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Friedrich-Ebert-Stiftung in Southeast Asia

Friedrich-Ebert-Stiftung has been present in Southeast Asia for more than 30 years. Its country offices in Bangkok, Jakarta, Manila and Hanoi have been active in implementing national cooperation programmes in partnership with parliaments, civil society groups and non-governmental organizations, academic institutions and 'think-tanks', government departments, political parties, women's groups, trade unions, business associations and the media.

In 1995, the Singapore office was transformed into an Office for Regional Cooperation in Southeast Asia. Its role is to support, in close cooperation with the country offices, ASEAN cooperation and integration, Asia-Europe dialogue and partnership, and country programmes in Cambodia and other ASEAN member states where there are no Friedrich-Ebert-Stiftung offices.

Its activities include dialogue programmes, international and regional conferences (e.g. on human rights, social policy, democratization, comprehensive security), Asia-Europe exchanges, civil education, scholarship programmes, research (social, economic and labour policies, foreign policy) as well as programmes with trade unions and media institutes.

Dialogue + Cooperation is a reflection of the work of the Office for Regional Cooperation in Southeast Asia of Friedrich-Ebert-Stiftung in Singapore: it deals with ASEAN cooperation as well as the Asia-Europe dialogue.

- *Dialogue + Cooperation* will tell you about our activities in Southeast Asia by publishing important contributions to our conferences and papers from our own work.
- *Dialogue + Cooperation* will contribute to the dialogue between Asia and Europe by systematically covering specific up-to-date topics which are of concern for the two regions.
- *Dialogue + Cooperation* will be an instrument for networking by offering you the opportunity to make a contribution and use it as a platform for communication.

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Editorial: *Dialogue + Cooperation* 3/2004

This edition of *Dialogue + Cooperation* includes documents from two international conferences organized by Friedrich-Ebert-Stiftung in October 2004 in Manila, the Philippines: An Asia-Europe Dialogue on Human Rights and International Law: ‘The International Criminal Court – A New Era for Justice’, which took place on 11-12 October 2004; and an international conference entitled ‘The Relevance of Social Democratic Parties and Progressive Movements in East and Southeast Asia’, which was held on 14-15 October 2004.

The Human Rights Conference in Manila was the seventh in a series that the Friedrich-Ebert-Stiftung’s Office for Regional Cooperation in Southeast Asia had organized since 1996.

The first two papers are keynotes presented by the former German Minister of Justice, Professor Dr Herta Däubler-Gmelin, and the Chief Justice of the Philippines, the Honorable Hilario G. Davide Jr. Both papers stress the importance of ‘dialogue’ resting, as Hilario G. Davide says, on two premises: first, that human rights are universal and must withstand the myriad qualifications of cultural relativists; and, second, that the recognition and enforcement of human rights must also always be a cultural concern. Dr Däubler-Gmelin reminds us that there are still numerous questions that have to be discussed in greater detail. For example, are we using the same language when we talk about human rights? And, what about the implementation and control in our respective countries by national law enforcement or by following international implementation mechanism? She also points out that by looking at the world map we have to realize that Asia, with all its important countries, cultures, traditions, billions of industrious people and increasing economical and political importance, is hardly represented at all in the International Criminal Court. And Hilario G. Davide Jr. concludes by saying: ‘A dialogue between Asia and Europe is an invitation to understand each other’s visions, each other’s travails, each other’s problems and to arrive, by the same dialogue at solutions that should always be in favour of the Rule of Law and the unyielding advocacy and protection of human rights.’

For Karsten Nowrot in his paper on ‘Global Governance and International Law’, the term ‘global governance’ leads to the evolution of a multidimensional regulatory system of networks and transnational legal as well as political processes that require a broader understanding of international relations. While in the past, legal regulations in the international system were more or less neatly divided between domestic law, created by states, and public international law, also created by states, global governance has resulted in what has been called an ‘emerging legal pluralism beyond the state level’. In his final remark, Nowrot cites Abram Chayes and Antonia Handler Chayes, whose statement in their book *The New Sovereignty* was somehow a thread through all the discussions: ‘The largest and most powerful states can sometimes get their way through sheer exertion of will, but even they cannot achieve their principal purposes – security, economic well-being, and a decent level of amenity for their citizens – without the help and cooperation of many other participants in the system, including entities that are not states at all.’

This statement directly leads to the role of the United States of America (USA) with regard to the establishment of the International Criminal Court (ICC). The USA, a founding

member of the ICC at the beginning, still denies the ratification of the Rome Statute. The USA argues that the ICC would undermine their basic constitutional principles by a lack of checks and balances and by limitation of national sovereignty. Kittisak Prokati looks closely at the issue that the ICC infringes on national sovereignty. Using the cases of the US and Thai governments he comes to the conclusion that the debate on sovereignty shows a general lack of understanding of this issue on all levels, be it governments, parliaments and the public. He closes by asking: 'Whom do these governments really intend to shield from persecution of some of the most despicable crimes in the world?'

All papers stress the role of the civil society in promoting the ICC. Sinapan Samydorai, a representative of the small Singapore civil society, looks at the role civil society organizations play in promoting international law and multilateralism as well as at the restrictions such groups face in certain countries, for example in Singapore. Edmund Bon looks at the same issue from a Malaysian perspective. He reminds us of the fact that civil society normally deals with human rights issues in which the violator is the state. But we should also remember that there are more and more violations by non-state actors, such as multinational companies or trans-border terrorists.

Finally, a summary of the Seventh Asia-Europe Dialogue on Human Rights and International Law concludes this set of articles on the significance of the International Criminal Court.

The international conference on 'The Relevance of Social Democratic Parties and Progressive Movements in East and Southeast Asia' was a first attempt to take stock of the social democratic movement in the region. Chow Kon Yeow from the Democratic Action Party in Malaysia concludes in his 'stock-taking' paper that 'The last two decades can be considered an era of democratic development. However, the process of consolidation towards democracy remains weak. The political change following the 1997 crises had offered opportunities for the strengthening of young democracies, ushering new governments that promised reform and there is a clamour among Southeast Asians for more accountable government and good governance.'

Answering the question 'Has social democracy made gains?' the participants of the conference replied overwhelmingly 'yes'. The various presentations at the conference, especially from newly established political parties, were one proof of this statement. One of these 'new' parties is Akbayan in the Philippines. The difficulties of developing from a social movement into a political party are described by Joel Rocamora, the former president of Akbayan. He originally called his paper 'Impossible is not so easy!'. His paper could well be of interest for other countries in the region because as he writes, 'Akbayan is a "work in progress"'.

Thomas Meyer, a leading thinker of the German Social Democratic Party, describes in detail the differences between the two competing models of social and libertarian democracy. He comes to the conclusion that social democracy is neither a system, nor a patent remedy for all the social and economic diseases, nor a ready-made model that could be exported to other places in the world. However, there are undisputable successes in the dimensions of welfare protection, social justice, the expansion of democracy, economic performance and democratic stability in those countries that have embarked on the way of social democracy.

And he finally states that in an era of globalization, social democracy requires simultaneous implementation at both levels: with the individual countries and in the global arena.

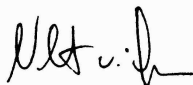
The last article of this edition deals with a completely different, but equally important matter: the future and the prospects of the Association of Southeast Asian Nations (ASEAN) as an Economic Community. The paper was first presented at a regional workshop entitled 'Towards an ASEAN Community: Agenda for Development and Social Responsibility through ASEAN Integration'. The workshop was organized jointly by Friedrich-Ebert-Stiftung and the Lao Institute of Foreign Affairs (IFA) in Vientiane/Lao PDR in June 2004. The two authors from the Singapore Institute for International Affairs (SIIA) updated their paper in October 2004 for this edition of *Dialogue + Cooperation* and conclude that increasing East Asian integration is not a policy choice but a policy necessity for ASEAN in order to keep its economy vibrant and competitive in the global market place. By default, ASEAN's position as the 'hub' of East Asia should be leveraged for maximum gain. The extent of how much benefit ASEAN can derive from its 'hub' position is critically dependent on how well and effective ASEAN can move forward from AFTA to an ASEAN Economic Community.

All papers reflect the opinions of the individual authors. The Singapore Office of Friedrich-Ebert-Stiftung would like to express its sincere appreciation to all the contributors of this edition.

Finally, on a more personal note, this will be my last *Dialogue + Cooperation* as editor. After 37 years with Friedrich-Ebert-Stiftung, and 22 years dealing with Southeast Asia, it is time to say good-bye to a region that has been my home for at least 16 years. My next stop will be retirement in the deep Southwest of Germany, an area that is supposed to have the most sunshine in Germany – I hope that is true!

I wish all readers of *Dialogue + Cooperation* and all friends of Friedrich-Ebert-Stiftung happiness, as well as a healthy and long life.

Yours sincerely



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International Law and the International Criminal Court

Herta Däubler-Gmelin*

Part I

We all know that we are living in the era of globalization. And living together peacefully in a globalized world requires global laws, the most essential part of which are human rights. I think we all share the view that nations today and in the future cannot fulfil their obligations towards their citizens if they rely exclusively on their national laws and means. Too many problems have to be addressed on a global level: climate problems, telecommunication, economy, the fight against hunger and new diseases, the fight for human rights and against terrorism. These issues and many others need global cooperation.

Furthermore, every nation or state has to accept responsibility for the whole of mankind. The Philippines and Germany,

as members of the United Nations (UN), have signed and ratified not only the UN Charter and the important General Declaration on Human Rights, but also the special Human Rights Conventions, which, together with the UN Charter, have become essential parts of international law. Acknowledging this, we also know that there are numerous questions that have to be discussed in greater detail, which is why the dialogue between Asia and Europe is so important. Two of these questions are: Are we using the same language when we talk about human rights? And, what about implementation and control in our respective countries by national law enforcement or by following the international implementation mechanism?

Part II

We all know how indispensable and important strong and independent courts are for good governance of nations. Without a fair legal system, including the rule of law, and without accessible independent courts and binding human rights, neither a just order nor peace and stability are possible. Thus all our efforts to improve and secure this legal order are both necessary and useful.

The International Criminal Court was once just a dream of the most enlightened political leaders and humanitarian thinkers of the time. One such visionary was Gustave Moynier,¹ later president of the International Red Cross Committee, who addressed the then newly founded Red Cross Conference in 1872. After the First World War, President Wilson of the United States of America (USA) was one of the

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1. Gustave Moynier (1826–1910) was a Swiss lawyer who drafted the first Geneva Convention, adopted on 22 August 1864.

most famous protagonists. Like Moynier, he wanted to secure the implementation of the international conventions in force, mostly with regard to '*jus in bello*',² through an international court; a court that would not only deal with state obligations but also take up the principle of individual responsibility. And also like Moynier, Wilson's proposals were not heeded in his time – even the US Senate denied the Treaty of the League of Nations.

After the Second World War, a big step was taken with the adoption of the United Nations (UN) system, in which we have been living for more than 50 years. Among the most important elements are human rights, peace and interdiction of violence, except for self-defence, and international multilateral cooperation. These have to be preserved, strengthened and amended, even if rules, institutions and procedures have to be adapted to make the UN more efficient, more democratic and more representative for the world today. Within the UN system, the International High Court in The Hague was established – albeit with restricted competencies of which we have recently been made aware.

Individual accountability for crimes against humanity, war crimes and genocide by political and military leaders was the most important element of the Nuremberg and Tokyo Trials after the Second World War. Those trials were introduced by the victorious powers of the Second World War; they were not independent international courts, even if they acted according to international law principles. In 1946, the UN General Assembly adopted the 'Principles of Nuremberg', thus politically enforcing the proceedings and sentences of both tribunals and underlining the principle of individual accountability of political and military leaders for crimes against humankind. In so doing, the UN

General Assembly acknowledged realistically that the new UN Charter with its global legal order would not and could not be secured as long as those responsible for committing crimes against humankind could not be indicted and prosecuted following global laws and standards because they were political or military leaders and protected by immunity or impunity. Both former US Prosecutors, Robert H. Jackson and Telford Taylor, made it quite clear when indicting Nazi leaders in Nuremberg that this new era would have lasting obligations for everyone. They stated quite openly that law is never a one-way street and that history would judge all accountable leaders following these principles, which the Nuremberg and Tokyo courts were acting upon, as adopted by the General Assembly.

Nevertheless, and in spite of the longstanding and most valuable work of the International Law Commission (ILC) in drafting a code on crimes and procedures for an independent International Criminal Court (ICC), it took more than four decades before the end of the Cold War presented a realistic opportunity to create an ICC. During the Cold War, it had been possible to agree on certain important international human rights and conventions, such as those against genocide, apartheid or torture. While these added to the body of international criminal law, along with the UN General Assembly's 1974 agreement on the definition of aggression as forbidden in the UN Charter, it was not possible to find common ground to introduce the principle of individual accountability into international criminal law.

Then, in December 1989, the General Assembly ruled that the drafting of a Code for an International Criminal Court should proceed. Subsequently, in 1994, the first of many drafts was published. In the

2. '*Jus in bello*' is Latin for 'justice in war'.

summer of 1998, the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court finally convened in Rome, with delegates from 162 states, 17 international entities, 124 non-governmental organizations (NGOs) and 14 UN organizations. The discussions were often fraught – many states wanted less, while others wanted more. NGOs attempted to widen the catalogue of crimes within the competence of the ICC, or to get more protection for victims and witnesses from the beginning. Nevertheless, a reliable compromise was found, and the Rome Statute, with its balanced clauses on clearly defined crimes against humanity, genocide and war crimes, and common rules of procedure, was agreed upon.

On 17 July 1998, the delegates of 120 countries voted for the Rome Statute, with only seven opposing it, namely China, Iraq, Israel, Yemen, Qatar, Libya and the USA. After ratification by 60 member states, including Germany in 2002, the Rome Statute came into force on 1 July 2002.

On 11 March 2003, the justices, outstanding personalities from all over the world, convened for the impressive opening of the ICC. In May 2003, the Prosecutor General, Luis Moreno Ocampo, was elected. Two deputies were also elected and appointed, one from Belgium, the other an outstanding lawyer from Gambia. So far more than 1000 cases have been forwarded to the Court; the first cases have been accepted or are in the process of being accepted. The Prosecutor General appointed a US attorney, Christine Chen, to lead the prosecution in the first case.

I am quite sure that the International Criminal Court will be a success. And I am also sure that those who still have doubts will become convinced that it will succeed at its great task.

The ICC is, however, up against some major problems. First, more member states are needed to enforce the global importance of the ICC. Presently, with the addition of Burundi, Guyana and Liberia, 97 states have ratified the Rome Statute, not only placing the majority of the UN membership within the ICC system but also bringing the objective of 100 accessions within reach. But looking at the world map we have to realize that Asia and Southeast Asia, with all its important countries, cultures, traditions, billions of industrious people and increasing economical and political importance, is hardly represented at all in the Court. We hope that more nations from this region will soon join the Court, as without Asia and Southeast Asia, the ICC cannot reach its full potential.

Nearly all European states, and certainly all the member states of the EU, including my home country, Germany, have signed and ratified the Rome Statute. We joined because we are convinced that the ICC will strengthen international laws, multilateral cooperation and the respect for human rights on a global level, as well as having beneficial effects for every region and every state. We are not only openly asking our friends and partners in Asia to join, but we are also prepared to cooperate with them. We acknowledge that some questions need to be discussed and clarified, among them the issue of conferring national sovereignty to multinational institutions.

Only since the Second World War have we in Germany become acquainted with the concept and the necessity of cooperation in Europe, and we support the ICC because of our historic experiences. There are people in Germany who hold the view that national sovereignty should not be affected by conferring parts of it to international institutions. In the end, an overwhelming majority said 'yes' to handing

over a certain, exactly defined part of that which had been considered the purview of national sovereignty alone – indicting and prosecuting perpetrators by national law before national courts – to the multilaterally created and independent ICC, even if we had to alter our constitution to do so. We said ‘yes’, convinced that this ICC will help to gain more global respect for human rights by securing the principle of individual accountability, indictment and prosecution of perpetrators: no one accountable for torture, genocide and other atrocities will go free, if the Rome Statute and the ICC are effective. We said ‘yes’ because we are convinced that the ICC will strengthen global legality. We also realize that the ICC can only act under the rule of complementation, meaning that the Court will only act if a country is not able or willing to indict and prosecute itself.

Germany’s intention to indict and prosecute perpetrators itself was ensured by the adoption of a large set of national rules on cooperation with the ICC, and others which transfer the clauses of the Rome Statute into our legal system. Several states have done the same. Today there exists a model law that can be adapted to different legal systems in the world.

A second serious problem is the attitude of the USA, especially the current US administration, which has set itself against the ICC with the notorious American Service Member Protection Act (ASPA). There are several reasons for this attitude and it is necessary to discuss how to deal with them and limit the damage they cause. Firstly, it is a long-standing and widely known fact that the USA would have preferred an ICC that could only initiate a case with prior consensus by either the UN Security Council or the respective national government. This type of dependent court is exactly what the overwhelming number of states in Rome did not want, and I fully

agree with that; a dependent court is always a politically influenced court, meaning it does not work exclusively following its statute and the rule of law. Knowing this, it is even more unacceptable that the current US administration is not only trying to fight the Court, but also quite openly in the UN Security Council accused the court of being an ‘essentially flawed political institution’.

