Is There a Place for Minorities’ and Indigenous Peoples’ Rights within ASEAN?:
Asian Values, ASEAN Values and the Protection of Southeast Asian Minorities and Indigenous Peoples

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Abstract
Southeast Asia is one of the most culturally diverse regions in the world. Nevertheless, unlike minorities and indigenous peoples in Western states, minorities and indigenous peoples in Asia have never received much attention from politicians or legal scholars. The level of minority protection varies from state to state, but can, in general, be called insufficient. At the regional level, for instance, within the context of the Association of Southeast Asian Nations (ASEAN), there are no mechanisms devoted specifically to the protection of minorities and indigenous peoples. In December 2008, the ASEAN Charter entered into force. In July 2009 the Terms of Reference (ToR) for the ASEAN Inter-Governmental Commission on Human Rights were adopted. Both the Charter and the ToR refer to human rights and to cultural diversity, but omit to refer explicitly to minorities or indigenous peoples. In this article, the extent to which this reticence with regard to the protection of minorities and indigenous peoples is dictated by the concept of Asian values and ASEAN values is explored. Further, it is analysed how, instead, ASEAN seeks to accommodate the enormous cultural diversity of this region of the world within its system. Finally, the tenability of ASEAN’s policy towards minorities and indigenous peoples in the light of, on the one hand, the requirements of international legal instruments concerning the protection of minorities and indigenous peoples and, on the other hand, the policies of the national states that are members of ASEAN is determined.

Keywords
ASEAN; protection of minorities and indigenous peoples; human rights; Asian values; ASEAN values

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1. Introduction

In 1993, the Ministers and representatives of Asian states, meeting in Bangkok in the context of preparations for the World Conference on Human Rights, adopted a Declaration, known as ‘The Bangkok Declaration’. It contained the aspirations and commitments of the Asian region. One of these commitments emphasised by the Asian states was “the importance of guaranteeing the human rights and fundamental freedoms of vulnerable groups such as ethnic, national, racial, religious and linguistic minorities, migrant workers, disabled persons, indigenous peoples, refugees and displaced persons”.

Strangely enough, in subsequent documents adopted by Southeast Asian states cooperating in the framework of the Association of Southeast Asian Nations (ASEAN), virtually no reference was made to minorities or indigenous peoples. Instead, most ASEAN documents seem to emphasise and to promote the (cultural) diversity of the Southeast Asian region. For instance, in an ASEAN document called ‘ASEAN Vision 2020’, adopted during the 30th anniversary of ASEAN in 1997, it was stated: “Our rich diversity has provided the strength and inspiration to us to help one another foster a strong sense of community” and that “we envision our rich human and natural resources contributing to our development and shared prosperity”.

In 2003, this vision was reaffirmed in a subsequent ASEAN document called Bali Concord II. The new ASEAN Charter, which entered into force in December 2008, also omits to refer to minorities and indigenous peoples, but acknowledges the potential of ASEAN’s cultural diversity. One of the principles mentioned in the ASEAN Charter is: “respect for the different cultures, languages and religions of the peoples of ASEAN”. However,

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2) The Association of Southeast Asian Nations (ASEAN) was established in Bangkok on 8 August 1967. The five original member countries were Indonesia, Malaysia, the Philippines, Singapore, and Thailand. Over the years, another five countries became members of the organisation, that is to say, Brunei Darussalam (1984), Vietnam (1995), Laos (1997), Burma (Myanmar) (1997), and Cambodia (1999). The ASEAN Community is developing three pillars: ASEAN Political-Security Community (APSC), the ASEAN Economic Community (AEC), and the ASEAN Socio-Cultural Community (ASCC), see Joint Communiqué of the 42nd ASEAN Foreign Ministers Meeting “Acting Together to Cope with Global Challenges”, Phuket, Thailand, 20 July 2009, <www.aseansec.org/PR-42AMM-JC.pdf>. See also section 4.5 of this article.
4) Ibid.
the same sentence also emphasises “their common values in the spirit of unity in diversity”.· ASEAN’s motto, also proclaimed in the Charter, further tempers the optimism with regard to the protection of diversity. The motto, “One Vision, One Identity, One Community”,· indicates that the emphasis of ASEAN is on strengthening unity rather than on promoting diversity.

The aim of this article is to find out, first, what is the background of ASEAN’s silence with regard to minorities and indigenous peoples: to what extent is it dictated by cultural relativism, i.e. by the concepts of Asian values and ASEAN values? The second aim of this article is to analyse how, nonetheless, ASEAN tries to accommodate the enormous cultural diversity of this region of the world within its system: is the protection of diversity a credible substitute for a direct protection of minorities and indigenous peoples? The third aim is to determine the tenability of ASEAN’s policy towards minorities and indigenous peoples. The ASEAN Charter proclaims the principle “to uphold the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN Member States”.· This proclamation calls for an assessment of ASEAN’s policy against the background of the requirements posed by international law with regard to the protection of minorities and indigenous peoples, on the one hand, and the policies and laws of member states of ASEAN, on the other.

### 2. Diversity in Southeast Asia

#### 2.1. Introduction

Southeast Asia is characterised by great ethnic, cultural and religious diversity, and is home to a large number of migrants from China and India, dominant groups of Malays and Indonesians, as well as indigenous peoples, hill tribes and many minority groups.· Vietnam, for instance, has 54 official ethnic groups.· As noted and regretted by many experts in the field of minority rights, there are no generally accepted definitions of minorities and indigenous peoples in international law. On the one hand, to a certain extent, minorities, indigenous peoples, states and legal scholars seem to have accepted this situation and even appear to

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7) Ibid., Article 2(1).
8) Ibid., Article 36.
9) Ibid., Article 2(2)(j).
be able to develop rights for minorities and indigenous peoples without such a generally accepted definition, or on the basis of working definitions. On the other hand, some uncertainty persists, for instance, with regard to the distinction between ethnic minorities and indigenous peoples. Scholars like Duncan, who has dealt with this issue in the Southeast Asian context, combines the two categories and uses one notion: “indigenous (ethnic) minorities”. Clarke developed short working definitions of both groups which are applicable to the Southeast Asian context; he describes ‘indigenous peoples’ as “autochthonous, or descendants of the earliest known habitants of a territory” and ‘minorities’ as “settler populations with more recent links (often stretching back hundreds of years), who share a common identity with groups in at least one other country”.

Several Southeast Asian states seem to use their large ethnic diversity, and the accompanying lack of conceptual clarity, for political purposes. Laos and Vietnam, for instance, have a highly developed system of ethnic classification, which they use for census purposes. Moreover, as was pointed out by Hadden, “the main focus of official policy is on the development of national unity by assimilation rather than by providing separate or autonomous structures”.

2.2. Policy and Practice

In general, at the level of nation states, the picture with regard to the protection of minorities and indigenous peoples appears to be somewhat diffuse. For instance, a statement by the Asian Forum for Human Rights and Development (Forum Asia) that the policy of none of the nation-states of ASEAN “reflects an

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15) Ibid.

16) Ibid. See also the Conclusions and Recommendations of the Sub-Regional Seminar on Minority Rights: Cultural Diversity and Development in South-East Asia (Chiang Mai, Thailand, 4–7 December 2002), Asbjørn Eide, Chairperson/Rapporteur, E/CN.4/Sub.2/AC.5/2003/2, 25 April 2003, and the example of Indonesia in section 5.2.2 of this article.


18) Asian Forum for Human Rights and Development (Forum Asia) is a membership-based regional human rights organisation. It consists of 42 member organisations. It was founded in 1991 and has had a consultative status in the Economic and Social Council (ECOSOC) since 2004.
ethos that celebrates and promotes this diversity, or empowers and protects the rights of its national, ethnic, religious and linguistic minorities/nationalities\(^{19}\) might be somewhat refined by the fact that some Southeast Asian states, e.g. Vietnam, Laos\(^ {20}\) and Cambodia,\(^ {21}\) did develop programmes in the field of education and agriculture with the aim of improving the situation of their respective minorities. Notwithstanding, Forum Asia keeps pointing out that, in Asian societies, particular attention must be paid to the marginalised minority groups, especially minority women and children.\(^ {22}\) Moreover, even if attention is being paid by states to minorities and indigenous peoples, several scholars warn that official programmes bringing development assistance, healthcare and education are often a cover for states for (forced) acculturation, assimilation and resettlement and often contribute to the degeneration of minorities and indigenous peoples.\(^ {23}\)

As far as acculturation and assimilation are concerned, the majority of the countries in Southeast Asia have development programmes that aim at developing indigenous peoples and minorities and to bring them in conformity with the norms of the majority. This means that the state wants to include them in the market economy, gain political control over them or that it tries to assimilate the people into the majority.\(^ {24}\) According to Duncan, in the effort of justifying these programmes and policies, minorities and indigenous peoples are regarded, not only by their governments but sometimes also by the local media and urban citizens, as ‘primitives’ who have a low status in society and spoil the international image of the country. Consequently, in the eyes of the governments, they must be helped to develop, which means raising their standard of living and their level of ‘civilisation’.\(^ {25}\) The latter entails proficiency in the national language,\(^ {26}\) the


\(^{24}\) Duncan, supra note 13, p. 1.

