

# Enlarging the Space for the People: Whither Human Rights and Governance in ASEAN?

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Formed in 1967, the Association of Southeast Asian Nations (ASEAN) now comprises 10 countries: Brunei Darussalam, Cambodia, Indonesia, the Lao People's Democratic Republic (henceforth, Lao PDR), Malaysia, Myanmar, Singapore, Thailand, the Philippines, and Viet Nam.<sup>1</sup> Until the 1990s, several of these countries were sworn enemies, engaged in wars against one another. Since then, ASEAN has helped resolve differences and brought peace to the region. The maxim 'Unity in Diversity' is thus apt to describe this regional organisation.

From the perspective of human rights and governance, the region is one of major contrasts. Several of its member countries are non-democratic while some democratic proponents walk a political tightrope. It hosts one of the world's biggest democracies with a majority Muslim population. Despite the tranquil haven found in this setting, violence and opacity still pervade parts of the region. How people are governed varies greatly, with centralisation still expansive in parts of the region. While civil society is allowed much space in some member countries, the space for participation in others is extremely limited and shrinking. Given the regional order now pervading through ASEAN, in the sense that peace between the member nations has come to the region, are human rights and governance actually institutionalised as part of that regional order? Even if these notions are accepted and legitimised in form by ASEAN, are they integrated substantively in practice, particularly from the angle of effective implementation and people-based centrality?

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<sup>1</sup> For background, see A. Broinowski (ed.) (1982), *Understanding ASEAN*. Hong Kong: Macmillan; V. Muntarbhorn (1997), *Legal Cooperation among ASEAN Countries*. Bangkok: Institute of Security and International Studies; S. Siddique and S. Kumar (compilers) (2003), *The 2nd ASEAN Reader*. Singapore: Institute of Southeast Asian Studies.

## Legitimation

In its origins, ASEAN was not a human rights organisation but a political entity. Neither human rights and democracy nor good governance (a possible euphemism for democracy and accountable exercise of power, aka lack of corruption) was mentioned in the 1967 Bangkok Declaration that established ASEAN.<sup>2</sup> Thus, from the outset, expectations for human rights and governance through ASEAN as a regional organisation have been modest. From the 1990s, the entity has burgeoned into a free trade area of extensive economic cooperation and has developed into an ASEAN community, consisting of three communities: the ASEAN Political–Security Community, the ASEAN Economic Community, and the ASEAN Socio-Cultural Community (ASEAN, 2009a; 2009b; 2009c) (See further: R. Severino, 2006).

On a salutary note, human rights, democracy, and good governance have become increasingly part and parcel of the ASEAN narrative. In form, these notions have become legitimised and, in a sense, institutionalised in the region. The ASEAN Charter 2007 refers explicitly to human rights, democracy, rule of law, and good governance as key principles of ASEAN, and calls for the establishment of an ASEAN human rights body (ASEAN, 2008, Article 14). This has been coupled with various blueprints and plans of action. The current projection is to direct the region with the ASEAN Economic Community Blueprint 2025 (ASEAN, 2015), after the realisation of the ASEAN Community in 2015, as underlined by the Kuala Lumpur Declaration on ASEAN 2025: Forging Ahead Together.<sup>3</sup>

The region as a whole agrees to abide by the Universal Declaration of Human Rights 1948, the Vienna Declaration and Programme of Action of the World Conference on Human Rights 1993, and the international human rights treaties to which ASEAN countries are parties.<sup>4</sup> Currently, the three (out of nine) core human rights treaties to which all 10 countries are parties are the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child, and the Convention on the Rights of Persons with Disabilities. All 10 countries have participated in the United Nations (UN) Human Rights Council's Universal Periodic Review and have opened the door to a wide array of recommendations from other states on the

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<sup>2</sup> Ibid.

<sup>3</sup> [www.asean.org](http://www.asean.org) (accessed 25 October 2016).