In this context I would like to highlight the agreement between the UN and the ICC that was signed by UN Secretary General Kofi Annan and Chief Justice Philippe Kirsch (ICC) in October 2004. It underlines the independence of the permanent ICC as it defines the conditions of cooperation and the relations between the UN and the ICC.

The Bush administration twice bullied the UN Security Council (UNSC) into resolutions that explicitly exempt US citizens participating in UN peacekeeping operations from the Rome Statute. During the discussion on UNSC resolutions 1422/2002 and 1487/2003, most of the UNSC ambassadors present expressed their doubts about the legality of the resolutions or their disagreement with the attitude of the USA. And indeed, it is hard to imagine how a member of a UN Peacekeeping Operation should be able to commit a crime under the jurisdiction of the ICC. Nevertheless, the resolutions were eventually agreed upon. In 2004, after the illegal Iraq war, the USA tried to present another resolution on exemption before the UNSC. However, the scandal about torture and abuse in Iraq by US military and so-called private US security officers made the adoption of such a resolution impossible. We have to keep this in mind for future reference. A third instrument used by the USA to fight against the ICC is the bilateral agreement, or BIA, which the US administration tries to get through political, financial and economic pressure. These are also an attempt by

means of bilateral relations to exempt US citizens from being indicted, prosecuted or extradited to the jurisdiction of the ICC.

It is difficult for small or financially weak states to withstand entering into such agreements and quite a number of states are not in a position to do so. The damaging effect of bilateral relations as well as international power play becomes evident. The powerful set the standards rather than the rule of law.

In the meantime, a number of legal assessments have found that these resolutions and agreements are legally questionable. I agree with the finding that not even UNSC resolutions are binding on the ICC, as there is no legal basis for that. And many existing bilateral agreements are not legally binding on the ICC, nor on those states that had to sign them. Nevertheless, there is no doubt that such agreements are politically damaging, not just to the ICC, but also to the cause of international law and to the principle of multilateralism in international relations.

One of the most interesting questions is whether there will be a change in attitude after the presidential elections in the USA. There are indeed some indications of this. For example, there has always been considerable support from US academia and civil society for the ICC as evidenced by the Princeton Principles of 2001, the American branches of the Coalition for an International Criminal Court (CICC), Amnesty International and Human Rights Watch. The *International Herald Tribune* recently published an article saying that the outcome of a US poll showed that the majority of US citizens do not and never have been opposed to the ICC. The same poll found that more than 60% of Bush supporters thought that the US was a member of this Court. The fact that the Bush administration partly copied the Rome Statute when drafting a statute for

an *ad hoc* court to prosecute Saddam Hussein may be an indication that part of the US administration accepts the Rome Statute as following the rule of law. So rather than being set back by the daily pressures coming from the present Bush administration we should increase the dialogue not only between our regions, but also between us and the USA.

The third problem is that the US tendency towards unilateralist thinking could become stronger and be copied by others. The global community has to ensure that this trend does not overwhelm multilateral cooperation. This might prove to be a real challenge and would require a lot of discussion and dialogue.

Addressing a conference in Berlin on fighting for global human rights everywhere and fighting against terrorism, the president of the Club of Rome, Prince Hassan of Jordan, pointed out that global law can only have favourable effects for peace, cooperation and understanding if it is not dictated by one or two powerful nations or institutions, but created, negotiated and adopted by multilateral institutions cooperating in partnership. He is right. It is worth mentioning this to our US friends and reminding them that we learned our lessons from the Boston Tea Party which marked the USA's birth as a nation state and its constitution as an outstanding model of democracy and the rule of law. The slogan the American colonials used in fighting against their British motherland was 'No taxation without representation'; reworded in the language of today it would be: 'Democracy requires that every country has the chance to participate in global law, meaning multilateralism is required, unilateralism is out'.

Finally, there will be a lot more to do in the years ahead to amend the Rome Statute. The next conference to revise the Rome Statute will take place in 2009, and for this

conference a new convention on aggression has to be drafted. In this conference I hope that other grave international crimes against humankind will be included, especially international terrorism and international trafficking of human beings.

Today we can say that the ICC will be a success story because of the quality and experience of its outstanding justices, and if it is supported by more member states, especially in Asia, and by important and reliable networks of partners within international civil society.

Asia-Europe Dialogue on Human Rights and the International Criminal Court – An Asian Perspective

Hilario G. Davide, Jr.*

Introduction

The Congress of the Philippines recently enacted two statutes protecting the rights of vulnerable sectors. The first, Republic Act No. 9208, defines and penalizes the crime of trafficking in persons. The second, Republic Act No. 9262, penalizes violence against women and children.

In declaring a state policy, these statutes acknowledge their provenance from international covenants and treaties on human rights. The significance of these statutes – and others like them – transcends the particular offences they define and punish. They constitute the concrete steps taken by the Philippine legal system to comply with international standards for the protection and the enforcement of human rights, and to give, once more, flesh and blood to the mandate in the Philippine Constitution on Human Rights. This Constitution devotes an entire article (Article XIII) to social justice and human rights and provides in Section 11 of its Article II (Declaration of Principles and

Statute Policies) that ‘The State values the dignity of the human person and guarantees full respect for human rights’. These statutes attain greater breadth because they extend the concept of criminal liability to cover all schemes for the exploitation of persons, including the exploitation of other’s vulnerability, with or without the victims’ consent. Also contemplated in the legal concept of violence is psychological violence, and economic abuse as well. Women and children can no longer be dealt with as abusive men please, and cowed into fear, submission and silence.

In a sense, the stale debate between monists and dualists on the relation of international law to municipal law has little currency today, for most domestic legal systems that have not, for ideological reasons, peremptorily closed themselves to the salutary influence of dialogue are coaxed and enriched to maturity by international law.

Human Rights in Asia

Asia is a paradox in several respects – human rights among them. It is this part of the world that has nurtured the philosophies and schools of thought that extol the dignity of the human person and

reflect acutely upon his or her nobility. Here the sages steeped their disciples in the doctrine of *jen*, human-heartedness, and a profound respect for the other. The dark side of the Asian picture, however, is

* The Honorable Hilario G. Davide, Jr. is the chief justice of the Supreme Court of the Republic of the Philippines.

equally well known. Here, up to the present, we have horrible stories of the transgression of human rights, often in institutionalized form. Despots and petty tyrants have introduced a callous disregard for human dignity that, in parts of this continent, is taking decades to undo. Indeed, bad habits are always difficult to unlearn. Transformation is a slow and even painful process.

I submit that a dialogue between Europe and Asia on human rights rests on two premises: first, human rights are universal and must withstand the myriad qualifications of cultural relativists; and second, the recognition and enforcement of human rights must always be a cultural concern.

It makes absolutely no sense to assert human rights without, at the same time, claiming them at all. We, who are Asians, who take justifiable pride in the richness of our culture, cannot and should not make of it a plea for the attenuation of the demands of human rights. Culture is checked and enriched, and must, therefore, grow in its respect for human rights. There is, however, a deeply rooted spirituality in Asian life that the West must recognize. While there is no way of justifying the destructive fanaticism of zealots, one cry the West cannot ignore is the clamour that the spirit be given its due. Men and women of faith are driven to zealotry and fanaticism when they face the prospect of the eclipse of the spirit. Many regrettable and detestable acts of violence and bigotry are contorted forms of the same cry: 'We take faith with utmost seriousness. Do not trivialize it'. It is also a fact that the most exalted expressions of regard for human rights have profound religion motives.

A dialogue between Europe and Asia should also inquire into the various ways that the

rather arid discourse of human rights – confined as it usually is in the West to the language of law – can find freshness from the religious and spiritual traditions of the East.

Yet another dimension of the problem of human rights in Asia is the poverty and underdevelopment of many countries in this part of the world. It is clear that poverty is no excuse for the violation of human rights, but it is just as clear that the exigencies of state survival – exacerbated in several respects by the regime of globalization that is perceived to be becoming less of a promise and more of a threat for many Asian countries – drive nations to short-cuts, unfortunately even by-passing internationally enshrined and guaranteed rights. Again, a dialogue between Europe and Asia would allow Asia to articulate the challenges it must confront and its frustrations about a regime that seems to give to what should be its global partners with a very large spoon, yet hardly any morsel is left in its dish. Whatever may have been the promise of globalization, the fact is that many Asian countries are reeling from its effects. Europe must listen, even as we in this part of the world listen to Europe propose ideals of respect and regard for human rights. Indeed, the issue of poverty is very relevant to the issue of human rights. It is for this reason that the Philippine Constitution puts together in one article – Article XIII – the subject of social justice and human rights. The stirring words of Section 1 read:

The Congress shall give highest priority to the enactment of measures that protect and enhance the right of the people to human dignity, reduce social, economic, and political inequalities, and remove cultural iniquities by equitably diffusing wealth and economic power for the common good.

The International Criminal Court

Every court is an institutional embodiment of the law's abstractness – and this is what guarantees the application of the law not to particular persons, but to all. The aim of law is justice. Law is abstract so that it may treat all alike, and render justice to all alike. This is the basis of law's authority and its claim to adherence and allegiance. Every court represents the law's sway over all, for anyone may be called before the bar of justice to account for his or her conduct. Basically, this is the significance of the emergence of the International Criminal Court. It is the embodiment of the ideal that one who offends universal standards of decency and respect for human rights will be called to account for his conduct before it, whether he hails from the affluent societies of Europe or America, or from the struggling and impoverished countries of Asia and Africa. The International Criminal Court is the international guarantee of the obligation of all to abide by internationally defined standards of conduct, particularly in situations rife with risks for human dignity.

All courts prior to the International Criminal Court were *ad hoc* tribunals, established as a response to atrocities already committed. This was true of the Nuremberg War Tribunal and of the Tokyo Tribunal. This is true of the International Criminal Tribunal for former Yugoslavia as it is for the International Criminal Tribunal for Rwanda. These two tribunals have provided the nascent International Criminal Court with immediate antecedents and have contributed considerably to what can rightly be categorized as 'international penal jurisprudence'. The pronouncements of the International Criminal Tribunal for former Yugoslavia, for example, on the reach of the jurisdiction of international courts, as

well as the precedent-setting ruling of the Rwanda Tribunal that rape can be a predicate act of the crime of genocide have provided useful precedent not only for the International Criminal Court but also for domestic courts. But these *ad hoc* tribunals were largely 'reactive' courts – set up to deal with atrocities already committed. And herein lies the novelty of the International Criminal Court.

The Rome Statute and the Court that it engendered represent a legal order that has particular application to situations of war and civil strife. Therefore, the very existence of the Court is a statement of the global community's resoluteness about enforcing the law across national boundaries: that proscribes genocide, crimes against humanity, war crimes and unlawful aggression. The fact that 'unlawful aggression' is a legal concept in international law that remains to be more fully worked out does not detract from the significance of the Court. In fact, it highlights it, for rather than being weighed down by precedent and established doctrine, international penal law is a work-in-progress, sensitive to the many new – and often terrible – forms by which human rights are trampled upon and responding with thoughtfulness and incisiveness.

It is persuasively argued that in post-conventional times, the force of the law will be found in the dynamics of collective will formation, and the strength of the Rome Statute and of the institution it has brought forth is that it is the expression of the determination of the global community to be unrelenting in its proscription of the terrible violations of human rights that have marred world history. In this regard, there are grounds for criticism for the lack of support from countries that are in a

particularly privileged position to be champions of the Court and guardians of the legal order that it represents. We should all have learned the lesson by now that when we refuse to abide by a legal order, we make ourselves vulnerable to the onslaught of lawlessness and stand unprotected. The surest guarantee is that our soldiers and men always act above suspicion and in full and unqualified compliance with the law's demands. All of society's institutions depend on the trust society has placed in them, and we must trust the men and women who sit as judges of the Court to know when a charge is meritorious and when it is merely meant to annoy, vex or harass.

My personal hope is that the Philippine Senate will soon ratify the Rome Statute in the realization that one of our most potent weapons against lawlessness and the terrorism that threatens us all is to be uncompromising in our adherence to the rule of law in the world. By doing so, the Philippines will further improve its standing as one of international law's guardians and advocates, and enhance Section 2 of Article II of the Constitution, which adopts the generally accepted principles of international law as part of the law of the Philippines, and adheres to the policy of peace, equality, justice, freedom, cooperation and amity with all nations.

Conclusion

Acceding to a treaty is more than passing the required number of votes in a legislature to obtain the necessary domestic ratification. It is also a matter of attending to the constellation of often very difficult facts – political alliances and economic dependence, principal among them – that go into the decision of acceding or refusing

I have found in my own studies that the basic documents of the International Criminal Court – the Rome Statute, the Elements of Crimes and the Rules of Procedure and Evidence – contain insights in penal law that should spur the evolution and maturation of domestic legal systems. Under the penal laws of the Republic of the Philippines, for example, we recognize the crimes of murder, homicide and physical injuries, but we do not recognize the crime of genocide or war crimes as such. By codifying the concept of 'genocide', legal systems are invited to see beyond the assault on a particular victim to the assault on an ethnic, cultural or minority group itself as a distinct and reprehensible malice. Thus the legal system is also invited to recognize not merely the claim of an individual to life, but the claim of a group to its survival.

This, to me, is also the more profound implication of the principle of complementarity by which the International Criminal Court operates, for it makes each state-party principally responsible for the enforcement of international penal law and for the vindication of human rights. It is only when state-parties are unwilling or unable to prosecute offenders that the mechanism of the international penal system is set in motion.

to accede. A dialogue between Asia and Europe is an invitation to understand each other's visions, each other's travails and each other's problems, and to arrive, by the same dialogue, at solutions that should always be in favour of the rule of law and the unyielding advocacy and protection of human rights. Written some centuries ago

but still ringing with contemporary relevance is the philosophical wisdom of John Locke's¹ 'Two Treatise on Government':

Man, being born, as has been proved, with a title to perfect freedom and an uncontrolled enjoyment of all the rights and privileges of the law of nature, equally with any other man, or number of men in the world, hath by nature a power not only to preserve his property, that is, his life, liberty and estate against the injuries and attempts of other men, but to judge of and punish the breaches

of that law in others, as he is persuaded the offence deserves.

We may take issue with some aspects of Locke's thought, but we are undoubtedly in agreement that concomitant with our rights to life and liberty – whether as individuals or as a global community – is the right to judge breaches of the law by those who transgress these rights. This is the challenge and the promise, the task and the guarantee of the International Criminal Court.

1. John Locke (1632-1704), English philosopher, founder of British empiricism.

Global Governance and International Law

Karsten Nowrot *

What Is Meant by Global Governance?

Despite the amount of literature on global governance, the most influential description of this concept was given by the Commission on Global Governance, founded at the initiative of former German Chancellor Willy Brandt. In its concluding report in 1995, entitled 'Our Global Neighbourhood', the Commission stated:

Governance is the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and co-operative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest. At the global level, governance has been viewed primarily as intergovernmental relationships, but it must now be understood as also involving non-governmental organizations, citizens' movements, multinational corporations and the global capital market. Interacting with these are global mass media of dramatically enlarged influence. ... There is no single model or form of global governance, nor is there a single structure or set of structures. It is a broad, dynamic, complex process of interactive decision-making that is constantly evolving and responding to changing circumstances.

Based on this definition, which – considering the complex phenomenon it tries to describe – necessarily has to be a rather abstract one, it is possible to identify three main characteristics of the regulatory scheme of global governance, all of them interrelated.

First, global governance is characterized by an increasing diversity of interconnected law-making processes, or, more precisely, 'normatively relevant regulatory processes', because not all of these instruments are legally binding in the traditional sense. While, in the past, legal regulations in the international system were more or less neatly divided into domestic law created by states and public international law also created by states, global governance has resulted in what has been called an 'emerging legal pluralism beyond the state level'. In addition, the former distinction between so-called 'hard law' and non-binding regulatory instruments is increasingly blurred. In establishing applicable law, international judicial bodies like the International Court of Justice (ICJ) and the Appellate Body of the World Trade Organization (WTO) frequently have recourse to international declarations, commonly referred to as 'soft law', especially those adopted at so-called 'world order' conferences such as the Rio Conference on Environment and Development. Non-binding 'codes of conduct' for transnational corporations, like the ones adopted by international

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organizations, such as the International Labour Organization or the Organization for Economic Cooperation and Development, as well as the codes adopted by individual corporations, sometimes subject to monitoring by non-governmental organizations (NGOs), exercise considerable regulatory force. Furthermore, international standards developed by private or intermediate organizations, such as the International Accounting Standards Board, the Codex Alimentarius Commission and the International Organization for Standardization, either acquire a certain amount of legally binding force through their incorporation in international treaty regimes, such as the WTO legal order, or, even if not directly legally binding, they are universally adhered to by the relevant actors and thus not devoid of normative value. Finally, autonomous self-regulatory systems have evolved without any or only negligible participation of states, such as the so-called 'new *lex mercatoria*' for business transactions, with the important role of the International Chamber of Commerce, the *lex informatica* for the Internet, partly dominated by ICANN (Internet Corporation for Assigned Names and Numbers), or the *lex sportiva*, prominently represented by the International Olympic Committee.

