

Memorandum on the Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights (AICHR)

I. Introduction

1. The International Commission of Jurists (ICJ) welcomes the opportunity to contribute to the process of reviewing the Terms of Reference (TOR) of the ASEAN Intergovernmental Commission of Human Rights (AICHR). It is our hope that the AICHR will take this opportunity to demonstrate its commitment to transparency and integrity by undertaking consultations with a wide variety of stakeholders as it reviews and revises its TOR.
2. The importance of regional and sub-regional mechanisms playing a fundamental role in promoting and protecting human rights was underlined in the 1993 Vienna Declaration and Programme of Action (VDPA). The VDPA emphasized that regional arrangements should “reinforce universal human rights standards, as contained in international human rights instruments, and their protection” and that they must cooperate with the United Nations Human Rights activities.¹
3. The ICJ supports the idea of a regional human rights mechanism that effectively promotes and protects human rights in a manner that is particularly adaptive to the distinctive conditions of the region, provided that it abides by principles that reinforce and do not fall below international human rights law and standards.
4. In this memorandum, the ICJ identifies and discusses what we take as problematic provisions in the TOR that may prevent the AICHR from fully functioning as a body tasked “to promote and protect human rights and fundamental freedoms of the peoples of the ASEAN” and makes recommendations on the amendment of these provisions. The ICJ also discusses additional functions and institutional improvements that may be undertaken to strengthen the AICHR as a regional human rights mechanism, in line with the commitments made by ASEAN member States in Vienna in 1993 and in the ASEAN Charter.

II. Problematic provisions in the TOR of the AICHR

A. Part II: Principles – the principle of non-interference

5. Paragraph 2.1 of the TOR provides that the AICHR shall be guided in its work by the principle of non-interference. This principle is also contained in the ASEAN Charter. Some representatives of ASEAN Member States have interpreted this principle within the ASEAN context to mean that Member States are prohibited from commenting on the domestic affairs of other Member States. The interpretation, however, is wholly out of step with the now longstanding understanding of the principle within the international community.

¹ Article 37 of the Vienna Declaration and Programme of Action (hereinafter VDPA)

6. Nonetheless, the principle of non-interference has been invoked a number of times by ASEAN Member States to prevent discussions of country-specific human rights situations, including laws, policies, and practices of States that negatively impact human rights protection. This radically restrictive view, if accepted, would mean that human rights issues could only be considered at an abstract level, rendering any efforts to address human rights concerns by ASEAN ineffective and futile.
7. In rejecting this narrow interpretation, the ICJ recalls the well-established principle that protection and overall realization of human rights is not exclusively a matter of internal affairs of States, but the international community has an interest, including a legal interest in this realization. The United Nations Charter, under articles 55 and 56, makes it a core obligation of all States to engage in joint cooperation to ensure universal respect for and observance of human rights. The protection of human rights is therefore not exclusively a matter of internal affairs of States. This premise has long been accepted by the international community, including ASEAN Member States, notably in paragraph 4 of the 1993 Vienna Declaration and Programme of Action (VDPA), which emphasizes the protection of all human rights as a legitimate concern of the international community.
8. Over the years, ASEAN Member States have invoked the non-interference principle inconsistently, but often it has been wielded as a political shield to avoid accountability for human rights violations and failure to fulfill human rights obligations.
9. There have been, however, several notable occasions where the ASEAN diverged from this principle and commented on the internal affairs of Member States. One recent example is the ASEAN's strong recommendation to Indonesia to ratify and operationalize the ASEAN Transboundary Haze Agreement. The Joint Communiqué issued after the 46th ASEAN Foreign Ministers' Meeting (AMM) in Brunei Darussalam in June 2013, called upon ASEAN Member States that have "not yet ratified and operationalized" the ASEAN Transboundary Haze Agreement "to do so expeditiously". Indonesia is the only Member State that has yet to ratify and operationalize the treaty.²
10. The ASEAN has discussed, on several occasions, the situation of Myanmar and made recommendations on steps it may take towards a more democratic government and to address human rights violations. For instance, in 2003, the Joint Communiqué issued after the 36th ASEAN Ministerial Meeting in Phnom Penh included an expression of concern over the Depayin massacre, which occurred on 30 May 2003, and where 70 people associated with the National League for Democracy (NLD) were killed by a government-facilitated mob. Moreover, the Joint Communiqué urged Myanmar "to resume its efforts to national reconciliation and dialogue among all parties concerned leading to a peaceful transition to democracy."³ In 2007, the Chairman's Statement made upon the conclusion of the 13th ASEAN Summit in Singapore included clear recommendations to Myanmar on actions it must take to improve its human rights situation. The ASEAN recommended to Myanmar that it should continue to work with the United Nations in order to initiate a meaningful dialogue with NLD leader Aung San

