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HUMAN RIGHTS IN ASEAN: A CATHOLIC CRITIQUE
OF THE HUMAN RIGHT MECHANISMS
IN THE ASSOCIATION OF THE SOUTHEAST ASIAN
NATION (ASEAN)¹

*D. Brian Scarnecchia*²

ABSTRACT

This article considers the history and progress of human rights mechanisms in the Association of Southeast Asian Nations (ASEAN) in the light of Catholic social teaching and concludes that only an objective understanding of human rights can provide a sound basis for the culture of peace and integral human development. The two dangers facing ASEAN human rights mechanisms are 1) the peril of legitimizing through ineffective action the human rights violations of its rogue member states, while 2) at the same time effectively imposing post-modern Western ideological dis-values under the guise of human rights upon all its member states. Nongovernmental organizations (NGOs) of Catholic inspiration working in this region of the world must warn of these twin dangers.

INTRODUCTION

Christ commissioned his disciples to go out and baptize and make disciples of all nations.³ Christ's Great Commission entails bringing the light of the Gospel to those hungry for hope and faith, which gives meaning to life, human suffering, and death. For many, this Gospel light will result in conversion, baptism, and confession of faith in Jesus Christ. Christ also said the poor we will have with us always.⁴ Certainly, included among the poor, are those who do not believe in Christ. For those who are not baptized, the

¹ This article, slightly modified, was first presented as a paper for the conference on *The Foundation of Human Rights: Catholic Contributions*, co-sponsored by Ave Maria School of Law, Ave Maria University, and Sacred Heart Seminary (Ave Maria, FL, Mar. 3–4, 2011).

² D. Brian Scarnecchia, J.D.

³ *Mark* 16:15; *Matthew* 28:19–20.

⁴ *Matthew* 26:11; *Mark* 14:7; *John* 12:8.

Great Commission of Christ is meant to affect *Pax Christi*, the reign of the peace of Christ, among all nations.⁵

A great European, Carol Cardinal Wojtyla, upon completing an extended visit to the United States just before returning to his native Poland, was quoted in the *New York Times* on November 9, 1976 to have said: “We are now facing the final confrontation between the Church and the anti-church, of the Gospel and the anti-Gospel.” Later, as Pope John Paul II, he described the times in which we live as an “anti-civilization”⁶ characterized by a commodification of the human person and a fixation upon all that frustrates and withers human life. It is composed, he said, of various programs backed by powerful resources which aim at breaking down the natural family and glamorizes irregular or counterfeit family structures.⁷ Like the Manicheans of thirteen century Europe, today’s “neo-Manicheans”⁸ boldly proclaim that any sex act is good, provided that it is promiscuous, unnatural or infertile. Many powerful international organizations and NGOs use this anti- Gospel as a weapon to implode the fertility of the poor and to wreck the natural family structure, the “fundamental group unit,”⁹ of the developing world.¹⁰

ASEAN recently inaugurated a new human rights body: the Intergovernmental Commission on Human Rights (ICHR). This paper asks: Whether ASEAN’s human rights mechanisms will be used to further or to frustrate authentic human rights, and integral human development? Will the ICHR be an instrument of authentic human development or will it be coopted in the service of an anti-life, anti-human rights ideology? And how best may NGOs of Catholic inspiration move the ICHR in the right direction?

I. *History of ASEAN*

ASEAN came into being in 1967 at the height of the Vietnam War as a political coalition of five Southeast Asian nations - the Philippines, Malaysia,

⁵ ROBERT JOHN ARAUJO, S.J. & JOHN A. LUCAL, S.J., *PAPAL DIPLOMACY AND THE QUEST FOR PEACE: THE VATICAN AND INTERNATIONAL ORGANIZATIONS FROM THE EARLY YEARS TO THE LEAGUE OF NATIONS* 3–4 n.6 (2004).

⁶ POPE JOHN PAUL II, *LETTER TO FAMILIES FROM POPE JOHN PAUL II* ¶ 13 (*The Two Civilizations*) (1994).

⁷ *Id.* at ¶ 5 (*Love and Concern for All Families*).

⁸ *Id.* at ¶ 19 (*The Great Mystery*).

⁹ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) art. 16 ¶ 3 (Dec. 10, 1948); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 art. 23 ¶ 1 (Dec. 19, 1966); Convention on the Rights of the Child, 1577 U.N.T.S. 3 pmb1. ¶ 6 (Nov. 20, 1989); International Conference on Population and Development, *Report of the International Conference on Population and Development*, A/CONF. 171/13, CH. V ¶5.1 (Oct. 18, 1994); World Summit for Social Development, *Report of the World Summit for Social Development*, A/CONF. 166/9, at 9 (Apr. 19, 1995); Beijing Declaration and Platform for Action, *Fourth World Conference on Women*, A/CONF. 177/20, ¶ 29 (Sept. 15, 1995).

¹⁰ STEPHEN W. MOSHER, *POPULATION CONTROL: REAL COSTS, ILLUSORY BENEFITS* 49–62 (2008).

Singapore, Indonesia, and Thailand – to resist Communist aggression.¹¹ The Secretariat of ASEAN is located in Jakarta, Indonesia. Over the years, five new members were added – Brunei (1984), Vietnam (1995), Laos (1997), Burma (1997) and Cambodia (1999). Timor-Leste made application to become a member of ASEAN in March of 2011.¹² Following the close of hostilities in Vietnam, ASEAN expanded its scope to include economic development, hoping to create a single market and economic community by 2015.¹³ However, until recently, it was not charged specifically to promote and protect human rights.¹⁴

At the time of its formation in 1967 until 2007, ASEAN's international personality remained "relative" or "subjective." That is, it was ever dependent upon the express recognition of its member states.¹⁵ However, once the ASEAN heads of government signed the Charter of the Association of Southeast Asian Nations (hereinafter, "the Charter") at the 13th ASEAN Summit in Singapore on November 20, 2007, its legal personality changed. ASEAN evolved into an "intergovernmental organization',... enjoying functional immunities and privileges."¹⁶ ASEAN was no longer the sum of its parts.

The Charter became effective on December 15, 2008¹⁷ and it aims to accomplish three goals: to give ASEAN international legal personality and to streamline its decision making; to strengthen its institutions, especially the Secretariat; and to establish mechanisms to monitor compliance of its agreements and settle disputes between its members.¹⁸ It contains thirteen chapters, fifty-five articles and four annexes. ASEAN's declaration of international legal personality is found in chapter three,¹⁹ and the ASEAN Human Rights Body is mentioned in chapter four.²⁰

¹¹ Eugene K.B. Tan, *The ASEAN Charter as 'Legs to go Places': Ideational Norms and Pragmatic Legalism in Community Building in Southeast Asia*, 12 SING. YEAR BOOK INT'L L. & CONTRIBS. 171, 197 (2008).

¹² Kate McGeown, *East Timor Applies to Join ASEAN*, BBC NEWS ASIA –PACIFIC (Mar. 4, 2011), <http://www.bbc.co.uk/news/world-asia-pacific-12644608>; see also, Tan, *supra* note 11, at 177 n. 34.

¹³ Tan, *supra* note 11, at 197.

¹⁴ Sou Chiam, *Asia's Experience in the Quest for a Regional Human Rights Mechanism*, VICTORIA U. OF WELLINGTON L. REV. 127, 137 (2009).

