of ASEAN Member States as parties to the ASEAN, the Charter of the United Nations, and as active members in the community of nations. Universalism in this case, therefore, might even be seen as a phenomenon long overdue.

## B. ASEAN’s Legal Personality as an International Organization Subject to International Law

From an initial membership of five Southeast Asian states (Indonesia, Malaysia, the Philippines, Singapore, and Thailand) in 1967, ASEAN has expanded its current membership to ten 10, including Brunei Darussalam, Vietnam, Laos, Myanmar, and Cambodia. The primary constitutive legal instruments of ASEAN are the 1976 Treaty of Amity and Cooperation (TAC) in Southeast Asia<sup>14</sup> and the 1967 ASEAN (Bangkok) Declaration.<sup>15</sup> Under the terms of the TAC and the Bangkok Declaration, ASEAN, prior to its new Charter, was simply an “association for regional cooperation.”<sup>16</sup>

Covenant on Civil and Political Rights), “second generation” rights (economic and social rights such as in the International Covenant on Economic, Social, and Cultural Rights), and “third generation” rights (post-war “collective” rights such as the right to environmentally sustainable economic development, peace, security, etc.), see *Eric A. Engle, Universal Human Rights: A Generational History*, *Annual Survey of International & Comparative Law* 12 (2006), 219-268, 254-266.

<sup>14</sup> Treaty of Amity and Cooperation in Southeast Asia, Indonesia, 24 February 1976 (*supra* note 5).

<sup>15</sup> ASEAN Declaration, 8 August 1976, Bangkok, Thailand. Full text found at: <http://www.aseansec.org/1212.htm> (last visited 23 January 2009).

<sup>16</sup> *Id.*: “1. To accelerate the economic growth, social progress and cultural development in the region through joint endeavours in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of South-East Asian Nations; 2. To promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries of the region and adherence to the principles of the United Nations Charter; 3. To promote active collaboration and mutual assistance on matters of common interest in the economic, social, cultural, technical, scientific and administrative fields; 4. To provide assistance to each other in the form of training and research facilities in the educational, professional, technical and administrative spheres; 5. To collaborate more effectively for the greater utilization of their agriculture and industries, the expansion of their trade, including the study of the problems of international commodity trade, the

In furtherance of the cooperative aims previously mentioned, the TAC strictly enjoins ASEAN Member States to observe the fundamental principles of mutual respect for the independence, sovereignty, equality, territorial integrity, and national identity of the respective Member States; freedom from external interference, subversion or coercion; renunciation of the threat or use of force; and peaceful settlement of disputes.<sup>17</sup> At the time of its creation, ASEAN's international legal personality was "relative" or "subjective",<sup>18</sup> being attributable to the express recognition of its Member States under the framework of the TAC and the Bangkok Declaration.

In 1994, ASEAN established the ASEAN Regional Forum (ARF), which facilitates cooperation on political and security matters through confidence building, "preventive diplomacy," and constructive dialogue with ASEAN political partners.<sup>19</sup> (Participants to the ARF include Australia, Brunei Darussalam, Cambodia, Canada, China, the European Union, India, Indonesia, Japan, the Democratic Republic of Korea, the Republic of Korea (ROK), the Lao PDR, Malaysia, Mongolia, Myanmar, New Zealand, Pakistan, Papua New Guinea, the Philippines, the Russian Federation, Singapore, Thailand, the United States, and Viet Nam.) Issues foremost on the ARF's agenda are nuclear non-proliferation,<sup>20</sup> counter-terrorism, territorial disputes,<sup>21</sup> and transnational crime.<sup>22</sup>

improvement of their transportation and communications facilities and the raising of the living standards of their peoples; 6. To promote South-East Asian studies; 7. To maintain close and beneficial cooperation with existing international and regional organizations with similar aims and purposes, and explore all avenues for even closer cooperation among themselves."

<sup>17</sup> Treaty of Amity and Cooperation in Southeast Asia, Indonesia, 24 February 1976 (*supra* note 4).

<sup>18</sup> *Oriol Casanovas*, *Unity and Pluralism in Public International Law* (2001), 124-125.

<sup>19</sup> See ARF overview at <http://www.aseanregionalforum.org/AboutUs/tabid/57/Default.aspx> (last visited 23 January 2009).

<sup>20</sup> See *Zone of Peace, Freedom, and Neutrality Declaration*, Kuala Lumpur, 27 November 1971. Full text at: <http://www.aseansec.org/1215.htm> (last visited 23 January 2009); *Treaty on the Southeast Asia Nuclear Weapon-Free Zone*, Bangkok, Thailand, 15 December 1995. Full text at: <http://www.aseansec.org/2082.htm> (last visited 23 January 2009).

<sup>21</sup> See *Declaration on the Conduct of Parties in the South China Sea*, Phnom Penh, Cambodia, 4 November 2002 at: <http://www.aseansec.org/13163.htm> (last visited 09 January 2009).

<sup>22</sup> See overview of ARF history and developments at <http://www.aseansec.org/92.htm> (last visited 23 January 2007).

Consistent with the “ASEAN Vision 2020,” (which articulates Member States’ long-term objectives for ASEAN)<sup>23</sup> regional cooperation is facilitated through three “communities”: the ASEAN Security Community, the ASEAN Economic Community (which provides the venue for cooperation and dialogue in relation to the ASEAN Free Trade Area),<sup>24</sup> and the ASEAN Socio-Cultural Community.

Pursuant to the fundamental principles of the TAC, decisions are made by ASEAN Member States through the consensus of all its members. ASEAN’s “silences” and “omissions” in recognition and enforcement of international human rights norms on civil and political rights have been attributed to the difficulty of achieving a consensus, and ASEAN’s strong emphasis on the fundamental principles of sovereignty and non-interference.<sup>25</sup>

The ASEAN Charter departs from ASEAN’s present voluntary model of international personality by expressly conferring upon ASEAN a “legal personality” as an “intergovernmental organization,”<sup>26</sup> and enjoying functional immunities and privileges “necessary for the fulfilment of [the] purposes”<sup>27</sup> of the organization. The hortatory provisions in the Preamble of the ASEAN Charter widen ASEAN’s orientation from political-economic cooperation towards “adherence to the principles of democracy, the rule of law and good governance, respect for and protection of human rights and fundamental freedoms.”<sup>28</sup> The contemplated new “purposes” of ASEAN reflects this wider orientation:

<sup>23</sup> Full text at: <http://www.aseansec.org/1814.htm> (last visited 23 January 2009).

<sup>24</sup> See Hanoi Plan of Action, Hanoi, Vietnam, 15 December 1988. Full text at: <http://www.aseansec.org/687.htm> (last visited 23 January 2009); Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area, Singapore, 28 January 1992. Full text at: <http://www.aseansec.org/1164.htm> (last visited 23 January 2009); Protocol to Amend the Framework Agreement on Enhancing ASEAN Economic Cooperation, Thailand, 15 December 1995. Full text at: <http://www.aseansec.org/2083.htm> (last visited 23 January 2009).

<sup>25</sup> *Li-ann Thio*. Implementing Human Rights in ASEAN Countries: Promises to Keep and Miles to Go Before I Sleep, *Yale Human Rights & Development Law Journal*, 2 (1999), 1-86, 6, 7, 49-57.

<sup>26</sup> ASEAN Charter, Chapter II (Legal Personality), Article 3.

<sup>27</sup> ASEAN Charter, Chapter VI, Article 17. Chapter VI, Article 19(2) also provides that “the conditions of immunities and privileges of the Permanent Representatives and officials on ASEAN duties shall be governed by the 1961 Vienna Convention on Diplomatic Relations or in accordance with the national law of the ASEAN State concerned”.

<sup>28</sup> Preamble to the ASEAN Charter, Seventh Clause.