Secondly, global governance is also characterized by changes in and a growing variety of law-enforcement processes. Traditionally, international law has been primarily enforced by confrontational means, in a decentralized way, by individual states. However, four alternative trends of international law enforcement can be identified. First, international treaty regimes as well as other regulatory instruments show an increasing reliance on non-confrontational, cooperative enforcement mechanisms considered to be more conducive to promoting compliance with international legal obligations. Among

these mechanisms is the approach of seeking compliance by providing incentives to adhere to international norms – a prominent example is the 'Global Compact' initiated by the United Nations (UN) Secretary General. Other cooperative compliance mechanisms are notification and reporting requirements, monitoring systems, capacity building and technical assistance, which can be found in areas such as international environmental law, international human rights law and international economic law. For example, various so-called 'flexible mechanisms' included in the Kyoto Protocol to the Climate Change Convention mirror nearly all of these compliance mechanisms. Furthermore, evolving private self-regulatory mechanisms rely less and less on states for securing compliance, and are instead developing their own judicial and non-judicial enforcement mechanisms. Aside from the well-established practice with regard to private and mixed business transactions, other notable examples are the various private and intermediate mechanisms for the resolution of domain-name disputes.

Thirdly, there is an increasing tendency to enforce international law by invoking respective violations in civil and administrative law cases at domestic courts. In the United States, this 'transnational human rights litigation' has been tested using the now well-known Alien Tort Claims Act in trials of foreigners such as that of Karadzic, the former leader of the Bosnian Serbs, as well as multinational corporations. While cases such as these in the United States deal primarily with the possible consequences of violations of human rights and international criminal law, in 1993, the Supreme Court of the Philippines, concerned with the termination of timber licence agreements granted to private companies, handed down a far-reaching decision with regard to international environmental law by ruling

in the case of *Minors Oposa v. Secretary of the Department of Environmental and Natural Resources* that plaintiff minors have standing to invoke for themselves as well as for their unborn posterity the right to a healthy environment based on the concept of 'intergenerational responsibility' under constitutional but also, as invoked by the plaintiffs, under international law.

Last but not least, there are clear indications that the idea of an institutionalized judiciary as an instrument of international law enforcement has gained momentum. In recent years we have observed an increasing use of the 'old' ICJ by states and the UN General Assembly, in light of which the Court decided, two months ago, to take measures to increase its productivity. Even more notable is the establishment of various new international judicial bodies such as the International Tribunal for the Law of the Sea, the Dispute Settlement Body of the WTO and, of course, the International Criminal Court, leaving aside similar developments at the regional level in the areas of human rights, international criminal law and economic integration.

In addition to this growing diversity of interconnected law-making and law-enforcement processes, a third and final central feature of global governance is the important role played by non-state as well as sub-state actors in the development and enforcement of these regulatory instruments. Not only do international organizations create between themselves an increasingly dense network of formal and informal agreements – one of the most recent examples being the agreement signed between the UN and the International Criminal Court – but also countless examples exist of non-state actors such as NGOs and multinational corporations being involved in the law-making and law-

enforcement processes. NGOs were incorporated in the preparation of the Convention on the Prohibition of Anti-personnel Mines, the Convention on the Rights of the Child, and the establishment of the International Criminal Court. Multinational corporations played a key role in the adoption of various WTO agreements, especially the TRIPS (Trade-related Aspects of Intellectual Property Rights) Agreement. Finally, the preparation of the Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, recently interrupted or at least slowed down by the UN Commission on Human Rights, also demonstrated the concerted effort of states, international organizations, as well as NGOs, business organizations, trade unions, multinational corporations and individual scholars.

With regard to the sub-state level, it is becoming increasingly obvious that states often do not act as solid units in international relations. Rather, for example, territorial sub-state entities, such as regions, interact with each other in transboundary cooperative regimes and administrative units below the level of government, together with non-state actors, participate in international regulatory regimes such as standardization organizations. Together with the evolving transgovernmental networks of legislative bodies and courts, this phenomenon of the 'disaggregated state' has recently been comprehensively described and analysed by Anne-Marie Slaughter in *A New World Order*.¹

To sum up, the term 'global governance' does not refer to some kind of centralized world government. On the contrary, it has already been described as 'governance without government', leading to the evolution of a multidimensional regulatory

1. Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004).

system of networks and transnational legal as well as political processes that require

us to broaden our understanding of international relations.

Underlying Reasons for the Emergence of Global Governance

What are the underlying reasons for this emerging regulatory scheme of global governance? The causes are indeed manifold. However, prominent among them are the processes that are commonly summarized by the term 'globalization'. Despite the prevailing concentration on the well-known economic side of globalization, the economic aspect is only one among many processes that contribute to this phenomenon. Other relevant developments are, for example, the revolution in telecommunications and information technologies, most prominently represented by the Internet, which has made possible a permanent world-wide dialogue and exchange of information between people who share the same interests, whether benign or not; the globalization of security interests caused by transnational organized crime as well as the emergence of truly global terrorist networks; and the phenomenon of what might be called 'ecological globalization', caused by threats to the global environment such as climate change.

All these aspects of globalization have one thing in common: they lead to an increasing loss by states of their previously held and virtually unchallenged ability to control these processes, even if they take place on their own territory. In particular, states acting individually are beginning to lack the necessary steering capacity to channel

these processes effectively to the benefit of their citizens and in pursuance of the promotion of global public goods, such as the protection of human rights and the environment, and the enforcement of core labour and social standards: multinational corporations can shift or at least threaten to shift their production plants to more 'comfortable' places, transboundary capital movements can take place in minutes, individual states cannot successfully combat global warming. This 'denationalization of economic and social activities' and the resulting decline in their steering capacity ultimately forces states to create and participate in formal and informal cooperative mechanisms with other states, international organizations, and increasingly influential non-state actors, such as transnational corporations and NGOs, in order to provide an effective regulatory scheme for the political, economic, ecological and social processes they are unable to control when acting on their own.

Thus, in the absence of something close to a world government – whether such an institution would be feasible or even desirable is an open question – the processes of globalization require states to contribute to, tolerate and actively participate in the emergence of what is called global governance.

The Interrelationship between Global Governance and International Law

In the light of these mere factual findings, the normative question arises: Is there an interrelationship between global

governance and international law? And if there is, what are the specific features of this connection?

Beginning with the impact of international law on the regulatory scheme of global governance, it is common knowledge and thus hardly worth mentioning that international law was formerly confined to a set of rules – often merely of a procedural nature with only a limiting and guiding effect on states as the sole subjects of international law in their interactions with each other. However, this traditional conception of international law has, over the past few decades, undergone quite a substantial change. Most significantly, with regard to its contents, international law has considerably extended its scope of application to areas that were previously thought to be in the exclusive competence of states, for example, human rights, core labour standards, environmental protection, the prosecution of the worst of crimes, and perhaps even legitimate form of government. Thus, in its transformation into a ‘comprehensive blueprint for social life’, international law is more and more independent of the will and interests of individual states. Rather, its substantive norms increasingly focus on the realization of community interests, the abovementioned global public goods – a process that has already been labelled the ‘constitutionalization of international law’.

In my opinion, it is in this context of the realization of global public goods that the significance of international law in the regulatory framework of global governance lies. International law provides the underlying values, the goals to be pursued by the various and diverse processes of global governance. By providing these substantive guidelines, international law ensures that global governance serves the purpose of contributing to the promotion of human rights, core labour standards and environmental protection. At the same time, international law thereby also creates the basis for the often disputed – especially with regard to the participation of non-state actors – legitimacy of the regulatory

framework for global governance.

The question remains: What are the effects of global governance on international law? I would venture to argue that global governance does not merely result in a continuation of the progressive development of international law that had already been visible in previous decades. Rather, under the impact of global governance, international law is being transformed into something new, something that only remotely resembles the normative structure of what we have so far considered to be the international legal order. Many terms have already been suggested to describe this ‘new international law’ – ‘global law’, ‘world law’, ‘world internal law’. I resist here the temptation to contribute to this more theoretical issue by adding another catchword. I would only like to briefly highlight three basic concepts in international law that require, in my opinion, a re-conceptualized understanding of the impact of global governance.

First, the enumeration of the classical sources of international law as prominently enshrined in Article 38(I)a to c of the ICJ statute is more or less outdated and in need of supplementation. The growing diversity of law-making processes in the international system, the increasingly blurred distinction between hard law and non-legally binding regulatory instruments and especially the rising importance of non-state actors in these processes are no longer adequately reflected in this provision. However, Article 38 not only requires a supplementation with regard to the possible sources of international law, but is also in need of a re-conceptualized understanding of the classical sources already enumerated in it. To give but one example, it is suggested that the traditional etatistic understanding of ‘state practice’ being one of the constitutive elements of customary law has to be modified by including the practice of powerful non-state actors as they

become increasingly influential participants in global governance. Interestingly enough, the wording of Article 38(I)b allows such a reinterpretation because it speaks only of 'international custom, as evidence of a general practice accepted as law' without restricting the possible scope of acting and contributing entities.

Second, under the impact of global governance, the traditional prerequisites of international legal personality, namely the granting by states of international rights and/or duties to the entity in question, can no longer be regarded as appropriate for the identification of normative responsibilities of powerful non-state actors such as multinational corporations and NGOs. There is general agreement that it is the purpose of international society to pursue international stability, avoid disputes and prevent the arbitrary exercise of power. In order to pursue these goals in an effective way, the development of international law has always been dependent upon a close conformity to the realities in the international system – a wisdom already expressed by the ICJ in 1949. As a consequence, the granting of international subjectivity also has to orientate itself to the changing sociological circumstances on the international scene. The international legal order needs to set the relations between all the *de facto* powerful entities in the international system on a legal basis, since a failure to bring the major actors under the rule of law imposes unnecessary risks on the inherently frail international legal system. Thus, contrary to the current predominant view, it follows that, in light of the aims to be pursued by the international legal order, the concept of international legal personality is in need of a reconceptualization. This is that, on the basis of a *de facto* influential position in the international system, a rebuttable

presumption already arises in favour of the respective actor being subject to applicable international legal obligations with regard to the promotion of community interests. It is submitted that this new concept concerning the establishment of international subjectivity – which would currently apply to some multinational corporations and NGOs – is clearly more in conformity with the evolving image of an international legal community that has as its central aim the civilization of international relations and the promotion of global public goods to the benefit of all.

Thirdly, in the light of global governance, the necessity arises for a re-conceptualized understanding of the sovereignty of states. I do not argue that states are no longer of importance in the newly evolving international system. Overall, they still remain influential actors – in some areas, such as the use of force, more influential; in others, like the international economic system, less important. However, under the influence of globalization, states are increasingly incorporated in the multi-layered scheme of global governance, and their position in these regulatory processes often cannot even be characterized as being 'first among equals'. Therefore, in order to describe the new understanding of state sovereignty, I would like to quote Abram Chayes and Antonia Handler Chayes, who, in their work entitled *The New Sovereignty: Compliance with International Regulatory Agreements*² state:

It is that for all but a few self-isolated nations, sovereignty no longer consists in the freedom of states to act independently in their perceived self-interest, but in membership in reasonably good standing in the regimes that make up the substance of international life.

2. Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge: Harvard University Press, 1995).

To summarize, global governance and international law mutually affect each other: while the substantive norms of international law provide the goals to be pursued by global governance in order to gain legitimacy, the regulatory scheme of global governance has a profound impact on the

structure of international law by expanding the kind of law-making and law-enforcement processes, as well as by increasing the number of participants, that are of relevance in the international legal order, thereby changing the role of the nation-state in the international system.

Conclusion

In conclusion, I would like to stress that this transformation of the international legal order into a 'new international law', which is taking place under the impact of global governance, is not a constant and linear process. Very powerful states, as well as a number of other countries, try to resist or successfully resist – at least in the short run – even some of the developments outlined above. They try to partly 'opt out' of global governance. In other words, it cannot be denied that occasional 'backlashes' do occur, caused by actions of 'state sovereignty liberation movements' comprising certain governments. The controversy concerning the International Criminal Court is one example among

several other well-known instances in recent years. In commenting on these 'backlashes' I would like to confine myself to again citing Abram Chayes and Antonia Handler Chayes who state:

The largest and most powerful states can sometimes get their way through sheer exertion of will, but even they [and I would like to add, not to mention the other countries] cannot achieve their principal purposes – security, economic well-being, and a decent level of amenity for their citizens – without the help and cooperation of many other participants in the system, including entities that are not states at all.

The Debate on the Conferring of National Sovereignty on International Institutions

Kittisak Prokati*

Introduction

The establishment of the International Criminal Court (ICC) through the Rome Statute on 2 July 2002 marks a new era of international law. This is the revival of natural law and demonstrates a fundament of the rule of law in the 'era of global governance', which directly affects all individuals. The global validity and enforceability of human rights will be more clearly seen as common sense to the legal community.

With the establishment of the ICC, a new round of debates on national sovereignty began. The United States of America (USA), a founding member of the ICC, is still refusing to ratify the Rome Statute. The USA argues that the ICC would undermine its basic constitutional principles because of a lack of checks and balances, and would limit its national sovereignty.

The US Arguments

In the first place, 'checks and balances' represent America's central founding principles, as John Adams¹ put it, 'power must never be trusted without a check'. The ICC, in the eyes of the US administration, is based completely on unchecked power, and those negotiating the treaty rejected proposals for checks and balances. The ICC prosecutor may initiate investigations on his own, and would not be responsible or accountable to any elected body. The prosecutor would answer to no one but the court itself. Even the United Nations (UN) Security Council, charged by the UN Charter with maintaining peace and security, would be unable to check the ICC's excesses.

Furthermore, the ICC would undermine the USA's sovereignty in at least three ways. First, it claims jurisdiction over American

citizens even though the USA has not ratified the treaty or otherwise consented to such jurisdiction. Second, the treaty allows ratifying states to opt out of crimes added to its jurisdiction in the future but not non-ratifying states. And third, the ICC itself determines when it should defer to prosecution in national courts; it only needs to decide that national courts are unable or unwilling to prosecute.

Nevertheless, the US administration still maintains that they are neither disagreeing in principle with the ideals and objectives of the ICC, nor trying to make the ICC ineffective. The US government seems to prefer the prior practice of setting up *ad hoc* international courts to try specific cases, as was done in the Nuremberg Trials of Nazi war criminals.

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1. John Adams (1797–1801), the second President of the United States of America.

The Position of Thailand

These US arguments have caused problematic situations in some developing countries, such as Thailand. On the basis of a cabinet resolution on 19 September 2000, Thailand became a signature party of the ICC on 2 October of the same year. Although a national committee is still going over the details of the ICC Statute and considering whether to promulgate an additional law or amend the present criminal code, it is known that, due to its close relationship with the US government, the present government of Prime Minister Thaksin Shinawatra will not support the implementation of the ICC.

In an investigation of the Thai Senate Committee on Foreign Affairs, the Thai foreign minister admitted on 23 October 2003 that Thailand would not ratify the ICC Statute. The main reason for this is concern over the possible implications for the immunity of the monarch as head of

state. The foreign minister criticized the former Thai government's 'unthoughtful' and 'dangerous' decision, because, as a signatory to the ICC, Thailand will be obliged to send its nationals accused of crimes under the Rome Statute to the ICC, and this includes even the head of state. The present Thai government cannot allow such a clause, and this concern is sufficient for Thailand to withdraw its support from the ICC ratification.

The Thai people have been misled by this argument as it reminds them of the unequal treaties with colonial powers in the nineteenth century. The pride of their struggle to maintain independence during the colonial era in the nineteenth and twentieth centuries and their concerns over the immunity of their beloved king has thus influenced the Thai decision not to join efforts to improve international justice.

The Counter Arguments

As far as checks and balances are concerned, the ICC consists of four independent organs (the presidency; the pre-trial, trial and appeals divisions; the office of the prosecutor; and the registry), which have been assigned contrasting and sometimes competing institutional functions and objectives so that the power of the ICC is not unchecked. Additionally, the ICC limits its power significantly by following the principle of complementarity, requiring that it defers to national courts first and serves only as court of last resort to try only the gravest and most wicked of crimes.

As far as the US claim that the ICC requires the sacrifice of national sovereignty is concerned, the fact is that the ICC does not have authority to define

new crimes, but rather provides a permanent institution where these crimes can be adjudicated according to existing international law. In the Geneva conventions on war and in the Hague peace conventions, the international community has, for more than 100 years, prohibited the crimes of genocide, war crimes and crimes against humanity as violations of international law. The USA is a member of both conventions. In addition, those crimes were recognized as violations of international law by the post-Second World War tribunals at Nuremberg and Tokyo. More recently, the *ad hoc* tribunals sponsored by the UN to try war criminals in Rwanda and former Yugoslavia demonstrated this practice. Clearly these tribunals had the full support and backing of the USA. Therefore, we can conclude

that the existing status of US sovereignty will not be limited.