<sup>4</sup> For the UN system of treaties and related matters, see: [www.ohchr.org](http://www.ohchr.org). See further Muntarbhorn (2013), *Unity in Connectivity? Evolving Human Rights Mechanisms in the ASEAN Region*. Leiden/Boston: Brill/Nijhoff.

needed human rights improvements, even in areas of the core human rights treaties they are not parties to.<sup>5</sup> All are committed to the Sustainable Development Goals initiated by the UN.<sup>6</sup>

In addition to the ASEAN Charter, ASEAN has begun to adopt instruments that have direct bearing on human rights in the region. In 2007, ASEAN adopted the Declaration on the Rights of Migrant Workers. In 2012, it adopted the ASEAN Human Rights Declaration (AHRD) (ASEAN, 2014). AHRD provides a list of rights to be promoted and protected, ranging from civil and political rights to economic, social, and cultural rights, with additional emphases on the right to development, the right to peace, and cooperation on human rights matters.

In 2015, ASEAN finalised the ASEAN Convention Against Trafficking in Persons, Especially Women and Children (ACTIP).<sup>7</sup> ACTIP is the first substantive treaty of ASEAN on a specific issue with human rights implications. While it is an anti-crime instrument, the elements of protection and recovery offered to victims invite a human-rights-oriented approach. The provisions of this regional convention parallel the multilateral UN Convention Against Transnational Organised Crime and its Protocol against human trafficking (The Palermo Protocol)<sup>8</sup>, underlining a broad definition of human trafficking based on ‘exploitation’, the need for criminalisation of trafficking, criminalisation of related money-laundering/obstruction of justice and corruption, possible universal jurisdiction, prevention measures, cross-border cooperation, protection of victims such as on victim identification, medical and other assistance, safety of return, effective law enforcement, confiscation of assets of culprits, and mutual legal assistance and cooperation. An action plan accompanies ACTIP and is complemented by a number of statements and declarations, especially the Kuala Lumpur Declaration on a People-Oriented, People-Centred ASEAN (2015), that highlight ASEAN as a rules-based, people-centred, people-oriented region.<sup>9</sup> This declaration lays down a programmatic approach that sees ASEAN as people-oriented and people-centred, the former description implying a top-down approach and the latter implying a bottom-up one. Regarding the ASEAN Political–Security Community, it advocates promotion of democracy, rule of law, good governance, and human rights promotion and protection, together with support for the ASEAN Inter-governmental Human Rights Commission (AICHR), paralleled by enhancement of judicial systems, and integrity in the public

<sup>5</sup> Ibid. See also UN (2014), *The Core International Human Rights Treaties*. New York, NY/Geneva, Switzerland: UN OHCHR.

<sup>6</sup> [www.un.org](http://www.un.org)

<sup>7</sup> [www.asean.org](http://www.asean.org) (accessed 25 October 2016).

<sup>8</sup> [www.unodc.org](http://www.unodc.org) (accessed 25 October 2016).

<sup>9</sup> [www.asean.org](http://www.asean.org) (accessed 25 October 2016).

sector. In regard to the ASEAN Economic Community is the call to support more small and medium-scale enterprises, reduce disaster risk, sustain development, and protect the environment. The ASEAN Socio-Cultural Community emphasises responding to the rights of women, children, youth, the elderly, migrant workers, indigenous peoples, persons with disabilities, and ethnic minorities, while narrowing the development gap. Concrete activities include people-to-people contacts from a young age, cooperation on disaster management, and regional student and academic exchange and mobility.

In 2016, the Chairman's Statement at the Vientiane Summit of ASEAN Heads of Government singled out some activities with implications for enlarging the space for the people in a variety of fields through these declarations: ASEAN Declaration on One ASEAN, One Response: ASEAN Responding to Disasters as One in the Region and Outside the Region; Vientiane Declaration on Transition from Informal Employment to Formal Employment Towards Decent Work Promotion in ASEAN; ASEAN Declaration on Strengthening Education for Out-of-School Children and Youth; ASEAN Joint Statement on Climate Change to the Twenty Second Session of the Conference of the Parties to the United Nations Framework Convention on Climate Change; and ASEAN Declaration of Commitment on HIV/AIDS: Fast Tracking and Sustaining HIV and AIDS Response to End the Epidemic by 2030 (ASEAN, 2016).