\(^{25}\) Ibid., pp. 3–5.

elimination of indigenous ritual belief systems, participation in a cash economy and conversion to a recognised world religion.\textsuperscript{27}

The (forced) resettlement and displacement of minorities and indigenous groups are often the result of the ambition of Southeast Asian governments to develop from an economy based on agriculture towards an industrialised economy. This development causes an exploitation of such natural resources as oil, timber, rubber and minerals and has massive implications for indigenous people who depend on the same resources for their living.\textsuperscript{28} Plantations\textsuperscript{29} are established and dams\textsuperscript{30} are built, causing the removal or marginalisation of these populations.\textsuperscript{31} (Forced) resettlement of the indigenous peoples and minority groups from the forests and mountains also occurs, and is often justified by governments with the protection of the environment, national development and national security. Environmental protection in particular is often brought up as a justification for the resettlement of indigenous peoples, as it is argued that the people's way of living is detrimental to the environment.\textsuperscript{32} Another form of resettlement is the movement of members (often poor peasants) of the dominant group to areas in which the ethnic minorities generally live, which is justified by reasons of overpopulation of the areas in which the majority lives and by the claim of giving these peasants a better future.\textsuperscript{33}

It could be stated that the problem underlying the conceptual issue is a lack of formal recognition of, and respect for, the identity and culture of minority

\textsuperscript{27} Duncan, \textit{supra} note 13, p. 3.
\textsuperscript{30} For instance, the building of the Nam Theun 2 Dam in Laos led to the replacement of 6,000 people, see the news archives of the Asian Forum for Human Rights and Development, <www.forum-asia.org>: 'Development and Human Rights: What will the Future hold for Minorities in Laos?', Wednesday, 12 September 2007.
\textsuperscript{32} Duncan, \textit{supra} note 13, p. 14, and K. Gillogly, 'Developing the “Hill Tribes” of Northern Thailand', in Duncan, \textit{supra} note 11, pp. 127–131. See also Ms. Julia Kam, referring in this context to West Kalimantan where minority peoples’ traditional shifting cultivation is also stigmatised as damaging to the environment, in Sub-Regional Seminar on Minority Rights, \textit{supra} note 16, para. 25.
\textsuperscript{33} Duncan, \textit{supra} note 13, p. 13. See also C. Duncan, 'From Development to empowerment', in Duncan, \textit{supra} note 11, pp. 104–106.
communities and indigenous peoples. According to the conclusions of the Sub-Regional Seminar on Minority Rights held in Thailand in 2003, this lack of formal recognition often results in a “denial of the rights to citizenship, to effective participation in government and to the recognition of their distinctive histories, cultures and lifestyles, notably in the context of national development policies”. 34

2.3. Conclusion

The silence with regard to minorities and indigenous peoples in the documents of ASEAN has been interpreted by Forum Asia as “an indication of the denial of human rights for [ethnic minorities] and [indigenous peoples] in member countries, or even an outright denial of their existence”. 35 Notwithstanding some examples of states which did develop policies and projects supporting minority education and the agricultural sector, the overall picture in most Southeast Asian states is rather dispiriting: the enormous cultural and religious diversity in Southeast Asia created by the different indigenous peoples and minorities is often considered as a hindrance to national progress or as a threat to national security by governments. 36 Many Southeast Asian governments seem to aim at minimising diversity within their country, thereby developing programmes that have the objective of assimilating and controlling indigenous people and ethnic minorities. 37 These policies can often be traced back to the governments’ ambition to modernise and develop into an industrialised economy, which means that social change is necessary to reach higher levels of economic development.

According to Forum Asia, the violations of human rights and of the rights of minorities and indigenous peoples are due to a “prevailing culture of impunity for human rights violators”, as well as “a renewed emphasis on cultural specificities to justify human rights violations”. 38 In the following section, a closer look will be taken at those ‘cultural specificities’ and describe how the concept of the universality of human rights works out in the Southeast Asian context.

34 UN Working Group on Minorities, supra note 17, para. 26.
37 Duncan, supra note 13, pp. 9, 12; UN Working Group on Minorities, supra note 17, paras. 24–26.
3. The Universality of Human Rights and Asian Values

3.1. Introduction

The notions of the universality of human rights and cultural relativism are mirrored in several UN human rights documents. The UN Charter states the aim of “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”. The Universal Declaration on Human Rights captures the universality of human rights as well, as member states “have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms” and which constitutes “a common standard of achievement for all peoples and all nations”. Subsequent treaties reiterate this universality and refer to the Universal Declaration. Although the 1993 Vienna Declaration and the Programme of Action reaffirmed the universality of human rights, it also left room for the notion of cultural relativism. This answered the call from non-Western societies for considering the regional context in the protection and promotion of human rights. Whereas it confirmed that human rights are “indivisible, interrelated and interdependent”, it is also stressed that “national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind”.

3.2. The Regional Context in Asia: Asian Values

In preparation for the Vienna Conference, Asian governments adopted the Bangkok Declaration. This document stresses, on the one hand, “the universality, objectivity and non-selectivity of all human rights” as well as “the need to avoid the application of double standards in the implementation of human rights and its politicisation and that no violation of human rights can be justified”.

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39) Article 1, and repeated in Article 55 UN Charter.
40) Preamble to the UDHR, adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.
41) Reaffirmations can be found in all nine core UN human rights treaties.
43) Ibid.
45) Article 7 Bangkok Declaration.
On the other hand, these rights “must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds”.46

When, in the Asian context, reference is made “to regional particularities and different cultural backgrounds”, the so-called ‘Asian values’ are often involved. In explaining the political and economic developments in East and Southeast Asia, Asian values have been playing an important role. After the Asian financial and economic crisis of 1997–1998, the validity of the Asian values argument was doubted, as these values where also used as an explanation for the region’s economic prosperity.47 However, scholars like Tatsuo Inoue have stated that the economic regression does not influence the importance of Asian values. He argued, amongst others, that the reasons for the influence of these values lay in history and politics, thus, in an Asian resistance of Western ideas. Similarly, after the economic crisis, some Asian political leaders perceived the Asian values as a form of protection against Western economic influences that were perceived as a new form of Western colonialism.48

The human rights debate in the region is also based on the generalisations of Asian values. In this regard, Asian values have been used by (South) East Asian states since the 1990s to underline that Asia can make contributions equal to Western civilisations to the development and growth of mankind.49 Hence, the Asian values are used as a means for reaching political equality. They are specifically used as a tool to resist Western attempts to export the Western ideas of democracy and human rights since the end of the Cold War. In Asia’s view, these notions are too much Western influenced.50 Accordingly, the proponents of Asian values are of the opinion that these notions must continue to make room for Asian influences and interpretations. In promoting these values, the proponents argue furthermore that Asian values “transcend the religious, linguistic and tribal divisions within Asia and are distinct from the dominant values in the West”.51

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46 Article 8 Bangkok Declaration.
Universalists question the existence of Asian values as a set of virtues ascribed to by all Asian countries that have different or even contradicting religions and languages. Indeed, the continent of Asia as a whole is too diverse to be captured in a number of values. As said, since the 1990s, a part of the continent has promoted its common values under the heading of Asian values, but even then the common values have been criticised for not capturing the region’s diversity. Another point of critique is that the proponents of Asian values have been selective in choosing their approach to protect their own authoritarian position.

3.3. The Content of Asian Values

Asian values are often linked to Confucianism, Buddhism and Taoism and are a reflection of especially (South)East Asian convictions. Singapore and Malaysia are the main proponents of these values, but other Southeast Asian countries have also adopted their stance.

As explained, Asian values are used as an explanation for the specific political developments in (South)East Asia and challenge the Western perception of democracy, human rights and the Western focus on civil and political rights. In other words, Asian values entail the claim for large cultural, economic and

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53) This has also been argued by Inoue, who is generally critical on Asian values. He states that “the Asian values discourse conceals and distorts the internal diversity, complexity, and transformative potential of Asian societies and reproduces the Western prejudiced perception that Asian societies are culturally inadequate to develop human rights and democracy on their own”, Inoue, *supra* note 48, p. 125.

54) Hoon, *supra* note 36, p. 158.

55) F. R. Dallmayr, “Asian Values” and Global Human Rights’, 52 *Philosophy East and West* (2002) p. 173, and Iyer, *supra* note 51, p. 160. These religions or traditions have an impact on the concept of human rights. For example, Confucianism has a view of morality that differs from the rights-based morality of human rights. Confucianism is virtue-based, which means that a person must become ‘a person of excellence’, rather than an individual claiming rights. This implies that modesty plays a large role, and that a person must strive to live in harmony with other members of the community. Hence, virtues need protection, while rights need moderation and self-restraint.