- “1. To maintain and enhance peace, security and stability and further strengthen peace-oriented values in the region;
2. To enhance regional resilience by promoting greater political, security, economic, and socio-cultural cooperation;
3. To preserve Southeast Asia as a Nuclear Weapon-free Zone and free of all other weapons of mass destruction;
4. To ensure that the peoples and Member States of ASEAN live in peace with the world at large in a just, democratic, and harmonious environment;
5. To create a single market and production base which is stable, prosperous, highly competitive and economically integrated with effective facilitation for trade and investment in which there is a free flow of goods, services and investment; facilitated movement of business, persons, professionals, talents and labour; and freer flow of capital;
6. To alleviate poverty and narrow the development gap within ASEAN through mutual assistance and cooperation;
7. To 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;**
8. To respond effectively, in accordance with the principle of comprehensive security, to all forms of threats, transnational crimes, and trans-boundary challenges; [...]” (Emphasis supplied).

Thus, while the ASEAN Charter affirms the fundamental principles in the TAC, the Bangkok Declaration and other treaties, declarations, agreements, and international instruments annexed to the Charter, the ASEAN Charter introduces a novel clause by making “respect for fundamental freedoms, the promotion and protection of human rights, and

the promotion of social justice”,<sup>29</sup> and “adherence to the rule of law, good governance, the principles of democracy and constitutional government”<sup>30</sup> key principles to govern the conduct of ASEAN and its Member States. In relation to these broader purposes and principles of conduct, Member States are expressly obligated to “take all necessary measures to effectively comply with all obligations, including the enactment of appropriate domestic legislation, to effectively implement the provisions of this Charter and to comply with all obligations of membership.”<sup>31</sup>

Most importantly, the ASEAN Charter appears to dilute the consensus requirement in decision-making. While the Charter categorically states that “[a]s a basic principle, decision-making in ASEAN shall be based on consultation and consensus,”<sup>32</sup> the failure to achieve a consensus will vest the ASEAN Summit with the authority to “decide how a specific decision can be made.”<sup>33</sup> Under the Charter, the ASEAN Summit (composed of the Heads of State or Government of the ASEAN Member States) is the “supreme policy-making body of ASEAN,”<sup>34</sup> and is accordingly vested with the following general powers to:

“b) deliberate, provide policy guidance and **take decisions on key issues pertaining to the realization of the objectives of ASEAN**, important matters of interest to Member States and all issues referred to it by the ASEAN Coordinating Council, the ASEAN Community Councils and ASEAN Sectoral Ministerial Bodies;

c) instruct the relevant Ministers in each of the Councils concerned to hold *ad hoc* inter-Ministerial meetings, and address important issues concerning ASEAN that cut across the Community Councils. Rules of procedure for such meetings shall be adopted by the ASEAN Coordinating Council;

d) address emergency situations affecting ASEAN **by taking appropriate actions**;

<sup>29</sup> ASEAN Charter, Chapter I, Article 2 (Principles), Section 2(i).

<sup>30</sup> ASEAN Charter, Chapter I, Article 2 (Principles), Section 2(h).

<sup>31</sup> ASEAN Charter, Chapter III (Membership), Article 5(2).

<sup>32</sup> ASEAN Charter, Chapter VII (Decision-Making), Article 20(1).

<sup>33</sup> ASEAN Charter, Chapter VII, Article 20(2).

<sup>34</sup> ASEAN Charter, Chapter IV (Organs), Article 7, Section 2(a).

e) decide on matters referred to it under Chapter VII and VIII”  
(Emphasis supplied).

The language of the ASEAN Charter also appears to vest the ASEAN Summit with the authority to decide in cases where “[a]ny Member State [is] affected by non-compliance with the findings, recommendations, or decisions resulting from an ASEAN dispute settlement mechanism.”<sup>35</sup>

It would appear, therefore, that the new ASEAN contemplated in the ASEAN Charter bears an “objective” legal personality, since the organization’s existence arises from the satisfaction of international legal requirements for “organization”: 1) the possession of the organization’s own “distinct will” apart from that of its members, evidenced by the organization’s power to take binding decisions upon the entire membership through the vote of a mere majority of its members; 2) the presence of organs bearing special tasks, defining the position of members in relation to the Organization; and 3) the granting of legal capacity, privileges, and immunities to the Organization in the territory of each of its Member States.<sup>36</sup>

ASEAN’s acquisition of an objective legal personality under the ASEAN Charter (in addition to its “relative” or “subjective” legal personality conferred by its membership under the present framework of the TAC and the Bangkok Declaration) has implications for its responsibility as an international organization, and for the residuary responsibility of its Member States, to third parties. If ASEAN under the ASEAN Charter were to be viewed as a “distinct legal entity from its Member States,” it would be difficult to attribute responsibility *per se* to its Member States for acts ascribed to or authored by ASEAN. However, if Member States’ residuary responsibility to third parties is to be affirmed even under the new ASEAN, the process will likely take the shape of either: 1) “**secondary Member State responsibility**”, where the third party must first present its claim to ASEAN, and recourse to the Member States would be had only if ASEAN is in default in providing an adequate remedy; or 2) “**indirect responsibility**”, where Member States are deemed *a priori* responsible to the organization to meet its obligations towards third parties.<sup>37</sup> As will be discussed later in Part IV, ASEAN’s revised international legal personality

<sup>35</sup> ASEAN Charter, Chapter VIII (Settlement of Disputes), Article 27(2).

<sup>36</sup> *Jan Klabbers*, An Introduction to International Institutional Law (2002), 54-57; see also *Reparation of Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, 178-179 and 185.

<sup>37</sup> *Klabbers*, 311-312 (*supra* note 36).



under the ASEAN Charter generates corresponding international legal obligations and responsibilities of ASEAN and its Member States, especially in the recognition, enforcement, and protection of core human rights norms. Parts II and III will first respond to the issue of whether, in themselves, the “right to culture” and “right to development” are still satisfactory normative exceptions to advance the developing universalism of core human rights norms in ASEAN.

### C. Ideological and Teleological Weaknesses of the “Right to Culture” as an Exception to “Universalizing” Core Human Rights Norms

The “right to culture” has been invoked as a competing right that qualifies, if not exempts, observance of core human rights norms on civil and political rights (by extension, *jus cogens* prohibitions against torture, slavery, crimes against humanity, war crimes, genocide, and egregious human rights violations).<sup>38</sup> The reference to culture is normatively relativist,<sup>39</sup> and presumptively argues that these “core” human rights norms can be wholly “localized” in their interpretation and enforcement.

ASEAN has refrained from codifying core human rights norms (or the first-generation civil and political rights) in its constitutive instruments, the TAC and the Bangkok Declaration. Its declarations, treaties, and protocols across its forty-year history have likewise denied any express codification of these norms. Instead, ASEAN has focused much of its efforts towards codification and enforcement of “second-generation” human rights norms on economic and social rights throughout the region.

This lack of codification of “first generation” rights fuelled the “Asian values” debate in the 1990s, led by some Southeast Asian heads of state who decried “Western imperialism” through “Western imposition of rights” deemed antithetical to “Asian values”. The “cultural” exception was cast along three premises - that rights are “culture specific;” that in Asia, “the

<sup>38</sup> Richard A. Schweder, *Customs Control: Some Anthropological Reflections on Human Rights Crusades*, *Virginia Journal of Social Policy & the Law* 14 (2006) 1, 1-38, 7-8, 11-13.