Despite the assertion of Thai international law experts that there are no grounds for the government's concern over the monarchy, the government has still chosen not to join the ICC. The ICC affirms that no immunity shall be given to the perpetrators of the worst acts, such as genocide, war crimes, crimes against humanity and acts of aggression. Since it is clear that the ICC will look for perpetrators who exercised 'effective

control' on the commission of the crimes, there is no reason to believe that the Thai monarch, who has no effective control over the mechanism of the state, will be subject to the ICC. Cambodia also has a constitutional monarchy, but has ratified the Rome Statute. Similarly, Norway, Finland, the Netherlands, the United Kingdom, Australia, Spain and Belgium saw no major conflict with legal protection for their monarchies when they ratified the Rome Statute. Concerns over the monarchy are therefore unfounded.

Conclusion

The Rome Statute is currently one of the best deterrents for some of the worst forms of human rights violations because it represents the most advanced international mechanism to combat impunity. However, the debate on sovereignty shows that there is a lack of popular understanding on this issue. It is time to make international law against wicked human rights violations and its mechanism understandable to the general public. This kind of popular legal understanding should be developed in

accordance with the legal consciousness and legal culture of each country, and the discussion on the ICC is a very good opportunity. In the present climate, it may be opportune to ask questions, particularly of governments that have been exhibiting tendencies towards authoritarianism and lack of respect for international standards. Whom do these governments really intend to shield from punishment for some of the most despicable crimes in the world?

Civil Society Promoting Multilateralism and International Law

Sinapan Samydorai*

Introduction

In June 1993, hundreds of Asian civil society organizations participated in the World Conference on Human Rights (WCHR) contributing to the Vienna Declaration and Programme of Action (VDPA). The WCHR had some impact on international human rights, resulting in the creation of human rights mechanisms such as the post of the United Nations (UN) High Commissioner for Human Rights in 1994, the UN Decade for Human Rights Education in 1994, the Declaration on Human Rights Defenders in 1998 and the Permanent Forum on Indigenous Issues in 2001, and the creation of National Human Rights Institutions (NHRI) in many countries. At the Durban 2001 World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR), newly emerging challenges were identified.

In the context of globalization, capital flows freely, but the freedom of movement of people is severely restricted. In some Asian countries, the emergence of democratic governance and civil society can be observed, while repressive legislation such as the Internal Security Act (ISA) and National Security Law (NSL) under authoritarianism still prevails in many countries. There has evidently been a lack of political will on the part of UN member states to uphold their commitments made at the World Conference on Human Rights.

Both the Vienna Declaration and the UN Millennium Declaration affirmed that they would 'spare no effort to promote democracy and strengthen the rule of law, as well as respect all internationally recognized human rights and fundamental freedoms, including the right to development'. The Universal Declaration of Human Rights declares the universality and indivisibility of human rights. Human rights cannot be achieved without guarantees of basic rights such as the right to life and fundamental freedoms. Human rights education and respect for human rights is the best weapon against terrorism and human rights violations. The monitoring and documentation of violations to protect human rights has made it difficult for governments to violate them and has provided a way to expose and punish numerous crimes committed by government officials.

Despite the various international laws to protect the basic needs of individuals, millions continue to be victimized by national and international policies that condemn them to suffer the negative impacts of globalization, poverty and denial of their rights. UN Secretary General Kofi Annan calls for a world that will provide for 'freedom from want' and 'freedom from fear'. For example, global annual deaths from war are 500,000, from crimes 750,000 and from suicides 1 million, but these figures are modest compared to

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preventable health-related deaths, which annually kill 17 million. There must be specific international instruments that will allow these policies to be considered as human rights violations, otherwise civil society organizations will lack effective tools to monitor and bring to justice these violations and crimes against humanity.

The coming into force of the International Criminal Court (ICC) this year following the adoption of the Rome Statute in 1998 is a step forward, as impunity remains a serious challenge to the people in the region. Although many governments have ratified and acceded to a number of core international treaties, they have failed to fulfil their obligations and failed to implement them. The International

Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which entered into force in 1976, have not been signed by some governments in Asia.

States have obligations to take measures to protect persons within their jurisdiction and bring to justice those responsible for attacks on civilians. All measures taken by states must be consistent with international law, in particular international human rights, refugee law and humanitarian law. The UN Charter prohibits torture and cruel, inhuman or degrading treatment or punishment. All measures taken must respect and protect the human rights of all concerned.

Civil Society in Singapore

In Southeast Asian countries, civil society is acknowledged as an emerging force of democratization. In reaction, some governments in the region have adopted restrictive measures to deal with this new development, including urging civil society groups to remain non-partisan, not to directly challenge prevailing government, to use the political party system and to contest elections, or governments have coopted civil society to help in policy discussion and formulation. It is convenient for governments to identify and manage individuals in emerging civil society when they join political parties. In Singapore, the government is reluctant to include independent political groups, policy groups or others such as human rights groups in the category of civil society. These groups are rarely recognized as members of civil society but are treated as political contenders.

Singapore is working towards a full realization of the Millennium Development Goals, and civil society is expected to

cooperate in the implementation of these goals. Political space is needed for a political society to exist in which all citizens have a legitimate right to participate. The interventionist policies of the PAP (People's Action Party) government over the past four decades has created an apathetic and non-risk-taking culture by criminalizing and persecuting alternative political voices. This has had a disastrous effect on aspects of most citizens lives, including their critical thinking, creativity and business.

The government is slowly becoming more open to the participation of civil society. Without genuine political commitment and respect for human rights from the government, it is not possible for civil society to play its role of promoting and protecting human rights. Singapore's economic development model is aimed solely at economic growth. The model lacks space for civil society organizations to participate in structural change, which is necessary for a more democratic, just, fair and peaceful development.

The Singapore government needs to be persuaded that human rights are not an obstacle for economic growth and development. In fact, respect for human rights will improve the quality of life enjoyed by Singapore residents. Economic growth should strengthen the fundamental rights of the people and should not be used to weaken respect for human rights. Economic progress can no longer legitimize suppression and coercion, even if the government argues that national security, social stability and public order are necessary for development.

Civil society organizations should be given more space to promote and protect human rights, especially the right to opinion and expression, peaceful assembly and association, and to monitor fundamental human rights. The government should meet the basic needs of an active citizenship by removing outdated policies, laws and restrictions on public speech, gatherings, and, if possible, abolish the Internal Security Act (ISA). If the ISA is to remain, it should be part of emergency legislation, applied only under a State of Emergency and approved by parliament. Allowing the ISA to continue in a democracy does not encourage citizens to participate.

Civil Society Faces Greater Restrictions after 9/11

Since 11 September 2001, some civil society activities have been further curtailed by new anti-terrorist measures that empower police to conduct surveillance into the lawful, private affairs of citizens under the guise of fighting terrorism. The police have powers to monitor telephones, e-mails and other forms of communication. Many Asian governments have restricted human rights groups, denying them the right to freedom of expression and opinion, and in Singapore, non-governmental organizations (NGOs) have been threatened with the ISA. Moreover, long-term problems of discrimination and poverty are no longer a top priority.

In this context, there is a great anxiety within civil society about how to respond to the changing environment within which civil society needs to work. While it may not be immediately discernable, a history of abuse of national security laws in Asia has put civil society in the region on its guard. Governments are proposing that more basic freedoms should be curtailed. The heavy state apparatus and paranoia of terrorism has even silenced some liberals and human rights activists. Meanwhile, governments are not addressing the root-cause of extremism – social, economic and political injustices.

Civil Society's Role in the Implementation of International Laws

Civil society is expected to play the role of advocacy and lobbying governments. Civil society monitors and reminds governments of their commitments to their people and the international community through the ratification of various covenants (human rights, labour rights and humanitarian laws).

Civil society does influence the development of international law and participates actively in the implementation of human rights, for example, in the ICC, the Ottawa Treaty, the World Conference on Human Rights and the World Conference against Racism.

The anti-landmine campaign (Ottawa Treaty) resulted in the adoption of the convention on the ban of mines. The initiative came from NGOs that had worked on the problem of mines in the field and decided to call for a ban on the use of landmines. The NGO's campaign for the banning of mines applied pressure on governments. Now 124 countries have ratified this convention, and NGOs continue to push for global ratification.

The Millennium Development Goals (MDG) are aimed at working towards freedom from fear, freedom from want and

the protection of the resources of this earth. To achieve the MDG, governments need to work in partnership with civil society. Is this partnership possible? If so, how can it be effective in building a more just, equitable, healthy and peaceful world? Civil society organizations are potential partners of governments to promote freedom from fear and want, peace, justice and development.

A good example of the cooperation of civil society organizations in international institutions is the Committee on Economic, Social and Cultural Rights.

Committee on Economic, Social and Cultural Rights¹

The primary function of the Committee is to monitor the implementation of the covenant² by state parties, that is, whether the state has adequately implemented and enforced the covenant. Could the implementation be improved so that all people who are entitled to the rights enshrined in the covenant can actually enjoy them in full?

State parties are required to submit periodic reports to the Committee – within two years of the entry into force of the covenant for the state party concerned, and thereafter once every five years – outlining the legislative, judicial, policy and other measures that they have taken to ensure the enjoyment of the rights contained in the covenant.

After an analysis of the reports and a presentation by the state, the Committee issues 'concluding observations', which is its decision regarding the status of the covenant for the state concerned.

The Committee recognizes the important contribution that can be made by civil society in the provision of information concerning the status of the covenant within states parties. The Committee was the first treaty body to provide NGOs with the opportunity to submit written statements and make oral submissions dealing with issues relating to the enjoyment or non-enjoyment of the rights contained in the covenant in specific countries.

On the first day of each session of the Committee, the afternoon meeting is set aside to give international and national NGOs and community-based organizations (CBOs) an opportunity to express their views on how the covenant is or is not being implemented by state parties. The Committee will receive oral testimony from NGOs as long as the information focuses specifically on the provisions of the covenant, is of direct relevance to matters under consideration by the Committee, is reliable and is not abusive.

1. The following text is adapted from Fact Sheet No. 16 (Rev. 1), Office of the High Commissioner for Human Rights, <http://www.unhchr.ch/html/menu6/2/fs16.htm#annexiii>
2. International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly in December 1966, and entered into force on 3 January 1976.

The Committee has indicated that the purposes of the NGO procedure are to enable it to inform itself as fully as possible, to examine the accuracy and pertinence of information, which would most probably be available to it anyway, and to put the process of receiving NGO information on a more transparent basis.

NGOs and CBOs wishing to provide reliable and new information to the

Committee may write to the secretariat of the Committee several months prior to the beginning of a particular session with a specific request to intervene during the NGO procedure. Groups with written materials may also send these to the secretariat, and may attend Committee sessions. Committee sessions are generally held in public, with the exception of meetings at which it prepares its concluding observations, which are held privately.

International Criminal Court

The International Criminal Court (ICC) is the first permanent international judicial institution with jurisdiction over individuals who commit gross violations against human rights and humanitarian law. The Rome Statute of the ICC includes genocide, war crimes and crimes against humanity as gross violations of human rights. Before the ICC, there was no permanent international enforcement mechanism with jurisdiction over individuals who commit these crimes. The ICC has the following features:

- It makes international standards of conduct more specific;
- It provides an important mechanism for the implementation of these standards;
- It will ensure that perpetrators are brought to justice when national courts are unable or unwilling to do so;
- Ratifying nations will fulfil their obligations by providing national laws that ensure that genocide, war crimes and crimes against humanity can be tried within their own borders.

Singapore Government's Position towards the ICC

Ambassador Kishore Mahbubani, Singapore's Permanent UN Representative, made the following points regarding the ICC in a statement about the UN Mission in Bosnia and Herzegovina on 10 July 2002:³

- Article 16 of the Rome Statute provides that: 'No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations,

has requested the Court to that effect; that request may be renewed by the Council under the same conditions'.

- The USA proposed that Article 16 should be indefinitely and automatically renewed. Article 103 of the UN Charter provides for Charter obligations to prevail in the event of a conflict between Charter obligations and other international obligations.
- Singapore has not yet acceded to the Rome Statute. But, as a small state, it is in our fundamental interest to exist in a rule-based international order.

3. http://www.globalsolutions.org/programs/law_justice/icc/unsc/1422/singapore.html

- It is a reality that the USA deploys disproportionate strategic weight in the post-Cold War world. This is a reality that we cannot brush aside. The principles engaged by this issue are important. But it is equally important to factor in the USA's contribution to peacekeeping.
- We live in an imperfect world. Our duty is to find practical and workable solutions to ensure that the good work done by United Nations Mission in Bosnia and Herzegovina is not unravelled, and that the future of the people of Bosnia and Herzegovina and the broader interests of the international community are not jeopardized.
- The USA is trying to seek a solution within the ICC framework through Article 16 of the Rome Statute. The USA 'requests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC for a twelve-month period shall not commence or proceed with any investigations or prosecutions ...'. Article 16 is also the basis of proposals tabled by France and the United Kingdom, the thrust of which we have supported.

Concluding Recommendations

- It is in Singapore's interest to exist in a rule-based international order.
- It is time for Singapore to come out of the shadow of US influence. We could learn from the European experience.
- Singapore should accede to the Rome Statute creating the International Criminal Court.

Advocating International Law

Edmund Bon*

No society can surely be flourishing and happy, of which the far greater part of the members are poor and miserable.

Adam Smith, *Wealth of Nations*

Civil Society

When we speak of the promotion of multilateral and international law through civil society, it is necessary to remind ourselves what we mean by 'civil society'. We have in the past used the term 'civil society' or 'civil society groups' freely without a real understanding of its true purport. In the absence of such an understanding, the following analysis would mean different things to different audiences.

Various attempts to define 'civil society' have been made. Unfortunately, there is no one clear definition.

The Cato Institute put it this way:

As political society – government – grows, civil society retreats. It is in civil society – the realm of liberty – that mankind flourishes. It is from civil society that industry, civility, rectitude, science, and prosperity arise. ... Civil society can be difficult to understand; it is individualistic without being atomistic and is made up of associations without being collectivist. Civil society is a spontaneous order, a complex network of relationships and associations based on the freedom of the individual,

who voluntarily assumes obligations and accepts responsibility for his or her behavior.¹

Civil society is defined as a structure or association, loosely organized, and which operates voluntarily. This is opposed to a 'state or political society', which operates on principles of coercion or self-interest. Examples such as self-help groups, consumer associations, non-governmental organizations (NGOs), charitable organizations, human rights organizations and trade unions constitute some of the diverse forms of civil society groups.

The Cato Institute explains:

No one is coerced into joining them, and they have no coercive power to force their desires on the unwilling. Political society encompasses those institutions that exercise coercion, whether in their financing (e.g., taxation), their participation (e.g., conscription), or their activities (e.g., economic intervention in or prohibition of peaceful activity). Government is the institutionalization of coercion.²

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1. See *Cato Handbook for Congress*, Chapter 2, at <http://www.cato.org/pubs/handbook/hb105-2.html>

2. Ibid.

State or political society is meant to protect civil society. The roll-back of civil society occurs when political society plays a role bigger than is necessary, eating into civil society:

Political society can do no more than provide the framework for virtue, industry and responsible behavior; it cannot mandate them. The moral awakening that is necessary will come, not from the corrupted centers of political society, but from the remaining healthy sectors of civil society.³

When the role, importance and legitimacy of civil society diminish, liberty, personal independence and respect for the human person diminish as well. Such conditions would not encourage the flourishing of individualism.

The second definition of 'civil society' says it is a sort of 'space'. It is not made up of a collective 'tangible' grouping of organizations, institutions or associations. It is something intangible – space – and this space is something that we are all entitled to and should claim. It is not homogeneous. It is limited at a point in time. The state or government competes for the same space. If it succeeds in claiming that space, it will be the voice of civil society. And if indeed that is the case, its views would prevail. Therein lies the support of the people. If it indulges in a culture of myth-making, this voice of civil society would be lying and the people would be deceived.

This space of civil society can be created and enlarged, claimed or re-claimed. The constant struggle for that space is our challenge as human rights advocates and activists. We must always strive to claim that space in our work.

Be that as it may, this view of civil society can be uncomfortable and dangerous. It divides people. An example of this is in Malaysia, where snatch theft incidents have been on the rise. People are fearful. The government has declared that suspected snatch thieves who are arrested will not be put on trial, but detained under Malaysia's Emergency Ordinance.⁴ Suspected terrorists in Malaysia are already serving detention orders under the Internal Security Act.⁵ Most ordinary citizens support such moves, saying, 'Why not?' From a human rights perspective, this is not quite right. Yet, is the voice of civil society reflected in public approval of such measures by the government?⁶

The human rights struggle has never been a short-term programme. Rather, it is projected as a slow, tedious process and a long-term investment for yields in the future. It is for a better society and a just world. The question that must always be posed based on this space concept of a 'civil society' is: What type of a state do we want to live in, and how are we to treat each other?