57) However, Asian values are not embraced by all. For instance, the Dalai Lama and Aung San Suu Kyi opposed the non-liberal and antidemocratic elements of Asian value. Hoon, *supra* note 36, p. 159.

religious diversity that must be taken into account when developing (international) human rights law. The following description made by a Chinese author captures the general sentiment on what Asian values entail: “Asian values [put] emphasis on a quest for consensual solutions, communitarianism rather than individualism, social order and harmony, respect for elders, discipline, a paternalistic state, and the primary role of government in economic development.”

While bearing in mind this general description, Errol Mendes has divided the proponents of Asian values into different Schools, each having their own nuances: the Singapore, Malaysian and Chinese Schools.

The Singapore School is the most influential in the Asian values debate, especially among ASEAN member states. This School does not contest the universality of human rights, but underlines at the same time that there must be respect for (regional) diversity and the right of states to have their own view on human rights and democracy. The values that can be found in the Malaysian and Chinese Schools can be traced back to a number of central values in the Singapore School, of whose values are mainly derived from Confucianism. These values are: “nation before the community and society above self; family as the basic unit of society; community support and respect for the individual; consensus, not conflict; and racial and religious harmony.”

Tommy Koh, one of the proponents of the Singapore School, added to these central values the values of reverence for education, hard work, teamwork, thrift

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60) Yet, they also detract from this distinction by summarising the commonalities of the Schools in five different values: (i) Respect for hierarchy and authority, (ii) the importance of the family and social consensus over conflict, (iii) the priority of law, social order, and security above individual civil and political rights, to promote economic and social development, (iv) the priority of communal welfare over individual human rights, and (v) emphasis on self-discipline. Castellino and Domínguez Redondo, supra note 10, p. 21.
61) In the Singapore School, Lee Kuan Yew, Bilahari Kausikan, Goh Chok Tong, Tommy Koh and Kishore Mahbubani are influential. The Malaysian School is also known as the Mahathir Model (named after the former Prime Minister of Malaysia, Dr. Mahathir Mohamad) and the Chinese School as the China Post-Tiananmen-Confucianism-Nationalism model. Brems elaborates on the Singapore and Chinese Schools, supra note 59, pp. 36–54.
62) Tommy Koh, one of the proponents of the Singapore School, added to these central values the values of reverence for education, hard work, teamwork, thrift.
and respect for authority. The latter value is regarded by Koh as part of the “Asian version of a social contract between the people and the state”. This social contract entails that the government must maintain law and order, provide its citizens with their basic needs (jobs, housing, education and healthcare) and treat its people with fairness and humanity. The citizens are obliged to abide by the law and to have respect for authority. They must also save, work hard, motivate their children to learn and be self-reliant. Regarding the balance that must be struck between the rights and responsibilities of individuals and those of society, Wong Kan Seng states that the importance of development and good governance can influence how this balance is struck.

An example of how these Asian values are applied in political leadership is the ‘Singapore Model of Development’. Chong distinguishes three elements in this context:

- First, credibility of political promises, programmes, and personnel, including talent promotion and anti-corruption.
- Second, cohesion of the state, for which the values of teamwork, diligence, and harmony are important. Order and cohesion within the state are induced by the value of primacy of the nation.
- Third, confidence in paternalistic leadership, in the implementation of strict law and order and the planning of long-time communitarian good.

Overall, communitarianism has greatly influenced the Asian values, which is opposite to the ‘Western’ focus on individualism. Despite this fundamental difference, proponents of Asian values acknowledge the significance of public accountability, fair play, and faith in scientific solutions, which are perceived as ‘Western’ values. ‘Western’ values which they criticise are individualism and individual freedoms, which in their eyes are overemphasised. Moreover, in a recent interview, Mahbubani has explained that there is “an iconisation of democracy within the West”. Although he states that democracy is the end-goal, Asia

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63 T. M. Koh, ‘The 10 Values That Undergird East Asian Strength and Success’, International Herald Tribune, 11 December 1993; Iyer, supra note 51 p. 160; and J. M. Kobila, ‘Comparative Practice on Human Rights: North-South’, in J. M. Coicaud, M. W. Doyle and A. M. Gardner (eds.), The Globalisation of Human Rights (Rawat Publications, Jaipur, 2004) pp. 104–105. The question is to what extent a number of these values are only a reflection of Asia’s convictions as opposed to Western ideas. It is not defendable that, for example, consensus, racial and religious harmony, and reverence for education and hard work are not important to Westerners. In this regard, it could be argued that the distinction between ‘the West’ and ‘the East’ is emphasised too much by Asian values. Consequently, there is a risk that both sides continue to confirm the existing prejudices and stereotypes.

64 Statement of Wong Kan Seng during the Vienna World Conference of Human Rights, see Brems, supra note 59, p. 60.

65 Chong, supra note 49, p. 104.
may have its own route towards this goal. According to Mahbubani, this may mean that progress will be slow, in order to maintain stability within a country.67 In the meantime, soft authoritarian regimes are the status quo. Regarding minorities, the argument of, for example, Lee Kuan Yew has been that such regimes prevent conflicts between different religious and ethnic groups within a country. Democratisation would lead to violent ethnic disputes as ethnic minorities could oppress the minority groups.68 Tatsuo Inoue, however, has rightly argued that this risk is only present in an unrestrained democracy. Democracy therefore requires constitutional restraints on the power held by the majority; it does not mean that democratic participation as such should be denied.69

3.4. Conclusion

The above may give the reader the impression that Asian values are only brought forward in the political debate and used as an excuse for not complying with certain international standards. This view clearly casts doubt on the added value of Asian values in the human rights discourse. On the other hand, it is important to stress that Asian values are not only political values, but also the connection to a cultural past, and a reflection of ways of thinking and living. In this sense, Asian values inevitably are part of the context in which the protection and development of human rights, including the rights of minorities and indigenous people, must take place.

Many Asian values find their origins in a collectivist way of thinking,70 and as such they do not seem to leave much place for specific rights for minorities or indigenous peoples. From a communitarian point of view, the rights of minorities and indigenous people are considered a threat to the collective and to national unity, so restraint is justified. This idea corresponds with the Asian value of ‘priority of law, social order, and security above individual civil and political rights, to promote economic and social development’ and the value of ‘priority of communal welfare rather than individual human rights’. Both these values can easily be associated with an assimilationist policy towards minorities and indigenous peoples.

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68 Lee Kuan Yew, see Inoue, supra note 48, pp. 126–127.
69 Ibid., p. 127.
70 The dominance of collective thinking in Southeast Asia has been affirmed by cross-cultural psychology, which has found that this region scores high on group-centred collectivism and low on individualism, F. Luthans, W. Zhu, and B.J. Avolio, ‘The Impact of Efficacy on Work Attitudes Across Cultures’, Journal of World Business (2006) p. 123. While the collectivist way of thinking is dominant, this collectivist perception is nuanced by individualistic influences found in, for instance, neo-Confucianism and the Buddhist idea of transcendental individualism that balance the stereotypical idea of a communitarian Asia, Inoue, supra note 48, p. 129.
However, several other Asian values can be interpreted as values indirectly protecting minorities and indigenous peoples. For example, the values of consensus and racial and religious harmony are reinforced if the needs of ethnic minorities and indigenous people are better protected. Next to this, the protection of these groups could be seen as part of the obligation of the state in the ‘Asian social contract’, as it entails amongst other things that it must provide its citizens with their basic needs and treat them fairly and humanely.

Generally, however, the call for cultural relativism, emphasising diversity in the context of the human rights debate, will work out to the detriment of minorities and indigenous peoples. First, this attention for regional diversity does not seem to apply to diversity on the national level: as described in section 2, the national initiatives to promote diversity through the protection of the rights of minorities and indigenous peoples are limited and the focus of most states is rather on the development of national unity by assimilation. Furthermore, the claim of Asian States of having ‘an own way in developing towards democracy’ might be used as an excuse to violate basic human rights. However, then the question could be: to what extent is there stability in accordance with the values of consensus and racial and religious harmony if the human rights of part of a country’s population are neglected?

It may be concluded that the Asian values do not leave a very generous place for rights for minorities or indigenous peoples, but that they do not explicitly exclude them either. A more serious impediment for the development of such rights in the Southeast Asian context, however, is the exceptional measure of discretion Asian states are reserving for themselves with regard to their implementation of (core) human rights or with regard to their ‘road towards democracy’. By invoking their cultural specificities, they have created an unverifiable grey zone in which they are free to do whatever they want: to realise ‘Asian values’, but also to violate basic human rights. In such a grey zone, (initiatives concerning) rights for minorities and indigenous peoples are not likely to materialise.

In the following sections, the way in which Asian values are incorporated in ASEAN and in the recently adopted ASEAN Charter will be discussed. Subsequently, it will be explored to what extent there is a place for the protection of minorities’ and indigenous peoples’ rights by ASEAN, taking into account the role of Asian and ASEAN values.