<sup>39</sup> Randall Peerenboom, *Beyond Universalism and Relativism: The Evolving Debates About “Values in Asia”*, *Indiana International & Comparative Law Review* 14 (2003) 1, 1-86, 9-14.

community takes precedence over individuals;” and that rights are “subordinate to national sovereignty.”<sup>40</sup>

Considering the plethora of literature on the “Asian values” polemic, the refutations to the foregoing premises have been multidimensional. Philosophical approaches tend to argue in favour of the “transcendental” nature of certain values enshrined in human rights, and that a cross-cultural critique would yield the conclusion that these “values” are commonly found across moral systems throughout the world.<sup>41</sup> Cultural anthropological approaches on the other hand point to the defects of transforming the “descriptive” construct of culture (what a given culture’s values supposedly are) into a “prescriptive” call for localization of value judgments (or what conduct a culture demands or prohibits).<sup>42</sup> Historical approaches contend that the provenance of human rights norms is not the post-World War II “Western” intellectual thought and political architecture, but, in reality, are the more ancient Asian civilizations which have been neglected and under-researched in scholarly literature.<sup>43</sup> These diverse approaches have spawned their own quantitative and qualitative investigations and findings on the nature and history of “Asian” cultures and their value systems.

The interdisciplinary approaches provoked some robust scholarly debate on their claims to validity, and invited counter-refutations and rejoinders – the tedium of which generated exasperation for some scholars

<sup>40</sup> *W. Theodore de Bary*, *Asian Values and Human Rights* (1998), 6.

<sup>41</sup> *Paul H. Brietzke*, *Globalization, Nationalism, and Human Rights*, *Florida Journal of International Law* 17 (2005) 3, 633-691, 660-663, 671-675; *William Joseph Wagner*, *Universal Human Rights, the United Nations, and the Telos of Human Dignity*, *Ave Maria Law Review* 3 (2005) 1, 197-226, 205-214.

<sup>42</sup> *Elvin Hatch*, *Culture and Morality: The Relativity of Values in Anthropology* (1983), excerpt reproduced in: *Henry Steiner & Philip Alston*, *International Human Rights in Context: Law, Morals, Ethics*, 2<sup>nd</sup> ed. (2000), 369; “[...] The relativists make the error of deriving an ‘ought’ statement from an ‘is’ statement. To say that values vary from culture to culture is to describe (accurately or not) an empirical state of affairs in the real world, whereas the call for tolerance is a value judgment of what ought to be, and it is logically impossible to derive the one from the other. The fact of moral diversity no more compels our approval of other ways of life than the existence of cancer compels us to value ill-health.”

<sup>43</sup> *Surya P Subedi*, *Are the Principles of Human Rights ‘Western’ Ideas? An Analysis of the Claim of the ‘Asian’ Concept of Human Rights from the Perspectives of Hinduism*, *California Western International Law Journal* 30 (1999) 1, 45-69, 48-57; *Raimundo Pannikar*, *Is the Notion of Human Rights A Western Concept?*, excerpt reproduced in *Steiner & Alston*, 383-389 (*supra* note 42).

on the seeming futility of the universalism-cultural relativism debate.<sup>44</sup> For the purpose of ascertaining the viability of the “right to culture” exception as a normative standard to be applied to the “new” ASEAN envisioned under the ASEAN Charter, however, these interdisciplinary approaches, while immensely valuable, appear unnecessarily inductive, rather than deductive. The “right to culture” exception should be tested from the standpoint of international law and the enforcement of “core” human rights norms (civil and political rights under the International Covenant on Civil and Political Rights, as well as the *jus cogens* prohibitions on torture, slavery, war crimes, crimes against humanity, genocide, and other similarly egregious human rights violations) **which are deemed non-derogable**.<sup>45</sup> Taken against the primacy of these norms in the body of international law, it is submitted that the inherent weakness of the “right to culture” as a normative standard lies in its ideological imprecision and teleological incoherence.

## I. Ideological Imprecision

“Culture” is an amorphous and unwieldy construct of moving parameters. It has been defined as referring to a set of normative principles, values, practices and ideas unique to or identifiable with a group,<sup>46</sup> which is difficult to disaggregate, being a “series of processes that construct, reconstruct, and dismantle cultural materials in response to identifiable determinants”.<sup>47</sup> Paradoxically, while the “right to culture” is itself affirmed as a fundamental human right,<sup>48</sup> its very indeterminacy is the cause of its disutility as a normative standard against core non-derogable human rights norms.

<sup>44</sup> See f. ex. *Michel Rosenfeld*, Can Human Rights Bridge the Gap Between Universalism and Cultural Relativism? A Pluralist Assessment Based on the Rights of Minorities”, *Columbia Human Rights Law Review* 30 (1999), 249-284.

<sup>45</sup> *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, I.C.J. Reports (2004), paras. 105-109; *Barcelona Traction Case*, I.C.J. Reports (1966), 32, para. 33; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), I.C.J. Reports (1996), para. 257.

<sup>46</sup> *Fernand Braudel*, *A History of Civilisation* (1995), 3-36.

<sup>47</sup> *Adam Kuper*, *Culture: The Anthropologists’ Account* (1999), excerpt reproduced in: *Steiner & Alston*, 376-381 (*supra* note 42).

<sup>48</sup> International Covenant on Economic, Social, and Cultural Rights, Arts. 1(1), 15(1), G.A. res. 2200A(XXI), 21 U.N. GAOR Supp. (No. 16), at 49, UN Doc. A/6316 (1966), 993 U.N.T.S., entered into force 3 January 1976; Universal Declaration of Human Rights, Article 27, UNGA A/Res 217, 10 December 1948.

It is for this reason that critics of “cultural” exceptionalism to human rights enforcement, particularly in Asia, refer to the obvious heterogeneity of cultures and sub-cultures throughout the region, reducing “Asian” values to straw arguments.<sup>49</sup> The diversity of Asian value systems and religio-philosophical schools of intellectual thought ultimately makes it difficult to carve a distinguishable normative exception.<sup>50</sup> The porous nature of the “right to culture” has been criticized as providing ostensibly “legal” justifications for authoritarian regimes refusing to comply with international human rights law.

However, defenders of “cultural” exceptionalism insist that there is no disagreement with the “solid core” of international human rights law, specifically the “core” and non-derogable human rights norms. A statement attributed to a former Minister of Foreign Affairs of Singapore downplays the existence of the controversy thus: “Diversity cannot justify gross violations of human rights. Murder is murder whether perpetrated in America, Asia or Africa. No one claims torture as part of their cultural heritage,” but that “the hard core of rights that is truly universal is perhaps smaller than we sometimes like to pretend.”<sup>51</sup>

The attempt to depict the “right to culture” as a “non-exception” to core non-derogable human rights norms fails upon scrutiny of the historical genesis of the prohibitive norms themselves. Violations of these norms, before (or even after) their express codification, have been loosely justified in the name of “culture.” Slavery, for example, prior to being outlawed by the international legal order, was treated for years as a cultural practice by many states.<sup>52</sup> “Honour” killings, which patently violate the fundamental right to life, is justified under a “cultural” ethic that permits men to vindicate their sense of filial or familial honour through the killing of

<sup>49</sup> *Amartya Sen*, Human Rights and Asian Values, *The New Republic*, 33-40 (14 July 1997), excerpt reproduced in: *Henkin*, 113-115 (*supra* note 8); See especially for the situation in China: *Amy J. McMaster*, Human Rights at the Crossroads: When East Meets West, *Vermont Law Review* 29 (2004) 2, 109-146, 134-145.

<sup>50</sup> For the argument on the interpretive fit between an individual’s cultural values and conduct, see *Chaim Perelman*, Can the Rights of Man Be Founded?, in: *Alan S. Rosenbaum* (ed.), *The Philosophy of Human Rights: International Approaches* (1980), 45-51.

<sup>51</sup> *Klabbers*, 16 (*supra* note 36).