In doing this, we will appreciate that the space we are to create, claim or re-claim

3. Ibid.

4. This Emergency Ordinance is a preventive detention law that allows the executive to sign orders detaining suspects without charges being brought against them and without a trial. The orders may be extended and the detainee may be detained for an indefinite period.

5. This Act also allows for detention without trial.

6. The now infamous efforts by the Prime Minister of Thailand to stem the drug trade in that country are a good illustration. As many as 2,500 people were killed within three months in the first campaign of the government's war on drugs. A coalition of 51 Thai and international human rights and health organizations have condemned this, claiming alleged drug offenders were shot dead in apparent extrajudicial executions. The government has just announced a new campaign to send drug dealers to meet the 'guardian of Hell': see *Bangkok Post*, 6 October 2004, p. 12 and 7 October 2004, p. 6. In principle, shooting to kill suspects is wrong, as there should be a presumption of innocence. But is this the voice of civil society or would society encourage such action in the name of eradicating drug crimes?

as the voice for civil society lies ultimately in the application of global human rights norms, articulation of international law principles and advocacy of minimum humanitarian standards. International law provides core content for the protection of rights, balancing of interests and adjudication of disputes. This would govern relations between states and between states and non-state actors.⁷ This would also

guide national, regional and international mechanisms to resolve conflict situations. Domestic or national laws may or may not be consistent with international law norms and should always be tested against the backdrop of international trends. It is in this context that we should constantly focus our advocacy strategies and campaign policies – and not lose sight of them.

Human Rights Flavoured International Law

The human rights movement of today has come a long way. The language of ‘rights’, arguably started as a way to limit the powers of the state, can be traced back to the Magna Carta in 1215. There followed a history chequered with wars, conquests, torture, liberation, genocide and, in general, crimes against humanity.⁸ The formalization of laws which aimed to prevent, govern and alleviate the recurrence of such acts then found themselves in the principal instruments of the United Nations Charter, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. These covered broad areas.

Specific issues or groups, such as those relating to women, children, forced labour, genocide, human trafficking and exploitation, slavery and the slave trade, war crimes, crimes against humanity, racial discrimination, biological and toxic weapons, stockpiling and use of chemical weapons, apartheid, torture, degrading and

inhuman treatment or punishment, refugees, stateless persons and the international criminal court, have also been addressed by international conventions and instruments.

What is my point? It is clear that the lowest common denominator running through the various instruments deals, in one way or another, with the rights of individuals and, collectively, against the state. While the instruments are ratified by states and, in many instances, may express the obligations of a state *vis-à-vis* another state, the nucleus of the instruments is the protection, not only of individuals of those same states, but also of the global population. It seeks to empower individuals, the disempowered or the marginalized. It breaks down sovereign barriers and geographical boundaries between states.⁹ It is prefaced by the common thread that all persons, no matter where they may be, without distinction of any kind, whether race, colour, gender, language, religion, birth, origin, political or other opinions, or status, are born free

7. It is interesting to note that human rights norms recently found their way into the area of corporate responsibility and business enterprises when the United Nations Subcommission on the Promotion and Protection of Human Rights on 13 August 2003 approved and adopted ‘The Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’.

8. For a comprehensive account of the human rights story, see Geoffrey Robertson QC, *Crimes Against Humanity – The Struggle for Global Justice*, 2nd edn. (London: Penguin Books, 2002).

9. The clearest example of this is no doubt seen through the wide-ranging provisions of the Convention Relating to the Status of Refugees and the Convention on the Status of Stateless Persons.

and equal and are to be treated with respect and dignity. This is the essence of human rights. This is what we have taken for

granted, and perhaps forgotten, and I will address this issue now.

International Standards, Terrorism and Human Rights

Terrorism has, at this stage, momentarily crippled the human rights movement. We have lost the momentum and the moral ground-swell of the people. We are, wrongly, seen as assisting terrorist activities in the name of human rights. Terrorism has overtaken us. States have fast-forwarded the process of implementing laws without proper and true consultation with us, and all in the name of security. We have not caught up. We are wayward and haphazard. We have been too slow to react. There is a lack of a concerted plan or energy to position ourselves on this issue. We are merely responding on an *ad hoc* basis. The quick succession with which the United Nations passed resolutions and conventions to deal with terrorism, without significant human rights input as to their content and reach, is worrying. Countries such as Malaysia, which have not ratified core international human rights conventions, have, nevertheless, acted on the terrorism resolutions passed and ratified terrorism conventions. This leaves the terrorism law and security measures open to abuse without corresponding civil and political rights protection for the people of Malaysia.

The human rights movement has been taken by surprise that non-state actors have come to the fore to violate rights.¹⁰ Whom do we protect? What do we say? Human rights are meant to protect people – but who are the people to be protected?

We see how politics and a heavy-handed government in Indonesia is keeping Abu Bakar Bashir behind bars, despite having served his sentence and been cleared of charges of being the spiritual leader of Jemaah Islamiah. It appears to be a politically motivated persecution, using the law as a tool. Human rights norms dictate that a person who has undergone due process and served his sentence ought to be released immediately. Yet we tip-toe around the issue when we are told that he is being detained for another terrorism offence, as new evidence has emerged that he is the leader of Jemaah Islamiah.

It is this archetype which calls to the fore and tests our resolve in maintaining human rights principles and norms. We must explain to the people that upholding human rights does not mean supporting terrorism. This would require grassroots advocacy in simple language, on how human rights, in fact, when applied properly and within a true context, encourage conditions for peace, security and protection while upholding rights. We need to do more work, to go back to the ground, to engage the masses from the perspective that they are the victims we are seeking to protect. This would take a shift in mindset, emphasis and strategy, but we must do so without losing focus on the fact that the same human rights must be accorded to suspected terrorists. Once we are aware of this need, we can forge ahead purposefully.

10. See Louise Arbour, United Nations High Commissioner for Human Rights, 'Security under the Rule of Law'. Keynote address at the Biennial Conference of the International Commission of Jurists, Berlin, 27 August 2004, at <http://www.hchr.org.co/publico/comunicados/2004/cp0431.pdf> and Wilder Tayler, Legal and Policy Director of Human Rights Watch, 'Towards an Advocacy Strategy for Human Rights in the Fight Against Terrorist Acts'. Paper at the Biennial Conference of the International Commission of Jurists, Berlin, 28 August 2004.

In relation to the numerous security laws and anti-terrorism legislation passed by various states so swiftly, we have lost out on propounding human rights safeguards into such measures and enactments. Taking it from here, we must be alert to the possibilities for abuse and advocate narrow and strict applications of such measures, in a language which will be supported by the people, while not diluting the rights content of our message. We must always emphasize that security is a priority to be given equal weight to that of rights, and that both can co-exist without one compromising the other. We must remind societies that we are in this for the long haul and that the measures advocated are to create a future that is safer than it is now. Despite all the measures taken so far – measures that have largely ignored rights safeguards – the world is no safer a place now than it was before.

The courts of advanced societies have to, and are beginning to, respond in relation to the rights of suspects. In the USA, where the ‘war on terror’ emanated, the decisions in *Rasul et al. v. Bush et al.*,¹¹ *Hamdi et al. v. Rumsfeld et al.*¹² and *Humanitarian Law Project et al. v. John Ashcroft et al.*¹³ go a long way to reaffirm core human rights notions in the face of the overwhelming political might of the executive in the war on terror.

In *Hamdi et al. v. Rumsfeld et al.*, Justice O’Connor said:¹⁴

Striking the proper constitutional balance here is of great importance to the Nation during this period of on-going combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.

Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to condense power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.

Thus, while we do not question that our due process assessment must pay keen attention to the particular burdens faced by the Executive in the context of military action, it would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his government, simply because the Executive opposes making available such a challenge.

11. Case No. 03-334 (542 U.S. _ (2004)).

12. Case No. 03-6696 (542 U.S. _ (2004)). *Hamdi* was decided by the Supreme Court of the United States on 28 June 2004. Yaser Esam Hamdi, an American, was detained at some point in 2001 on the Afghanistan battlefield by the Northern Alliance and was turned over to the United States military. He was interrogated and transferred to Guantanamo Bay in January 2002, then to a naval brig in Norfolk, Virginia in April 2002, where he remained until he was transferred to a brig in Charleston, South Carolina. He was the first detainee labelled by the US government as an ‘enemy combatant’. No formal charges or proceedings have been filed against him. Subsequent to the Supreme Court decision, *Hamdi* was released on 11 October 2004. This is a victory for the human rights movement.

13. Case No. CV 03-6107 ABC (MCx).

14. At pp. 25, 29 and 30.

In the United Kingdom,¹⁵ lawyers for nine foreign terror suspects detained in British prisons without charge for nearly three years recently commenced opening arguments. The argument has been made that it is 'unacceptable to lock up potentially innocent people without trial or without any indication when, if ever, they are going to be released'.¹⁶ It is hoped that this argument, based as it is on human

rights notions, will prevail.

International human rights principles are norm-setting, time-honoured, agreed upon and cannot be derogated from, except in certain situations. This is precisely to cater for the situation now facing us. It does not matter to whom we apply the principles, it must be done. And we must not be afraid to say so.

Towards a Concerted and Effective International Human Rights Law Campaign

Human rights campaigning for developing societies may be seen as a three-tier 'building-blocks' process:

1. Awareness
2. Advocacy/Articulation
3. Action

Developing societies, such as Malaysia, are still at a very early stage of understanding and accepting international human rights norms. I speak in terms of both the public in general and the government. Awareness, therefore, is at its minimal and requires addressing. I will illustrate the three-tier process using Malaysia as the example.

While our Human Rights Commission ('SUHAKAM') has repeatedly called on the government to ratify core international conventions, such as the International Covenant on Economic, Social and Cultural Rights and the International

Covenant on Civil and Political Rights, the government has thus far refused to do so. Malaysia has only ratified the Convention on the Rights of the Child¹⁷ and the Convention on the Elimination of All Forms of Discrimination against Women,¹⁸ both of which appear to be the least politically sensitive and, it can be argued, are part of a policy to bolster the government's popularity.

The majority of the public at large appear to have yet to reach full awareness of human rights principles and their impact, let alone international norms. SUHAKAM has, since it was formed, commendably and to a large extent, contributed to formalizing and legitimizing human rights activism and advocacy in Malaysia, which was once seen (and may still be seen by some quarters) as 'anti-establishment' or 'anti-government'. This, in turn, has seen an encouraging rise in public education of international human

15. See Robert Verkaik, 'Appeal begins for terror suspects held in "UK's Guantanamo"', *The Independent*, 5 October 2004.

16. *Ibid.*

17. With many reservations, in effect rendering such ratification a mere formality with little practical use. The domestic legislation in the form of the Child Act recently passed further waters down the effect of the Convention, and it does not adequately cover many areas such as pre-trial detention for investigations. There has also been no legislation prohibiting children, protected by the Convention, from being detained under Malaysia's Internal Security Act, which allows for detention without trial. Recently, and despite ratification of the Convention, the government detained without trial under the Internal Security Act several children under the age of 18, who were protected by the Convention, under suspicion of being trained in Al-Qaeda camps in Pakistan.

18. To date, no new and wholesale legislation has been put in place to effectively empower Malaysia's international commitments under the Convention domestically.

rights norms. There is still a long way to go, but we are much closer now than we ever were before.

Without full awareness, it is not possible for the masses to advocate and clamour for action in implementing international human rights norms by the government. It cannot be denied that NGOs and civil society groups in Malaysia have contributed immensely by engaging SUHAKAM and complementing its work.¹⁹ It is hoped that SUHAKAM will continue to provide avenues for cooperation with other NGOs and civil society groups in raising awareness, which is the first tier.²⁰

The problem that poses a challenge to SUHAKAM is that if it works too closely with these groups, its perception and credibility may be affected. However, this should not cause any concern considering that, even at present, the government views SUHAKAM with caution and has chosen, up to now, not to debate any of SUHAKAM's reports in parliament. No substantial reasons have been given for this. If the cause is right, I see no reason why SUHAKAM should distance itself from other human rights groups.

On creating greater awareness, I am of the view that we are heading in the right direction, but it will take time. As a broad-brush approach, national human rights organizations can play an extremely important function, especially in some developing Third World nations where human rights activism is viewed with suspicion and hostility. Legitimacy, independence and credibility are provided

by such organizations. It is as much what is being said as who says it that matters. I am not saying that this is right, but it is a strategy that we can, and should, capitalize on.

In terms of the second tier, advocacy or articulation involves creating an atmosphere of constant engagement with the government on the delivery of human rights, either by way of participatory diplomacy and consultation, or by mounting legal challenges. It also covers monitoring and accurate collection of data or information to be used in such engagements. Engagements in these forms should become the norm rather than the exception. Ingenious and innovative interpretations of domestic or international law with comparative applications of international human rights norms of other countries should constantly be brought forward and argued. Legal test cases to analyse and examine the parameters should frequently be filed. There should be training, encouragement and vigilance to make this a culture of our work. Data and information should be collected with the dual purpose of presentation to governments for action and, if no action is taken, for legal cases to be filed. Time frames should be put into place for each individual issue or factual scenario. Plans of action must be drawn up, systematically, at the outset. If there is no will or resources to follow the plan through, or if it is impossible, it should not be embarked on.

We lack real and substantial organization and structure. Our resources are stretched. The way forward in this area must therefore be coalition based. There are insufficient

19. For example, in a climate of tight governmental control of the media in Malaysia, human rights groups use the offices of SUHAKAM to lodge complaints in public, where there will be media coverage, and at the same time hold press conferences with the media on the issue. This has met with some success and has paved the way for the media to highlight and report on politically sensitive issues that would not have been reported on in the past. The apparent and perceived independence, legitimacy and credibility of SUHAKAM in the eyes of the media are reasons enough not to censor such reporting.

20. One area that should be explored is the recent move by SUHAKAM to introduce a formal human rights syllabus in schools.

coalition-based initiatives. Human rights organizations must set aside any differences or bickering and work together, even if it means competing for the same funds. Ernesto Che Guevara was once quoted as saying in a speech:²¹

If we lack organisation, the ideas, after the impetus of the first moment, lose their effectiveness, fall into the basic routines and conformity, and become simply a memory.

Needless to say, there is insufficient positive engagement with the government on human rights issues in Malaysia. This is partly because we are ourselves not as organized as we should be and partly because the government culture has been that the authorities shy away from any talk of human rights, rarely grant us an audience and, when they do, there is in place a great deal of bureaucracy coupled with a slow turn-around time. The only time we will probably find the government taking a position and responding quickly enough is when a case is filed in the courts.

It is in this area that we should find ways and means to litigate human rights cases, as and when the facts permit. This heightens accountability, not only the government's but also the court's – we would know where the judiciary stands on a particular issue. We should appreciate the value of legal cases for they increase discussion and constructive dialogues. It shows where we are lacking and where we are heading in terms of protection. It defines issues, narrows facts, sets boundaries, tests the law and makes public the official position of governments.

The media has not been as fully utilized as it should. Not enough attention has been

paid to positioning human rights issues and articulating human rights language with, and through, the media. The freedom of expression and the press as fundamental human rights are indivisible from and part of the actual, content-based, capacity-building human rights advocacy. The rights enshrined in the former are imperative and necessitate the effective articulation of human rights issues within the latter. Media contacts should be lobbied, personally, on every issue, with a view to explain and help them internalize human rights and international norms. Strategies should be worked on to educate the media on effective human rights reporting. Human rights language in press releases or advisories should be easy to understand, concise and relevant, yet worthy of report. All this has largely been ignored, especially in Malaysia.

This second tier is unfortunately still very much a new area for Malaysia. But, while little has been done, there is surely more to come. We are said to be a peace-loving and conflict-avoiding people, prepared to accept what may come, but, it is hoped, with organization, vision and structure, we will make progress in this area.

The third tier of action concerns the ultimate in human rights protection – it is when the government puts into place the measures that we have been advocating. In Malaysia these have been few and far between, except when measures are seen to be popular with the people. This third tier is a culmination of the first and second tiers. Any progress made towards the fulfilment of this tier is a step closer to fulfilling what is desired. Of course, follow-up and monitoring of measures put in place is mandatory as part of this strategy.

21. Eduardo Sanchez, 'Remembering a journey with Che', (Project Syndicate), reproduced in *Bangkok Post*, 6 October 2004, p. 12.

As human rights advocates, we must also be perpetual optimists. We may not all see it achieved in our lifetimes, but that is the struggle. The human rights movement is a struggle to the death of certain ideas and for the birth of certain ideals. It is this struggle which will ultimately rest in the third tier – that certain practices, policies or laws are put to death so as to give rise to the application of accepted international human rights norms.