¹⁵ Diane A Desierto, *Universalizing Core Human Rights in the 'New' ASEAN: A Reassessment of Culture and Development Justifications Against the Global Rejection of Impunity*, 1 GÖTTINGEN J. INT'L L. 77, 88 (2009), available at <http://ssrn.com/abstract=1485538>.

¹⁶ *Id.* at 89.

¹⁷ Tan, *supra* note 11, at 171–172.

¹⁸ *Id.* at 172.

¹⁹ *Id.* at 177.

²⁰ *Id.* at 177.

The Terms of Reference (TOR) for the ASEAN Human Rights Body (AHRB) were formally adopted on July 20, 2009, by all ten ASEAN Foreign Ministers.²¹ Dr Surin Pitsuwan, Secretary-General of ASEAN, pointed out that the TOR embody the spirit and the letter of the Charter: “Democracy and human rights are two basic principles enshrined in the Charter and we are now taking steps towards the fulfillment of these principles for our peoples.”²²

On October 23, 2009, ASEAN leaders inaugurated the ASEAN Intergovernmental Commission on Human Rights (AICHR)²³ as the overarching human rights institution for the promotion and protection of human rights in ASEAN. The Prime Minister of Thailand, H.E. Abhist, pointed out the AICHR is still evolving: “AICHR is not an end in itself but an evolutionary process towards strengthening the human rights architecture within the region”²⁴ of Asia and the Pacific. One newly formed human rights body that will operate under AICHR is the ASEAN Commission on the Rights of Women and Children (ACWC). United Nations (UN) representatives from UNICEF and UNIFEM were present at the inauguration of ACWC. Each State member would appoint one representative on the ACWC.²⁵ It has been established to “promote the implementation of international instruments, ASEAN instruments and other instruments related to the rights of women and children” and develop policies consistent therewith.²⁶

Finally, on November 18, 2012 ASEAN adopted a Human Rights Declaration at its summit in Phnom Penh.²⁷ However, this long awaited achievement was not greeted with enthusiasm by civil society because it compromised the principle of the indivisibility and universality of all human

²¹ Tan Hsien-Li, *The ASEAN Human Rights Body: Incorporating Forgotten Promises for Policy Coherence and Efficacy*, 12 SING. YEAR BOOK INT'L L. & CONTRIBS. 239, 255 (2010).

²² Press Release, ASEAN Secretariat, Another Step Forward for Regional Human Rights Cooperation (July 20, 2009), available at <http://www.law.georgetown.edu/RossRights/chapters/documents/PR-Another-Step-Forward-for-Regional-HR-Cooperation.pdf>.

²³ TERMS OF REFERENCE OF ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS (2009), available at <http://www.unhcr.org/refworld/pdfid/4a6d87f2.pdf>.

²⁴ H.E. Abhisit Vejjajiva, Remarks at the Inaugural Ceremony of the ASEAN Intergovernmental Commission on Human Rights (Oct. 23, 2009), available at <http://www.asean.org/asean/asean-summit/item/remarks-by-he-abhisit-vejjajiva-prime-minister-of-the-kingdom-of-thailand-on-the-occasion-of-the-inaugural-ceremony-of-the-asean-intergovernmental-commission-on-human-rights-aichr>.

²⁵ *Id.*

²⁶ ASEAN COMMISSION ON THE PROMOTION AND PROTECTION OF THE RIGHTS OF WOMEN AND CHILDREN (Apr. 7, 2010), available at <http://www.aseansec.org/24447.htm#Article-2>.

²⁷ ASEAN Human Rights Declaration, <http://www.asean.org/news/asean-statement-communicues/item/asean-human-rights-declar...> Last visited 4/19/2013.

rights.²⁸ Article 8 of the Declaration, in particular, contains the following problematic language:

The human rights and fundamental freedoms of every person shall be exercised with due regard to the human rights and fundamental freedoms of others. The exercise of human rights and fundamental freedoms shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition for the human rights and fundamental freedoms of others, *and to meet the just requirements of national security, public order, public health, public safety, public morality, as well as the general welfare of the peoples in a democratic society.*²⁹

The United Nations High Commissioner for Human Rights, Navi Pillay, expressed concern that ASEAN's new Human Rights declaration fell below international standards: "The international human rights mechanisms will continue to hold ASEAN member states to their international obligations and encourage ASEAN to strengthen further its regional human rights framework."³⁰ The International Gay & Lesbian Human Rights Commission criticized the ASEAN Human Rights Declaration because they say it "makes a mockery of the international human rights values and principles that all nations and citizens abide by and are held accountable to" by excluding lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) peoples throughout the region from its protection.³¹ The World Organization Against Torture (OMCT) also denounced ASEAN's Human Rights Declaration for the loopholes it provides state members to pick and choose which human rights it will honor and protect and which it will not:

OMCT further deplores the broad language on the limitation of rights in the Declaration, such as 'national security', 'public order' and 'public morality'. This sets a dangerous signal to the countries in the region with a track record of abusive and expansive invocations of state security and

²⁸ Human Rights Watch, "Civil society Denounces Adoption of Flawed ASEAN Human Rights Declaration," <http://www.hrw.org/print/news/2012/11/19/civil-society-denounces-adoption-flawed-asean...>; Human Rights Brief, "Concerns Over the conditionality of Human Rights Protections in New ASEAN Declaration," <http://hrbrief.org/2013/02/concerns-over-the-conditionality-of-human-rights-protections-in-new-asean-declaration>; Voice of America, ASEAN Approves Controversial human Rights Declaration, <http://www.voanews.com/articleprintview/1548305.html>;

²⁹ ASEAN Human Rights Declaration, par. 8 (Nov. 18, 2012)(emphasis added).

³⁰ UN News Centre, "UN official welcomes ASEAN commitment to human rights, but concerned over declaration wording," <http://www.un.org/apps/news/printnewsAr.sp?nid=43536>

³¹ International Gay & Lesbian Human Rights commission, ASEAN Human Rights Declaration Refuses to Protect LGBTIQ Rights!" <http://www.iglhrc.org/content/asean-human-rights-declaration-refuses-protect-lgbtqi-rights>.

public order or moral to curtail universally accepted rights. These laws created frameworks of arbitrary detention and prone to torture and ill treatment.”³²

ASEAN’s Human Rights Declaration violates the universality of human rights by creating huge lacunae that allow its member states to discriminate, decide and enforce only those human rights which comport with their nation’s culture, morality and tradition.

However, internationally, in every region of the world, there is a conflict raging over which human rights uphold human dignity and which do not:

We see a danger, however, in a process we may qualify as top-down globalism which, under the guise of bottom-up participation, equal rights and non-discrimination, uses the channels of global governance to try and engineer global assent to special interests by way of a manipulative use of language in the consensus-building process.”³³

A number of states in attendance at the 19th Session of the Human Rights Council on March 7, 2012 objected to the inclusion of sexual orientation and gender identity as threatening the universality of human rights. They argued that “national and religious particularities had to be raised in the context of any discussion of human rights since homosexual acts were against the teachings of world religions, as well as cultural and traditional values of many communities.”³⁴ Archbishop Tomasi, Permanent Observer of the Holy See to the United Nations in Geneva, noted that the undue focus on sexual orientation and gender identity particularizes human rights to such a degree as to “easily put at risk the universality of these rights” raise serious concerns.³⁵ Vice Secretary of State for the Holy See, Archbishop Mamberti in his address to the High Level Segment of the 22nd Session of the Human Rights Council warned that “the introduction of ambiguous expression and ideological positions appear to ignore the solid foundations of human rights,

³² The World Organization Against Torture, ASEAN Human Rights Declaration: Peoples of ASEAN states must not accept any protection lower than universally accepted human rights standards,” <http://wpan.files.wordpress.com/2012/11/asean-ahrd-declaration-26112.pdf>

³³ Marguerite A. Peters, “Towards preserving the universality of human rights: The gender agenda divorces the human person from himself or from herself, from his or her body and anthropological structure,” *L’Osservatore Romano*, April 19, 2013,

www.osservatoreromano.va/portal/dt?JSPTabContainer.setSelected+JSPTabContain...