<sup>52</sup> See *Vernon Palmer*, The Customs of Slavery: The War Without Arms, *American Journal of Legal History* 48 (2006) 2, 177-218, 177-178.

adulterous (or suspected unfaithful) wives and female family members.<sup>53</sup> Genocide has been described as having “cultural” dimensions, even justified by the Nazi regime as a defensive act to preserve the purity of Aryan culture.<sup>54</sup> Clearly, the potency of “culture” as a claimed exception to “core” human rights norms cannot be swept under the rug by appeals to rhetoric that “torture is not part of one’s cultural heritage.” The “right to culture” is still actively invoked as a legal exception against observance and full enforcement of core non-derogable human rights norms.

It is for this reason that the ideological imprecision of the “right to culture” militates against its value as a normative standard asserted against the “core” human rights norms from which states (both by customary and conventional international law) cannot derogate. These non-derogable *jus cogens* prohibitions against genocide, torture, slavery, crimes against humanity, war crimes, and egregious violations of human rights (generally giving rise to obligations *erga omnes*) form part of **general** international law<sup>55</sup> and should not be easily circumvented under a highly malleable and ambiguous standard such as “culture.” To do otherwise would sanction violence to the highest tier of importance and protection accorded to these norms, as described in the famous dictum from the *Barcelona Traction* case:

“[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State... By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.”<sup>56</sup> (Emphasis supplied)

<sup>53</sup> Rebecca Adams, Violence Against Women and International Law: The Fundamental Right to State Protection from Domestic Violence, *New York International Law Review* 20 (2007) 57-130, 78-79.

<sup>54</sup> David Nersessian, Rethinking Cultural Genocide under International Law, *Human Rights Dialogue*, 2 (2005) 12, can be found at: [http://www.cceia.org/resources/publications/dialogue/2\\_12/section\\_1/5139.html](http://www.cceia.org/resources/publications/dialogue/2_12/section_1/5139.html) (last visited 09 January 2009).

<sup>55</sup> Robert Jennings & Arthur Watts (eds), *Oppenheim’s International Law* (1992), 978-1030; Antonio Cassese, *International Law*, 2<sup>nd</sup> ed. (2005), 198-212.

<sup>56</sup> *Barcelona Traction Case*, I.C.J. Reports (1970) 3, para. 33.

For the overriding reason that core human rights norms are non-derogable and binding on all states as “norms accepted and recognized by the international community of states as a whole,” and “which can be modified **only** by a subsequent norm of general international law having the same character,”<sup>57</sup> the “right to culture” (with its inherent ideological imprecision) cannot be the basis for an exception. The “right to culture” has not been shown to be a norm of general international law “having the same character” as “core” human rights norms.<sup>58</sup> The “right to culture,” cannot operate as a normative “exception” as would modify the obligatory character of “core” and non-derogable human rights norms.

## II. Teleological Incoherence

Upholding the “right to culture” as an exception to core non-derogable human rights norms would also thwart the purpose and design underlying both sets of rights.

International human rights law, as it developed after the Second World War, drew currency from theoretical conceptions of the “good” for an individual, and by extension, the social order, as well as concepts of “right conduct” and justice.<sup>59</sup> The protection of “human rights” is inimitably tied up with these theoretical conceptions of the “good.” What is the common theoretical conception of the “good” envisioned as the object of protection from state incursion and/or third party interference in the case of both “core” non-derogable human rights norms and the “right to culture?”

<sup>57</sup> Vienna Convention on the Law of Treaties, Article 53.

<sup>58</sup> Admittedly, this assessment falls prey to the critique of normative relativity, cautioned against for its weakening of international law as a “normative order” and as a “factor of social organization”; see *Prosper Weil*, Towards Relative Normativity in International Law? in: *Martti Koskenniemi*, Sources of International Law: Library of Essays in International Law (2000). However, it may also be considered that this evaluation of the normative quality of non-derogable international legal norms as opposed to “ordinary” norms simply exemplifies rules for state recognition (not equivalent to persuasion) of the argument; see *David Kennedy*, Theses About International Law Discourse, also in: *Koskenniemi*, 81-119.

<sup>59</sup> For the historical development of international human rights law, see *Hersch Lauterpacht*, International Law and Human Rights (1968), 3-72; see also *Patrick Lee*, Soul, Body and Personhood, *American Journal of Jurisprudence* 49 (2004), 87-125, 116-125; *Immanuel Kant*, Foundations of Metaphysics of Morals (1959), 49-54, reproduced in: *Henkin*, 38-41 (*supra* note 7); *Jeremy Bentham*, An Introduction to the Principles of Morals and Legislation (1789), Chapter 1, reproduced in: *Henkin*, 52-54 (*supra* note 7).

It is submitted that it is the protection of the individual’s “personhood” that predicates an individual’s conception of the “good life.”<sup>60</sup> While itself a “term of legal art,” an individual’s “personhood” is inextricably comprised of aspects such as bodily integrity, autonomy, the capacity to assert rationality, judgment<sup>61</sup> and the inherent dignity of the human person.<sup>62</sup> Thus, the core non-derogable human rights norms (*jus cogens* prohibitions against torture, slavery, genocide, crimes against humanity, war crimes, and egregious violations of civil and political rights codified in the International Covenant on Civil and Political Rights or ICCPR) are in themselves articulations of value for aspects of personhood such as bodily integrity, autonomy, the capacity to assert rationality and judgment and the inherent dignity of the human person. On the other hand, the right to culture as a human rights norm is also vital to an individual’s “personhood,” as it critically relates to the individual’s development of identity, personality, and beliefs in a wider sphere of group association and interaction.<sup>63</sup>

Since both culture and the core non-derogable human rights norms appear to be reflections of the same fundamental value of “personhood,” why then would the assertion of one norm be inimical to the other? Otherwise stated, why would the international legal order privilege these core human rights as “non-derogable,” (being of supreme importance as would amount to the level of an obligation *erga omnes* or an obligation owed to all States) over the right to culture?

It is submitted that the privileging of core non-derogable human rights norms draws from the immediacy, inextricability, and/or proximity of these norms to the individual’s human dignity and “personhood.”<sup>64</sup> Torture, genocide, slavery and various forms of crimes against humanity and war

<sup>60</sup> For the comprehensive discussion of the totality of “personhood” under the international legal order, see *Louis B. Sohn*, *The New International Law: Protection of the Rights of Individuals Rather than States*, *American University Law Review* 32 (1982) 1, 1-64.

<sup>61</sup> See *Harvard Law Review Association*, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction* (Note), *Harvard Law Review* 114 (2001) 6, 1745-1768, 1759-1768.

<sup>62</sup> *Oscar Schachter*, *Human Dignity as a Normative Concept*, *American Journal of International Law*, 77 (1983) 4, 848-854, 854.

<sup>63</sup> *Steiner & Alston*, 372-381 (*supra* note 42).

<sup>64</sup> *Id.*, It has also been argued that *jus cogens* or non-derogable peremptory norms emerged from inspirational analogies from national legal systems’ own normative hierarchies. *Theodor Meron*, *On a Hierarchy of International Human Rights*, *American Journal of International Law*, 80 (1986) 1, 1-21, 3, 13-21.

crimes directly threaten the individual's bodily integrity and subordinate his inherent dignity as a human person. Similarly, the basic civil and political rights of freedom of thought, religion, association, opinion, speech, and guarantees of substantive and procedural due process are critical to preserving the individual's autonomy and independent assertion of rationality and judgment.<sup>65</sup> The deprivation of these key aspects of "personhood," through the violation of the "core" non-derogable human rights norms, trenches upon the legal interest of all States precisely because this wholly subverts the human conception of the "good" – or the protection and development of the individual's "personhood."