4. ASEAN and its Values

4.1. Introduction

ASEAN was established in Bangkok on 8 August 1967. At the time of ASEAN’s inception, Southeast Asia was confronted with instability aggravated by

71) The ASEAN Declaration, Bangkok, 8 August 1967, supra note 2.
underdevelopment. The ASEAN founding states themselves were just beginning to learn to trust one another, while recovering from disputes of previous years. ASEAN was, therefore, presented as a sub-regional grouping for economic, social and cultural cooperation. The ASEAN Bangkok Declaration of 1967 stipulated the aims and purposes of this inter-governmental organisation and exhorted the association to attain its economic, social and cultural, technical, scientific and administrative aims through ‘joint endeavours’ and ‘active collaboration and mutual assistance’. The commitments to the aims of ASEAN were reaffirmed by the ASEAN Vision of 2020, which was adopted on the 30th anniversary of ASEAN in 1997.

4.2. ASEAN and its Values

At the First ASEAN Summit in Bali 1976, the member countries signed the Treaty of Amity and Cooperation in Southeast Asia, which set out the basic principles for their relations with one another and the conduct of the Association’s programme for cooperation. The introverted character of these principles is striking:

- Mutual respect for the independence, sovereignty, equality, territorial integrity, and national identity of all nations;
- The right of every state to lead its national existence free from external interference, subversion, or coercion;
- Non-interference in the internal affairs of one another;
- Settlement of differences or disputes by peaceful means;
- Renunciation of the threat or use of force; and
- Effective cooperation among themselves.

The treaty envisaged these principles as the foundation of a strong Southeast Asian community. It stated that ASEAN political and security dialogue and cooperation should aim to promote regional peace and stability by enhancing regional resilience. This resilience should be achieved by cooperation in all fields among the member countries.

On 20 November 2007, ASEAN agreed to a new Charter, which entered into force on 15 December 2008. A comparison with the principles mentioned in Bangkok (1967) and Bali (1976) shows a certain development towards more openness for human rights and other worldwide-accepted core principles. New in the Charter is the explicit reference to: “shared commitment and collective responsibility in enhancing regional peace, security and prosperity” (Article 2(2)(b));
“adherence to the rule of law, good governance, the principles of democracy and constitutional government” (h); “respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice” (i). Not entirely new, but with more emphasis than in previous documents, the Charter aims at “upholding the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN Member States” (j). And finally, most relevant in the context of this article, the Charter refers to: “the respect for the different cultures, languages and religions of the peoples of ASEAN, while emphasising their common values in the spirit of unity in diversity” (l).

Generally speaking, the following ASEAN values can be deduced from the different ASEAN documents: consensus, mutual respect, non-interference, peaceful settlement of disputes, renunciation of the use of force, promotion of social justice and the protection of human rights. At first sight, Asian values may seem to correspond with ASEAN values. However, a closer look shows that Asian values can contradict the ASEAN value of the protection of human rights. Especially, the Asian values of ‘respect for authority’ and ‘balance between the individual and societal interests’ can be problematic. ASEAN values can even conflict, namely, ASEAN’s adherence to protecting human rights and the principle of non-interference. This latter value, however, still prevails. The value of non-interference has from the beginning been instrumental to the maintenance of peaceful relations between the members of ASEAN. According to Kraft, “ASEAN and non-interference became inextricably linked in the minds of the region’s political elites”.

4.3. ASEAN and Human Rights

The discussion on the development of human rights at ASEAN level began in the early 1990s. In 1993, following the Vienna Declaration and Programme of Action, the foreign ministers agreed that ASEAN should deliberate and establish an “appropriate regional mechanism on human rights”. In 1995, an informal non-governmental Working Group for an ASEAN Human Rights Mechanism was established, which is in continuing dialogue with ASEAN officials. This Working Group proposed a Human Rights Commission with monitoring,
investigative and recommendatory powers. ASEAN’s ambition to progress in the field of human rights became more and more visible: in its 2004 Vientiane Action Programme, specific programme areas are listed: the establishment of a Commission on the promotion and protection of rights of women and children, the elaboration of an ASEAN instrument on the promotion and protection of the rights of migrant workers, the promotion of education and public awareness of human rights in the region, and networking among existing national human rights institutions in the region.

Article 14 of the new ASEAN Charter brings the establishment of a human rights body a step nearer. It provides that the terms of reference for this body will be determined by ASEAN’s High Level Panel (HLP). During the third meeting of the HLP, the Working Group submitted a list of recommendations. In this document, the Working Group refers to the guiding principles for the commission, its functions, its organisation and the evolutionary approach in developing a regional human rights mechanism. This document epitomises the relation between universalism, cultural relativism and Asian values described above. In this document, it is stressed that the commission must be guided by, among other things, “universally recognised human rights”, while there must also be room for “regional and nation laws, policies and practices consistent with international law”. The Working Group focuses furthermore on the reference to sovereignty and non-intervention as emphasised in the Charter, and links these notions to the acknowledgement that member states have “the internationally recognized responsibility to protect its populations, on the part of individual states, from genocide, war crimes, ethnic cleansing and crimes against humanity”. At the 14th ASEAN Summit that was held in December 2008, the first draft of the Terms of Reference (ToR) of the organisation’s human rights body was discussed.

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81 As agreed upon during ASEAN’s 41st Ministerial Meeting, Singapore, 20–21 July 2008.
82 Held in Manila (10–12 September 2008). Previous meetings were held in Singapore (21 July 2008) and Bangkok (14–16 August 2008).
83 Article 5 Proposed Elements for the Terms of Reference of an ASEAN Human Rights Body, supra note 79.
84 Ibid., Article 8.
During the 42nd ASEAN Foreign Ministers Meeting, held from 19–20 July 2009 in Phuket, Thailand, the ToR were adopted and the name of the ASEAN’s human rights body was agreed upon: the ASEAN Inter-Governmental Commission on Human Rights. The Secretary-General of ASEAN, Dr. Surin Pitsuwan, stated after the adoption of the ToR by the ASEAN foreign ministers: “[W]e are now implementing the Charter both in letter and in spirit. 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.” Unfortunately, the ASEAN Inter-Governmental Commission on Human Rights will only be a consultative body.

4.4. ASEAN and the Protection of Cultural Diversity

The Asian values of priority of law, social order and security above individual civil and political rights to promote economic and social development, and the priority of communal welfare rather than individual human rights, are often associated with an assimilationist policy towards minorities and indigenous peoples. Within the context of ASEAN and the ASEAN values, these specific Asian values have been toned down to a certain openness towards human rights and international law in general. Nevertheless, the ASEAN values immediately indicate the limits of this openness, being the entrenched value of non-interference.

Although minorities and indigenous people have not been explicitly mentioned in any ASEAN document since the Bangkok Declaration of 1993, they are not completely absent in ASEAN policy documents. ASEAN seems to have chosen to deal with those groups in a less ambitious and probably more feasible way, namely, through the protection of cultural, linguistic and religious diversity. In the ASEAN Vision 2020, adopted at the 30th anniversary of ASEAN in 1997, it was stated: “Our rich diversity has provided the strength and inspiration to us to help one another foster a strong sense of community”, and it continued to state that “we envision our rich human and natural resources contributing to our development and shared prosperity”.

In the Declaration of ASEAN Concord II (Bali Concord II) of October 2003, it was reaffirmed that ASEAN is “a concert of Southeast Asian nations, bonded together in partnership in dynamic development and in a community of caring societies, committed to upholding cultural diversity and social harmony”.

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87) See section 1 and footnote 1. See, however, para. 4.5.


89) Preamble of Bali Concord II, supra note 5.
Further, it was declared that “ASEAN shall respond to the new dynamics within the respective ASEAN Member Countries and shall urgently and effectively address the challenge of translating ASEAN cultural diversities and different economic levels into equitable development opportunity and prosperity, in an environment of solidarity, regional resilience and harmony”.

Subsequently the framework to “achieve a dynamic, cohesive, resilient and integrated ASEAN Community” was established consisting of the development of three pillars.

### 4.5. The Protection of Cultural Diversity Through the Three Pillars of ASEAN

The first pillar of ASEAN is the ASEAN Political-Security Community (APSC). According to several ASEAN documents the realisation of the APSC “will ensure that countries in the region live at peace with one another and with the world at large in a just, democratic and harmonious environment”. As follows from the text of Bali Concord II of 2003, the APSC shall abide by the UN Charter and other principles of international law and uphold ASEAN’s principles, in particular the principle of non-interference: “ASEAN shall continue to promote regional solidarity and cooperation. Member Countries shall exercise their rights to lead their national existence free from outside interference in their internal affairs.”

The recent APSC Blueprint, which is guided by the ASEAN Charter, does not emphasise the principle of non-interference and shows more openness towards the principles of democracy, the rule of law and good governance, respect for and promotion and protection of human rights and fundamental freedoms as inscribed in the ASEAN Charter. According to the Blueprint the APSC promotes:

A people-oriented ASEAN in which all sectors of society, regardless of gender, race, religion, language, or social and cultural background, are encouraged to participate in, and benefit from, the process of ASEAN integration and community building. In the implementation of, the Blueprint, ASEAN should also strive towards promoting and supporting gender-mainstreaming, tolerance, respect for diversity, equality and mutual understanding.