³⁴ Jane Adolphe, “The U.N. Human Rights Council Resolution on Sexual Orientation and Gender Identity (Part 3),” WWW.zenit.org/en/articles/the-u-n-human-rights-council-resolution-on-sexual-orientation, last visited 4/19/2013.

³⁵ Archbishop Silvano M. Tomasi, Address to the 19th Session of the Human Rights Council regarding item 3, News, VA, Vatican Radio, March 9, 2012, <http://www.news.va/en/news/holy-see-addresses-un-human-rights-council-on-gender...> Last visited 4/19/2013.

to weaken the successes already achieved , and to undermine the universality of human rights.”³⁶ These, so called, “new rights” put at risk the universality and indivisibility of human rights” enshrined in the Universal Declaration on Human Rights,” he said.³⁷ Rather than seeking to impose new rights that do not enjoy universal recognition, he suggested, that the Human Rights Council ought to strive to strengthen those already agreed upon.³⁸ Archbishop Mamberti pointed out that the key to international peace must be found in the “promotion of the universality and indivisibility of human rights.” Ironically, in this context, the deference accorded national and religious and cultural values in ASEAN’s Human Rights Declaration may serve to protect its member states from the imposition of post-Modern Western “new rights” that threaten the universality of human rights. It would seem that ASEAN’s Human Rights Declaration has revived the “Asian Values” debate, discussed more fully below in Part IV.

³⁶ Archbishop Dominique Mamberti, Address at the High Level Segment of the 22nd Session of the Human Rights Council, Geneva, February 26, 2013, http://www.vatican.va/roman_curia/secretariat_state/2013/documents/_20K.

³⁷ *Id.*

³⁸ *Id.*

II. *History of a Regional Human Rights Mechanism in ASEAN*³⁹

The UN Commission on Human Rights (UNCHR) set up a study group in the 1960's to further regional human rights commissions around the world. In 1968, the UNCHR requested that the UN Secretary General plan regional seminars in areas of the world that had no regional human rights commissions. A series of seminars and workshops were set up in Asia and the Pacific starting in 1982.⁴⁰

The world Conference on Human Rights in Vienna in 1993 produced the *Vienna Declaration and Programme of Action* which was adopted by 171 states and it recognizes the importance of regional human rights mechanisms: "Regional arrangements play a fundamental role in promoting and protecting human rights. They should reinforce universal human rights standards, as contained in international instruments...where they do not already exist."⁴¹

From the beginning, the factors hindering progress towards establishing human rights mechanisms in ASEAN included the lack of political will, different cultural value systems and languages, legal issues concerning

³⁹ Many of the important events in the formation of ASEAN's human rights mechanisms may be summarized as follows: ASEAN was established in Bangkok, Thailand on August 8, 1967. In 1993, ASEAN's heads of state met in Bangkok and adopted *The Asia Pacific Declaration on Human Rights*, also known as, *The Bangkok Governmental Human Rights Declaration*. At the 26th ASEAN Ministerial Meeting in Singapore in July of 1993, they declared their general support, with important reservations, for the Vienna Declaration of 1993. The ASEAN Inter-Parliamentary Organization (AIPR) responded to the statement of support for the Vienna Declaration. In July of 1995, the Regional Working Group for an ASEAN Human Rights Mechanism (Working Group) came into existence and in July of 2000, it submitted a Draft Agreement for the Establishment of the ASEAN Human Rights Commission to ASEAN officials. At its 9th Annual Summit in Bali, ASEAN issued the *Declaration of ASEAN Concord II* (Bali II) declaring that the three pillars of the ASEAN Community were political and security cooperation, economic cooperation and social-cultural cooperation. ASEAN adopted a *Plan of Action for a Security Community* that expressed the desire to strengthen democratic institutions and protect vulnerable groups. In December of 2005, at the ASEAN Summit held in Kuala Lumpur, ASEAN leaders issued the *Kuala Lumpur Declaration on the Establishment of the ASEAN Charter* and established an Eminent Persons Group (EPG) to make recommendations for the proposed Charter. The High-Level Task Force took over for the EPG and they argued that the proposed Charter ought to include an ASEAN human rights mechanism. In January of 2007, ASEAN leaders at the ASEAN Summit in Cebu issued the *Cebu Declaration on the Blueprint of the ASEAN Charter* which endorsed the High-Level Task Force recommendations. In March of 2007, the ASEAN Foreign Ministers Meeting in Cambodia approved the inclusion of a human rights body in the proposed Charter. In November of 2007, ASEAN leader adopted the *ASEAN Charter* at the 13th ASEAN Summit in Singapore. On December 15, 2008, the *ASEAN Charter* came into force. The Terms of Reference for the ASEAN Human Rights Body (AHRB) was adopted on July 20, 2009. Finally, the ASEAN Intergovernmental Commission on Human Rights (AICHR) was adopted on October 23, 2009. (See Shaun Narine, *Human Rights Norms and the Evolution of ASEAN: Moving without Moving in a Changing regional Environment*, 34 CONTEMPORARY SOUTHEAST ASIA 365, 367-75 (2012).

⁴⁰ Chiam, *supra* note 14, at 128.

⁴¹ Vienna Declaration and Programme of Action, ¶ 37, A/CONF.157/23 (July 12, 1993), available at <http://www.unhcr.org/refworld/pdfid/3ae6b39ec.pdf>.

human rights norms embodied in UN treaties, political issues centering on state sovereignty, and the economic and developmental diversity of these various nations.⁴² The Working Group for an ASEAN human rights mechanism considered three possible instruments and mechanisms: a declaration of principles, a human rights commission, and a human rights court.⁴³ A human rights declaration and court were not provided for, but Article 14 stated that a Human rights Body would be established for “the promotion and protection of human rights and fundamental freedoms.”⁴⁴ However, what many believe is necessary for any serious treatment of human rights violations is the triple-prong model adopted by the inter-American, European, and African systems of human rights convention and declaration, a human rights commission, and a human rights court.⁴⁵ On the other hand, even without these mechanisms, the ASEAN charter of itself makes a difference and “marks a convergence of ASEAN towards ‘universalizing’ core human rights norms as now seen in its Organization Principles and the new requirements of ASEAN membership obligations.”⁴⁶

On October 23, 2009, ASEAN created the ICHR as well as the TOR for the ICHR, both of which provide that it will have primarily an advisory, as opposed to enforcement role. This has led to some observers to quip that ICHR lacks teeth.⁴⁷ One of the main objectives of the ICHR remains “to develop an ASEAN Human Rights Declaration with a view to establishing a framework for human rights cooperation” through conventions and human rights instruments.⁴⁸

Setting up human rights mechanisms in ASEAN may prepare the way for greater Asian human rights mechanisms following the “step by step” path marked by the growing economic integration of Asian nations.⁴⁹ The economic approaches are characterized by “flexible participation and implementation” and appear to be “indicative of a nuanced recalibration of the consensus approach.”⁵⁰ From a pragmatic point of view, the same formulas for economic integration may be used to advance human rights in ASEAN and in the greater Asia and Pacific area.⁵¹

⁴² Chiam, *supra* note 14, at 143.