² *Joint Communiqué of the 46th ASEAN Foreign Ministers' Meeting*, Bandar Seri Begawan, Brunei Darussalam, 29 to 30 June 2013, par. 47, <http://www.asean.org/images/2013/news/joint%20communiqué%20of%20the%2046th%20asean%20foreign%20ministers%20meeting%2046th%20amm%20-%20final%20-%2030%20june%202013.pdf> (Accessed 25 April 2014).

³ *Joint Communiqué of the 36th ASEAN Ministerial Meeting*, Phnom Penh, Cambodia, 16 to 17 June 2003, par. 18, <http://www.asean.org/communities/asean-political-security-community/item/joint-communiqué-of-the-36th-asean-ministerial-meeting-phnom-penh-16-17-june-2003> (Accessed 25 April 2014).

Suu Kyi, lift restrictions on her, and release all political detainees. The ASEAN also reiterated its call to Myanmar to work towards a peaceful transition to democracy.⁴

11. ASEAN Member States are regularly subjecting their domestic human rights performance to scrutiny by other States through the mechanisms and procedures established under the international instruments they have ratified or acceded to. All ASEAN Member States, for instance, are party to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). As State parties, ASEAN Member States, like all States, submit reports to the Committee on the Elimination of Discrimination Against Women on national action taken to improve the situation of women. The Committee, in turn, would comment on these reports, request specific information on the laws, policies and practices within the country, and draw conclusions and make recommendations to the States concerned. In addition, all ASEAN Member States are party to the Convention on the Rights of the Child (CRC), whose supervisory body, performs a similar function. Many ASEAN Member States are subject to similar review by a range of other treaty bodies, such as the Human Rights Committee, Committee on Economic, Social and Cultural Rights, the Committee against Torture, the Committee on the Elimination of Racial Discrimination, the Committee on Migrant Workers, and the Committee on the Rights of Persons with Disabilities.
12. Furthermore, ASEAN Member States have voted favorably on a number of country-specific resolutions at the United Nations and regularly unanimously welcomes reports of UN Special Procedures of fact-finding missions to assess human rights situations in specific countries. For instance, all ASEAN Member States recently voted in favor on the resolution on the right of the Palestinian people to self-determination (A/C.3/67/L.54).⁵ A number of ASEAN Member States voted favorably on the resolution on the situation of human rights in the Syrian Arab Republic (A/C.3/67/L.52).⁶
13. Finally, all ASEAN Member States are subjected to the Universal Periodic Review (UPR) at the UN Human Rights Council. Each ASEAN Member State goes through the UPR every four years. Under the UPR, all UN Member States examine each other's actions on how human rights are improved in their countries. The reports, appraisals, and commitments all contain specific information as to law, policies and practices of the States under review.

B. Part IV: Mandate and Functions

13. In October 2012, the AICHR made public its Five-Year Work Plan (2010-2015), which outlines specific activities under each mandate and function listed in its TOR. Based on the Five-Year Work Plan, there is still substantial room for improvement in the AICHR's implementation of its mandates and functions. The ICJ observes that many of the listed mandates and functions in the TOR have not yet been implemented by the AICHR.
14. The ICJ, therefore, believes that all of the mandates and functions listed in the TOR must be maintained, with certain modifications. Among the mandates that should be maintained is that "to develop an ASEAN Human Rights Declaration" (AHRD).⁷ The ICJ, along with many other human rights stakeholders, considers the AHRD to be fatally

⁴ *Chairman's Statement of the 13th ASEAN Summit*, Singapore, 20 November 2007, par. 16, <http://www.asean.org/news/item/chairman-s-statement-of-the-13th-asean-summit-one-asean-at-the-heart-of-dynamic-asia-singapore-20-november-2007> (Accessed 25 April 2014).