You will notice that the strategies I have stated appear to deal with human rights issues in which the violator is the state. We should remember also to factor

violations by non-state actors, such as terrorists, into our campaigns, but we should never compromise established and avowed human rights norms in the name of security. Both can exist in tandem. Do not become defensive over the question of terrorism. A balance can be struck – the question is how. The specifics would largely be based on the particular issue or legislation at hand. For example, human rights may be implemented in security laws in the form of safeguards (i.e. couched in the negative) rather than as expressions of privileges to be claimed (i.e. couched in the positive).

The End-Game

International human rights law is the culmination of the experiences of others who have suffered and died or survived. They are not necessarily from the same country as I, but their experiences can be used by me in my country. An issue won or lost in another country today is an issue similarly won or lost in my country today. International human rights law transcends time, people and place.

It is time to remember our core principles, to consider the challenges ahead, to re-think our strategies, to go back to the masses, to articulate or re-articulate our rights agenda and to lay claim to that space of civil society.

In his treatise 'Socialism and Man in Cuba',²² Ernesto Che Guevara wrote the following, which may be of relevance:

The road is long and full of difficulties. At times we wander from the path and must turn back; at other times we go too fast and separate ourselves from the masses; on occasions we go too slow and feel the hot breath of those treading on our heels. In our zeal as revolutionists we try to move ahead as fast as possible, clearing the way, but knowing we must draw our sustenance from the mass and that it can advance more rapidly only if we inspire it by our example.

22. This can be found at <http://playagiron.org/docs/guevara/man.php>

An Asia-Europe Dialogue on Human Rights and International Law: 'The International Criminal Court – A New Era for Justice?' Conference Summary

Norbert von Hofmann*

The Friedrich-Ebert-Stiftung Office for Regional Cooperation in Southeast Asia and the Manila Office of Friedrich-Ebert-Stiftung jointly organized its seventh International Human Rights Conference on 11-12 October 2004 in Manila, the Philippines. About 50 participants from governmental, non-governmental, academic and legal institutions within the Philippines, Southeast and East Asia, and Europe attended the conference.

All seven human rights conferences since 1996 have had the aim of preparing venues for open and constructive dialogue on human rights between representatives of different sectors of polity and society from Asian countries and Europe, and to contribute to a more practical and pragmatic approach and possible cooperation beyond the sometimes confrontational rhetoric of the past.

The objective of the seventh conference was to exchange views on the issues of global human rights with special reference to the International Criminal Court (ICC), and to raise awareness about the need to convince and encourage countries in Asia to become signatories to the Rome Statute which established the ICC in The Hague in 1998.

The main emphasis of the conference was the 'dialogue' – a dialogue between

concerned people from Europe and Asia. Both keynote speakers referred to that principle of dialogue. First, the former German Minister of Justice, Professor Dr Däubler-Gmelin, who said that 'Dialogue between the regions is of great importance, as we have to find out if we are using the same language when talking about human rights and to know if we are using the same measurements for implementation and control of human rights'. The Philippine Chief Justice, the Honourable Hilario G. Davide, Jr., stated that the dialogue between Asia and Europe rests on two premises: first, that human rights are universal and must withstand the myriad qualifications of cultural relativists; and, second, their recognition and enforcement must always be a cultural concern. In this context he stressed that the West must recognize the deeply rooted spirituality in Asian life, and that the dialogue between Asia and Europe can find freshness in the religious and spiritual traditions of the Orient, compared to the discourse of human rights in the West, which is often confined to the language of law.

No doubt, living in an era of globalization requires global laws, especially global human rights laws. Nation states cannot fulfil their obligations to their citizens if they rely exclusively on their national laws. Globalization in all its forms – trade, economy, finance and communication, as

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well as terrorism and cross-border crimes – shows that nation-states are losing control. Ongoing denationalization forces nation-states to engage in more international cooperation, resulting in a cry for ‘global governance’ or, even better, for ‘good global governance’. As Willy Brandt, the German Nobel Peace Prize winner once said, ‘We all live in a global neighbourhood’.

The need for global governance was defined by:

- An emerging legal pluralism;
- The blurred borders between hard law and (non-binding) soft law, such as codes of conduct, rules by non-state actors, international treaties and conventions, international monitoring, compliance mechanisms, rulings by international financial institutions, etc.;
- The increased role and influence of non-state actors such as non-governmental organizations (NGOs), international civil society groups and multinational corporations (MNCs).

This demand for a stronger role for non-state actors was a thread through all the discussions over the two days of the conference, especially because many participants were representing civil society or NGOs. To quote Willy Brandt again, ‘International cooperation is far too important to leave to governments alone’. In this context there were repeated demands for NGOs, civil society groups and MNCs to define their rights and duties. Something like a ‘code of ethics’ is necessary.

It was observed that civil society had lost ground and space in the changed security environment since 11 September. The enemy is no longer the government or the state only but also non-state actors, which are difficult to define. It is therefore essential to keep in touch with the people and not to dismiss domestic forums as a

means to achieve international rules of law and global human rights.

The answer to the demands for ‘good global governance’ is a series of international conventions, including human rights conventions, core labour standards, international environmental law, financial regulations and so on. It is obvious that global governance requires new international laws, new legal bodies as well as a new understanding of the sovereignty of states.

However, the transfer from purely state (rules) to international rules is not a linear process. There will be plenty of hiccups, set-backs and backlashes, and, of course, some states will try to be more equal than others. But in the end, even the most powerful states cannot achieve the primary task of securing human rights for their citizens without participation in the international community.

A problem seen by many participants was the lack of transparency and internal democracy as well as the inequality that exists in international or global institutions, such as the Security Council of the United Nations and the Bretton-Woods institutions. To achieve ‘good global governance’ these institutions need to change. Again, NGOs and civil society have to and can play a very important role here.

The ICC is a great step towards fairer and just global governance. It is, of course, only one of several cornerstones needed, but it is an important cornerstone. It is an answer to the world’s shared desire for more international justice.

The conference was privileged to have among its participants Dr Hans-Peter Kaul, one of the 18 judges of the ICC and a highly qualified and passionate representative of the court. Dr Kaul spoke about the current

situation of the court, identified the major challenges and tasks ahead and drew some future scenarios of the ICC.

The Rome Statute of the ICC has been ratified by 97 states – the majority of the UN member countries. The court started in The Hague in July 2002 with only five staff members. Two years later, there are 270 people from 70 countries working there.

The court itself is still under construction in both senses of the word. The courtrooms are presently being built and the organizational structure is in the process of being set up. Four chambers have been formed and the first two cases are under investigation: the Democratic Republic of Congo and Uganda. The ICC will try to concentrate its work on the prosecution of the so-called 'big fish', without creating too big a justice gap. Also important will be its role of achieving a balance between efficiency and finding the truth. The ICC will certainly draw on the experiences of the 'ad hoc tribunals', especially the Yugoslavia trials.

All participants saw the ICC as a symbol for a global rule of law – a powerful reminder that not all crimes will go unpunished. The ICC will set new international legal standards and it will send out a clear signal to all perpetrators that they can be prosecuted. But the ICC will also be a 'wailing wall' and a documentation centre, and will provide comfort to the victims of severe human rights violations.

The ICC was the first democratically established international institution. Not only states but also civil society and individuals took part in its formation.

Unfortunately, Asia is a region with a very small number of signatory states. Only two out of the ten Southeast Asian countries – Cambodia and East Timor – and six out of

all the countries in the Asia-Pacific region have ratified the Rome Statute. All the larger countries in the region are missing from the list, despite the fact that it is in this region that the most crimes against humanity have taken place, often in an institutionalized form.

What are the reasons for this poor response in Asia? One reason is the political influence the United States of America (USA) has in the region. The present US government not only refuses to sign the Rome Statute, but also tries to convince other countries not to. In addition, the USA forces other countries to sign bilateral agreements, which guarantee that the respective country will not extradite any US citizen to the ICC. The US administration even threatened to withdraw military aid or US peacekeepers from countries that ratified the Statute.

The position of the present US administration is that the ICC lacks the necessary checks and balances and undermines the US constitution by infringing on its sovereignty.

All participants agreed that US ratification and membership would certainly be a great asset for the ICC. Nevertheless, at present, US membership is not essential for the existence and work of the ICC. More countries will join in future, putting the USA more and more on the defensive. And, one should not forget that there are also large groups in the USA who are strongly in favour of the ICC.

Another reason for the small number of Asian signatories is the lack of information and knowledge about the ICC, both for stakeholders – parliamentarians and members of the legal profession – and the public. This was mentioned time and again during the two days of the conference. In this context, NGOs and civil society groups have an important role to play in educating

the public. The NGO coalitions for the ICC, both in Europe and in Asia, have to be congratulated for their excellent work. Another important aspect is the role of the media in disseminating information on the ICC and the availability of documents. Also mentioned was the need to get regional organizations such as the Association of Southeast Asian Nations (ASEAN), the South Asian Association for Regional Cooperation (SAARC), the Asia-Europe Meeting (ASEM) and the Inter-Parliamentary Union (IPU) involved.

The so-called 'war on terror' is becoming an increasing threat to the existence of the ICC. Presently, unilateralism seems to have the upper hand over multilateralism. But this will only be a temporary set-back. All participants strongly stressed the importance of multilateralism, which is an answer to the negative aspects and growing injustice of globalization, especially the need for a multilateral rule of law and multilateral efforts in peace building and conflict prevention.

One repeatedly asked question was: 'Is the ICC a threat to national sovereignty?' ICC judge Dr Kaul vehemently denied this. The ICC is neither a threat nor is there any hidden agenda. Individual states had, in the past, sought to punish perpetrators of severe human rights violations, regardless if they were citizens or not. All the crimes listed in the Rome Statute have been listed in other conventions, such as the Geneva Convention. Thus the argument that the ICC is a threat to sovereignty is a matter of misinformation and untrue. What is new is that the ICC is a standing institution, and it seems as if countries in Southeast Asia are far more reluctant to join permanent institutions than countries in Europe. For example, civil society groups have been lobbying for an ASEAN human rights mechanism for many years, but there has been little progress so far.

The ICC has no primary or parallel jurisdiction, only a secondary one. Conferring the right to prosecute such terrible crimes against humanity on the ICC is not a limitation of national sovereignty, but a sign that the state is sovereign in its decision.

In this context, it was mentioned that one should not forget that there are many countries, both in Europe and Asia, that are still struggling for a national identity. For those countries it is not easy to confer some of their sovereign rights to an international body before achieving full sovereignty for themselves. It might be necessary in a globalized world to define 'nation-state' anew.

Another concern raised was that the ICC will follow purely Western legal concepts, neglecting the social and political background of developing countries. As Chief Justice Davide mentioned in his keynote speech, poverty is no excuse for the violation of human rights, but both are linked. A Chinese participant stated in his paper: 'I believe that the complicated social and political backgrounds worldwide, the existence of political struggles among different countries and the unequal treatment of advanced countries versus developing countries are part of the reasons for the non-signing of the Statute.'

Later on, however, the Chinese participant suggested that the concept of sovereignty should be changed 'from a state that has the inherited supreme power to treat its domestic and international affairs unrestricted from other state's intervention' into 'a state that handles its supreme power by treating its domestic and international affairs independently and while exercising sovereignty, it (the state) enjoys rights and fulfils obligations according to relevant international institutions and rules'.

Both the Chinese participant and Dr Kaul stated that the People's Republic of China is generally in favour of the ICC and might in the not-too-distant future ratify the Rome Statute.

The participants of the conference briefly discussed the possibility of taking the Burma case, especially the case of the Depayin Massacre of 30 May 2003, to the ICC. However, Myanmar/Burma is not a signatory to the ICC, so the UN Security Council would have to ask the ICC to take up this issue. Here again there is the risk of a veto by the US administration, which presently has no intention of giving legitimacy to the ICC.

All participants agreed that there is a need to continue to press for more ratifications,

especially in Southeast Asia. Civil society has to play its part in informing the public of the importance of being part of the Rome Statute. Many more meetings like the one in Manila have to be organized. Furthermore, it is very important that the ICC is able to convince the international community with a fair, speedy, properly investigated and concluded first case. This would be the best argument in the ICC's favour.

There will certainly be set-backs and backlashes. But these should not discourage us. We all have to be realistic and should not fall into the trap of over-expectation.

The ICC will be a success story. Time is on the side of those who believe in multilateralism.

Democracy in Southeast and East Asia: Has It Made Gains?

Chow Kon Yeow*

To be able to answer the question of whether democracy in Southeast and East Asia has made gains, we should begin with the term 'democracy'. The term literally means 'power of the people' (combining the Greek words *demos*, meaning 'the people', and *kratien*, meaning 'to rule'). It is usually used to describe a political system in which the legitimacy of exercising power stems from the consent of the people. Accordingly, a democratic polity is often identified by: the existence of a constitutional government, where the power of the leaders is checked and restrained; representative institutions based on free elections, which provide a procedural framework for the delegation of power by the people; competitive parties, in which the ruling majority respects and guarantees the rights of minorities; and civil liberties, such as freedoms of speech, press, association and religion.

The countries of Southeast Asia are home to some 500 million people and have a combined Gross Domestic Product of more than US\$700 billion. Their young populations, with large numbers of well-educated and hard-working people, have helped to make the region one of the fastest growing in the world.

Most people believed that one of the main reasons for Southeast Asia's decades of rapid economic growth was the tough, authoritarian style of the region's leaders. These strong men tolerated little dissent,

but delivered increasing wealth and stability. It was a bargain that many Southeast Asians were prepared to accept as millions of them were lifted out of poverty. Most governments in the region expressly rejected 'Western-style' democracy and actively promoted 'Asian values'.

The complexion of these governments is diverse. They are all members of the Association of Southeast Asian Nations (ASEAN). They range from Indonesia, the world's largest Muslim country, to Vietnam, one of the last bastions of communism, Brunei, a small oil-rich Islamic sultanate, and the Philippines, the region's most raucous democracy, as well as Cambodia, Laos, Malaysia, Myanmar, Singapore and Thailand.

The question of whether democracy in Southeast Asia has made gains suggests a need for a comparative analysis. The year 1997 was a watershed year because of the great political changes following the financial and economic crisis that affected many countries in the region. Prior to the 1997 crisis, most governments rejected Western-style democracy and actively promoted Asia values.

However, the decade of despondency that many predicted now seems unlikely to materialize. Doom and gloom has given way to renewed optimism and the crisis produced some positive outcomes: it speeded up the opening of economies;

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forced Asians to become more aware of corporate governance; made the region focus on its real competitive strengths; provided a hard lesson about globalization; and, most importantly, paved the way for the emergence of more open and democratic government that will make the most difference to the future of the region.

Today, Southeast Asian leaders must try to ensure that their economic recovery is sustainable. Some of these leaders are not the same ones who held power when the region was hit by the 1997 financial and economic crisis.

Where has democracy made gains?

Indonesia is now run by a freely elected government for the first time in more than 30 years. The world's most populous Muslim country has a new leader, Susilo Bambang Yudhoyono. The fact that three elections this year have gone with barely a hitch is remarkable in a country with 220 million people, spread across a huge archipelago of 17,000 islands. It is even more remarkable in light of the country's political history: in just six years, Indonesia has gone from authoritarian rule to the brink of chaos and now to full democracy.

Susilo has promised to tackle government corruption, which remains a huge problem, as well as the unpredictable legal system. However, if he is to succeed, he will also have to take on the parliament, where a coalition of parties linked to Megawati and others with no allegiance to the new president holds just over half of the seats.

Should Susilo fail to deliver on his promises, he, like Megawati Sukarnoputri, will most likely be ousted from office after just one term, for Indonesians, having put up with dictatorship for decades, are all too keen to wield their democratic powers.

In doing so, they have unwittingly spawned that rarest of creatures, a vibrant Muslim democracy.

At the other end of the democracy spectrum, Burma continues to be ruled by a highly authoritarian military junta that reinforces its firm grip on power with a pervasive security apparatus. Citizens still do not have the right to change their government. The military junta continues to be hostile to all forms of political opposition and the government has cracked down severely on the main opposition party, the National League for Democracy (NLD). Amid international and regional pressure, the military junta is now taking an even more hard-line position against the establishment of a constitutional democracy in Burma.

In Cambodia, the promotion of democracy and good governance, as well as the continued improvement of human rights have been on the agenda, although Cambodia's human rights record has remained poor. While there have been improvements in some areas, there have also been a number of allegations of political killings and a climate of impunity for violence has continued.

The Laos government's human rights record remains poor. The people of Laos lack basic freedoms, including freedom of speech and expression. The only political party – the Lao People's Revolutionary Party – holds a tight monopoly on all political, economic and social decision-making. Several political prisoners remain in jail serving long sentences, and the judiciary is under government influence.

Vietnam is a single party state, ruled and controlled by the Communist Party of Vietnam. The government has significantly restricted freedom of religion, speech, the press, assembly and association. The

government's intolerance of political dissent, including on the Internet, resulted in the arrests and sentencing of several democracy activists who criticized the government.

Heightening awareness of democratic principles at grassroots remains important in these three Indo-China countries.