The promotion and protection of human rights will take place in the APSC-pillar, and one of the actions to this end will be the establishment of the ASEAN Inter-Governmental Commission on Human Right by the end of 2009. Other

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90) Ibid., para. 3.
91) In Bali Concord II, supra note 5.
93) Bali Concord II, supra note 5, at A. ASEAN Security Community (ASC), paras. 3 and 4.
94) APSC Blueprint, supra note 92, para. 7.
developments mentioned in the Blueprint are an increased attention to the promotion of education and public awareness on human rights, and to the protection and promotion of the rights of migrant workers, women and children.95

The promotion of peace and stability in the region is one of the other aims of the APSC pillar, and respect for diversity seems to be one of its central themes. Several interesting actions have been planned in this field, such as:

i. Support the inclusion of culture of peace which includes, *inter alia*, respect for diversity, promotion of tolerance and understanding of faiths, religions and cultures in the curriculum of ASEAN academic institutions;
ii. Develop programmes and activities aimed at the promotion of culture of peace, interfaith and intrafaith dialogue within the region;
iii. Promote respect and appreciation for the region’s diversity and harmony among the peoples of the region;
iv. Promote dialogue and greater interaction among various religious and ethnic groups.96

Compared to the Bali Concord II, the ASEAN Charter and the APSC Blueprint appear to be surprisingly open about the promotion and protection of human rights and about the promotion of diversity. Unfortunately, most actions planned for the practical realisation of this pillar remain still very general. Further, it must be noted that in the context of respect for diversity reference is made to the existence of religious and ethnic groups, not to minorities and indigenous peoples.

The aim of the second ASEAN pillar, the ASEAN Economic Community (AEC), is the realisation of economic integration, to create a stable, prosperous and highly competitive ASEAN economic region in which there is a free flow of goods, services, investment and a freer flow of capital, equitable economic development and reduced poverty and socio-economic disparities in the year 2020.97 The only reference made to diversity in this economic context is of a rather pragmatic and instrumental nature. It concerns the establishment of ASEAN as a single market and production base, “turning the diversity that characterises the region into opportunities for business complementation making ASEAN a more dynamic and stronger segment of the global supply chain”.98

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95 Ibid., para. A.1.5. For the mandate and functions of the ASEAN Inter-Governmental Commission on Human Rights, see <www.aseansec.org/DOC-TOR-AHRB.pdf>, para. 4.
96 Ibid., para. A.1.9.
97 Bali Concord II, supra note 5, B. ASEAN Economic Community (AEC), para. 1. See also for a detailed description: ASEAN Economic Community Blueprint, adopted during 13th ASEAN Summit, 20 November 2007, <www.aseansec.org/21083.pdf> (last visited on 20 July 2009). In this document no reference is made to human rights, minorities, indigenous peoples and diversity.
98 Ibid., para. 3.
The third pillar is the ASEAN Socio-Cultural Community (ASCC). The ASCC envisages “a Southeast Asia bonded together in partnership as a community of caring societies founded on a common regional identity”99 and focuses on different cooperations in the field of social welfare and development, health, rural development and poverty eradication, protection of children, youth, elderly people and women, education, university networking and resource development.100 The first Declaration of the ASEAN Concord of 1976 already stated the objectives of accelerating the development of low-income groups and rural populations, and the active involvement of all sectors and levels of the ASEAN communities. Attention to all kinds of disadvantaged groups and the aim of poverty reduction fit very well in the picture of ASEAN as a ‘Community of Caring Societies’101 as reaffirmed in the Declaration of ASEAN Concord II. Minorities and indigenous peoples have not been mentioned as one of the disadvantaged groups, but might indirectly (as a low income group, as women or as children) benefit from the measures listed in the Appendix to the Plan of Action of the ASCC and the ASCC Blueprint.102

Although the ASCC might seem a logical place for the protection and advancement of cultural diversity, the closest to this aim is the statement that: “The Community shall nurture talent and promote interaction among ASEAN scholars, writers, artists and media practitioners to help preserve and promote ASEAN’s diverse cultural heritage while fostering regional identity as well as cultivating people’s awareness of ASEAN.”103 The Blueprint lists several specific actions for the enhancement of the ASEAN’s cultural heritage, among others, to “[p]reserve and develop the traditional handicraft villages and occupations in the rural areas, particularly among ethnic minority groups”.104 This latter action is interesting because it is the first time since 1993 that minorities are explicitly referred to in an ASEAN document. However, one swallow does not make a summer. The practical meaning of this mention for the political and legal status of minorities in the ASEAN region should not be overestimated. The protection of minorities as such, unlike the protection of migrant workers, women and children, remains absent in the structures and core documents of the ASEAN.

99 Bali Concord II, supra note 5, C. ASEAN Socio-Cultural Community (ASCC), para. 1. For ASCC Plan of Action, see <www.aseansec.org/16832.htm> (last visited on 20 July 2009).
100 Ibid. See also on Social Development, <www.aseansec.org/21218.htm> (last visited on 20 July 2009). See also Blueprint for the ASEAN Socio-Cultural Community (ASCC Blueprint), adopted during the 14th ASEAN Summit, 28 February–1 March 2009, paras. 27 and 28, <www.aseansec.org/22336.pdf> (last visited on 20 July 2009).
101 ASCC Plan of Action, supra note 99, para. 5.
102 Appendix A for the ASCC, <www.aseansec.org/16835.htm> (last visited on 20 July 2009). See also ASCC Blueprint, supra note 100, paras. 27 and 28.
103 Bali Concord II, supra note 5, C. ASCC, para. 5. This aim has been elaborated in the ASCC Plan of Action, supra note 99, paras. 11 and 12, ASCC Blueprint, supra note 100, para. 44 xiv.
104 ASCC Blueprint, supra note 100, para. 44 vii.
As far as indigenous peoples are concerned, there might be some relevance in the promise in several ASEAN documents that “the Community shall intensify cooperation, inter alia, in addressing problems associated to environmental degradation and transboundary pollution” and the promotion of “the involvement of local community to maintain biodiversity conservation and forest health by 2015”.

4.6. Conclusion

Compared to the Asian values, the ASEAN values are more open towards international human rights and international law in general. However, the limits of this openness are also made very clear, being the entrenched value of non-interference. The strong adherence of ASEAN and its member states to this value inevitably hampers the development of rights of minorities indigenous peoples.

As far as the choice for the protection of diversity is concerned, it can be concluded with some disappointment that in the Bali Concord II of 2003 the preambular commitment of the ASEAN members states “to upholding cultural diversity” has been worked out only in the pillar of the ASCC, and there in fact boils down to nurturing the talent and promoting interaction among ASEAN scholars, writers, artists and media practitioners. The aim of raising the standard of living of ‘disadvantaged groups’ through cooperation in social development is the closest reference to minorities or indigenous peoples in this document. Further, the aims of cooperation in the field of rural development and poverty eradication, protection of children, youth, the elderly people and women, and education might appear to be beneficial to minorities and indigenous peoples. However, compared to Bali Concord II, in the ASEAN Charter of 2007 already more explicit reference has been made to respect for the different cultures, languages and religions of the peoples of ASEAN, and this trend seems to become stronger. In the Blueprints of 2009 this ‘respect for diversity’ has been worked out in several general actions which will be developed not only in the context of the third (ASCC) pillar, but also in the context of the first (APSC) pillar.

Unfortunately, the strong emphasis in all ASEAN documents, and especially in the ASEAN Charter and the Blueprints, on “common values in the spirit of unity in diversity” seems to devaluate the intention of respect of diversity. The question raised by this contradictory principle, as mentioned in Article 2(2)(l) of the Charter, is whether the reference to “respect for the different cultures, languages and religions of the peoples of ASEAN” is an indication of a new development within this region and a starting point for the recognition of rights for minorities and indigenous peoples. In this case, the second sentence should be seen as a mere political, and internally feasible, statement. The opposite interpretation of this
principle would be that the emphasis laid on “the common values in the spirit of unity in diversity” — especially when read in the context of the motto of the Charter: “One Vision, One Identity, One Community”\(^{106}\) — is another manifestation of the Asian value of communitarianism and cooperation. In this case, the first sentence referring to respect for diversity should be seen as feasible and useful in external relations.

In order to find an answer to the question as to the right interpretation of this principle of the Charter, the attitude of ASEAN member states towards international legal developments with regard to the protection of minorities, indigenous peoples and cultural diversity will be analysed in the following section.

5. Asian Minorities and Indigenous Peoples and the United Nations: A Last Resort?

5.1. Introduction

The lack of domestic or regional mechanisms sends Asia’s minorities and indigenous peoples to the United Nations (UN) for redress. Fortunately, the bulk of the core international human rights documents are ratified by the majority of ASEAN member states. Consequently, these states are bound by internationally recognised human rights, and they are obliged to submit periodic reports to the monitoring Committees of that particular treaty.

In general, there are the principles of equality and non-discrimination in the enjoyment of all human rights that are codified in different UN human rights documents.\(^{107}\) Additionally, there are a number of UN documents that are of special importance for minorities and indigenous peoples. To what extent have Southeast Asian states embraced these international documents?