⁵ Voting records during the 46th Meeting of the Third Committee of the UN General Assembly on the resolution on "*The right of the Palestinian people to self-determination*", UN Doc. A/C.3/67/L.54 (2012), http://www.un.org/en/ga/third/67/docs/voting_sheets/l.54.pdf

⁶ Voting records during the 46th Meeting of the Third Committee of the UN General Assembly on the resolution on "*Situation of Human Rights in the Syrian Arab Republic*", UN Doc. A/C.3/67/L.52 (2012), http://www.un.org/en/ga/third/67/docs/voting_sheets/l.52.pdf (Note: Brunei Darussalam, Indonesia, Lao PDR, Malaysia, and Thailand voted in favor of the resolution).

⁷ TOR of the AICHR, paragraph 4.2.

flawed, which falls below and risks undermining international human rights standards.⁸ The ICJ therefore considers it imperative that this mandate be maintained to enabling the AICHR to amend the AHRD and to bring it in line with international human rights law and standards.

a.) Dialogue and consultation with civil society and non-governmental organizations

15. The TOR must reflect the importance of continued dialogue and cooperation between the AICHR and a wide range of stakeholders including civil society organizations (CSOs) in respect of all of its areas of work, including standard setting.
16. The AICHR has the existing mandate under paragraph 4.8 of the TOR “to engage in dialogue and consultation with other ASEAN bodies and entities associated with the ASEAN, including civil society organizations and other stakeholders”.⁹ However, this mandate is subject to Chapter V of the ASEAN Charter, which limits the engagement of the AICHR only to those ‘entities associated with the ASEAN.’ Such entities are presently limited to a group of parliamentarians (the ASEAN Inter-Parliamentary Assembly), business organizations (e.g. ASEAN Alliance of Health Supplement Association, ASEAN Business Forum), a think tank (ASEAN-ISIS Network), and accredited civil society organizations consisting mostly of professional groupings (e.g. ASEAN Council of Teachers, ASEAN Federation of Accountants, ASEAN Federation of Electrical Engineering Contractors).¹⁰ There are no human rights CSOs or national human rights institutions among the accredited groups.
17. The ICJ considers that paragraph 4.8 of the TOR should be amended to reflect the importance of the role of a wide range of CSOs in supporting the work of the AICHR. This paragraph should be amended to ensure that the AICHR is able to engage with a wider network of CSOs in order to enrich its work by tapping into the experience and expertise of individuals and groups that have been working to promote and protect human rights. Clearly, it makes little sense to exclude the stakeholders of human rights from the work ASEAN does in the name of human rights.
18. The ICJ is convinced that the AICHR will necessarily benefit greatly from substantive contributions from civil society organizations in the process of setting regional human rights standards, in addition to carrying out the promotional and protective functions of its work. Providing for the space and opportunity, and indeed encouraging, civil society organizations to engage in and contribute to its work will also greatly enhance the credibility of the processes and enable AICHR to produce a solid body of regional standards that are consistent with international human rights law.
19. In the United Nations human rights system, a wide range of civil society human rights stakeholders, including ECOSOC-accredited non-governmental organizations and national human rights institutions, participate fully in the forums and mechanisms. The Human Rights Council, which is the principal UN human rights organ, recognizes the essential role of civil society and non-governmental organizations in supporting the work of sub-regional, regional, and international organizations. In a resolution adopted on 23 September 2013, the Human Rights Council emphasized that civil society plays an important role in supporting the work of sub-regional, regional, and international organizations by sharing their expertise and experience through their participation in these organizations’ meetings. In that regard, the Human Rights Council, in that resolution, reaffirmed “the right of everyone, individually and in association with others, to unhindered access to communication with sub-regional, regional, and international

⁸ International Commission of Jurists, *The ASEAN Human Rights Declaration: Questions and Answers* (2012), p. 3, <http://icj.wpenline.netdna-cdn.com/wp-content/uploads/2013/07/ASEAN-leaflet-240713.pdf>

⁹ TOR of the AICHR, paragraph 4.8

¹⁰ *Entities Associated with ASEAN*, Annex 2 of the ASEAN Charter, <http://www.asean.org/archive/publications/ASEAN-Charter.pdf>

bodies.”¹¹ That right is also affirmed in another resolution by the Human Rights Council on cooperation with the United Nations, its representatives and mechanisms in the field of human rights, which was adopted on 25 September 2013.¹²