⁴³ *Id.* at 137–38.

⁴⁴ ASEAN Charter, art. 14, available at <http://www.aseansec.org/publications/ASEAN-Charter.pdf>.

⁴⁵ Hsien-Li, *supra* note 21, at 244.

⁴⁶ Desierto, *supra* note 15, at 80.

⁴⁷ Michelle Staggs Kelsall, *The New ASEAN Intergovernmental Commission on Human Rights: Toothless Tiger or Tentative First Step?*, 90 ASIA PAC. ISSUES 1 (2009).

⁴⁸ *Id.* at 4.

⁴⁹ Chiam, *supra* note 14, at 148.

⁵⁰ Tan, *supra* note 11, at 182.

⁵¹ Tan, *supra* note 11, at 181. See also Chiam, *supra* note 14, at 148.

ASEAN nations have broken the stalemate of requiring total consensus on economic initiatives in the following three ways. One approach is the “ASEAN-X” formula characterized by most of the ASEAN nations, minus a few acting in consort. Within the ten-member organization of ASEAN those “states that are not ready to participate in the range of free trade agreements use this formula and may participate at a later stage.” Another approach is that of two ASEAN nations plus more that is the “ASEAN 2+X” sum. ASEAN employs this formula to accommodate the differing speeds of integration and development of the various ASEAN nations. This formula allows two member states to advance in modes of cooperation when they are ready while those that are not can join later, so that no member holds back the group. A third approach is that all ASEAN nations plus however many non-ASEAN nations wish to join a joint economic venture, that is, the “ASEAN +3” (ASEAN nations plus China, Japan, and Korea) or “ASEAN +6” (ASEAN nations plus Australia, India, and New Zealand) equation.⁵²

The ICHR might look to the Arab Charter on Human Rights since it weaves together both human rights and Islamic law, which are pertinent in several ASEAN countries. Also, both the Arab Charter on Human Rights and the African Charter on Human Rights may serve as references for how to incorporate non-Western perspectives and still maintain a universal non-negotiable vision of human rights.⁵³

Although the ICHR has no enforcement provision and may appear a toothless tiger, it may still provide a catalyst for civil society to advocate successfully for human rights in ASEAN by reinforcing the lobbying efforts of human rights NGOs. However, in a worst case scenario for ASEAN, the ICHR may be co-opted and “[o]bfuscate or diminish the positions of reform-minded individuals” as well as the more provocative human rights minded foreign ministers within ASEAN instead of strengthening them.⁵⁴ Also, special interest groups are courting ICHR members, attempting to woo them to their post-modern vision of human rights treaty obligations of the ASEAN member states.⁵⁵

III. *Hard Law v. Soft Law in the ASEAN Charter*

The lack of any provision for sanctions in ASEAN’s Charter for non-compliance or a serious breach of the Charter,⁵⁶ such as expulsion or

⁵² Chiam, *supra* note 14, at 148.

⁵³ Kelsall, *supra* note 35, at 5.

⁵⁴ Kelsall, *supra* note 35, at 6.

⁵⁵ CENTER FOR REPRODUCTIVE RIGHTS, CENTER BRIEFS ASIA’S PIONEER HUMAN RIGHTS BODY (Dec. 18, 2010), <http://reproductiverights.org/en/resources/publications>.

⁵⁶ Tan, *supra* note 11, at 185–86.

suspension of membership, would seem to be a serious setback for the rule of law in ASEAN. However, upon closer inspection, these formal lacunae in ASEAN's Charter may have been calculated to secure maximum buy-in, so as to enlist its states' members in an informal process of "soft law" sensitivity training. This training would make one sensitive to values respectful of human dignity and a culture of human rights:

A case can be made that the Charter also endows ASEAN with the software and attitudinal mindset of encouraging member states to imbibe the desired values, and to adopt the desired conduct so as to facilitate the attainment of the purposes and principles of ASEAN. The development of the Charter was seen as one of the strategies for the 'shaping and sharing of norms' in the Vientiane Action Programme.⁵⁷

Over time, the scope of the "hard law" tends to expand through court interpretation and application. What the top-down pressure "hard law" produces will inevitably meet with societal resistance if it is not complimented by a change in cultural mores, habits of thought, and behavior that either pave the way for or reinforce the "hard law" norms. The role of supranational "soft law" customs – international customary law – is to produce a complimentary scissor movement from the bottom-up of politically correct cultural virtues and social sins that, together with "hard law" norms and enforcement mechanisms, cut through all effective social resistance to engineer the desired "social learning." ASEAN's Charter may prove to have a transformative capacity to create, through "soft law," a fertile soil for a culture of human rights to be eventually reinforced by "hard law."

Soft law can also be understood as law in the embryonic stage of formation –a precursor of emerging hard law...Specifically, soft law mechanisms can be adapted for the purposed of persuading ASEAN members of the importance of the norms that the Charter seeks to promote concertize and give effect to. In ASEAN's context, this means the member states can use soft law attributes to attract, socialize and co-opt other member states on the imperative of observing the Charter...socializing stakeholders through a consensual and confidence-building process.⁵⁸

But will this hard law/soft law double scissor movement coincide with what is already traced on the "fleshy tablets of the human heart"?⁵⁹ What if it cuts out the heart of authentic human rights and transposes post-modern

⁵⁷ *Id.* at 187.

⁵⁸ *Id.* at 188.

⁵⁹ *Romans 2:15. See D. Brian Scamecchia, Response, in ST. PAUL, THE NATURAL LAW, AND CONTEMPORARY LEGAL THEORY 41–51 (Jane Adolphe, et al eds. 2012).*

Western ideologically driven norms. Even worse, what if the importation of such post-modern norms is really in the service of First-World neo-colonialism, as some suggest is at the heart of the debate over “Asian Values.”

IV. *The “Asian Values” debate & ASEAN Summit’s ability to Decide*

The “Asian Values” debate, styled “the parochialism of ‘Asian values versus Western imperialism,’”⁶⁰ drew international attention when ASEAN delegations to the Vienna World Conference on Human Rights (1993) claimed exception from the imposition of Western, so-called, universal human rights. The 26th ASEAN Ministerial Meeting sent a joint communiqué which stressed that “development is an inalienable right and that the use of human rights as a conditionality for economic cooperation and developmental assistance is detrimental to international cooperation and could undermine an international consensus on human rights.”⁶¹ The Vienna Declaration rejected these claims and denied an exception from the sweep of universal core human rights on the basis of cultural relativism: “It is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”⁶²

The arguments put forward by Asian values proponents can be seen in one of three ways: 1) As an excuse for tyrant’s rights, that is, as an attempt by various Asian dictatorial regimes to avoid scrutiny of their abysmal human rights record by asserting that human rights are a Western or Capitalist imposition; 2) As a last stand in resisting post-modern Western cultural relativism sweeping the developing world,⁶³ which fights in defense of truly universal innate core human rights; or 3) As a bit of both.

An example of the first perspective may be heard in the Chinese Communist delegation’s disingenuous attempt to regionalize core political rights as “Western” in an attempt to deflect criticism from China’s egregious violation of these same political rights:

The concept of human rights is a product of historical development. It is closely associated with specific social, political and economic conditions and the specific history, culture and values of a particular country. Different historical development stages have different human rights requirements.