Between these two spectrums are parliamentary systems of government based on periodic multi-party elections in the Philippines, Thailand, Malaysia and Singapore. But has democracy made gains here?

The Philippines continues to be a vibrant, freewheeling democracy with an elected president, an elected bicameral legislature, and a fractious but functioning multi-party system. The government generally respects the human rights of citizens; however, there are serious problems in some areas, like extra-judicial killings and widespread corruption. Building respect for human rights in the security forces, promoting rule of law and transparent practices in government and the judiciary, and strengthening civil society will promote greater democracy and good governance.

Thailand is a democratically governed constitutional monarchy. In the elections at the beginning of 2001, Prime Minister Thaksin Shinawatra's Thai Loves Thai Party won a landslide victory and is by far the largest partner in a three-party coalition government. The government and military control nearly all the national terrestrial television networks and operate many of Thailand's radio networks. The media are free to criticize government policies and cover instances of corruption and human right abuses, but journalists exercise self-censorship regarding the military, the monarch, the judiciary and other sensitive issues.

If democracy means people have a free choice between various political alternatives in the framework of free elections and there is a possibility for change of government by peaceful means based on the free will of the people, then the Philippines and Thailand stand out as role models in ASEAN.

Malaysia and Singapore also fulfil these criteria, but there has been no change in their ruling governments since independence in 1957 and 1963, respectively, and the prospect of a change of government is unlikely in the short term.

The National Front coalition has won every election since Malaysia's independence, but it has never won by such a crushing margin as in this year's election. Voters awarded it 90% of the seats in the national parliament and it also won control of 11 of the 12 state governments at stake. In the election campaign, new Prime Minister Abdullah Ahmad Badawi stole the opposition's thunder by promising humbler, cleaner and more responsive government.

However, there is one item on the opposition's agenda that Abdullah is likely to neglect and that is the dismantling of the various repressive measures that his predecessor Dr Mahathir employed to dampen dissent. The government still controls the airwaves, potential critics have difficulty obtaining newspaper licences, opposition politicians are jailed without trial and protest rallies are banned. DAP national chairman and member of parliament Karpal Singh was suspended from parliament for six months without allowance over the swearing in of members of parliament in the new parliament in May 2004. In Malaysia, the inability of the opposition to form a viable, broad-based coalition representing the multi-ethnic, multi-religious and multicultural electorate is one of the main reasons why the

possibility of a change of government is remote.

Under Brunei's 1959 constitution, the sultan is the head of state with full administrative authority. The government assures continuing public support for this form of government by providing economic benefits such as subsidized food, fuel and housing, free education and medical care and low-interest loans for government employees. The sultan said in a 1989 interview that he intends to proceed to establish more liberal institutions and that he would reintroduce elections and a legislature. In 1994, a constitutional review committee submitted its findings to the sultan, but these have not been made public.

This paper has endeavoured to take stock of the state of democracy in Southeast Asia. The past two decades can be considered an era of democratic development. However, the process of consolidation towards liberal democracy remains weak. Political change following the 1997 crisis offered opportunities for the strengthening of young democracies, ushering in new governments that promised reform, and there is a clamour among Southeast Asians for more accountable government and good governance. However, much needs to be done in some countries to establish and institutionalize basic structures for democracy to be a legitimate form of governance.

Party Building and Local Governance in the Philippines¹

Joel Rocamora*

The Philippines is often acknowledged as one of the places with the best experience in civil society engagement of local governance. But, unlike Brazil, where peoples' participation in the budget process has had a measurable material impact on the lives of the Brazilian urban poor, participatory planning at the *barangay* (the lowest level) government level in the Philippines has had a limited direct impact. Unlike Kerala, in India, and Brazil, where experiments in participatory local governance were backed by powerful, established political parties, Akbayan (Citizens Action Party), the political party most supportive of participatory democracy, is still a new and struggling progressive party.

But the Philippine experience might be of interest in countries of the South precisely because it is still a 'work in progress', one where the requisites for work on participatory democracy are not set as high as in Brazil and India. In the Philippines, both Akbayan and BATMAN, the main civil society coalition working on participatory local governance, are still in the throes of working out in theory and in practice how best to advance participatory democracy. This open, highly dynamic and often contentious process may be more accessible to those who want to do similar work in their countries.

Akbayan

Akbayan is often called a 'social movement' party because most of its original members come from labour, peasant, urban poor, women and other social movements. But it could just as accurately be called a 'participatory local governance' party because its next batch of members come out of a decade-long struggle to maximize the participatory and 'good governance' potential of decentralization. The coming together of these two trends within the context of a deep ideological crisis of the Philippine Left provide the main outlines of the complex story of Akbayan.

Although formally founded at a congress in January 1998, the very process of conceiving Akbayan already marked it as a very different political formation. Several pre-party political formations, called 'political blocs' in the Philippines, discussed the possibility of forming a new party as early as the late 1980s. In 1992, these groups, plus many NGOs, supported a presidential candidate. Although the experience left much to be desired (the candidate lost badly), the same groups supported local candidates in 1995, this time with many good results. This salutary

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1. This paper is part of a recently published book on democratization and local governance, *Politicising Democracy – The New Local Politics of Democratisation*, edited by John Harriss, Kristian Stokke & Olle Tornquist, pp. 148–170.

experience formed the backdrop to renewed discussions in the first half of 1996. The very fact that these blocs came together, not as a coalition, as they and some NGOs had tried to do in 1992, but to work together to begin the process of building a new political party, was unprecedented in the history of the Philippine Left. The resulting concept paper was then discussed, first at a national meeting in July 1996, and then at innumerable small and large meetings throughout the country. By the time of the founding congress a year and a half later, the party already had more than 3,000 'stakeholders' who had attended these meetings.

Only a few months after its founding congress in May 1998, Akbayan won one seat in the party list election of the House of Representatives. This was a considerable feat because the party list election for 20 per cent of the House of Representatives has a national constituency and voters hardly knew about this new feature of the electoral system. Ten municipal mayors who won in these elections subsequently joined the party. After the next election, in 2001, Akbayan had two members in the House of Representatives. Nineteen municipal mayors and some 200 councillors and other local government officials were elected at the same time. Only 20 Akbayan members were elected mayor during the May 2004 elections, but 59 close allies, at least half of whom are recruitable, also won. Akbayan is nowhere near being a major national party, but it has grown steadily. It now has party units in 54 out of 84 provinces and in 237 cities and municipalities.

Akbayan was consciously set apart from traditional Philippine political parties. These parties are unabashed elite 'old boys clubs'. There are non-élite individuals, mostly men, who identify with one or other party, but all of them are followers ('retainers' might be a better word) of elite individuals. These elite individuals are linked together in shifting coalitions from *barangays* all the way to the

national government in Manila. Already weak in the period before martial law in 1972, traditional parties have not recovered from Marcos' deliberate destruction of all but his own party. In the post-1986 period, parties have been so weak that in national elections, coalitions of parties are the relevant campaign mechanisms (Abinales 2003).

In contrast, Akbayan has a mass membership of close to 100,000 mostly lower class people. This is the source of its self-identification as a 'progressive' party. Akbayan's base in labour unions and organized farmers is now firmly established. Three of the largest peasant federations in the country are affiliated with Akbayan. There is an ongoing drive to organize among middle class professionals and business people. There is a practical as well as a political reason for this. We cannot win elections with only the support of organized workers and peasants. Middle class people have networks and personal resources necessary in election campaigns. They also have the technical skills needed in governance. Besides, when Akbayan members get elected to office, they do not become mayors or congressmen only of the poor. They are public officials of all citizens.

To prevent disputes over membership numbers, there are no member organizations, only individuals. But members of the same group organized into party units can form caucuses within the party. Loosely affiliated mass organizations are linked through sectoral party committees of peasants, labour, youth and others. Party structures and processes are taken seriously. In practice, deeply embedded anti-democratic tendencies from both traditional and left-wing political practice continue to rear their ugly heads. But inner party democracy is fiercely defended and fought over. Autonomy of local party units is an established principle.

Akbayan also sets itself apart from the dominant party-building traditions of the Philippine Left. Unlike other progressive

political parties, Akbayan is not a party with one ideology. Many progressive groups and political tendencies work together within Akbayan – national democrats, socialists, democratic socialists, popular democrats and people who do not give themselves labels. We are also not linked with an underground party. We believe that you cannot have inner party democracy if you have another party dictating who your leaders and what your policies are. We are not engaged in armed struggle. We take the open, legal struggle seriously and do not view it merely as a tactical arena as other left-wing groups do.

Unlike other left-wing parties who take a 'smash the state' perspective, Akbayan is a vehicle for accumulating political power for political reform. From the time of its founding congress in January 1998, Akbayan has steadily drawn reformers from all walks of life into its ranks. It supports reform in Congress, in the parliament of the streets and in local government led by elected Akbayan members. Having town executives provides opportunities to show that party members can promote participatory democracy and good government at the same time. It might even be said that the very formation of Akbayan is a political reform. By forming a new type of political party, Akbayan is contributing directly to transforming our political party system.

Democracy is at the core of Akbayan principles. Our idea of 'state' is one that imposes distinct limits on the state's powers over society. We are against a totalitarian state which insinuates itself into all the spaces of society including private spaces. We operate within a conscious, explicit 'state and civil society' framework. We will defend and promote the integrity and autonomy of civil society organizations as one of the central tasks of Akbayan. We will actively work to remove obstacles to political participation, especially restrictions on the self-organization of the poor such as those on labour unions.

Working closely with social movements and other civil society organizations in the legislature and in the 'parliament of the street', Akbayan is in the forefront of struggles for political and economic reform. Our two representatives in Congress have effectively championed electoral reform and migrant rights, fought against the pro-monopoly privatization of water utilities and the energy sector, and a variety of other issues. In the 'parliament of the streets', Akbayan and its affiliated organizations and NGOs work actively on a range of issues from agrarian reform to anti-corruption campaigns, to women's issues and gay rights. It is in local government, however, that Akbayan, with the help of friendly NGOs, is investing in long-term political reform projects.

Political Crisis and the Struggle for Political Reform

Party building is happening in the midst of a deep political crisis. The situation before and after the May 2004 elections illustrates what we might call a 'crisis of representation'. It was a campaign rife with threats of coup d'état and 'civil war'. The leading candidates for president, incumbent President Gloria Macapagal Arroyo and action movie star Fernando Poe Jr., embodied the main elements of the crisis.

Arroyo became president in January 2001 in the aftermath of massive demonstrations that brought down elected president Joseph Estrada. Although the Supreme Court legitimized then Vice-president Arroyo's accession to the presidency as the constitutional successor, Estrada followers never accepted her legitimacy and rallied behind Poe.

Poe followed in the footsteps of his friend Estrada from action movie stardom to become the leading candidate in the presidential election campaign. Poe was backed by politicians associated with Estrada and the late dictator Marcos, who saw him as their only chance to get back into power. A high school drop-out without experience in politics or public administration, Poe, unlike Estrada, has never been elected to public office. He came close to winning because he had become a symbol for the poor of their deep frustration with Philippine politics. Poe provides a perfect example of the right-wing populism that periodically threatens to throw the Philippines into political crisis (Weekley 2000).

Right-wing populism is the product of two key elements in the Philippine political situation. The main 'democratic deficit' is the failure of the political system to respond to the needs of the rural and urban poor (Hutchcroft & Rocamora 2003). Sluggish economic growth going back to the early 1980s, uncontrolled trade and capital account liberalization, privatization and deregulation have combined to produce an ever-increasing number of desperately poor rural and urban inhabitants. Because the poor see that politicians spend more time lining their pockets than doing something about their poverty, they have become cynical about politics. They have also become vulnerable to the promises of political charlatans like Estrada and Poe.

The steady erosion of patron-client ties, the weakness of patronage-based machines, and the absence of organizationally coherent, programme-based political parties means that a larger and larger proportion of the national electorate of 40 million strong, as it were, vote 'blind'. Because of the absence of social and political means to 'organize' electoral participation, voter preference is determined mainly by name recognition.

The best-known 'names' are those of movie and television actors, sports personalities and newscasters. Analysts believe that as little as 20 per cent of the national vote is in 'vote banks' controlled by local politicians.

'Professional' politicians have become increasingly aware of the linked problems of right-wing populism and the weakness of political parties. As early as May 2002, all major political parties gathered for a 'political summit' and unanimously called for changes in the country's political system through constitutional reform. Political party leaders, including the president, the senate president and the speaker of the House of Representatives, worked together with civil society organizations to push constitutional reform. Leaders and groups who had opposed constitutional reform during the Ramos and Estrada administrations now supported it.

What prevented this consensus from coming to fruition was the attempt of members of the House of Representatives to control the constitutional reform process. They insisted on pushing reform by convening the two houses of congress into a Constituent Assembly. They manoeuvred to put into place a new parliamentary form of government with a ceremonial president, and a unicameral parliament elected in single member districts, the same ones that elect the House of Representatives. In this way, the House of Representatives would become the all-powerful centre of government and incumbent representatives could get themselves elected over and over again.

Because organized civil society groups, key religious leaders and, most importantly, the senate president and a majority of senators opposed the obvious power grab of the House of Representatives, the call for a Constituent Assembly was stopped. These groups instead proposed the election of

delegates to a Constitutional Convention at the same time as the May 2004 elections. By the time the Speaker conceded the need to shift to a Constitutional Convention mode of amending the constitution, it was too late to pass legislation in time for the May 2004 elections.

Despite the defeat of the third attempt in as many regimes to organize constitutional reform, there are grounds for cautious optimism on the 'demand side' of political reform. The disjuncture between a political system designed to fit the requirements of the Philippines of the 1930s and the Philippines of the twenty-first century is producing more insistent demands for political reform. The 1930s political system carried over to today was cut to fit the requirements of a colonial government (thus a powerful governor general/president) and Filipino political leaders with localized power. This was apparently adequate for the needs of a mainly rural, agricultural country with a small population. It is more and more obviously unable to fulfil the requirements of a large, highly urbanized population of 82 million, with a considerably more complex economy.

One of the main determinants of Philippine politics is local-central government relations. There is a powerful chief executive with vast fiscal and patronage powers, but because there is no coherent and stable political party system, the president is dependent on local political bosses to mobilize votes and implement central government policy. Presidents and local bosses are therefore equally powerful (if at different stages in the political cycle) – a strange political system which is neither centralized nor decentralized. The result is a policy-making process that is dominated by deal-making, which makes it difficult to pass coherent bills, much less a series of interrelated legislation. Having to operate under incoherent, often self-contradictory legislation makes

implementation by the bureaucracy similarly difficult. Deal-making and negotiation continues into implementation and even the judicial process.

The effect of this strange system is illustrated in the fate of elected administrations. Most presidents elected since independence in 1946 did not initially have working party majorities. Within a few months, however, enough members of the majority party shift to the president's party in order to get in (party) line for patronage and the pork barrel. By the middle of the president's term, the number of officials who have to be given patronage shares get to the point at which it is impossible to make everyone happy. Towards the end of the president's term, unhappy politicians outnumber happy ones, making it difficult for the president to get re-elected or, after 1987, when the president was not allowed to run for re-election, get his candidate elected (Choi 2001).

The failure of successive attempts at constitutional reform is particularly unfortunate because it had the potential to break one of the critical 'log-jam' points in the process of political reform in the Philippines: local-central government relations. The decentralization process opened by the passage of the Local Government Code in 1991 created the potential for deep reform in local government. But without equally deep reform at the central government level, a possibility closed off by the failure of attempts at constitutional reform, reforms in local governance could not be 'clinched' for the whole political system. Instead, central government acts as a lid on the dynamism of local politics.

Local politics in the Philippines, going back to the American colonial period, has mainly been two key contests: one, who is best at generating funds from the central government, and therefore controlling their

allocation; and two, who controls illegal economic activity such as gambling and smuggling. These contests have determined the qualifications of contestants, the nature of the contests, including elections, and the characteristic activities of winners. The first contest 'shapes' class dynamics in such a way that family connections, university education and membership in various networks such as university fraternities determine who the winners are. The second contest privileges contestants who are adept at manipulating illegality and the various uses of violence. Neither contest has been conducive to conventional conceptions of good governance. They have kept local governments somnolent and largely 'do nothing' operations.

The main reason why these have been the main contests in local politics is that through most of the past century, local governments have not had any money. This, in turn, was because there was not very much taxable economic activity in most local areas. In most rural communities through most of the past century the main economic activity was subsistence agriculture. Where there was share tenancy, landlords also tended to control local politics and, of course, did not want to be taxed. Illegal economic activity by its very nature could not be taxed except in unconventional ways where the receipts did not go into government coffers (de Dios & Hutchcroft 2003).

The political economy of local communities has gradually changed. Now there are more funds available locally. The agro-export economy, built by the Americans, concentrated power in Manila, where the central government controlled access to international markets. This continued into the post-war period, when foreign financial resources, customs collections and revenue sucked out of local areas added to the centre's power. Metro Manila cannot physically absorb any more industry, and

partly because of this, industrial growth has been moving outside – to the Calabarzon area, Subic, Cebu and further afield to places such as General Santos and Davao in Mindanao. This dispersal of industry feeds into internally generated growth in these and nearby places to spur much faster growth.