The individual's right to culture, on the other hand, does not approximate the same degree of immediacy to the individual's "personhood" as that manifest from the core non-derogable human rights norms. The observance of core non-derogable human rights norms enables the individual's multidirectional access to culture, but the converse situation does not necessarily hold true. "Cultural" participation, devoid of guarantees of autonomy, bodily integrity, and rational judgment, would degenerate into meaningless and enforced interactions to "induce" identity, "design" personality, and "condition" belief. An individual who enjoys freedom of thought and expression, for example, can verily interact with others and thereby shape the environment in which culture materializes and develops. On the other hand, if that individual's basic autonomy and capacity for rational judgment is capsulated by the arbitrariness of state interference expressed through use of force, the individual's overall ability to develop his "personhood" is compromised under an imposed fiction of "cultural" participation. "Core" human rights norms, therefore, are intrinsic to the individual's capacity to avail of his right to culture, but it is not always so the other way around.

<sup>65</sup> See *Khaled Abou El Fadl*, *The Unique and International and the Imperative of Discourse*, *Chicago Journal of International Law* 8 (2007), 43-58, 43-44; *Rosalyn Higgins*, *Problems and Process: International Law and How We Use It* (1995), 96. "[...] I believe profoundly in the universality of the human spirit. Individuals everywhere want the same essential things: to have sufficient food and shelter, to be able to speak freely; to practice their own religion or to abstain from religious belief; to feel that their person is not threatened by the state; to know that they will not be tortured, or detained without charge, and that, if charged, they will have a fair trial. I believe there is nothing in these aspirations that is dependent upon culture, or religion, or stage of development. They are as keenly felt by the African tribesman as by the European city-dweller, by the inhabitant of a Latin American shanty-town as by the resident of a Manhattan apartment."



The right to “culture” therefore cannot be validly asserted as a normative exception to “core” non-derogable human rights norms. To do so courts teleological incoherence, and needlessly risks the purpose and design of the theoretical conception of the “good” (individual “personhood”) as expressed in these norms. The subordination of “culture” claims to “core” human rights norms is recognized in the provisions of the UNESCO Universal Declaration on Cultural Diversity:

“Article 4. No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.

Article 5. Cultural rights are an integral part of human rights, which are universal, indivisible, and interdependent...and all persons have the right to participate in the cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and fundamental freedoms.”<sup>66</sup>

Apart from the use of interdisciplinary approaches, therefore, it is submitted that the viability of the “right to culture” as a normative exception should also be weighed against the ideological and teleological basis of the “core” non-derogable human rights norms. Rather than fall into the trap of pitting cultural anthropological and scientific claims (universalist or particularist), focus should be redirected towards the binding scope and obligatory nature of these “core” human rights norms as part of general international law. Since the “right to culture” suffers from the vice of ideological imprecision and teleological incoherence, it can be more plausibly argued that “culture” cannot operate as an exception given the peremptory status of these “core” human rights norms.

<sup>66</sup> UNESCO Universal Declaration on Cultural Diversity, Articles 2, 4, and 5; See also International Covenant on Economic, Social, and Cultural Rights, Article 15(1); Universal Declaration on Human Rights; Principle 13 of the 1994 Draft Principles of Human Rights.

#### D. Empirical and Causal Weaknesses of the “Right to Development” as an Exception to “Universalizing” Core Human Rights Norms

North-South discourse featured the “right to development”<sup>67</sup> as another exception to the universality of human rights. The argument contextualizes Western insistence on universality against the postcolonialism of international law as a whole,<sup>68</sup> and stresses that the call for full enforcement and universality of human rights is yet another mode of Western imperialism to arrest the development of Southern states, particularly on the platforms of democracy and rule of law.<sup>69</sup> The “development” exception is also justified as a “fundamental right,” the “precondition of liberty, progress, justice and creativity,” the “alpha and omega of rights,” flowing and carrying the same importance as the right to self-determination.<sup>70</sup> Critical responses to the “development” exception, therefore, tended to focus on the abstract and expansive content of the right; the dearth of international recognition for this right; and its precarious (even nonexistent) conventional and customary foundations under international law.<sup>71</sup>

ASEAN’s forty-year record marks strong recognition, codification, and enforcement of economic and social rights as extensions flowing from the right to development. The tradeoff between “universalizing” core human rights norms (or explicit recognition, codification, and enforcement of such first-generation civil and political rights and corresponding *jus cogens* prohibitions) has been justified under the rubric of state sovereignty and

<sup>67</sup> See Vienna Declaration and Programme of Action, 5, U.N. Doc. A/CONF.157/23. Full text at: <http://www.ohchr.org/english/law/vienna.htm> (last visited 23 August 2007).

<sup>68</sup> See *Sundhya Pahuja*, The Postcoloniality of International Law, *Harvard International Law Journal*, 46 (2005), 459-469, 467-468; which seeks the reestablishment of human rights that are wary of universality because “it is necessary to explore the relationship between the concept of universality itself and the byzantine reinforcements of colonial power and knowledge, not to mention its relationship to Christianity.” The author stresses that the search for foundations of the normative content of universality is itself a “search for authority”, the narrative of which has the effect of being “authoritative and authorizing”.

<sup>69</sup> *Randall Peerenboom*, Human Rights and Rule of Law: What’s the Relationship?, *Georgetown Journal of International Law*, 36 (2005), 809-854, 817-818.

<sup>70</sup> *Steiner & Alston*, 1321-1322 (*supra* note 42).

<sup>71</sup> *Jack Donnelly*, In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development, *California Western International Law Journal*, 15 (1985), 473-509, 482-509.

non-interference with the developmental policies of ASEAN Member States. Some ASEAN Member States still retain national or internal security legislation (the validity of which is challenged under core human rights norms) in their statute books, notwithstanding their disuse in the past decades.<sup>72</sup>

Similar to the previous section’s analysis of the “right to culture” exception, the value of the “right to development” as a normative standard must be weighed against the binding scope and obligatory nature of “core” non-derogable human rights norms. However, apart from the oft-cited responses of a lack of conceptual clarity and legal support for the “right to development” as a competing, “equal” right to the “core” non-derogable human rights norms, it is further submitted that the additional weaknesses of the “right to development” lie in its empirical uncertainty and causal nebulosity.

## I. Empirical Uncertainty

The logic of the “development” exception has a Maslow-like appeal.<sup>73</sup> “Development” responds to the individual’s most basic needs, whereas “core” non-derogable human rights norms appear more remote from the individual’s physical viability as a human being. “Core” non-derogable human rights norms are frequently couched in “negative” terms or prohibitions, in contrast to “development” which connotes “affirmative” rights (second-generation economic and social rights, and third-generation collective or welfare rights). For empiricists, the tangibility of “development” should prove infinitely more satisfactory as a value to be protected by the international legal order, rather than the intangibility of constructs such as the right to life, freedom of association and opinion, speech, thought, religion, among others.

This very same initial appeal, however, ultimately undercuts the utility of “development” as a value that should have precedence in international legal protection. What degree or extent of development is “sufficient” before civil and political rights can be recognized and enforced? If it is asserted that states are the sole arbiters of their developmental models and policies, then necessarily, states therefore possess the sole discretion on the recognition and enforcement of “core” human rights norms. This line of

<sup>72</sup> Such as the respective Internal Security Acts of Malaysia and Singapore.