20. The UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, Individuals, and Associations (known as the UN Declaration on Human Rights Defenders), adopted by the UN General Assembly,¹³ similarly affirms the right of everyone, individually or in association with others, and for the purpose of promoting and protecting human rights and fundamental freedoms, “to communicate with non-governmental or governmental organizations.”¹⁴ This includes communicating with regional mechanisms such as the AICHR on issues pertaining to the promotion and protection of human rights.
21. The UN Declaration on Human Rights Defenders also provides that everyone has the right, individually or in association with others, “to know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how those rights and freedoms are given effect in domestic legislative, judicial, and administrative systems.”¹⁵ Individuals and groups should therefore be able to access information from the AICHR on how human rights and fundamental freedoms are given effect in ASEAN Member States.

b.) Protection functions to increase effectiveness of the AICHR

22. To enhance the AICHR’s effectiveness, it is important to include strong protection competencies in its TOR in addition to its existing mandate and functions. The ICJ notes that even before the establishment of the AICHR in 2009, a number of authorities and stakeholders, including the Office of the High Commissioner for Human Rights (OHCHR), submitted recommendations on types of protection functions that should be vested in the AICHR. Prior to the establishment of the AICHR, the OHCHR’s Regional Office for Southeast Asia published a non-paper on Principles for Regional Human Rights Mechanisms, which contains recommendations as to the minimal powers, responsibilities, and the structure appropriate to a regional human rights mechanism.¹⁶
23. Recommendations by the OHCHR, which the ICJ believes should be integrated in the TOR, include that the AICHR should have the following mandated functions:
 - (a) to observe the general human rights situation in each country and when necessary, request further information on the promotion and protection of human rights from each Member State;
 - (b) to undertake on-site visits to investigate specific human rights concerns, publish reports and recommendations following these visits, including progress reports issued on a periodic basis, which shall be publicly circulated;

¹¹ Human Rights Council, Resolution on civil society space: creating and maintaining, in law and practice, a safe and enabling environment, UN Doc. A/HRC/24/L.24 (2013), para. 6.

¹² Human Rights Council, Resolution on Cooperation with the United Nations, its representatives and mechanisms in the field of human rights, UN Doc. A/HRC/24/L.17/Rev.1 (2013), para. 1.

¹³ UN General Assembly Resolution 53/144, Declaration on the Right and Responsibility of Individuals, Groups, and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, UN Doc. A/RES/144 (1999).

¹⁴ UN General Assembly, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (*hereinafter, the UN Declaration on Human Rights Defenders*), UN Doc. A/RES/53/144 (1999), para. 5(c).

¹⁵ UN Declaration on Human Rights Defenders, para. 6(a).

¹⁶ UN Office of the High Commissioner for Human Rights-Regional Office for Southeast Asia, *Principles for Regional Human Rights Mechanisms (Non-Paper)*, <http://bangkok.ohchr.org/programme/asean/principles-regional-human-rights-mechanisms.aspx>

- (c) to develop an early warning system to prevent gross violations of human rights;
 - (d) to receive and investigate communications from individuals or groups, alleging human rights violations committed by Member States;
 - (e) to develop measures to protect individuals and groups from reprisals by Member States;
 - (f) where it finds that violations of human rights have been committed, to make recommendations to the Member State concerned, including recommendations of appropriate remedies; and
 - (g) to request Member States to adopt specific precautionary measures to prevent irreparable harm to persons in serious and urgent cases.¹⁷
25. The ICJ considers that for the AICHR to effectively carry out both its present functions and any additional functions it might assume, it should, along the lines of the UN and other regional human rights mechanisms, be given the mandate to appoint independent experts or special rapporteurs for key thematic concerns such as freedom of expression, freedom of assembly and association, the situation of human rights defenders, economic, social and cultural rights, the rights of the child, women's human rights, torture, enforced disappearance, and business and human rights. Reports of these independent experts or special rapporteurs shall feed into discussions of the AICHR so that it will be able to fulfill its mandate "to develop common approaches and positions on human rights matters of interest to ASEAN."¹⁸