⁶⁰ Desierto, *supra* note 15, at 114.

⁶¹ ASEAN Charter, *supra* note 32, art. 17; *see also* Tan, *supra* note 11, at 182–83.

⁶² Desierto, *supra* note 15, at 83.

⁶³ *See* MARGUERITE A. PEETERS, THE GLOBALIZATION OF THE WESTERN CULTURAL REVOLUTION: KEY CONCEPTS, OPERATIONAL MECHANISMS 3 (Benedict Kobus, trans., 2007).

Countries at different development stages or with different historical traditions and cultural backgrounds also have a different understanding and practice of human rights.⁶⁴

On the other hand, ASEAN societies may genuinely wish to shield themselves from permissive Western culture and excessive post-modern individualism, epitomized by the hedonistic sexual and reproductive rights movement.⁶⁵

We draw a line between liberty and license. We do not deem it a matter of constitutional principle that there should be a right to desecrate a national flag, to blaspheme our religion and to walk freely into shops to buy murderous weapons. We view a free-wheeling sexual lifestyle, drug taking and alcohol addiction with revulsion. With the bulk of us, pornography is not part of free speech, abortion on demand is not part of personal liberty and homosexuality is not part of freedom of choice. We acknowledge that rights and responsibilities must go hand-in-hand and that freedom is not an end in itself.⁶⁶

Nobel Peace Prize Laureate and former president of South Korea, Kim Dae Jung, argues that concepts of the universal and objective nature of human rights are part of Asia's traditions: "Asia has its own venerable traditions of democracy, the rule of law, and respect for the people. Asia's destiny is to improve Western concepts, not ignore them."⁶⁷ Nobel Prize winning economist, Amartya Sen, described development as substantive human freedoms including both civil and political freedoms as means and ends in themselves.⁶⁸ If this is true, then "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,'" which form part of the "human capital" the poor need to accumulate for authentic integral development.⁶⁹

⁶⁴ Chiam, *supra* note 14, at 145 (referring to HUMAN RIGHTS AND INTERNATIONAL RELATIONS IN THE ASIA PACIFIC (James T. H. Tang ed., 1995)).

⁶⁵ Li-ann Thio, *Implementing Human Rights in ASEAN Countries: Promises to Keep and Miles to Go Before I Sleep*, 2 YALE H.R. & DEV. L.J. 1, 2 (1999).

⁶⁶ *Id.* at 18–19.

⁶⁷ Chiam, *supra* note 14, at 146 (referring to Dae Jung Kim, *Is Culture Destiny? The Myth of Asia's Anti-Democratic Values*, 73 FOREIGN AFF. 189 (Nov./Dec. 1994), available at <http://www.foreignaffairs.com/articles/50557/kim-dae-jung/is-culture-destiny-the-myth-of-asias-anti-democratic-values>).

⁶⁸ Desierto, *supra* note 15, at 104.

⁶⁹ *Id.* at 105–06.

Perhaps, it is not so much the political rights per se but the imposition of permissive post-modern Western mores as human rights that is offensive to various leaders in ASEAN. Former Prime Minister of Malaysia, Dr. Mahathir, regarded the post-modern West as “morally decadent because of the growth of gay rights and relative success of the women’s movement.”⁷⁰ Even former General Secretary of the UN, Kofi Annan, has at times felt constrained to offer a more authentic vision of human rights as innate and, for that reason, universal and inviolable:

There is no one set of European rights, and another of African rights. Human rights assert the dignity of each and every individual human being, and the inviolability of the individual’s rights. They belong inherently to each person, each individual, and are not conferred by, or subject to, any governmental authority. There is not one law for one continent, and one for another. And there should be only one single standard –a universal standard –for judging human rights violations.⁷¹

So what are the core values, Asian or Otherwise, of ASEAN? These can be found in Article 2 of the Charter as “Principles,” which include respect for different cultures, languages and religions, while emphasizing “common values in the spirit of unity in diversity.”⁷² The gravamen of these aspirational core principles –including respect for rule of law, good governance, renunciation of the use of force and the peaceful settlement of disputes –are in accord with an authentic culture of universal human rights. However, as commentators have noted, the “unity within diversity” principle in the ASEAN context may be a prescription for turning a blind eye to egregious human rights atrocities enshrining “the so called ASEAN Way of non-interference in the internal affairs [of rogue state members].”⁷³

To be sure, the traditional “ASEAN Way” of consultation and consensus and “non-interference” is codified in the Charter in Article 20(1). However, the Charter has modified the rules for ASEAN to deal with the human rights violation of its members by adding a mechanism for arbitrating obdurate “hold out” postures of state members. The Charter provides that the ASEAN Summit can “decide” disputes involving state members of ASEAN whether or not states members consent.⁷⁴ The option is there for ASEAN to

⁷⁰ Chiam, *supra* note 14, at 146. *See also* Chris Brown, *Human Rights, in THE GLOBALIZATION OF WORLD POLITICS: AN INTRODUCTION TO INTERNATIONAL RELATIONS* 599 (John Baylis & Steve Smith eds., 2001).

⁷¹ Kofi Annan, Address by the UN Secretary General to the Foreign Institute to the Paasiviki Association in Helsinki, Finland (Aug. 13, 1997).

⁷² Desierto, *supra* note 15, at 114.

⁷³ ASEAN Charter, *supra* note 32, art. 2(2)(1) *quoted in* Tan, *supra* note 11, at 188.

⁷⁴ Tan, *supra* note 11, at 189.

determine unresolved disputes and the non-compliance of state members.⁷⁵ The ability of the ASEAN Summit to decide disputes is an expression of its new objective legal personality, i.e., “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.”⁷⁶ The Charter has implicitly “opened the door for a robust interpretation and application of the norm of non-interference.”⁷⁷

The case of the admission of Cambodia into ASEAN may be illustrative of when the ASEAN Summit acted decisively. When Cambodia sought admission to ASEAN, it was told to achieve peace within its borders first, before it would be granted admittance. However, this was not a requirement when Burma sought admittance. So, what justifies the different treatment? Some suggest ASEAN is more willing to intervene in the internal affairs of one of its state members if their domestic turbulence threatens to spill over across its borders than when their internal affairs, even if they involve egregious violations of human rights, are not threatening to disrupt the regional status quo.⁷⁸

ASEAN has tended to see itself as a family with a liberally applied “live and let live” approach to each other’s internal domestic policies.⁷⁹ However, what goes on in the privacy of the home should not always receive a blind eye from one’s neighbors, especially when it involves matters of domestic abuse. One’s home may be one’s castle in many respects, but it should not imprison victims of crime, muffling their cries for help. Respect for human dignity and genuine human rights must supersede state sovereignty. This growth in the formation of international conscience may be seen as reflected in “the emergence of the putative ‘responsibility to protect’ (R2P) norm in humanitarian law.”⁸⁰ If any nation’s government is unwilling or unable to protect its own citizens from “mass atrocity crimes (e.g. ethnic cleansing, genocide),...then a wider responsibility lies with the international community...and if required, [to] act effectively.” However, the use of force on an abusive state government is legitimate, some suggest, only if endorsed by the United Nations Security Council.⁸¹

⁷⁵ ASEAN Charter, *supra* note 32, art. 26, 27.

⁷⁶ Desierto, *supra* note 15, at 92.