<sup>73</sup> Maslow’s hierarchy of needs theory is set out in his 1943 paper entitled “A Theory of Human Motivation”. Summary at: [https://www.ahpweb.org/articles/theory\\_human\\_motivation.html](https://www.ahpweb.org/articles/theory_human_motivation.html) (last visited 23 January 2009).

reasoning is in complete accord with the proposition that international law bears legitimacy only because states act (and sanction conduct) in pursuit of their self-interest.<sup>74</sup> However, while it has been observed that “states in the ordinary yet important run of their affairs generally observe international law,”<sup>75</sup> compliance as the “only” test for validity of international law has long been outmoded. Norms of international law arise from their breach as much as from their observance.<sup>76</sup> “Soft law” has also emerged and is also a subject of international compliance, under their fundamental importance as generating “expectations about the future behavior and attitudes of international actors, providing a measure of stability within the evolving system while still maintaining some flexibility.”<sup>77</sup> The legitimacy of international law (particularly international human rights law) cannot thus be reduced to the measure of subjective and arbitrary state implementation.

Further compounding the indeterminacy of the right to “development” is the proliferation of diverse economic development models and growth theories. From the broad spectrum of neo-Keynesian state interventionism and neoclassical *laissez-faire* economics, economists themselves dispute the determinants of growth, and the extent of state incursion, corporatism, and/or necessary interference with the individual’s basic civil and political freedoms in order to bolster growth rates and reduce income inequalities. The disparity in the models for public governance, state authority, and individual freedoms was further highlighted in the literature explaining the implosion of many Asian economies during the 1997 Asian financial crisis.

Among relatively recent development theories is the categorization of the individual’s basic civil and political rights as an **endogenous** determinant of development. In “Development as Freedom,”<sup>78</sup> Nobel Prize-winning economist Amartya Sen conceptualizes “development” as “capabilities,” or substantive human freedoms. Civil and political freedoms are deemed constitutive of development, since a liberal democracy is both a means and an end in itself. Civil and political rights are pivotal to “conceptualizing” economic needs, enabling individuals to have constructive inputs in shaping values and norms. From this perspective, the supposed “tradeoff” between development and “core” non-derogable human rights norms is at best, illusory.

<sup>74</sup> Jack L. Goldsmith & Eric A. Posner, *The Limits of International Law* (2005), 23-26.

<sup>75</sup> Stephen M. Schwebel, *Justice in International Law* (1994), 598-607.

<sup>76</sup> *North Sea Continental Shelf Cases*, I.C.J. Reports (1969), 1-260.

<sup>77</sup> Dinah Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (2000), 23.

<sup>78</sup> Amartya Sen, *Development as Freedom* (2000), 54-86.

Regardless of the growth and development theory subscribed to by a state, there is weak rational value in the “right to development” as a normative exception to “core” non-derogable human rights norms. As discussed in Part II, the *telos* of “core” non-derogable human rights norms is the defence of the individual’s “personhood.” It is due to states’ general agreement in the conception of this “good” that these norms have attained the status of *jus cogens* (and where the correspondence applies, obligations *erga omnes*). The empirical uncertainty of “development” substantiates the threat of statist arbitrariness and coercion upon the conception of the “good,” or the individual’s “personhood.” If Sen’s definition of “development” holds, then “core” human rights norms should not be seen as an obstacle, but as necessary instruments to advance states’ conception of the “good,” or the individual’s “personhood.”

## II. Causal Nebulousness

An argument privileging “development” to the exclusion of “core” human rights norms implies that the recognition and enforcement of these norms impedes development. This is not an easy causality to draw or prove. Citing the scarcity (and conflicting results) of quantitative and qualitative studies on the negative proportionality between recognition and enforcement of human rights norms and economic development, scholars advocate “rule of law” as a substitute analytical focus.<sup>79</sup> It is difficult to assign variables for empirically measuring already indeterminate concepts such as “development,” “degree of recognition of “core” human rights norms,” and “level of enforcement” of such norms, without falling prey to the criticism of partiality.<sup>80</sup>

The nebulousness does not end there. More critically, recent literature considers a **reverse causal relationship** between development and human rights enforcement. Instead of human rights enforcement impeding economic development, the proposition advanced is that the violation of human rights is a causal determinant of poverty.<sup>81</sup> “Core” human rights norms are deemed to **form part of human capital**,<sup>82</sup> and are thus

<sup>79</sup> Charter of the United Nations, Chapter I, Article 1(3) (*supra* note 11).

<sup>80</sup> See *Sally Engle Merry*, *Anthropology and Activism: Researching Human Rights Across Porous Boundaries*, *Political & Legal Anthropology Review*, 28 (2005) 2, 240-258, 245-246.

<sup>81</sup> *Alfredo Sfeir-Younis*, *The Violation of Human Rights as a Determinant of Poverty*, *International Social Science Journal*, 56 (2004) 180, 321-325.

<sup>82</sup> See *Elhanan Helpman*, *The Mystery of Economic Growth* (2004), 111-142.

inextricably linked to the processes of wealth creation, poverty alleviation, and developmental effectiveness:

“[...]those whose human rights are violated, or have no possibilities to realize them (i.e. **whose human rights are denied even if not deliberately violated**), are severely handicapped in the whole process of capital accumulation. Absence of respect for human rights means social exclusion, loss of individual and social identity, and marginalization. This, in turn, means little or no access to productive assets. Lack of capital both constitutes poverty and entrenches it. Available capital, conversely, is a crucial means of getting out of poverty.

[...]

In recent decades, much focus has been placed on poor people and their ability to accumulate capital – physical (e.g. infrastructure), financial (e.g. credit), and human (e.g. education). Much less attention has been paid to how the poor accumulate other forms of capital, in particular natural, institutional, and cultural capital. The focus here is on institutional capital, which includes a number of components (e.g. organizational arrangements, the role of different actors, incentive structures and instruments, participation, empowerment, governance), and the objective is to emphasize the importance of the normative and rule-making aspects of development. The key claim is indeed that rule-making must become an intervening and endogenous variable in the design and implementation of poverty alleviation programs rather than a residual to the manipulation of other forms of capital.

[...]

Human rights are a form of capital endowment that the poor need to accumulate, within the context of all the forms of capital listed above, in order to escape poverty. This perspective offers a common framework to assess how violations of human rights – which limit directly the ability of poor people to accumulate “human rights capital” as well as indirectly limiting their access to other forms of capital – become a major determinant of entrenched poverty.”

Thus, if the causality between enforcement of “core” human rights norms and development is nebulous at best, and even supportive of abuse at

worst, there is no value in privileging the “right to development,” exception as a normative standard asserted against core non-derogable human rights norms.

As has been shown, there are additional objections (based on empirical uncertainty and causal nebulosity) to permitting the use of the “right to development” as an exception to core human rights norms. The universality of these core human rights norms is based on states’ theoretical conception of the “good” – which is the promotion and protection of the individual’s “personhood.” “Development,” while itself a value, requires greater precision and proximity to the individual’s “personhood” than the core non-derogable human rights norms.

### E. The “Push and Pull” Effect of ASEAN’s “Internal” and “External” Spheres, and the “Equilibrium”-Imperative of Universalism of Core Human Rights Norms

Given the inherent weaknesses of the “culture” and “development” exceptions as normative standards against “core” human rights norms, there is no reason why the “new” ASEAN and its Member States under the ASEAN Charter should relapse into these timeworn justifications. More so, developments within and outside of ASEAN in its forty year history reflect an “internal” push and “external” pull towards universalizing these “core” human rights norms through recognition, codification, and enforcement in the Southeast Asian region.

