

The ASEAN Human Rights Declaration:

Questions and Answers



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1. What is the ICJ's position on the ASEAN Human Rights Declaration (Declaration)?

The Declaration is a fatally flawed document and falls below and risks undermining international human rights standards.

The international community in June this year marked the 20th anniversary of the watershed adoption in 1993 of the Vienna Declaration and Programme of Action (VDPA), which was endorsed by all States, including those of the ASEAN. States affirmed unreservedly that the universal nature of all human rights and fundamental freedoms is "beyond question". They agreed that "it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms." This VDPA was widely seen as having firmly rejected once and for all the contention of a very few that human rights are relative in nature. Yet the ASEAN Declaration attempts to undo the Vienna consensus by requiring that human rights be conditioned on regional and national particularities.

The VDPA also underscored the fundamental role of regional arrangements in promoting and protecting human rights, stressing that regional systems "should reinforce universal human rights standards, as contained in international instruments." ASEAN, in adopting this retrogressive Declaration, has employed its human rights system to undermine rather than reinforce universal standards.

While ASEAN member States remain bound by their obligations in respect of universal standards, ASEAN has missed an important opportunity to fulfill the promise of the VDPA by enhancing universal human rights.

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2. Why is the Declaration below international standards?

The Declaration is below international standards since it contains provisions in its General Principles that:

- Subjects the enjoyment of fundamental rights to a “balancing” with State-imposed duties on individuals (General Principle No. 6).
- Challenges the principle of universality of human rights by making their realization subject to regional and national contexts (General Principle No. 7).
- Allows for broad and all-encompassing limitations on rights, including those that may never be restricted under international law (General Principle No. 8).

The Declaration is a significant and worrying departure from existing international human rights law and standards, including those found in other regional human rights instruments, in Europe, the Americas, Africa, and the Middle East and North Africa (League of Arab States).

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3. What is the effect of the General Principles on all the provisions in the Declaration?

The General Principles serves to guide how the succeeding provisions in the Declaration are to be read and applied. They are the principles by which all the provisions in the Declaration should be interpreted. Below are examples of how provisions might be read and interpreted in the light of the General Principles.

General Principle No. 6:

"The enjoyment of human rights and fundamental freedoms must be balanced with the performance of corresponding duties as every person has responsibilities to all other individuals, the community and the society where one lives. It is ultimately the primary responsibility of all ASEAN Member States to promote and protect all human rights and fundamental freedoms."

Under General Principle No. 6, the enjoyment of rights and freedoms "must be balanced with the performance of corresponding duties". The ICJ notes the idea that all human rights are to be 'balanced' against individual responsibilities contradicts the very idea of human rights agreed upon in the 1948 Universal Declaration of Human Rights and at Vienna. Under universal standards all persons are entitled to realization of human rights; the enjoyment of human rights cannot be made conditional upon their performance of duties. In fact, human rights limit the scope and nature of the duties that States may impose on an individual and not the other way around.

General Principle No. 6 could serve to provide ASEAN Member States with a basis and justification to violate human rights, instead of providing safeguards to the people, since the terms "duties" and "responsibilities" are not defined adequately.

Example- Reading Article 27 of the Declaration in the light of General Principle No. 6:

Article 27 of the Declaration provides every person the right "to enjoy just, decent and favorable conditions of work." However, ASEAN Member States

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could read Article 27 in the light of the language of General Principle No. 6 to deny this right to workers in the interest of “balancing” this right with their “duty” and “responsibility” of contributing to the national economy. Under General Principle No. 6, labourers in the ASEAN may be required to work in factories with inadequate safety regulations and impermissibly low wages under the justification that they are called upon to fulfill their “duty” and “responsibility” to help the national economy.

General Principle No. 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 realization of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, and cultural, historical and religious backgrounds”.

Under General Principle No. 7, the realization of human rights “must be considered in the regional and national context, bearing in mind different political, economic, legal, social, cultural, historical, and religious backgrounds.” This construction severely distorts and effectively contravenes the language of 1993 VDPA, as noted above, affirming the principle of universality of human rights. While the VDPA did express that the significant different backgrounds should be born in mind, it in no manner imposed any obligation to consider human rights in regional and national contexts. On the contrary, it stressed that “it is the duty of States, regardless of their political economic and cultural systems to promote and protect all human rights and fundamental freedoms.” Furthermore, under international law ASEAN Member States have the duty, regardless of their political, economic and cultural systems, to respect and protect all human rights and fundamental freedoms.