c.) Cooperation with national human rights institutions and the UN

26. The AICHR must vigorously engage with appropriate national human rights institutions (NHRIs) and the UN and this must be clearly reflected in its mandate. Under the current TOR, the AICHR has the mandate "to consult, as may be appropriate, with other national, regional, and international institutions concerned with the promotion and protection of human rights."¹⁹ The ICJ believes that it is not enough for the AICHR to merely "consult" NHRIs and the UN, but it should be clear that they should cooperate with and complement the work of these bodies, provided that those NHRIs comply with the Principles Relating to the Status of National Institutions (Paris Principles). The Paris Principles, adopted by the UN General Assembly,²⁰ set out the appropriate characteristics and framework for the work of NHRIs, including the requirement that they are independent and represent a pluralism of social forces involved in the promotion and protection of human rights in their particular country.
27. Article 37 of the VOPA emphasizes the importance of cooperation of regional bodies with the United Nations human rights activities. This is because regional bodies, such as the AICHR, have an important role to play in reinforcing universal human rights standards, as contained in international human rights instruments.
28. Five ASEAN Member States have established NHRIs: Indonesia, Malaysia, Thailand, Philippines, and Myanmar. Except for the Myanmar National Human Rights Commission, all the other NHRIs have been given "A" status accreditation by the International Coordinating Committee of NHRIs, which means that they comply fully with the Paris Principles.

¹⁷ Ibid.

¹⁸ TOR of the AICHR, paragraph 4.11.

¹⁹ TOR of the AICHR, paragraph 4.9.

²⁰ UN General Assembly Resolution 48/184, National institutions for the promotion and protection of human rights, UN Doc. A/RES/48/134 (1993).

29. In 2008, the NHRIs of Indonesia, Malaysia, Thailand, and the Philippines formed the ASEAN NHRI Forum (ANF), with the aim of creating a platform for discussions among them on "practical and most feasible actions to facilitate the process of establishing an ASEAN Human Rights Mechanism."²¹ ASEAN NHRIs view their role vis-à-vis the AICHR as "catalytic, complementary, and cooperative."²²
30. The ICJ observes, however, that these ASEAN NHRIs have been effectively excluded from the discussions of the AICHR, most notably during the process of development of the TOR and the ASEAN Human Rights Declaration (AHRD). ASEAN NHRIs made efforts to engage in dialogue with AICHR, but were rejected by the latter based on the ground that the AICHR had yet to develop its own Rules of Procedure prior to engaging with external parties.²³
31. ASEAN NHRIs may have varied mandates, but all of them have mechanisms set up to receive information and investigate complaints regarding human rights violations.²⁴ The use of readily available information received from NHRIs would serve to significantly bolster AICHR's ability to fulfill some of its existing mandate, such as "to develop common approaches and positions on human rights matters of interest to ASEAN"²⁵ and "to prepare studies on thematic issues of human rights in ASEAN."²⁶
32. ASEAN NHRIs also have experience conducting human rights capacity building, including trainings groups in the security sector (e.g. police, military). The AICHR could draw from this experience to fulfill its existing mandate "to promote capacity-building for the effective implementation of international human rights treaty obligations undertaken by ASEAN Member States."²⁷ Indeed, the AICHR could consider carrying out such promotional work in cooperation or partnership with NHRIs and/or civil society organizations.

C. Part V: Composition

a.) Qualifications and Selection Process of Representatives

33. Under the current TOR, Representatives to the AICHR are required to possess "integrity and competence in the field of human rights."²⁸ The ICJ believes that further qualifications beyond these two should be required of Representatives to increase the effectiveness of the AICHR.
34. The examples from other human rights institutions may serve as a starting basis for establishing enhanced criteria for the AICHR Representatives. The set of criteria followed at the UN Human Rights Council in nominating, selecting, and appointing mandate-holders of Special Procedures is particularly instructive in that regard. Special procedures mandate holders are selected on the basis of: "(a) expertise; (b) experience

²¹ The ASEAN National Human Rights Institutions (NHRIs) Forum, <http://seanf.asia/index.php/about-us/1-the-asean-national-human-rights-institutions-nhri-forum>

²² The 4th Roundtable Discussion on Human Rights in the ASEAN: Realizing the People-Oriented ASEAN Community with Human Rights, Summary of Discussions, 2008, para. 10, [http://www.aseanhrmech.org/downloads/4th%20RTD%20Summary%20of%20Proceedings%20\(Final\).pdf](http://www.aseanhrmech.org/downloads/4th%20RTD%20Summary%20of%20Proceedings%20(Final).pdf)

²³ SAPA Task Force on ASEAN and Human Rights, *Hiding behind its limits: a performance report of the first year of the ASEAN Intergovernmental Commission on Human Rights (AICHR)*, 2010, p. 11.