#### I. The “Internal-Push”

ASEAN’s “internal” sphere, forty years from its inception, demonstrates that the *opinio juris* of its Member States is towards recognition and observance of these “core” human rights norms. The majority, if not all of its Member States, have, in recent years, either signed, ratified, or acceded to the fundamental treaties and conventions codifying the “core” human rights norms on civil and political rights and the *jus cogens* prohibitions against torture, crimes against humanity, slavery, genocide, racial discrimination, and other egregious human rights

violations.<sup>83</sup> Vietnam, Cambodia, Laos, and the Philippines, have already ratified the Apartheid Convention. All ASEAN Member States have ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC). Cambodia, Indonesia, Laos, the Philippines, Thailand, and Vietnam have all ratified the Convention on the Elimination of Racial Discrimination (CERD). Cambodia, Laos, Malaysia, Myanmar, the Philippines, Singapore, and Vietnam have likewise ratified the Genocide Convention. The ICCPR has been ratified by Indonesia, Laos, the Philippines, Thailand, and Vietnam. In the last decade, the Torture Convention has been ratified by Indonesia, and the Philippines. Alongside these developments, it may be noted that ASEAN's most significant regional dialogue partners, China and India, have likewise ratified these international instruments. Clearly, even states most vocal about relying on the "culture" and "development" justifications, such as China and India, have by and large, evinced similar recognition of these "core" human rights norms. These acts of state recognition lend force to the obligatory character of these norms.

Notably, all ASEAN Member States are also parties to the UN Charter, which mandates human rights protection and promotion as one of its fundamental purposes. Consistent with ASEAN Member States' obligations under the UN Charter, ASEAN's own declarations and communiqués<sup>84</sup> among Member States likewise manifest the growing *opinio juris* in favour of "universalizing" "core" human rights norms through recognition and enforcement. Thus, both from the individual perspectives of Member States and the institutional perspective of ASEAN, the record of the last forty years shows a convergence towards recognition and enforcement of "core" human rights norms. The formal inclusion of the

<sup>83</sup> See <http://www.unhcr.org> (last visited 18 August 2008) for the status of ASEAN Member States' signatures, ratifications and accessions to the "core" human rights treaties on civil and political rights.

<sup>84</sup> Joint Communique of the 26<sup>th</sup> ASEAN Ministerial Meeting, Singapore, 23-24 July 1993; Joint Communique of the 31<sup>st</sup> ASEAN Ministerial Meeting, Manila, 24-25 July 1998; Joint Communique of the 32<sup>nd</sup> ASEAN Ministerial Meeting, Singapore, 23-24 July 1999; Joint Communique of the 33<sup>d</sup> ASEAN Ministerial Meeting, Bangkok, 24-25 July 2000; Joint Communique of the 34<sup>th</sup> ASEAN Ministerial Meeting, Hanoi, 23-24 July 2001; Joint Communique of the 35<sup>th</sup> ASEAN Ministerial Meeting, Bandar Seri Begawan, 29-30 July 2002; Joint Communique of the 36<sup>th</sup> ASEAN Ministerial Meeting, Phnom Penh, 16-17 June 2003; Joint Communique of the 37<sup>th</sup> ASEAN Ministerial Meeting, Jakarta, 29 June – 2 July 2004; Hanoi Plan of Action; ASEAN Vision 2020; ASEAN Plan of Action to Combat Transnational Crime.



recognition and protection of these norms in the language of the ASEAN Charter crystallizes the “internal push” towards universalizing these norms in the Southeast Asian region.

## II. The “External Pull”

At the same time, ASEAN’s forty-year history cannot be read in isolation from developments in the international sphere. New customary norms of international law have also emerged through the development of more international enforcement mechanisms for human rights protection from *ad hoc* offices, international organizations, fact-finding, and other permutations of negotiated mediation,<sup>85</sup> to the stricter form of prosecutions in the various international criminal tribunals (seen in the jurisprudence of Nuremberg and the International Military Tribunals, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and now the International Criminal Court), violations of “core” human rights norms on civil and political rights and the *jus cogens* prohibitions on torture, crimes against humanity, war crimes, genocide, slavery, racial discrimination, and other egregious violations of international human rights and humanitarian law. There is considerable support for the view that states have the international legal obligation to reject impunity for egregious violations of “core” human rights norms, as stated, for example, in UN Security Council Resolution 1674, which “reaffirms that ending impunity is essential if a society in conflict or recovering from conflict is to come to terms with past abuses committed against civilians affected by armed conflict and to prevent future such abuses...” and “emphasizes in this context the responsibility of States to comply with their relevant obligations to end impunity and to prosecute those responsible for war crimes, genocide, crimes against humanity and serious violations of international humanitarian law...” as well as “calls on States...to take appropriate legislative, judicial and administrative measures to implement their obligations under instruments [of international humanitarian, human rights and refugee law].”<sup>86</sup>

The customary rejection of impunity finds expression in various state duties. These include, among others: 1) the duty to prosecute persons

<sup>85</sup> Dinah Shelton, *Remedies in International Human Rights Law* (2000), 137-182.

<sup>86</sup> UN Security Council Resolution 1674 (2006), S/RES/1674 (2006); 2005 World Summit Outcome, 24 October 2005, paras. 119-126 at: <http://daccessdds.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement> (last visited 26 September 2008).

committing serious international crimes and crimes against humanity;<sup>87</sup> 2) the duty to ensure that there is no “denial of justice” to persons residing or sojourning in state territory, due to “bad faith, the wilful neglect of duty, or an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency”;<sup>88</sup> and 3) the duty to protect the fundamental human right of all persons to an effective remedy.<sup>89</sup>

The customary norm rejecting impunity should therefore be read into the legal parameters of state conduct for ASEAN and its Member States. This is the “external pull” that now draws ASEAN and its Member States towards universalizing core human rights norms through the recognition and enforcement of these norms in the Southeast Asian region.

Considering the “internal push” and the “external pull” effects of spheres affecting ASEAN and its Member States, therefore, the explicit inclusion in the ASEAN Charter of human rights protection as among the fundamental purposes of ASEAN (and forty years after the “neutral” language of the Treaty of Amity and Cooperation and the Bangkok Declaration) expresses the convergence towards the “equilibrium-imperative” of universalizing “core” human rights norms. This is in itself a laudable departure from ASEAN’s silence in the last forty years, and reflects a political-ideological maturity and the mobilizing potential of ASEAN’s role as an international organization.

The inevitable convergence of ASEAN towards “universalizing” core human rights norms through their recognition, codification, and enforcement should not be inhibited by back-peddalling towards “cultural” and “developmental” exceptionalism. As previously shown, appeals to the “right to culture” and the “right to development” should be made cautiously (if at all), in view of their inherent weaknesses as normative standards.

<sup>87</sup> *Diane F. Orentlicher*, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, *Yale Law Journal* 100 (1991) 8, 2537-2615, 2593-2594.

<sup>88</sup> *Jan Paulsson*, *Denial of Justice in International Law* (2006), 68-69.

<sup>89</sup> Article 8 of the Universal Declaration of Human Rights; Article 2(3) of the International Covenant on Civil and Political Rights; Article 6 of the Convention on the Elimination of Racial Discrimination; Article 2(c) of the Convention on the Elimination of All Forms of Discrimination Against Women; Article 14 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment; Article 16 of the Convention on the Rights of the Child; Article 11(3) of the American Convention on Human Rights; Article 8 of the European Convention on Human Rights; Article 5 of the African Charter on Human and Peoples Rights; Articles 16(4) and 16(5) of the Convention Concerning Indigenous and Tribal Peoples in Independent Countries, ILO No. 69, 27 June 1989, 28 I.L.M. 1382.