Yet, the legitimisation of human rights and good governance in the region are qualified. AHRD is a key example of human rights being instituted in the region in a limited manner. While it contains some innovative elements, such as the call to protect persons with HIV/AIDS, and advocacy of the right to development and peace, AHRD has been heavily criticised as not being congruent with international standards.<sup>10</sup> The stumbling blocks include the appearance of regional particularities that have the effect of undermining universally recognised human rights. These include the overt mention of 'duties/obligations' (of persons) instead of paramount emphasis on human rights; reference to 'national and regional context' that might override universal standards, with components of cultural relativism; omission of various internationally guaranteed rights, particularly the right to freedom of association; broad limitations on human rights in the guise of 'morality'; emphasis on 'non-confrontation' that interplays with the ASEAN official attachment to national sovereignty and the claim that human rights-related action should not interfere in the internal affairs of states; and subjecting human rights, particularly the right to seek asylum, to national laws (bearing in mind that most ASEAN states are not parties to the international refugee agreements).

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<sup>10</sup> For a critique, see The Solidarity for Asian People's Advocacy Task Force on ASEAN and Human Rights (2014).

Problems concerning the text of AHRD are borne out by the fact that the ASEAN leaders had to issue the Phnom Penh Statement in 2012 to accompany AHRD, underlining that its implementation has to be in accordance with international standards and a reaffirmation of the Universal Declaration of Human Rights, the Vienna documents, and the human rights treaties (instruments) to which ASEAN countries are parties (ASEAN, 2014). Ironically, AHRD can never be cited alone – it must be coupled with the Phnom Penh Statement.

Behind AHRD lies a degree of ambivalence amongst some official circles that control the reins of power. First, while the notion of human rights is anchored internationally on the concept of human rights' universality, premised on universal/international standards as the minimum standards below which no country should stoop, the declaration implies that if there is a conflict between international standards and regional or national policies or practices, the latter should prevail.<sup>11</sup>

Second, while internationally the principle that human rights are indivisible in the sense that civil, political, economic, social, and cultural rights should be promoted and protected in tandem (without selectivity), many ASEAN countries aim to promote and protect economic, social, and cultural rights, such as the right to an adequate standard of living and the right to education, rather than civil and political rights, such as freedom of expression and peaceful assembly that are at the heart of democracy and good governance.<sup>12</sup>

Third, there remains strong advocacy of state sovereignty, national security, and the principle of non-interference in the internal affairs of a state. Conservative quarters also claim that human rights advocacy (by others) is in breach of that principle. This contradicts the international position that human rights advocacy to protect victims is part of international jurisdiction and cannot be considered to be interference in the internal affairs of a state.<sup>13</sup>

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<sup>11</sup> The difficulty is exemplified by the wording in AHRD: '7. All human rights are universal, indivisible, interdependent and interrelated. All human rights and fundamental freedoms in this Declaration must be treated in a fair and equal manner, on the same footing and with the same emphasis. At the same time, the realisation of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds.'

<sup>12</sup> Human rights indivisibility is discussed in major human rights texts, such as Steiner, Alston, and Goodman (2008).

<sup>13</sup> www.ohchr.org. See further: Muntarbhorn (2013), pp. 183–89.

Fourth, a preferred emphasis on a cooperative and non-confrontational approach in human rights and other matters, partly influenced by the consensus-based decision-making of ASEAN, permeates the actions on human rights.<sup>14</sup> The tendency to look for a cooperative kind of programming avoids complaints and communications that might be linked with human rights violations and country situations. This also has bearing on (the lack of) participatory space, transparency, and accountability that are the backbone of good governance.

Fifth, in the march to draft more instruments in ASEAN, are cases of backtracking from international standards. For example, while ACTIP is welcome, it omits provisions on refugee protection found in international treaties on the issue, particularly safeguards for international refugee protection standards.<sup>15</sup>

## Integration

To be fair, integrating human rights and good governance into the ASEAN setting is taking place to some extent, but it remains a step-by-step affair that is still distant from effective implementation and people-based centrality geared to substantive institutionalisation. This incrementalism is seen as follows.