5.2. Minorities

5.2.1. Article 27 of the International Covenant on Civil and Political Rights

Article 27 of the International Covenant on Civil and Political Rights (ICCPR) is the most widely accepted legally binding provision on minorities.\(^{108}\) The

\(^{106}\) Article 36 ASEAN Charter, *supra* note 6.

\(^{107}\) See the UN Charter, the Universal Declaration on Human Rights, but also later UN conventions such as the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social, and Cultural Rights (ICESCR), Convention on the Elimination of Discrimination Against Women (CEDAW), and Convention on the Rights of the Child (CRC).

\(^{108}\) Article 27 ICCPR: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to these minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”
Human Rights Committee (HRC) observed that “this article establishes and recognizes a right which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the [ICCPR]”.  

Although the HRC has never defined the concepts of ‘peoples’ or ‘minorities’ used in Articles 1 and 27, respectively, indigenous peoples are in most cases bound to fit under the concept of ‘ethnic, religious or linguistic minorities’. For instance, minorities’ right to enjoy their own culture has been widely interpreted so as to include “a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.”

Only half of the ASEAN member states have ratified or acceded to the ICCPR; Brunei Darussalam, Malaysia, Burma and Singapore have neither signed nor ratified this Convention and Laos only signed the ICCPR. None of the ratifying states have, however, made a reservation to Article 27, which implies recognition of the existence of minorities. Although Article 18 ICCPR does not explicitly refer to minorities, the Article is also relevant because it protects the freedom of thought, conscience and religion. Next to this, Article 1 ICCPR (and ICESR – International Covenant on Economic, Social and Cultural Rights) should be mentioned. Minorities have tried to invoke this right, but the Human Rights Committee as the monitoring body of the ICCPR has decided that no claim for self-determination may be brought under the Optional Protocol. Of the ASEAN member states, Cambodia has signed this Protocol and only the Philippines has also ratified this Protocol. This low acceptance of the possibility of individual complaints seems to follow from the idea that the implementation of human rights is a matter of domestic jurisdiction according to Asian governments. In general, it could be concluded with regard to the ICCPR that because of the low acceptance of the Treaty and the First Optional Protocol, the protection of Southeast Asian minorities based on these documents is rather limited.

109) CCPR General Comment No. 23: The rights of minorities (Art. 27), adopted on 8 April 1994, CCPR/C/21/Rev.1/Add.5, para. 1.
110) Ibid., para. 7.
111) Reservations are allowed if they are in conformity with customary law and the 1969 Vienna Convention of the Law of Treaties. Within these limits, reservations can accommodate domestic norms and values, Castellino and Domínguez Redondo, supra note 10, pp. 6, 33.
112) Article 4(2) stipulates that no derogations are allowed by Article 18.
113) Thailand has added a declaration to this Article.
114) Ominayak v. Canada (No. 167/1984); Marshall v. Canada (No, 205/1996); A.B. and Others v. Italy (No. 413/1990).
115) Castellino and Domínguez Redondo, supra note 10, p. 32.
5.2.2. The Convention on the Rights of the Child

Parallel to the wording of Article 27 ICCPR, the rights of minority children are addressed in Article 30 of the Convention on the Rights of the Child (CRC).\textsuperscript{116} Further, on the access to mass media, Article 17(7) stipulates that states “encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous”. At first sight this Convention might be called one of the most successful UN conventions because of its almost universal ratification. Although no reservations to Article 30 have been made by ASEAN member states, several other rights enshrined in the CRC have been restricted by ASEAN member states. Those restrictions are particularly detrimental to children belonging to minorities and indigenous peoples. Brunei Darussalam, for instance, has made a reservation, \textit{inter alia}, to Article 14, which lays down the rights of the child to freedom of thought, conscience and religion. Further, it must be noted that many states do not accept obligations on the basis of the CRC that go beyond the limits of their constitution. In this way Indonesia, for instance, limits Article 17 and Article 29. According to this latter Article the education of the child shall be directed to, \textit{inter alia}:

(c) The development of respect for the child’s … own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

Malaysia also invokes its Constitution and national laws to limit the working of, \textit{inter alia}, Article 2, containing the right to enjoy the rights set forth in the CRC without discrimination, and the child’s right to be protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions or beliefs of the child’s parents, legal guardians or family members. The same goes for Articles 13 and 14, establishing, respectively, the child’s right to freedom of expression and the rights of the child to freedom of association and to freedom of peaceful assembly. Even Article 37, containing the right of the child not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment and the right not to be sentenced to death or life imprisonment, can

\textsuperscript{116} Article 30 CRC: “In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.”
be set aside by the Constitution, national laws and national policies of the government of Malaysia. Sadly enough, also Singapore considers that Articles 19 (the protection of the child from all forms of physical or mental violence) and 37 of the Convention do not prohibit

(a) the application of any prevailing measures prescribed by law for maintaining law and order in the Republic of Singapore;
(b) measures and restrictions which are prescribed by law and which are necessary in the interests of national security, public safety, public order, the protection of public health or the protection of the rights and freedoms of others; or
(c) the judicious application of corporal punishment in the best interest of the child.117

It could be concluded that the CRC – a Convention that one would expect to be unproblematic and acceptable to all states – appears to contain several indigestible provisions to some ASEAN member states. As the declarations to the CRC make clear, several rights of this Convention have to yield to the constitutions, national legislation and national policies of those states. Very often such declarations and reservations turn out to be particularly detrimental to children belonging to a minority group or indigenous people.

5.2.3. The International Convention on the Elimination of All Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination118 is relevant because of its prohibition and definition of racial discrimination in Article 1 and because of its formulation of the positive obligation in Article 2(2) “to take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms”. This Convention has been ratified by only a slight majority of the ASEAN member states. Moreover, those states have repeatedly been reprimanded for not submitting the required monitoring reports.119 Brunei Darussalam, Malaysia, Burma and Singapore did not ratify this Convention.120

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117 For all reservations and declarations to the CRC see www.unhchr.ch/html/menu3/b/k2crc.htm (last visited on 20 July 2009).
118 Adopted by the General Assembly of the United Nations in resolution 2106 (XX) 2 of 21 December 1965.
119 According to the 2008 Report of the CERD, Cambodia and Vietnam each have reports overdue to the CERD, A/63/18, pp. 103–104.
120 See the website of the CERD www2.ohchr.org/english/bodies/cerd/.
5.2.1. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities

Finally, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UNDM) should be mentioned, which was inspired by the provisions of Article 27 of the ICCPR and adopted by the General Assembly of the United Nations in 1992. The UNDM, which is a non-binding instrument, contains several rights of minorities, such as the right to enjoy their own culture, profess and practice their own religion, and use their own language freely in public and in private; the right to participate effectively in cultural, religious, social, economic, and public life, and in decisions on the national and, where appropriate, regional level concerning their minority group or region. The UNDM also formulated several obligations for states with regard to minorities, such as the obligation to protect their existence and their national or ethnic, cultural, religious, and linguistic identity, and the obligation to consider legitimate interests of minorities in developing national policies and programmes, as well as in planning and implementing programmes of cooperation and assistance. Southeast Asian states are obliged (albeit only politically) to abide by the standards set in this UN minority instrument.

5.3. Indigenous Peoples

As far as indigenous peoples are concerned, two documents should be mentioned: Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, adopted by the International Labour Organization in 1989 (ILO Convention No. 169), and the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly in September 2007.

5.3.1. ILO Convention No. 169

ILO Convention No. 169 is the most comprehensive binding international document dealing with indigenous peoples’ rights. In its Preamble, the Convention draws attention to “the distinctive contributions of indigenous and tribal peoples to the cultural diversity and social and ecological harmony of humankind and the international co-operation and understanding”. Many provisions in ILO Convention No. 169 are aimed at national governments and contain obligations to take specific measures with regard to indigenous peoples. Maybe deterred by the binding nature of this Convention, none of the Southeast Asian or even Asian

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states have ratified this Convention.\textsuperscript{125} However, as described by Alexandra Xanthaki,\textsuperscript{124} this Convention has served as a model in the drafting of national legislation in the region, such as the Indigenous Peoples’ Rights Act 1997 (the Philippines)\textsuperscript{125} and the new Land Law 2001 (Cambodia).\textsuperscript{126}

5.3.2. United Nations Declaration on the Rights of Indigenous Peoples

Considering this lack of official enthusiasm for ILO Convention No. 169, it is remarkable that all Southeast Asian states voted in favour of the United Nations Declaration on the Rights of Indigenous Peoples in 2007.\textsuperscript{127} This Declaration was hailed as “a triumph for justice and human dignity following more than two decades of negotiations between governments and indigenous peoples’ representatives”.\textsuperscript{128} The General Assembly of the United Nations affirmed in the Preamble that “all people contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of mankind” and is convinced that “control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs”. The articles of the Declaration address both individual and collective rights and deal extensively with cultural rights and identity rights of indigenous peoples, such as their right to education, health, employment and language. The Declaration also promotes the full and effective participation of indigenous peoples in all matters that concern them. As said, all Southeast Asian and Asian states voted in favour of the Declaration, but the statements of the different representatives reveal some common concerns, mainly in relation to the scope of the right to self-determination of indigenous peoples and to the use of natural resources.