⁷⁷ Tan, *supra* note 11, at 190.

⁷⁸ Thio, *supra* note 53, at 57.

⁷⁹ Tan, *supra* note 11, at 186.

⁸⁰ *Id.* at 185.

⁸¹ *Id.* (noting that the ‘R2P’ doctrine was adopted by the UN World Summit in 2005); *see also* Pope John Paul II, *Evangelium Vitae*, ¶ 55, *cited in* CATECHISM OF THE CATHOLIC CHURCH, ¶ 2265 (2d ed. 1997)

When Pope Benedict XVI addressed the United Nations in 2008, he spoke quite extensively about the “principle of the responsibility to protect,” noting that although it has only been recently defined, this responsibility has been present implicitly in the origins of the UN. In fact, it “was considered by the ancient *ius gentium* as the foundation of every action taken by those in government with regard to the governed.”⁸² Francisco de Vitoria “described this responsibility as an aspect of natural reason shared by all nations, and the result of an international order whose task it was to regulate relations between peoples.”⁸³ His Holiness noted that R2P only makes sense if it points to the transcendence and the natural reason of the human person: “now, as then, this principle has to invoke the idea of the person as an image of the Creator, the desire for the absolute and the essence of freedom.”⁸⁴ When this orientation has been abandoned, “freedom and human dignity [have been] grossly violated.”⁸⁵

The world is still waiting to see whether the ASEAN Summit or the AICHR have the political will to “decide” to protect the victims of human rights violations by its most notorious rogue nation – Burma/Myanmar.

A. ASEAN and Burma/Myanmar

Burma became an independent republic following the withdrawal of the British colonial government in 1948. It was a representative republic until 1962 when General Ne Win led a military coup. His regime lasted until the August 8, 1988 popular uprising. Aung San Suu Kyi made her first appearance at this time and went on to become the leader of Burma’s National League for Democracy (NLD). Burma’s military ousted Ne Win and formed the State Law and Order Restoration Council (SLORC), which crushed the reform movement.⁸⁶ Three thousand students were massacred in the military occupation of Rangoon University alone.⁸⁷ Hoping to garner

(noting the duty of defense of the third party: “[L]egitimate defense can be not only a right but a grave duty of defense of the third party.”). The author was told by one Asian Catholic Bishop that this section of the Catechism is to rebuke the leaders of the governments of Western countries for standing ideally by and allowing ethnic cleansing and other mass atrocities to occur in former Yugoslavia in the early 1990s.

⁸² Pope Benedict XVI, Address of His Holiness Pope Benedict XVI to the 62nd Session of the United Nations General Assembly: 95th Plenary Meeting (Apr. 18, 2008), *available at* <http://www.holyseemission.org/Pope%20Benedict%20XVI%20GA%20English.html>.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ John Arendshorst, *The Dilemma of Non-Interference: Myanmar, Human Rights, and the ASEAN Charter*, 8 NW. J. INT’L HUM. RTS. 102, 103 (2009), *citing* US Relations in Burma, U.S. DEPARTMENT OF STATE (Aug. 1, 2012), <http://www.state.gov/r/pa/ei/bgn/35910.htm>.

⁸⁷ Anna E. Johansson, *A Silent Emergency Persists: The Limited Efficacy of U.S. Investment Sanctions on Burma*, 9 PAC. RIM L. & POL’Y J. 317, 320 (2000).

legitimacy, Burma's military junta held multiparty elections in May of 1990, which resulted in an overwhelming victory for the opposing party, the NLD. The military regime, however, refused to honor the results of the election. Later in 1998, the NLD convened a parliament based on the 1990 election results. Unfortunately, the military junta detained two hundred NLD delegates and hundreds of pro-democracy supporters⁸⁸ including NLD secretary general and 1990 Noble Prize recipient, Aung San Suu Kyi.⁸⁹ At this time, SLORC changed Burma's name to Myanmar. Currently, the UN recognizes this name change, but many countries, including the US, refuse to honor it because they deny that the military's junta has a right to rule the country.⁹⁰ In 1997, the same year Burma was admitted into ASEAN, SLORC changed its name to the State Peace and Development Council (SPDC)⁹¹ but otherwise continued the same policies. In 2005, the UNCHR issued the following scathing denunciation of the SPDC's human rights violations:

Extrajudicial killings, rape and other forms of sexual violence are persistently carried out by members of the armed forces, continuing use of torture, renewed instances of political arrests and continuing imprisonment and other detentions...destruction of livelihoods and confiscations of land by armed forces; forced labor, including child labor; trafficking in persons; denial of freedom of assembly association, expression and movement; discrimination and persecution on the basis of religious or ethnic background...systematic use of child soldiers; and violations of the rights to education and to an adequate standard of living, including food and medical care.⁹²

Moreover, Burma leads the world in the production of heroin, producing 24,000 metric tons of heroin per year. For comparison, it is estimated that the consumption of heroin in the US is approximately 10 metric tons per year. The junta and drug traffickers work together to build up the country's infrastructure.⁹³ As such, drug trafficking is the backbone of the Burmese economy.⁹⁴ The U.S. Assistant Secretary of State for Narcotics and Law

⁸⁸ *Id.* at 321.

⁸⁹ Mann Bunyanunda, *Burma, ASEAN, and Human Rights: The Decade of Constructive Engagement, 1991-2001*, 2 STAN. J. E. ASIAN AFF. 118, 121 (2002).

⁹⁰ Arendshorst, *supra* note 73, at 103-104 (noting that in this article Burma will not be called Myanmar).

⁹¹ *Id.* at 104.

⁹² *Id.* at 107.

⁹³ Johansson, *supra* note 74.

⁹⁴ *Id.* at 326.

Enforcement Affairs, Robert Gelbard, confirmed the collusion of the military junta and drug lords:

The Burmese junta has brazenly exploited drug trafficking...[D]rug traffickers and their families are among the leading backers of high-profile infrastructure projects in Burma. They launder their money with impunity in banks controlled by the military.⁹⁵

The European Union (EU) and the United States have imposed economic sanctions against Burma. However, this has only served to strengthen China's historic role and influence in Burma.⁹⁶ Modeled after the South African anti-apartheid statutes, in the early and mid-1990's, some municipalities and the states of Massachusetts and Connecticut refused to do business with companies that traded with Burma.⁹⁷ In 2000, the U.S. Supreme Court in *Crosby v. National Foreign Trade Council* struck down all such laws stating as its reason that state's action in this respect was preempted and unconstitutional under the Supremacy Clause of the federal Constitution.⁹⁸ All the same, Nobel Peace Prize recipient and head of the National League for Democracy, Aung San Suu Kyi, supports economic sanctions against Burma.⁹⁹ Countries and corporations that invest in Burma are stigmatized as complicit with the human rights violations perpetrated by Burma's military/drug cartel junta.¹⁰⁰

Both Thailand and the Philippines suggested that Burma should democratize before entry into ASEAN in 1997, but the majority of ASEAN members thought Burma would reform after its entry.¹⁰¹ The EU temporarily suspended its formal dialogue with ASEAN in 1997 in response to the admission of Burma into ASEAN.¹⁰² In 2001, the UN General Assembly condemned Burma's human rights violations against ethnic and religious minorities, women and children and strongly urged the government of Burma/Myanmar to "ensure full respect for all human rights and fundamental freedoms."¹⁰³ Six months later, the Burma junta temporarily released Aung San Suu Kyi from house arrest.¹⁰⁴ However, in 2002, Burma

⁹⁵ *Id.* at 337.