One angle of integration is the establishment of various regional human rights mechanisms.<sup>16</sup> AICHR, the offspring of the ASEAN Charter, has two siblings: the ASEAN Commission on the Rights of Women and Children and the ASEAN Committee on the Rights of Migrant Workers. The AICHR's mandate is to promote and protect human rights and fundamental freedoms to complement the building of the ASEAN Community.<sup>17</sup> Many meetings and seminars have been held for this. A study on corporate social responsibility was completed under the auspices of AICHR in 2015, in addition to an earlier interest to study the right to peace. It has also agreed on a new thematic study on women affected by natural disasters. At its meeting in February 2016

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<sup>14</sup> On the consensus issue, see further Siddique and Kumar (compilers) (2003).

<sup>15</sup> 'Saving clause

1. Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.
2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are victims of trafficking in persons. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.'

<sup>16</sup> For details, see Muntarhorn (2013).

<sup>17</sup> [www.aichr.org](http://www.aichr.org)

in Vientiane, AICHR singled out various issues on which to focus: right to health; right to education; right to employment for persons with disabilities; seminars on the promotion of corporate social responsibility; and annual consultation on a human rights-based approach in the implementation of the ASEAN Convention Against Trafficking in Persons, Especially Women and Children and the ASEAN Plan of Action Against Trafficking in Persons, Especially Women and Children, the ASEAN Forum on Media and Human Rights, and the ASEAN Youth Debates on human rights.<sup>18</sup> A key transversal issue is how to mainstream human rights across all pillars of ASEAN. Its latest action plan (2016–2020) targets the following issues for study: migration, trafficking particularly of women and children, women and children in conflicts and disasters, juvenile justice, right to information in criminal justice, right to health, right to life, right to education, right to peace, legal aid, and freedom of religion and belief.<sup>19</sup>

In the meantime, the ASEAN Commission on the Rights of Women and Children's mandate is to concentrate on the promotion and protection of the rights of women and children.<sup>20</sup> Its recent emphasis has been to counter violence against women and children, and it has evolved a plan of action on this front. It has also cooperated with the UN on this issue. The ASEAN Committee on the Rights of Migrant Workers' mandate is even more modest.<sup>21</sup> It is more of a bureaucratic committee represented by members from the labour ministries of the respective ASEAN states, principally to draft a new instrument on the rights of migrant workers. In reality, this is a difficult challenge since several countries are hesitant to guarantee rights for migrant workers and their families.

While these mechanisms help to some extent to integrate human rights into the ASEAN region, their mandates and functions are currently more geared to the promotion of human rights (e.g. seminars, education, and research studies) than the protection of human rights. These mechanisms do not have the power to receive complaints, address country situations, offer redress, and call for accountability. The 2015 review of their mandates delved into formal (bureaucratic) matters by setting up a human rights unit

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<sup>18</sup> [www.asean.org](http://www.asean.org) (accessed 11 October 2016).

<sup>19</sup> [www.aichr.org](http://www.aichr.org)

Its latest action plan 2016–2020 targets the following, amongst others:

1. Develop more ASEAN instruments after the AHRD adoption;
2. Enhance public awareness of human rights, such as via roadshows on AHRD and AICHR;
3. Promote capacity-building, such as through training programmes;
4. Promote implementation of ASEAN instruments on human rights, such as through conferencing and more educational access by children with disabilities;
5. Engage in dialogue and consultation with other ASEAN bodies and entities associated with ASEAN, including civil society organizations and other stakeholders, as provided for in Chapter V of the ASEAN Charter, such as in regard to the AHRD.

<sup>20</sup> [asean.org](http://asean.org) (per email of Dr Pons, 6 May).

<sup>21</sup> For details, see Muntarbhorn (2013).

to service AICHR at the ASEAN Secretariat in Jakarta and did not expand the mandates substantively to strengthen human rights protection. The trend of these mechanisms is to concentrate in cooperative programming on the promotion of rights pertaining to various groups, such as women, children, persons with disabilities, and victims of natural disasters (Muntarbhorn, 2016).