The representative of Burma said that her government was pleased to see that the Declaration included reference to self-determination and understood that such rights referred to activities which did not impair the territorial integrity or political unity of states.\textsuperscript{129} The representative of Thailand said that “Thailand understood that the articles on self-determination would be interpreted within

\textsuperscript{123} See <www.ilo.org/ilolex/english/convdisp1.htm> (last visited on 20 July 2009).
\textsuperscript{124} Xanthaki, \textit{supra} note 122, p. 4.
\textsuperscript{125} Republic Act No. 8731 (Indigenous Peoples’ Rights Act).
\textsuperscript{126} Royal Decree No. NS/RKM/0801/14 (Land Law).
\textsuperscript{127} Adopted by General Assembly resolution 61/295 on 13 September 2007.
\textsuperscript{128} This intervention of Forum Asia was given in association with the Cambodian Human Rights and Development Association (ADHOC), Indonesia Legal Aid and Human Rights Association (PBHI), NGO Forum on Cambodia, Pusat Komas/Dignity International, Taiwan Association for Human Rights (TAHR), Task Force Detainees of the Philippines (TFDP), Thailand Centre for Muslims for Democratic Development (TCMDD), and Empowering People for a Strong Civil Society (People’s Empowerment).
\textsuperscript{129} Aye Thid ar Myo, GA/10612, 13 September 2007.
the framework of the principle set out in the Vienna Declaration” and that “Thailand also understood that the Declaration did not create any new rights and that any benefits that flowed from the Declaration would be based on the laws and Constitution of Thailand”. The representative of the Philippines underlined that “his delegation’s expression of support was premised on the understanding that the right to self-determination shall not be construed as encouraging any action that would dismember or impair the territorial integrity or political unity of a sovereign or independent State. It was also based on the understanding that land ownership and natural resources was vested in the State.”

Remarkably, only the Indonesian representative made a statement with far-reaching consequences: after he had noted that “several aspects of the Declaration remained unresolved, in particular what constituted indigenous peoples”. He continued to argue as follows:

The absence of that definition prevented a clear understanding of the peoples to whom the Declaration applied. In that context, the Declaration used the definition contained in the International Labour Organization Convention, according to which indigenous people were distinct from tribal people. Given the fact that Indonesia’s entire population at the time of colonization remained unchanged, the rights in the Declaration accorded exclusively to indigenous people and did not apply in the context of Indonesia. Indonesia would continue to promote the collective rights of indigenous peoples.

Apparently, Indonesia wished to exclude its indigenous (‘tribal’) peoples from the Declaration’s scope of application. In this way, Indonesia is another example of a state where lack of conceptual clarity with regard to the definitions of minorities and indigenous peoples has been used for political purposes.

5.4. Cultural Diversity

In this context of the UN, three ‘cultural diversity’ conventions of the United Nations Educational, Scientific and Cultural Organization (UNESCO) also should be mentioned constituting the three pillars of the preservation and promotion of creative diversity: The 1972 Convention concerning the Protection of the World Cultural and Natural Heritage was ratified, or at least accepted, by all Southeast Asian states, except for Brunei Darussalam and Singapore. However, the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage was only ratified by Cambodia, Indonesia, Philippines and Vietnam. The 2005

130) Mr. Punkrasin, GA/10612, 13 September 2007.
131) Mr. Insigne, GA/10612, 13 September 2007.
133) Twenty-nine Sites in the Southeast Asian region have been placed on the Cultural Heritage List, <whc.unesco.org/en/list> (last visited on 20 July 2009).
Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which has the appealing aim, especially from the perspective of the Asian Values, to ‘reaffirm the sovereign right of states to draw up cultural policies’, was ratified by only three Southeast Asian states: Cambodia, Vietnam and Laos.

5.5. Southeast Asian States and the United Nations: Conclusion

Most Southeast Asian states have exercised restraint towards legally binding UN and ILO documents dealing with the protection of minorities, indigenous peoples and even cultural diversity in general. The 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities and especially the UN Declaration on the Rights of Indigenous Peoples, however, have been welcomed with more enthusiasm. The latter even seems to have triggered some change in the Southeast Asian attitude towards the protection of indigenous peoples. Notwithstanding certain concerns – which Asian states share with many non-Asian states – with regard to the scope of the right to self-determination of indigenous peoples and the use of natural resources, most Asian states are positive to the UN Declaration on the Rights of Indigenous Peoples. It remains to be seen whether this change was triggered by the non-binding nature of the UN Declaration, or by a sincere appreciation of its value.

Considering the chronology of the adoption of the Declaration in September 2007, and the adoption of the ASEAN Charter in November 2007, it could be stated in the first place that the relevant provisions in the ASEAN Charter, like the principle mentioned in Article 2(2)(l), should be seen in the light of the UN Declaration. More generally, a confirmation of this approach can be found in Article 2(2)(j) of the Charter which refers to “upholding the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN Member States”. This means that the intentions of the ASEAN member states with regard to “respect for the different cultures, languages and religions of the peoples of ASEAN” as laid down in the Charter can be taken seriously and might even become the starting point for the further development of indigenous peoples’ rights, and hopefully also for minorities in Southeast Asia. In the second place, conversely, the comments and support of most Southeast Asian representatives at the adoption of the UN Declaration by the General Assembly can – in retrospective – also be taken more seriously.

5.6. Practice: The Problems Remain

Notwithstanding these hesitant, though positive, first signs, the atmosphere was far from optimistic during the 1st Regional Workshop on Minority Issues in Southeast Asia organised by several non-governmental organizations (NGOs) in
January 2008,\textsuperscript{134} where “with extreme concern the situation of national or ethnic, religious and linguistic minorities, and the similarity and interrelationship with the situation of indigenous peoples” was noted.\textsuperscript{135} The following general problems were pointed out: non-recognition of the diversity of ethnic, racial, religious and other identities within states in the region by national governments; discriminating laws and policies often combined with the imposition of exclusivist national identities by states, often based on the ethnicity and identity of the ethnic majority; statelessness and the denial or deprivation of citizenship; disadvantaged situations such as poverty and exclusion generally experienced by minorities and indigenous peoples; lack of effective participation and representation in all stages of decision-making; the continuing serious situation faced by many minority women and children; the need for effective state compliance and domestic application of international human rights standards on minorities and indigenous peoples.

Subsequently, the human rights situations of minorities and indigenous peoples by country were raised and it became clear that no Southeast Asian state had a truly clean slate. Therefore, the subsequent reaffirmation of “the state’s primary responsibility to promote and protect the human rights of minorities and indigenous peoples in accordance with international human rights standards”\textsuperscript{136} sounded rather unconvincing and perfunctory. The NGOs who participated in this workshop seem to have placed their hopes on the United Nations, especially the UN Independent Expert on Minority Issues,\textsuperscript{137} the United Nations Forum on Minority Issues, and the Durban Review Conference in 2009, which they consider to be “a new opportunity to look into human rights issues related to racism, racial discrimination, xenophobia and related intolerance”\textsuperscript{138} As far as ASEAN is concerned, the development of effective Terms of Reference for an ASEAN human rights body (the ASEAN Inter-Governmental Commission on Human Rights) is called for “in accordance with international human rights standards, with full and meaningful participation by civil society and, in particular, representatives of minorities and indigenous peoples”.\textsuperscript{139}

\textsuperscript{134} 1st Regional Workshop on Minority Issues in Southeast Asia, supra note 28.

\textsuperscript{135} Ibid., para. 6 of the Final Statement.

\textsuperscript{136} Ibid., para. 13.


\textsuperscript{138} 1st Regional Workshop on Minority Issues in Southeast Asia, supra note 28, para. 26 of the Final Statement.

\textsuperscript{139} Ibid., para. 33. The ToR of the ASEAN Inter-Governmental Commission on Human Rights does not refer to minorities or indigenous peoples, supra note 86.
6. Conclusions

In this article, the feasibility of minorities’ rights and indigenous peoples’ rights in the context of ASEAN was investigated. In the search for an answer to this question, the silence in virtually all ASEAN documents on the existence of minorities and indigenous peoples, the “lack of appreciation of a history reflecting the cultural diversity and plurality of communities in society”\(^{140}\) and the fact that in Asia the protection of human rights at the national and regional levels is still in its infancy were not very promising first signs. This, however, triggered our curiosity in the first place with regard to the background of ASEAN’s silence with regard to minorities and indigenous peoples and its relation to cultural relativism, i.e. the concepts of Asian values and ASEAN values.