⁹⁶ *Id.* at 339.

⁹⁷ *Id.* at 336.

⁹⁸ *Crosby v. National Foreign Trade Council*, 530 U.S. 366 (2000).

⁹⁹ Thio, *supra* note 53, at 45.

¹⁰⁰ *Id.* at 48.

¹⁰¹ Johansson, *supra* note 74, at 339 n. 181.

¹⁰² Bunyanunda, *supra* note 76, at 131.

¹⁰³ Chiew Choong Yee, et al., *South East Asia and International Law*, SING. J. INT'L & COMPARATIVE L. 616 (2002).

¹⁰⁴ *Id.* at 617.

blocked East Timor's bid for inclusion in ASEAN because of its leaders' links with NLD leader, Aung San Suu Kyi.¹⁰⁵

ASEAN policy with Burma has been characterized as one of "constructive engagement."¹⁰⁶ Despite the fact that Burma's human rights record is despicable, geopolitical realities have prevented ASEAN from expelling it from her ranks. Burma is strategically located between China and India. Singapore's Foreign Minister explained that if Burma was expelled from ASEAN, then China and India would create options for themselves in Burma. Then, in the event of internal discord in Burma, they would be dragged in, which would consequently alarm the Japanese and the Americans. "In the end, Myanmar can become an arena for big power conflicts. At that point in time, our own interests will be dragged in too."¹⁰⁷ So, he argued, it is better to keep Burma within ASEAN'S circle of influence.¹⁰⁸ On the other hand, ASEAN's policy of constructive engagement may amount to nothing more than securing a favored trade partner relationship with Burma as much as preventing Burma from becoming China's "Trojan horse in the region."¹⁰⁹ However, China already enjoys a near monopoly as military supplier to the junta and has expressed its willingness to aid Burma in case of a military coup or popular uprising.¹¹⁰ Unfortunately, "China's ties with Burma are deepening and its leverage over [Burma's junta] has only grown during the period of constructive engagement."¹¹¹ For many, "constructive engagement" is simply a "euphemism for economic exploitation and opportunism."¹¹²

B. Customary International Law

ASEAN is beginning to come to grips with the idea of R2P and "responsible sovereignty," meaning that each country is responsible for the effects its domestic policies produce in other sovereign states as well as its impact on its own citizens.¹¹³ Responsible sovereignty, for better or worse, will mean that international customary law will have a greater role to play in a country's internal affairs. "More fundamentally, ASEAN will also have

¹⁰⁵ *Id.* at 623.

¹⁰⁶ See PAUL SECK FAI CHEAK, ASEAN'S CONSTRUCTIVE ENGAGEMENT POLICY TOWARD MYANMAR (BURMA) 2012.

¹⁰⁷ Tan, *supra* note 11, at 192.

¹⁰⁸ *Id.*

¹⁰⁹ Bunyanunda, *supra* note 76, at 123.

¹¹⁰ *Id.* at 123.

¹¹¹ *Id.* at 129.

¹¹² *Id.* at 133.

¹¹³ Tan, *supra* note 11, at 194.

difficulty justifying its non-observance of prevailing and emerging international norms to the domestic constituencies as well.”¹¹⁴

It is likely the measures ASEAN meets out to bring Burma in line with respect to the core principles of human rights (respect for rule of law, democratic principles, free and open elections, freedom from torture, and crimes against humanity) will be brought to bear against state members for non-compliance with the highly contentious post-modern sexual and reproductive rights and gender mainstreaming. Many influential Western public advocacy groups believe sexual and reproductive rights and gender mainstreaming are to be grouped with torture, crimes against humanity, war crimes, apartheid, racial discrimination, and sexual discrimination as *opinio juris* obligations to which all ASEAN states are bound to comply under the international human rights norms the ASEAN Charter incorporates by reference.¹¹⁵

The proponents of “Asian values” are wrong insofar as they advance the claims of relativism – that one can derive an “ought” from an “is”. It is wrong to suggest that from the fact of a diversity of cultural norms around the world, one must conclude that there is only one political norm binding on all nations, namely, tolerance of all cultural norms: “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.”¹¹⁶

However, the claims of those who see in the call “for full enforcement and universality of human rights...yet another mode of Western imperialism to arrest the development of Southern states”¹¹⁷ should not be lightly dismissed. Perhaps the mingling of post-modern “decadent” human rights, such as “sexual and reproductive rights” and “gender mainstreaming,” with the authentic body of universal human rights is in the service of the hegemony of the post-modern West. Leaders of the Developing Countries have reason to distrust a human rights project that includes sexual, reproductive, and gender rights as a tool of repression. Furthermore, they have evidence to support their belief. In 1995, the Vice Major of Manila, Lito Atienza, referenced the newly declassified United States National Security Memorandum 200 and quipped at a human rights conference “Tell the American to dump their damn condoms in Manila Bay”¹¹⁸:

¹¹⁴ *Id.* at 194.

¹¹⁵ Desierto, *supra* note 15, at 84.

¹¹⁶ *Id.* at 94.

¹¹⁷ *Id.* at 102.

¹¹⁸ The author was present in October 1995, when the vice Major of Manila, Philippines, Lito Atienza, made this remark to a gathering of participants from Human Life International 2nd Love Life and Family Conference, referencing the United States National Security Study Memorandum (NSSM 200). See STEPHEN D. MUMFORD, THE LIFE AND DEATH OF NSSM 200: HOW THE DESTRUCTION OF POLITICAL

Declassified in 1989, National Security Study Memorandum 200 (NSSM 200) explained that the real problem of strategic supply of vital mineral ores for the United States was not in their scarce physical supply, but in the political and economic issues of access, given the conflicts of interest between the developed and developing world. These conflicts of interest over the natural resources of the developing world would be less exacerbated under conditions of slow or zero population growth and the elimination of large, growing, unemployed and rebellious youthful populations. Therefore, NSSM 200 urged that greater motivation for smaller family size be brought to bear on developing nations. However, because leaders in the least developed countries (LDCs) might see this as a form of economic or racial imperialism, NSSM 200 recommended that the United States promote reduction in fecundity in the LDCs as a vindication of the right of individuals to freely and responsibly number and space their children, and as the way of social and economic development for poor countries. To better motivate the masses of the LDC to embrace smaller family size, minimal levels of education, especially for women, would be necessary in order to indoctrinate them in the desirability of smaller family size.¹¹⁹

Given the fact that all ten ASEAN state members have signed the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), one should not be surprised if the AICHR brings pressure on its state members to fully comply with the recommendations for the CEDAW treaty body reports for their countries. Under the tutelage of the Center for Reproductive Rights (CRR), ASEAN's intergovernmental commission on Human Rights (AICHR) is being shown how to bring the Philippines in line. For instance, for ten years, the Manila City government has prohibited public health facilities funded by Manila City from counseling and recommending contraceptives.¹²⁰ The CRR opines that Convention on the Elimination of all Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), the Civil and Political Rights Covenant and the International Economic, Social and Cultural Rights Covenant requires states to 'provide access to family planning services and information.'¹²¹ As such, it suggests that Manila City's "NFP only ordinance" "is in violation of these treaty commitments insofar as it fails to provide a

WILL DOOMED A U.S. POPULATION POLICY, 45-186 (1994); Cf. MICHEL SCHOONYANS, THE TOTALITARIAN TREND OF LIBERALISM 57-58 (John H. Miller, trans. 1997); Peeters, *supra* note 51, at 115-16.