Example-Reading Article 30, par. 3 of the Declaration in the light of General Principle No. 7:

Article 30, par. 3 of the Declaration provides that “every child, whether born in or out of wedlock, shall enjoy the same social protection.” Reading Article 30,

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par. 3 in the light of General Principle No. 7, an ASEAN Member State could decide that it was entitled to provide for less social protection for children born out of wedlock based on the rationale that its majority religion frowns upon extramarital unions and therefore, discourages bearing children out of wedlock.

General Principle No. 8:

"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."

General Principle No. 8 subjects all the rights in the Declaration to broad and all-encompassing limitations: "national security, public order, public health, public safety, public morality, as well as the general welfare of the peoples in a democratic society." General Principle No. 8, therefore, permits limitations and restrictions for all rights across the entirety of the Declaration. In addition, it allows them without imposing the required conditions of necessity and proportionality and for purposes far more expansive than under international law.

Under international law, certain rights may only be subjected to limitations under specific and narrowly defined situations. For example, under the International Covenant for Civil and Political Rights (ICCPR), to which 167 States are party, including six of the 10 ASEAN States, only a few rights are subjected to such limitations.

These include freedom of movement, freedoms of association, expression and peaceful assembly and freedom to manifest one's religion. But even limitations on these rights are subject to tight conditions of necessity and proportionality: they must be strictly necessary for protection of national security, public order, public health or morals or to protect the rights of others.

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The ASEAN Declaration extends the possibility of imposing limitations to all rights, even those that are absolute under international law, such as freedom from torture and cruel, inhuman and degrading treatment and punishment. Rather than applying a condition of strict necessity, General Principle 8 merely says that limitations have to be imposed for the purpose of meeting the “just requirements” of national security and other purposes.

The ASEAN Declaration, unlike the ICCPR, allows for limitation on the bases of “general welfares of peoples in a democratic society”. This category is so broad that it could be interpreted to encompass almost all State activity.

Example-Reading Article 14 of the Declaration in the light of General Principle No. 8:

The right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment is provided for explicitly under Article 14 of the Declaration. However, this provision would have to be read in light of General Principle No. 8. Therefore, under terms of the ASEAN Declaration, Member States would be allowed the use of torture to extract information from suspected terrorists in the name of “national security” and “public safety”. Torture, however, is a peremptory norm of international law, allowing no exceptions. This principle has been accepted by all States, including all ASEAN States, in United Nations General Assembly resolutions adopted by consensus.

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4. Does the Phnom Penh Statement correct the Declaration's flaws?

The Phnom Penh Statement on the Adoption of the Declaration provides some language that aims to mitigate the defects in the Declaration. But these cannot serve to make the Declaration itself consistent with international human rights law and standards. The Phnom Penh Statement provides that ASEAN Member States:

"REAFFIRM further our commitment to ensure that the implementation of the AHRD be in accordance with our commitment to the Charter of the United Nations, the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and other international instruments to which ASEAN Member States are parties, as well as to relevant ASEAN declarations and instruments pertaining to human rights."

While this language is welcome so far as it goes in reaffirming the existing commitment of ASEAN Member States, as a political Statement it can in no way serve to override the plain language of the Declaration itself, certain provisions of which are in clear contravention of the instruments mentioned. To be clear, a political Statement does not override a declaratory instrument, which is the ASEAN Declaration.

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5. Is the Declaration “better than nothing”?

The Declaration was justified by its supporters within and outside ASEAN as “better than nothing”. They note that bringing those ASEAN Member States with poor human rights records to sign such a document is already a step forward.

This argument fails on two important factors:

First, the applicable human rights legal framework is not ‘nothing’ – there is in fact a wide body of existing international human rights law that applies to ASEAN member states, including binding customary international law and large number of international human rights treaties ratified or acceded to by the Member States. To the extent that the Declaration deviates from—and weakens—these applicable laws, it is, in fact, significantly ‘worse than not doing anything at all.’

Second, the Declaration, if applied, will bring all ASEAN Member States – without exception - a step backwards in fulfilling its obligations under international human rights law. If States take the Declaration as the primary standard, it is possible that they may disregard the universal standards, including hard legal obligations, when formulating their domestic law, policies and practices.

Should the Declaration result in States applying its provisions instead of universal standards, it would erode not only human rights protections, but also the rule of law generally in the ASEAN region. To disregard international legal obligations, as well as other international commitments can never be a step forward. For that reason, ASEAN Member States and all ASEAN stakeholders should continue to adhere strictly to universal international human rights standards and take measures with a view to revising the ASEAN Declaration in order to bring it line with international law and standards.

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