6.1. Asian Values, ASEAN Values, and the Grey Zone of Cultural Relativism

Cultural relativism as defended by proponents of the Singapore School means that, in applying international human rights law, ‘the diversity of the region’ must be taken into consideration. In practice, Asian states are reserving for themselves an exceptional measure of discretion with regard to their implementation of (core) human rights and with regard to their ‘road towards democracy’. However, by invoking their cultural specificity, they have created an unverifiable ‘grey zone’ in which states can realise the ‘Asian values’ and, when convenient, (temporarily) subordinate human rights to those values. For instance, several Asian states hold that economic growth takes precedence over individual human rights and that a certain level of economic advancement must be reached before realising human rights.\(^{141}\) Next to this possibility of suspending the applicability of human rights in the pursuance of an aim concealed in one of the Asian values, the ‘grey zone’ also leads to unpredictability with regard to the implementation of human rights.

As regards the influence of Asian values on the development of rights for minorities and indigenous peoples, it was noted that many Asian values find their origins in a collectivist way of thinking. Consequently, they do not leave much room for specific rights of minorities or indigenous peoples. As was pointed out during a seminar held in 2002, “non-conformity of minorities’ culture to that of the mainstream society had been interpreted, on repeated occasions, as posing a risk to national security and unity”.\(^{142}\) Given this rather fundamental impediment, the general conclusion in section 3.4 was that the Asian values as such do not

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\(^{140}\) Sub-Regional Seminar on Minority Rights, supra note 16, para. 10.

\(^{141}\) Iyer, supra note 51. 166. See also Mahbubani, supra note 49, p. 74. Research has shown, however, that the level of protection of civil and political rights has no causal links with economic success, Avonius and Kingsbury, supra note 49, p. 8.

\(^{142}\) Sub-Regional Seminar on Minority Rights, supra note 16, para. 10.
leave a very generous place for rights for minorities or indigenous peoples, but that they do not explicitly exclude them either. The main reason for this latter nuance is the existence of several Asian values, like the values of consensus and racial and religious harmony, which could be interpreted as indirectly protecting ethnic minorities and indigenous people. However, the interpretation of those values takes place in the so-called ‘grey zone’ and, inherently, remains unverifiable and unpredictable for the peoples concerned as well as for the world outside the Asian region. In this way, Asian values can cover the daily policy of many Southeast Asian states resulting in the (forcible) assimilation of minorities and indigenous peoples, the violation of their basic human rights and the denial of their rights to protection of their culture.

Therefore, it can be concluded that, more than the Asian values as such, the claim of cultural relativism made by Asian states in the context of the human rights debate appears to be a serious obstacle for the development and protection of rights of minorities and indigenous peoples in this region of the world. In other words, the policy – mainly that of restraint – of Southeast Asian states with regard to minorities’ rights and indigenous peoples’ rights falls in the ‘grey zone’ created by the claim of cultural relativism and which can largely be covered by Asian values.

As far as the compatibility of minority protection and the protection of indigenous peoples with ASEAN values is concerned, there are several remarkable developments. In the first place, ASEAN values – being consensus, mutual respect, non-interference, peaceful settlement of disputes, renunciation of the use of force, protection of human rights, promotion of social justice – show more openness towards human rights and international law than the above-mentioned Asian values. Nevertheless, ASEAN seems to avoid explicit reference to minorities and indigenous peoples in its official documents. This can be explained to a certain extent by the fact that ASEAN, as a regional organisation of Southeast Asian states, cannot develop a view on this issue contrary to its constituting members’ approach. Moreover, it must be considered that ASEAN was never meant to be or become a regional human rights organisation. The main focus of ASEAN is on economic, social and cultural cooperation and the recent developments with regard to human rights are very young. The ASEAN Inter-Governmental Commission on Human Rights will be established at the end of 2009, and it will only be a consultative body.

However, the main reason for this silence can be found within ASEAN values. As concluded in section 4.6, the limit of the openness towards human rights in ASEAN values has been made very clear, being the entrenched value of non-interference. The strong adherence to this value makes the development of

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143) See also Suryadinata, supra note 75.
144) See Press Release: Another Step Forward for Regional Human Rights Cooperation, supra note 86.
minorities’ rights and indigenous peoples’ rights in the context of ASEAN almost impossible. Since states themselves pose the greatest danger to minorities and indigenous peoples, their protection, if taken seriously, cannot be entrusted to states exclusively, but requires a form of external supervision, by, for instance, a kin-state, a regional governmental organisation or an international organisation. In order for ASEAN to develop any form of external supervision or control mechanism it would have to sacrifice the value it was founded on: the value of non-interference.\textsuperscript{145} This, though, is still a bridge too far.

6.2. Protection of Cultural Diversity

Meanwhile, the (cultural) diversity of the region is a fact which cannot be denied. The second aim of this article was to analyse how ASEAN, notwithstanding its silence on minorities and indigenous peoples, accommodates the enormous cultural diversity of this region of the world within its system. A subsequent question was whether the protection of diversity as such could be considered a credible substitute for the direct protection of minorities and indigenous peoples.

ASEAN seems to be caught in the middle between the requirements of international law with regard to the protection of minorities and indigenous peoples and the values of its member states. ASEAN seems to deal with this position by choosing a third way out: in its 2007 Charter, and in the subsequent Blueprints, ASEAN explicitly mentions the protection of cultural, linguistic and religious diversity. On the one hand, this option seems to fit in the tradition of the Asian values; it leaves a great deal of discretion to the states, thus enabling them to keep control over the promotion of cultural diversity. On the other hand, the protection of cultural diversity corresponds with several international legal standards in this field and, moreover, even creates an indirect opening to the protection of the cultures of minorities and indigenous peoples.

However, this ‘solution’ is not as ideal as it might seem. In the first place, considering the national policy of most states, which is harming rather than promoting cultural diversity, it could be stated that the protection of cultural diversity is not (yet) deeply rooted in this region. The low level of ratification by Southeast Asian states of the relevant UNESCO conventions on cultural diversity confirms this conclusion. However, as far as the structure of ASEAN is concerned, respect for cultural diversity seems to become a serious item. It does no longer only fall under the pillar of the ASCC, where it boils down to nurturing the talent of, and promoting interaction among, ASEAN scholars, writers, artists and media practitioners, but it has also found a place under the first (APSC) pillar. Secondly, a danger inherent to the protection of cultural diversity by states, or even by a

\textsuperscript{145} Kraft, supra note 76, pp. 25–30.
regional organisation like ASEAN, is the creation of a monopoly. For minorities and indigenous peoples, the value of the protection of ‘cultural diversity’ will depend on the extent to which they will be involved and allowed to participate in decisions and measures affecting their culture.

6.3. Is There a Place within ASEAN?

The third aim of this article was to determine the tenability of ASEAN’s policy towards minorities and indigenous peoples. On the one hand, the ASEAN Charter proclaims the principle “to uphold the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN Member States”; on the other hand, ASEAN has to deal with its member states which seem strongly attached to their territorial integrity, do not unconditionally adhere to the international human rights standards, and, given the Asian values, nourish suspicion with regard to specific rights for minorities and indigenous peoples. As stated above, ASEAN seems to be caught in the middle between the requirements of international law with regard to the protection of minorities and indigenous peoples and the values of its member states, and prefers, probably therefore, to refer to cultural diversity. However, the reactions to recent developments in international law with regard to the protection of minorities and, especially the protection of indigenous peoples, in the form of the United Nations Declaration on the Rights of Indigenous Peoples enable a more refined view on the relation between Southeast Asian states, ASEAN and international law.

Although most Southeast Asian states are applying a strong assimilationist national policy towards minorities and indigenous peoples, they seem more lenient at the regional (ASEAN) and international stage: here they have adopted the new ASEAN Charter where respect for human rights and for cultural diversity are explicitly mentioned, and even more remarkably they cast positive votes for the UN Declaration on the Rights of Indigenous Peoples. Apparently, states as well as ASEAN are becoming more aware of an inevitable embeddedness in the broader international context of the issues they are coping with. Further, it is remarkable that, for instance with regard to indigenous rights, Southeast Asian states prefer to adhere to an international document on this issue, instead of dealing with this issue at the regional level in the context of ASEAN. This choice to keep delicate issues like human rights (until recently), minority rights and indigenous peoples’ rights outside the scope of ASEAN could also be seen in the light of the strong emphasis in the ASEAN values and principles on consensus, mutual respect and non-interference.

147) See the ToR of the ASEAN Inter-Governmental Commission on Human Rights, supra note 86, para. 2.
In other words, while Asian values seem to interfere with minority rights because of their collectivist and assimilationist character, ASEAN values seem to prevent the development of a regional approach on these delicate issues because of their strong emphasis on consensus, mutual respect and non-interference. This, however, makes the international level as presented by the United Nations not only a last resort for minorities and indigenous peoples in this region, but also for Southeast Asian states themselves who want to deal with human rights, especially with regard to minority rights and indigenous rights, in a ‘neutral’ and ‘safe’ way, without allowing the neighbouring states to look over their shoulder.

Is there a place for minorities rights’ and indigenous peoples’ rights in ASEAN? It can be concluded that minorities and indigenous peoples can only hope for a second-class place; either they will link up with the human rights developments − the ASEAN Inter-Governmental Commission on Human Rights − which can offer only limited protection to minorities and indigenous peoples, or they will have to reconcile themselves to an indirect form of protection, as one of the many contributors to the cultural diversity of Southeast Asia.