¹¹⁹ D. BRIAN SCARNECCHIA & TERRENCE MCKEEGAN, THE MILLENNIUM DEVELOPMENT GOALS: IN LIGHT OF CATHOLIC SOCIAL TEACHING 90 n. 320 (2009).

¹²⁰ Cheak, *Supra* note 106.

¹²¹ *Id.*

full range of family planning information.”¹²² The CRR encouraged and then commended the Philippines Commission on Human Rights, a national human rights body, for its, “strong statement calling for the revocation of Manila City’s ban on contraception, categorizing it as in violation of human rights obligations, and urging the council to apologize.”¹²³

Shortly after the creation of the ICHR, the CRR presented its vision of global, sexual reproductive rights to members of ICHR during their first visit to the United States. The CRR praised ICHR for being “uniquely positioned to provide leadership on this important humanitarian issue” concerning maternal mortality due to lack of access to comprehensive reproductive healthcare services, including family planning.¹²⁴ This humanitarian issue also concerned pervasive gender inequality and discrimination “as it begins to implement its mandate to promote human rights in Southeast Asia and assumes the role of key architect of human rights norms and standards in the region.”¹²⁵

Asian values ought not to be used to justify gross violations of human rights, as the Minister of Foreign Affairs of Singapore said: “Murder is murder whether perpetuated in America, Asia, or Africa. No one claims torture as part of their cultural heritage.”¹²⁶ However, Asian values, or simply authentic human rights, ought to be used to shield the ICHR so that it is not co-opted to serve the political and economic/demographic interests of powerful Western nations. These nations would attempt to force ASEAN state members to discriminate against their own people based on the stage of their development, as one human rights advocate testified: “I believe profoundly in the universality of the human spirit. Individuals everywhere want the same essential things... I believe there is nothing in these aspirations that is dependent upon culture, or religion, or stage of development (emphasis added).”¹²⁷

V. *NGOs of Catholic Inspiration and Conclusion*

In late November of 2007, eighty-five Catholic inspired NGO’s (CNGOs) were invited to Rome to further a dialogue between themselves

¹²² CENTER FOR REPRODUCTIVE RIGHTS, *IMPOSING MISERY: THE IMPACT OF MANILA’S CONTRACEPTION BAN ON WOMEN AND FAMILIES* 48 (2007), available at <http://reproductive-rights.org/sites/crr.civicaactions.net/files/documents/imposingmiseryupdated.pdf>.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Desierto, *supra* note 15, at 93.

¹²⁷ *Id.* at 100.

and the Holy See.¹²⁸ In his address to CNGO's, Pope Benedict XVI said they need to take part in the public sphere and work in their personal capacity to reconfigure social life, disfigured by a "relativistic logic" which makes a natural law ethic impossible: "This has led, in effect, to the imposition of a notion of law and politics which ultimately makes consensus between states...the only real basis of international norms."¹²⁹ His Holiness urged Catholic NGO's to collaborate and develop amongst themselves a spirit of solidarity conducive to promoting as a united group ethical principles "which by their very nature and their role as the basis of social life, remain non-negotiable."¹³⁰

Will the new regional mechanism of human rights enforcement, including those laying nascent in ASEAN, be used to underscore or undermine authentic human rights? Will ASEAN turn a blind eye to the atrocities of its rogue members, while at the same time imposing a tyranny of relativism on others? Or will it uphold Asian values in the best sense of the term, rejecting sexual and reproductive rights as both decadent and imperialistic? Will it call to task egregious human rights violations that deny a rule of law based on an innate human dignity?

The normative content of "human dignity" is not entirely self-evident: It cannot be exhaustively defined, but neither is it obscure. We know it when we see it. In a relativistic universe, one must look to areas of agreement to discern which core or fundamental rights are universally accepted. The Universal Declaration of Human Rights, which was affirmed by 171 countries at the 1993 Vienna Conference on Human Rights, and constitutional bills of rights are good starting places¹³¹

Pope John Paul II, visited the UN for the first time in 1979. In an impassioned address, he reminded the gathered delegates that the horrors of World War II and Poland, "on whose living body Oswiecim was at one time constructed," were the painful inspiration that gave rise to the Universal Declaration of Human Rights. He said, the desire to avoid a repetition of the horrors of WWII and its crimes against humanity gave rise to the Declaration of Universal Human Rights which remains the "cornerstone of the United Nations Organization":

¹²⁸ Pope Benedict XVI, Address to Catholic Inspired Non-Governmental Organizations (Dec. 1, 2007), in *Counter Relativism by Presenting Truth*, L'OSSERVATORE ROMANO (English Edition), Dec. 12, 2007, at 5-6.

¹²⁹ *Id.* at 6.

¹³⁰ *Id.* at 6.

¹³¹ Thio, *supra* note 53, at 23.

This declaration was paid for by millions of our brothers and sisters at the cost of their suffering and sacrifice, brought about by the brutalization that darkened and made insensitive the human consciences of their oppressors and of those who carried out a real genocide. This price cannot have been paid in vain! The universal Declaration of Human Rights...must remain the basic value in the United Nations...If the truths and principles contained in this document were to be forgotten or ignored and were thus to lose genuine *self-evidence* that distinguished them at the time they were brought painfully to birth, then the noble purpose of the United Nations Organization could be faced with the threat of a new destruction.¹³²

NGOs of Catholic Inspiration are called to hold high the light of self-evident natural law principles in order to pierce the miasma of the anti-Gospel. In doing so they will reaffirm the contour of human dignity marked out by right reason and etched in the seminal human rights documents of humanity – the *Universal Declaration of Human Rights* (1948), *The Declaration of Independence* (1776), *The Declaration on the Rights of Man and Citizen* (1789) and the *Magna Carta* (1215). The discovery and promulgation of these documents “can be compared with the discovery of fire, or electricity in the technical and scientific fields.”¹³³

These perennial self-evident fundamental human rights must guide AICHR to avoid the twin dangers it faces: To fail to sanction the egregious violations of authentic self-evident human rights perpetrated by its rogue state members, while compelling all its state members to adopt ideologically constructed Western dis-values, such as sexual and reproductive health/services/rights, sexual orientation and gender identity issues in the service of a neo-colonialism that seeks to undermine the natural family, the “fundamental group unit,”¹³⁴ of all Asian nations. The basic question for NGOs of Catholic inspiration is - “How can we ensure the fundamental rights of man, when they are mocked? How can we make those in charge realize that it is a question of an essential heritage of man that on one can harm with impunity, on any pretext, without making an attempt on what is most sacred for a human being and thus ruining the very foundations of social life?”¹³⁵

¹³² Pope John Paul II, Address to the United Nations General Assembly (Oct. 2, 1979), available at http://www.vatican.va/holy_father/john_paul_ii/speeches/1979/october/documents/hf_jp-ii_spe_19791002_general-assembly-onu_en.html.

¹³³ SCHOYANS, *supra* note 113, at 8-9; Pope John Paul II, *supra* note 112.

¹³⁴ International Covenant on Civil and Political Rights, *supra* note 9.

¹³⁵ Archbishop Dominique Mamberti, Address at the High Level Segment of the 22nd Session of the Human Rights Council, Geneva, February 26, 2013, http://www.vatican.va/roman_curia/secretariat_state/2013/documents/_20K.