Taken against the emergence of customary international law rejecting impunity, the “right to culture” and the “right to development” should be subject to strict judicial scrutiny standards (even an outright presumption against validity) before they are asserted to justify state derogations from “core” human rights norms.<sup>90</sup>

The “new” status of ASEAN as an international organization thus raises various questions on its separate responsibility as an international organization and the derivative responsibilities of its Member States. Considering that the ASEAN Charter mandates human rights protection and observance as one of ASEAN’s fundamental organizational purposes and vests the ASEAN Summit with the authority to make binding decisions on its members, it is submitted that ASEAN as a distinct international organization should bear the duty of observing core human rights norms and ensuring compliance by its Member States. While the new ASEAN does not assume the full form and structural complex of the European Union, ASEAN can nonetheless retain an analogous “margin of appreciation” in the recognition and enforcement of these norms within the framework of the new ASEAN Charter. Under the doctrine of margin of appreciation in the jurisprudence of the European Court of Human Rights, there is a realistic “judicial “self-restraint” in recognition of the obligation to respect, “within certain bounds, the cultural and ideological variety, and also the legal variety characteristic of Europe.”<sup>91</sup> ASEAN’s enduring principle of mutual respect for diversity among its Member States could be preserved, notwithstanding ASEAN’s new international obligations of rejecting impunity through ensuring recognition and enforcement of “core” human rights norms. The test for the governing institutions of ASEAN (specifically, the highest level of governance under the ASEAN Summit) is how and in what manner it will undertake this balancing test within the

<sup>90</sup> Which is not to say that the competing rights to culture and development should not figure in the discourse on human rights protection and observance by Southeast Asian governments. What I have tried to show, however, is that the traditional supremacist justifications for reliance on these rights are now timeworn in view of the strong international rejection of impunity for serious human rights violations. Conceivably, Southeast Asian states’ own practices, declarations, and express international obligations over the last forty years have themselves contributed to the development of the norm rejecting impunity. If militant or repressive Southeast Asian governments would seek exception from the observance of core international human rights norms under the new ASEAN Charter, they are now impelled by their ASEAN membership obligations to provide more rigorous theoretical and analytical foundations to justify non-compliance.

<sup>91</sup> *Steiner & Alston*, 854-856, (*supra* note 42).

framework of institutional competences and membership obligations under the ASEAN Charter.

## F. Conclusion

While ever mindful of diversity, ASEAN's new status and organizational purpose is ultimately, a choice to transcend the limitations of "culture" and "development" exceptionalism in favour of affirming states' theoretical conception of the "good" – the protection and enhancement of individual "personhood." It is a choice over forty years in the making, and is highly significant due to the region's deliberate move from loose and informal ties under developmental cooperation towards a more binding formal structure oriented towards international legal compliance.

In a region densely marked with diversity and resistance to express codification of civil and political rights, it is a significant development that the ASEAN Member States committed themselves to "promote and protect human rights and fundamental freedoms," "uphold the United Nations Charter and international law, including humanitarian law," and adhere "to the rule of law, good governance, the principles of democracy and constitutional government."<sup>92</sup> These undertakings are not mere hortatory platitudes, but indeed constitute binding international obligations upon ASEAN Member States.<sup>93</sup> Even more telling is the fact that a region with Member States emerging from (or still under) authoritarian or militaristic regimes has purposely expanded Member States' international obligations by expressly committing to "take all necessary measures, including the enactment of appropriate domestic legislation, to effectively implement the provisions of this Charter and to comply with all obligations of

<sup>92</sup> ASEAN Charter, Articles 1(7) and 2(i),(j), and (h).

<sup>93</sup> These norms satisfy the five necessary and sufficient conditions for the process-driven establishment of obligatory norms: 1) formulation and designation of a requirement as to behaviour in contingent circumstances; 2) an indication that that designation has been made by persons recognized as having the competence (authority/legitimate role) to perform that function and in accordance with procedures accepted as proper for that purpose; 3) an indication of the capacity and willingness of those concerned to make the designated requirement effective in fact; 4) the transmittal of the requirement to those to whom it is addressed (the target audience); and 5) the creation in the target audience of responses (both psychological and operational) which indicate that the designated requirement is regarded as authoritative and as likely to be complied with in the future to some substantial degree. See: *Oscar Schachter, Towards a Theory of International Obligation*", in *Koskenniemi*, 9-31 (*supra* note 59).

membership.”<sup>94</sup> The ASEAN Charter marks a decidedly universalist topography visible from Southeast Asia’s widened political space for public international discourse. Given ASEAN Member States’ near half-century experience in consensus based decision making, their willingness to modify this mode of decision making (by permitting the ASEAN Summit to “decide on how a decision should be made” in the event of failure to reach a consensus) is reason enough for some optimism on the possibility of approximating procedural (through a rational consensus), as well as contextual universalism.<sup>95</sup>

It would also appear that ASEAN’s evolution from cooperation to integration augurs well for the realization of a genuine Habermasian rational consensus on democratic commitments. Notably, ASEAN’s forty year history of (informal) developmental cooperation itself paved the way for the arduous process of diplomatic and informal negotiations among ASEAN Member States (fuelled by initiatives among counterpart domestic representatives, interest groups and organizations within ASEAN Member States) – which led to the ASEAN Member States’ collective decision to abide by, and participate in, democratic international lawmaking under the ASEAN Charter.<sup>96</sup> The widespread involvement of diplomats, scholars, lawyers, bureaucrats, interest groups and community organizations in the creation of the integrated ASEAN is itself a triumph for liberal internationalism in the region.<sup>97</sup>

Certainly, however, optimism toward structural progress must be tempered with realistic concerns. Among various regional polities throughout the world, it cannot be said that Southeast Asia is the model of international human rights observance and compliance.<sup>98</sup> Critics have

<sup>94</sup> ASEAN Charter, Chapter III, Article 5(2).

<sup>95</sup> See *Alessandro Ferrara*, Universalisms: Procedural, Contextualist, and Prudential, in: *David Rasmussen* (ed.). *Universalism v. Communitarianism: Contemporary Debates in Ethics* (1995), 11-38.

<sup>96</sup> Considering the relative history of other international organizations, ASEAN’s emergence as a formally integrated regional organization after forty years speaks volumes about a shared history of “bureaucratic sclerosis” with other international organizations; *Jose E. Alvarez*, *International Organizations: Then and Now*, *American Journal of International Law* 100 (2006) 2, 324-347, 346.

<sup>97</sup> See *Anne Marie Slaughter*, *A Liberal Theory of International Law*, *American Society of International Law Proceedings* 94 (2000) 240-248, 242-246.

<sup>98</sup> For a synthesized report on Southeast Asian human rights developments, including, among others, extrajudicial killings and enforced disappearances in the Philippines, infringement of suffrage and electoral rights in Malaysia and Cambodia, suppression of press freedoms and the right to expression in Myanmar, see [http://www.hrw.org/doc?t=southeast\\_asia](http://www.hrw.org/doc?t=southeast_asia) (last visited 31 August 2008).

assailed the ASEAN Charter for failing to concretely provide for a human rights tribunals or bodies. The ASEAN Charter only provides for an executory provision where, “[i]n 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,” leaving the terms of reference for such a body to be determined in a forthcoming ASEAN Foreign Ministers Meeting to be convened after the entry into force of the ASEAN Charter.<sup>99</sup> There is much left to be done, articulated and resolved, in light of the shared and unique experience of religio-political heterogeneity in Southeast Asia.

At the very least, for the ASEAN region and its constituents, the scholarly debate has finally moved on from the parochialism of “Asian values versus Western imperialism.” A newly integrated, officially institutionalized, and rules based ASEAN, with the specific international obligations assumed by its Member States, consciously evinces a universalist design in its Charter framework. Given the internal and external spheres of ASEAN politics, we can hardly expect otherwise. The new ASEAN Charter should be viewed as the tangible culmination of its individual Member States’ practice and *opinio juris* on universal norms, a move to political-economic integration that demonstrates universalist consciousness of human dignity, and a growing openness to the architecture of global citizenship<sup>100</sup> in international human rights law.

<sup>99</sup> ASEAN Charter, Chapter IV (Organs), Articles 14(1) and 14(2).

<sup>100</sup> See for an analysis of the international development of common legal principles *Sabino Cassese*, *The Globalization of Law*, *New York University Journal of International Law and Politics* 37 (2005) 4, 973-993.