From the perspective of space for the people, while the groundwork is provided for to some extent by ASEAN instruments such as the Kuala Lumpur Declaration on a People-Oriented, People-Centred ASEAN, the reality as advocated by civil society suggests the contrary. Precisely because the latter felt that the space for the people in the region was/is shrinking, AICHR opted in 2016 to organise the annual ASEAN civil society forum in Timor-Leste rather than in an ASEAN country as done previously.<sup>22</sup>

This interlinks appropriately with the issue of access by civil society to ASEAN itself in general and to the ASEAN human rights mechanisms more particularly. It should be noted that ASEAN already adopted in 2012 the Guidelines on Accreditation of Civil Society Organisations to accredit organisations confined to ASEAN nationals that would help promote the ‘development of a people-oriented ASEAN Community’ (ASEAN, 2016b). The accredited organisations now include the ASEAN Law Association and the ASEAN Law Students’ Association. While they could deal tangentially with human rights, they are not directly human rights organisations. In 2015, AICHR adopted the Guidelines on AICHR’s Relations with Civil Society Organisations for engagement with civil society organisations dealing with human rights and their accreditation.<sup>23</sup> In Article 4 of the guidelines, civil society organisation is defined as

... the association of persons, natural or juridical, that is non-profit and non-governmental in nature, which are organised voluntarily to promote, strengthen and help realize the aims and objectives of ASEAN activities and cooperation in the promotion and protection of human rights’.<sup>24</sup> The criteria for assessing eligibility are quite demanding, as per Article 8, including

- a. Abide by and respect the principles and purposes of the ASEAN Charter, ASEAN Human Rights Declaration (AHRD) and the Phnom Penh Statement on the Adoption of the AHRD and the Terms of Reference of the AICHR...;

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<sup>22</sup> ‘Expanding People’s Solidarity for a Just and Inclusive ASEAN Community: ASEAN Civil Society Conference (ACSC)/ ASEAN People’s Forum (APF) 2016 – CSO Statement’. <http://aseanpeople.org/> (accessed 11 October 2016).

<sup>23</sup> [www.aichr.org](http://www.aichr.org) (accessed 11 October 2016).

<sup>24</sup> Ibid.



- d. Have been in existence for at least two years with a legally established entity in one of the ASEAN Member States, appropriate mechanisms of accountability and democratic and transparent decision-making processes;
- e. Provide copies of their constitution/charter to the ASEAN Secretariat including a copy of their registration papers/proof of existence;
- f. Provide a list of members of the governing bodies and their nationalities;
- g. Provide a copy of the most recent financial statement and annual report, including a statement whether they receive financial support, direct or indirect from a Government...<sup>25</sup>

The application will then be assessed by a screening panel of three members, which may consult the ASEAN sectoral bodies and the Committee of Permanent Representatives to ASEAN. Some civil society organisations, such as Maruah from Singapore, have now been accredited. This will perhaps open the door to more access by civil society organisations to AICHR, inviting some space for the voices of the general public. This should also pave the way for similar openings in regard to the other mechanisms. However, it remains to be seen whether the network of accredited organisations will have substantive impact on the work of AICHR, particularly with regard to more protection rather than promotion work. The preferred way is for the ASEAN mechanisms to provide at least one ‘open day’ annually to meet civil society organisations without the need for accreditation, to open up the space for civil society, particularly on protection issues.

As another stepping stone, the ASEAN mechanisms might be invited to introduce a Universal Period Review system for ASEAN to share experiences at the regional level while receiving inputs from civil society.<sup>26</sup> Yet, that entry point alone is not adequate. The real test of integration of human rights as well as good governance is through the quality of implementation measures, including human rights and governance sensitive laws, policies, practices, mechanisms, resources, information monitoring and data, education and capacity-building, provision of remedies and accountability measures, and an open process for public participation and reform. As the answer at the regional level at present is both nascent and incremental, the quest for channels of complaint,

<sup>25</sup> Ibid.

<sup>26</sup> The UPR is a multilateral system established by the UN Human Rights Council for peer review of states by other states in which all countries have participated (to date). However, the information shared comes from three sources: the state under review, the UN, and stakeholders (including civil society organisations or non-governmental organisations). The process leads to recommendations from the review process, which the state in question can accept or reject. The process provides some space for people to question the state under review through the information shared and the resultant recommendations. (See further: [www.ohchr.org](http://www.ohchr.org)) It is open to debate whether a similar system should be adopted at the regional level.

investigations, remedies, and accountability has to be explored at the national level, and where there is no remedy yet at that level, the search has to reach higher to the international/multilateral level, such as the UN.