²⁴ Asian NGOs Network on National Human Rights Institutions (ANNI), *2009 Report on the Performance and Establishment of National Human Rights Institutions in Asia*, Asian Forum for Human Rights and Development, 2009, p.16.

²⁵ TOR of the AICHR, para. 4.11.

²⁶ TOR of the AICHR, para. 4.12.

²⁷ TOR of the AICHR, para. 4.4.

²⁸ TOR of the AICHR, para. 5.3.

in the field of the mandate; (c) independence; (d) impartiality; (e) personal integrity; and (f) objectivity.”²⁹

35. Under the existing TOR, it is not mandatory for Member States to consult relevant stakeholders in the process of selecting Representatives to the AICHR. Member States will generally only consult “if required by their respective internal processes.”³⁰
36. Consultation with a broad variety of stakeholders is important in ensuring the selection of the best candidates who meet appropriate criteria, including independence. The Paris Principles, for example, suggest following a selection procedure that affords “all necessary guarantees to ensure the pluralist representation of social forces (civil society) involved in the promotion and protection of human rights.”³¹
37. The Sub-Committee on Accreditation of the International Coordinating Committee of NHRIs (hereinafter, the ICC Sub-Committee on Accreditation) noted in its General Observations that the selection and appointment process of the governing body of an NHRI is critically important in ensuring its independence. The same can be said for a regional human rights mechanism like the AICHR. Factors listed by the ICC Sub-Committee on Accreditation that would help ensure the selection of an independent candidate are a transparent process of selection; broad advertisement of vacancies; and maximizing the number of potential candidates from a wide range of societal groups.³²
38. In this respect, it would be advisable for ASEAN Member States to establish a procedure to allow for the receipt of nominations for Representatives. These nominations may be received from the government itself, CSOs, and individuals.³³ NHRIs may also nominate candidates.³⁴
39. The Paris Principles and the General Observations of the ICC’s Sub-Committee on Accreditation are valuable in the task of reviewing the TOR, as the AICHR shares similar characteristics and functions of NHRIs.

b.) Term of office; security of tenure

40. AICHR Representatives shall serve for a period of three years, renewable for an additional three years. However, at any given time and for any reason, the appointing Member State “may decide, at its discretion, to replace its Representative.”³⁵ This means therefore that AICHR Representatives do not enjoy a guarantee of tenure.
41. The Paris Principles notes that a human rights body cannot be independent if its members are not given a guarantee of tenure or a stable mandate. Hence, the Paris Principles provide that to ensure independence, appointments shall be effected by an official act that shall establish the specific duration of the mandate.³⁶ Removal of members of human rights bodies must be “in strict conformity with all the substantive

²⁹ Resolution 5/1 on the Institution-building of the United Nations Human Rights Council, 18 June 2007, para. 39.

³⁰ TOR of AICHR, para. 5.4.

³¹ Principles relating to the status of national institutions (Paris Principles), Part B, para. 1.

³² Ibid.

³³ Supra note 30 at para. 42.

³⁴ UN Human Rights Council Resolution 16/21, Review of the work and functioning of the Human Rights Council, UN Doc. A/HRC/RES/16/21 (2011), para. 22(a).

³⁵ TOR of AICHR, para. 5.6.

³⁶ Paris Principles, Part B, para. 3.

and procedural requirements as prescribed by law³⁷ and “should not be allowed based on solely the discretion of appointing authorities.”³⁸

D. Part VI: Modalities

42. Under the existing TOR, decisions are reached by the AICHR based on “consultation and consensus”.³⁹ “Consensus” is interpreted to mean that there is agreement by all Representatives.
43. Requiring consensus for decision-making may mean that no decision is reached to address substantive human rights issues. The ICJ, therefore, recommends that the TOR include a provision that allows the AICHR to make a decision by majority vote, after all reasonable efforts have been exhausted to achieve consensus.

E. Part VII: Role of the Secretary-General and the ASEAN Secretariat

44. At present, the AICHR is provided secretarial and administrative support by the ASEAN Secretariat. Member States are not required under the TOR to provide funds for the smooth conduct of the activities of the AICHR, but the TOR allows Member States to second their officials to provide secretarial and administrative support to the AICHR.
45. One of the key features of regional human rights mechanisms in Europe, the Americas, and Africa is “competent and full-time secretariat support with sufficient resources”.⁴⁰ A strong, independent, and well-resourced infrastructure for support is also one of the key components identified in the Paris Principles to guarantee the independence of a human rights body.⁴¹ It is therefore important that the AICHR should have its own Secretariat that is independent from the ASEAN Secretariat. This should be reflected in the TOR.
46. The staff of the secretariat should be adequately resourced not only by persons competent to carry out strictly administrative functions, but also by professionals who are experts in the substantive areas of human rights, including international human rights law.
47. The Secretariat of the AICHR should have adequate funding for the effective implementation of its activities so that it can hire its own staff and premises. This would help ensure that it is able to operate in a way that it cannot be subjected to the financial control of any Member State that might affect its independence.⁴²
48. The ICC Sub-Committee on Accreditation likewise underlines the importance of adequate funding for a support infrastructure of a human rights body, which it explains should “ensure the gradual and progressive realization of the improvement of the organization’s operations and the fulfillment of their mandate.”⁴³
49. The Secretariat of the AICHR should be headed by an Executive Director, who shall be of high moral character and has recognized competence in the field of human rights.⁴⁴

³⁷ General Observations of the ICC Sub-Committee on Accreditation, October 2011, para. 2.9 (b).

³⁸ General Observations of the ICC Sub-Committee on Accreditation, October 2011, para. 2.9 (c).

³⁹ TOR of AICHR, para. 6.1.

⁴⁰ Office of the High Commissioner for Human Rights-Regional Office for Southeast-Asia, *Regional human rights systems in other parts of the world: Europe, the Americas, and Africa*, <http://bangkok.ohchr.org/programme/other-regional-systems.aspx>

⁴¹ Paris Principles, Part B, para. 2.

⁴² Ibid.

⁴³ General Observations of the ICC Sub-Committee on Accreditation, October 2011, para. 2.6.

⁴⁴ Statute of the Inter-American Commission on Human Rights, Article 21, para. 2.

50. The Secretariat should be empowered to employ its own staff. It might accept staff seconded from government agencies of Member States, but as recommended by the ICC Sub-Committee on Accreditation, as a matter of good practice, "senior level posts should not be filled with secondees"⁴⁵ and that "the number of seconded personnel should not exceed 25% and never be more than 50% of the total workforce"⁴⁶ of the organization.
51. Funding from external sources, such as development partners, might be allowed for the Secretariat. However, it is recommended that this shall not compose the core funding of the Secretariat. It should be emphasized that Member States still have the responsibility to ensure the AICHR Secretariat's minimum activity budget so that it may be able to operate smoothly and fulfill its mandate.⁴⁷

III. Recommendations on revising the TOR:

A. Part II: Principles

52. *Paragraph 2.1(b)* should be deleted. Should paragraph 2.1(b) be maintained, the TOR should make clear that it should not be construed to mean that AICHR may not engage in work relating to human rights situations of Member States. (See paragraphs 5 to 12)

B. Part IV: Mandate and Functions:

53. *Paragraph 4.8* should be revised so as to read:

To 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.~~ (See paragraphs 15 to 22)

54. *Paragraph 4.9* should be revised so as to read:

To consult **and cooperate**, ~~as may be appropriate~~, with other **national human rights institutions, other regional human rights mechanisms, the United Nations**, and other national, regional, and international institutions and entities concerned with the promotion and protection of human rights. (See paragraphs 15 to 21)

55. *Part IV* in general should include protection functions to increase its effectiveness. The following are recommended to be included:
 - (a) to observe the general human rights situation in each country and when necessary, request further information on the promotion and protection of human rights from each Member State;
 - (b) to undertake on-site visits to investigate specific human rights concerns, publish reports and recommendations following these visits, including progress reports issued on a periodic basis, which shall be publicly circulated;
 - (c) to develop an early warning system to prevent gross violations of human rights;
 - (d) to receive and investigate communications from individuals or groups, alleging human rights violations committed by Member States;

⁴⁵ General Observations of the ICC Sub-Committee on Accreditation, October 2011, para. 2.4(a).