Importantly, in five ASEAN countries today (Indonesia, Malaysia, Myanmar, the Philippines, and Thailand) are mechanisms in the form of national human rights commissions that can receive complaints, undertake investigations, and call for remedies and accountability (Muntarbhorn, 2013, Chapter 2). Also, all ASEAN countries have courts and other channels for receiving grievances, although access and quality of decision-making vary per setting. Yet, there remains a degree of opacity that counters the quest for good governance, compounded by extensive corruption in some circles.

Therefore, where the national setting is unable or unwilling to protect human rights and ensure good governance, it is important to access also the international system available to fill in gaps.<sup>27</sup> This includes the human rights treaties referred to above, all of which have monitoring mechanisms in the form of human rights committees, Universal Period Review, and the variety of international monitors set up by the UN known as Special Procedures, such as the Special Rapporteurs on Myanmar and on Cambodia, together with UN presences in the region. In this context, intriguingly, the most challenging mechanism for good governance and human rights in the ASEAN region is possibly the Khmer Rouge tribunal, which establishes standards against the more egregious forms of human rights violations such as genocide and crimes against humanity.<sup>28</sup> Of course, its mandate is based on a compromise between the UN and Cambodia, and is limited to a single country and a particular period of history. However, its very presence impels others to at least ask the question: whether action against impunity if serious violations exist in the region, especially in the absence of a national remedy?

From the perspective of human rights and good governance, the challenge to the region is to identify and/or establish a variety of checks-and-balances against abuse of power as well as to promote good governance together with human rights protection at national, regional, and international levels. There is more room for human rights institutions and participatory processes at the national level (such as good courts, human rights commissions, and a vigilant civil society). The regional mechanisms need to have more proactive mandates that can receive complaints, address country situations, initiate investigations, and advocate remedies and accountability.

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<sup>27</sup> [www.ohchr.org](http://www.ohchr.org)

<sup>28</sup> <https://www.eccc.gov.kh/en> (accessed 25 October 2016).

What of an ASEAN Parliament and an ASEAN Court of Justice in the future?<sup>29</sup>

Where there are protection gaps nationally and regionally, there needs to be recourse to the international setting. This can be improved by means of more ratification and implementation of the core human rights treaties, more access to the Statute of the International Criminal Court,<sup>30</sup> more leverage through Universal Period Review, and more access to the UN Special Procedures, related complaints mechanisms, and UN presences in the region and beyond.

Finally, it should not be forgotten that some of the preferred next steps are already laid out in the AEC Blueprint 2025 (ASEAN, 2015), and they invite effective implementation. These include human rights-sensitive domestic laws and related enforcement, more ratification of human right treaties, fuller use of Universal Period Review, strengthening of ASEAN's human rights mechanisms, and human rights education. To these can be added the need to reform substandard laws, policies, and practices such as the overuse of national security laws to curb dissent, and the presence of discrimination against various ethnic groups. Meanwhile, those blueprints also open the door to more actions on good governance, including education, skills development, corporate social responsibility, e-services to open up government, and the adoption of benchmarks for performance. These need to be coupled with the advent of more democracy in the region, together with free and fair elections, multi-party system, and respect for the totality of human rights, not least political rights such as freedom of expression and lawful assembly.

In conclusion, 50 years after its formation, ASEAN can be lauded for personifying a regional order based on peace amongst its member states. However, the challenge is to advance further as a caring community and a community of caring communities, less in form and more in substance. Only when the pillar of people's participation and people-based centrality anchored on human rights and good governance, alias democracy, is truly embedded in the region can ASEAN claim to have founded a dynamic regional architecture beyond the pedestals of an inter-governmental framework.

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<sup>29</sup> Currently, the ASEAN Inter-Parliamentary Assembly, drawn from parliamentarians of the ASEAN region, interfaces with ASEAN but it is not yet an official organ of ASEAN. See: [www.aipasecretariat.org](http://www.aipasecretariat.org)

<sup>30</sup> See further: [www.icc-cpi.int/](http://www.icc-cpi.int/)

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