⁴⁶ General Observations of the ICC Sub-Committee on Accreditation, October 2011, para. 2.4(b).

⁴⁷ General Observations of the ICC Sub-Committee on Accreditation, October 2011, para. 2.6.

- (e) to develop measures to protect individuals and groups from reprisals by Member States;
 - (f) where it finds that violations of human rights have been committed, to make recommendations to the Member State concerned, including recommendations of appropriate remedies; and
 - (g) to request Member States to adopt specific precautionary measures to prevent irreparable harm to persons in serious and urgent cases.⁴⁸ (See paragraphs 22 to 23)
56. *Part IV* should also include a paragraph that allows the AICHR to appoint independent experts or special rapporteurs for key thematic issues, such as freedom of expression, freedom of assembly and association, and the situation of human rights defenders, economic, social and cultural rights, the rights of the child, women's human rights, torture, enforced disappearance, business and human rights, or other thematic areas viewed by the AICHR as necessary for achieving its mandate. These independent experts or special rapporteurs shall seek and receive information from all relevant stakeholders and submit their reports to the AICHR on a regular basis. (See paragraph 25)

C. Part V: Composition

a.) Qualifications and selection process of representatives

57. *Paragraph 5.3* should be revised to read:

When appointing their Representatives to the AICHR, Member States shall give due consideration to gender equality, **expertise, experience in the field of human rights, independence, impartiality, personal integrity, and objectivity.** (See paragraphs 33 to 34)

58. *Paragraph 5.4* should be revised to read:

Member States should **ensure that it undertakes a transparent process involving a wide variety of** consult, ~~if required by their respective internal processes, with appropriate~~ stakeholders in the **selection and** appointment of their Representatives to the AICHR. (See paragraphs 35 to 38)

b.) Term of office ; security of tenure

59. *Paragraph 5.6* should be deleted. (See paragraphs 40 to 41)

D. Part VI: Modalities-Decision-making

60. *Paragraph 6.1* should be revised to read:

Decision-making in the AICHR shall be based on consultation and consensus, ~~in accordance with Article 20 of the ASEAN Charter.~~ **Decisions may be made by a majority vote if all reasonable efforts have been exhausted and consensus still cannot be reached.** (See paragraphs 42 to 43)

⁴⁸ Ibid.

E. Part VII: Role of the Secretary-General and the ASEAN Secretariat

61. *Paragraph 7.2* should be revised to read:

There shall be an independent Secretariat created to ~~The ASEAN Secretariat shall~~ provide the necessary secretarial support to the AICHR to ensure its effective performance. **It shall be headed by an Executive Secretary, who shall be a person of high moral character and recognized competence in the field of human rights. The Secretariat shall be empowered to hire its own staff, which should comprise of competent professionals who are experts in a variety of substantive human rights areas, including international human rights law.** ~~To facilitate the Secretariat's support to the AICHR, ASEAN Member States may, with the concurrence of the~~ **Executive Secretary, Secretary-General of ASEAN, second their officials to the ASEAN Secretariat, provided that senior level posts shall not be filled with secondees, and that the number of seconded personnel shall not be more than 50% of the total workforce of the Secretariat.** (See paragraphs 44 to 46, 49 to 50)

F. Part VIII: Work Plan and Funding

62. *Paragraph 8.1* should be revised to read:

The AICHR shall prepare **and adopt** ~~and submit~~ a Work Plan of programmes and activities with indicative budget for a cycle of five years. ~~to be approved by the ASEAN Foreign Ministers Meeting, upon the recommendation of the Committee of Permanent Representatives to ASEAN.~~ (See paragraphs 47 and 51)

63. *Paragraph 8.2* should be deleted. (See paragraph 47)

64. *Paragraph 8.3* shall be revised to read:

The annual budget **of the Secretariat** shall be funded on equal sharing basis by ASEAN Member States. (See paragraph 47)

65. *Paragraph 8.6* shall be revised to read:

Funding and other resources from non-ASEAN member States, **development partners, or external sources,** ~~shall be solely for human rights promotion, capacity building, and education~~ **shall be allowed provided that it does not compose the core funding of the Secretariat.** (See paragraph 51)

66. *Paragraph 8.8* should be deleted. (See paragraph 47)

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