Central-local economic relations were reflected in and exacerbated by the highly centralized presidential system of government. The Local Government Code itself might be seen as the translation into the political realm of economic decentralization. But if economic growth in local areas that are not dependent on favours from central government continues, a whole chain of events in the political realm will follow. This local economic change, combined with the passage of the Local Government Code in 1991, which mandated an automatic transfer of 40 per cent of internal revenue collections and widened the taxing powers of local governments, has meant major increases in the revenue available to local governments (Kerkvliet & Mojares 1991; Lacaba 1995).

Local politicians naturally want more political control over resources generated by more rapid local economic growth. More revenue in local governments will change the nature of local political contests. If nothing else, local business people are increasingly participating to keep the tax bite on them low and to help determine the uses of taxes they do pay. With more money available, the administrative requirements of local government increase, with corresponding changes in the qualifications of those who contest these positions in elections. While this is not yet a nationwide phenomenon and there are still many authoritarian enclaves dominated by warlords, there are enough of these places to believe, or at least hope, that this is a trend for the future.

Because most studies on Philippine local politics do not posit analyses of how and in what direction change is occurring, it might seem to some that the analysis in this paper is more than a bit optimistic. It is admittedly difficult to be politically active with unalloyed pessimism. It should also be pointed out, however, that the kind of change I have described is not a generalized movement from bad, patronage-driven, patron-client local politics to World Bank-style 'good governance'. As John Sidel points out,² local politics in the Philippines cannot be forced into a rigid framework locating very different situations along a 'what is good for development' frame. What is important is that change is happening. Determining the extent, pace and direction/s of change requires a lot more research. Political action does not have that luxury.

The varieties of local situations described by Sidel are validated by the experience of

Akbayan. There are areas, such as several towns in the Bondoc peninsula, where the economic control and coercive capabilities of local élites spur small farmers into organizing themselves and engaging in armed struggle. There are provinces, such as Negros Occidental, where tight economic and political control by a major economic player, Eduardo Cojuangco, is difficult to challenge locally. In this case, change will have to await action at the national level on the source of Cojuangco's economic power – the cocoa levy and his control of the massive San Miguel Corporation. There are many places, however, where changes in the political economy have disrupted élite control of local politics enough to generate openings for alternative politics. From the vantage point of Akbayan, the problem is not the supply of reform local politicians but rather Akbayan's capacity to identify and recruit them, and assist them after they join the party.

More than Difficult, Short of Impossible

This, then, is the historical context of Akbayan's party-building project. It is a project hemmed in from the Right and ironically also from the Left. Thankfully, both the Right and the armed Left are in the throes of political crisis. The assertion of what might be called a Centre Left political project is at once made necessary and viable by this twin crisis. While there are dreams among some Akbayan leaders of 'political rupture', making seizure of power possible at the centre, the locus of accumulation of power by Akbayan is, of necessity, in local politics. It is in local politics where motivational forces and facilitative conditions make the accumulation of power possible.

With only two members in one of two houses in the legislature and no party members in the upper levels of the bureaucracy, Akbayan's capacity to influence national policy is only marginally greater than civil society advocacy. In fact, Akbayan has almost always worked within civil society coalitions in pushing its positions on issues. Its capacity to do so, however, is limited by divisions in civil society. It is hemmed in on the one side by the open formations of the underground Communist Party of the Philippines and what are called 'rejectionist' breakaway groups, which have greater mobilizational capacity and political command of Left rhetoric, and on the other side, by civil

2. See his article in Harriss, Stokke & Tornquist, 2004.

society groups with better social connections with the Arroyo government.

There are three major ways in which Akbayan is accumulating power. The party list system provides a platform for Akbayan to publicize itself and its programmes, and, together with civil society groups, to promote issues. But the three-seat limit in the system means permanent minority status in the national legislature. The 20 per cent House of Representatives limit is small enough in a bicameral system. Implementing a contradictory constitutional provision and enabling law has meant that, in both the 1998 and 2001 elections, less than half of the available 52 seats were filled. The party list system can be seen as a limited 'affirmative action' programme for 'marginalized groups'. While respecting the ambitions of 'sectoral groups' who want some, even severely limited, representation, Akbayan is contesting not only the limited spaces of the party list system, but also the political system as a whole (Velasco & Rodriguez 1998).

There are ideological and organizational obstacles to accumulation of power through organizing social movements. For Akbayan, abandoning the 'vanguard party' framework of other Philippine Left groups means ensuring the autonomy of social movement groups affiliated with it. There are also practical reasons for refusing the demands of some social movement leaders for Akbayan to provide political and organizational leadership to social movements affiliated with it. Akbayan does not want the often acrimonious divisions among social movement groups to exacerbate existing divisions within the party. In addition, the party has not yet developed the capacity to service social movement needs. The political blocs with which most of the social movement groups within Akbayan are affiliated constitute an ideological and organizational 'filter'

between the party and these movements. While this can be seen as a necessary, intermediate stage in party building, it also acts as an obstacle to tightening ideological and political unity within the party.

Six years of party-building experience show that it is possible for Akbayan to recruit reformist local politicians. But until it accumulates enough power and resources to support these politicians, recruitment will be slow. Under the present political system, it will take a long time for Akbayan to accumulate enough electoral capacity to become a major national party. The party list system does not apply in local elections. The centre of gravity of the electoral system is in local politics where political clans and wealthy business people dominate in electoral contests, determined largely by money and violence. National elections raise the financial requirements of electoral victory to astronomical proportions. The capacity to organize cheating in the vote count, another determinant in elections, requires bureaucratic influence, especially in the Commission on Elections. Finally, the capacity to mobilize violence and threats of violence is in the hands of local and national élites, with the exception of the Communist Party of the Philippines and its electoral fronts.

Because Akbayan is ideologically inhibited from developing most of these political 'resources', at least part of the national leadership of Akbayan has worked at pushing changes in the electoral system and form of government through legislative and constitutional reform. Changes in the electoral system through electronic counting machines and electronic transmission will weaken traditional politician control over the 'technology' of fraud in elections. Overseas voting will enlarge the electorate in a section of the population outside of the capacity of traditional politicians to mobilize. Even support for economic reform will work in

this direction where specific reforms remove sources of corruption and weaken patronage networks.

The greatest potential for reform, which will go some distance to 'level the playing field' between reform and traditional politicians and parties, will be a shift to a parliamentary form of government and a proportional representation electoral system. This will push parties to become organizationally and programmatically coherent, and facilitate party-mediated policy making. The creation of more effective and cohesive political parties, oriented to programmatic rather than particularistic goals, policy rather than pork, is arguably the single most important reform needed to strengthen Philippine democracy. Stronger parties can promote clearer choices to voters, and help to structure political competition toward the realization of generalized rather than particularistic interests (Abad 1997; Abueva 2002).

Our electoral system, and the actual practice of elections have been one of the most important factors shaping political parties. The intensely personalized character of parties is derived partly from the fact that individual candidates are elected in a 'first past the post' system. 'During elections, it is not so much the political parties that are the real mobilising organisations but the candidate's electoral machinery and network of relatives, friends, political associates and allies' (David 1994:1). Because at the base of the electoral system, the municipality and power and status of families are at stake, all means are used, including cheating and violence, to achieve victory.

We have become so used to money politics that unconsciously we believe that 'that's just the way politics is'. In fact, elections in many countries, particularly in Europe, do not require massive expenditures. There

are many factors that can explain these differences in political practice, but the main factor is the electoral system. The proportional representation electoral systems used in Europe push elections away from personal contests towards party contests. In the process, the use of money and violence in elections is also reduced, creating one of the conditions necessary for reforming our political party system.

The party list system introduced by the 1987 constitution provides an experiment in proportional representation elections. But the system is so confused that it can hardly be seen as indicating the potential of proportional representation systems. To start with, the 1987 constitution mixes up the contradictory requirements of proportional representation and sectoral representation within the narrow political space of 20 per cent of the seats in the House of Representatives. Congress has added to the problems by limiting the number of seats a single party can win to three. The Supreme Court made things even worse by imposing a formula for the allocation of seats that guarantees that only a few of the available seats will be allocated.

What we need is the revision and expansion of the existing party list system, or an outright shift of the whole system to proportional representation. If voters choose between parties instead of individual candidates, it will lessen the intensity of personal and clan contests that are the main sources of violence and money politics. Parties will then be required to strengthen the organizational and programmatic requirements for electoral victory. Minimally, parties will be forced to distinguish themselves from each other enough for voters to make choices. The shift in the centre of gravity of organizational work away from individual candidates will force parties to strengthen themselves organizationally.

One formula that is being talked about is a system of elections for a unicameral parliament where half of the seats are elected in enlarged single member districts and the other half through a proportional representation system. Single member districts are seen as a way of securing the support of district congress persons who have to approve legislation calling for elections of delegates to a Constitutional Convention. While a Constitutional Convention will allow non-politicians to get elected as delegates, more powerful district representatives will be able to get their people elected too. This will require some accommodation with them. In the party list proportional representation system, existing restrictions on traditional parties would be removed. Such a system would be advantageous for Akbayan, which is organized precisely for such contests. Not only would such a system be new for traditional politicians, but also most of them will be too busy contesting seats in single member districts to build parties which can successfully compete in proportional representation elections. Until such changes happen, however, Akbayan will have to

accumulate electoral power through long and painstaking work in local contests.

The changes in the electoral system that pro-reform civil society groups are proposing are specific to the Philippine situation. We are not making general propositions about a necessary connection between proportional representation electoral systems and strong parties. Here the differentiation that Martin Shefter makes between 'internally mobilized' parties of élites, who are already within the prevailing regime and have access to patronage resources, and 'externally mobilized' parties of those outside the regime, who do not have access to patronage and instead rely on ideological appeals in their quest for a mass following, might be useful (Shefter 1994). Philippine political history has clearly privileged 'internally mobilized' parties. The issue is, what changes can be made in the electoral system that will go some distance towards 'levelling the playing field' for new 'externally mobilized' parties such as Akbayan.

Local Governance and Party Building

New protagonists and the changing nature of political contests have brought an edge of dynamism to local politics. Younger, better educated politicians are open to good governance ideas, especially when these ideas can also strengthen them against political opponents and position them for higher office. But political change has also disrupted old patronage networks and weakened political parties. Without effective political parties, local politicians' links with the central government will be irregular and unpredictable. There are only a few available ways to strengthen a local politician's position, and even then only in larger, vote-rich municipalities.

What we tell these young, local politicians is that the predominant ladder available for them to move up in their political careers will require them to throw out their ideals and become corrupt. This ladder, moreover, has become more and more rickety. Akbayan is a new ladder that will enable them to keep their ideals, sharpen them and put them into practice. Akbayan can provide an organizational base for elections and governance. The problem is that the brightest among these politicians then point out that our ladder only has a few rungs in it. At this point we invite them to help us build more rungs in the ladder.

One of the rungs in the ladder that civil society activists, led by the Institute for Popular Democracy (IPD) and the Institute for Politics and Governance (IPG), have built is something that is mischievously called BATMAN. In late 1996, local leaders who had been drawn into discussions about building a new political party told Akbayan organizers that if they were serious about building a party they should figure out how to help them win in elections at the *barangay*, the lowest level of the administrative and political structure. Seven Manila-based NGOs, including IPG and IPD, hurriedly put together a 'Barangay Administration Training Manual' (BATMAN), and trained over 1,000 people to participate in the *barangay* elections in 1997. This was the first *barangay* election after the introduction of the Local Government Code (LGC), which allocated a share of internal revenue funds to *barangay* and honoraria for elected *barangay* officials, and there was therefore a lot of interest in the election. Because a large number of people who were trained won in the elections, there was a demand for continued work at the *barangay* level.

BATMAN represented a distinct phase in the development of civil society governance work in the Philippines. Although it is broadly understood that there was civil society governance work before the passage of the LGC, most of this 'people empowerment' work did not target local governments as venues for civil society work. At best, civil society groups worked parallel to, and periodically did promotional work, but seldom worked within local governments. After the passage of the LGC in 1991, civil society groups concentrated on campaigning for the implementation of provisions for civil society representation in special bodies in local government units. But BATMAN was the first network that systematically undertook local governance work (Fabros 2003).

But why choose the *barangay*? The original BATMAN 'Consortium Program on Barangay Governance' said, simply, 'The *barangay* is the lowest unit of governance in the Philippines. It is also the newest. It is here in rural villages and urban poor communities, which comprise the majority of *barangays*, that the greatest possibilities for citizen action to deepen democracy in the Philippines can be found. *Barangays*, both rural and urban, are the sites of most of the face-to-face communities left in the wake of urbanisation and commercialisation of Philippine society. Dominance of élite groups and the centralisation of politics and administration have, for most of the past century, meant that town centres and cities have been the locus of political life. Natural communities have largely been by-passed ... The absence of administrative units at the level of the *barangay* [until the Local Government Code was passed in 1991] was an expression of these political conditions.'

Empowerment of the poor is the bedrock of BATMAN governance intervention. The vision is a considerable distance from old 'seize the state' Left paradigms, but the ambition remains as lofty, changing the very nature of political relationships. 'These social and institutional arrangements generated a political culture anchored on exchanges of private instead of public goods as the characteristic "currency" of political relationships. Politicians provide jobs, money for a variety of consumption needs to individuals and their relatives who return the favour in terms of personal support for an individual politician and his clan. Many of the ills of Philippine politics – nepotism, corruption, violence, lack of transparency, government inefficiency can be traced to this essential element in Philippine political culture' (Consortium Program 1997:2).

While reform initiatives at other levels of government can generate changes in specific elements of the political system, including the central bureaucracy and the

very form of government itself (as in a shift from a presidential to a parliamentary form), the most comprehensive changes towards democratic governance are possible only at the base of the political system, the *barangay*. It is here where the largest number of people can participate in political activities close enough to their day-to-day life to affect political behaviour, and over time, the political culture itself.

The creation of *barangay* government units under the 1991 LGC created, for the first time in Philippine history, the possibility of lowering the centre of gravity of Philippine politics from the town and city centres, where élites dominate, to the level of the *barangay* where poor people live. The LGC provides for a salaried *barangay* captain and *barangay* council, an allotment from internal revenue funds, limited ordinance making and taxation, and borrowing powers. Quite simply, it is now possible to do things at the level of the *barangay*, enough to generate *barangay*-level politics, instead of *barangay* politics being only an adjunct of municipal politics.

Progressives have not been so different from the élite in their neglect of the *barangay* as a community. The most extensive organizing of rural poor communities that has been done by the national democratic movement has either been secret or focused on 'guerrilla zone preparation'. NGO intervention has unwittingly contributed to bypassing and disregarding *barangay*-level communities. While avoiding traditional, family-centred political relationships, NGOs have concentrated on building 'peoples' organizations' – new social units only tangentially connected to pre-existing communities. More often than not, NGO organizing and political reform initiatives have been couched in discourse that is counter to local political culture.

Starting with seven Manila-based NGOs, BATMAN quickly expanded to 42 mostly

local NGOs. The maintenance needs of the consortium were served by IPG, which became its secretariat. Apart from training *barangay* officials, BATMAN assisted in *barangay* development planning. The LGC provides for *barangay* assemblies with limited legislative powers, where all *barangay* residents can participate – the only form of direct democracy available in the current political system. *Barangay* governments are obliged to formulate *barangay* development plans through the creation of a *barangay* development council with provisions for NGO and peoples' organization participation. These institutional arrangements open up the possibility of a broadly participatory political system. Over time, *barangay* development planning became the signature activity of BATMAN.

After five years of work, what has BATMAN achieved? BATMAN NGOs work in over 2,500 *barangays* among which 1,200 have undertaken development planning. The BATMAN experience has clearly had a multiplier effect. Although this is just a small minority of the country's roughly 45,000 *barangays*, the BATMAN experience is already spreading as local governance 'best practice'. This has facilitated the adoption of development planning in adjoining *barangays*. In many cases, mayors from other towns and even governors, asked local BATMAN NGOs to implement BATMAN programmes in their areas.

There have been material benefits. Having *barangay* development plans has helped to access resources from higher local government units and other sources. *Barangay* priorities have also affected municipal budgets. Where there were sympathetic mayors, municipal development plans were based on identified priorities in *barangay* development plans. New perspectives on the uses of public monies also began to develop. New priorities emphasized livelihood projects,

potable water supply, and *barangay* electrification and communication systems. The latter is crucial because it relates to the original BATMAN goal of facilitating the generation of 'public goods' as a way of changing the political nexus between *barangay* and town centre élites. 'Beautification projects' were either vanity projects of politicians or sources of graft from construction kickbacks. Projects with palpable impact on the livelihood of *barangay* residents can raise the stakes in citizen participation.

Because of the extent of the need, whether for livelihoods or public infrastructure, BATMAN efforts hardly dent the overall problem. BATMAN is relevant firstly as an experiment in building participatory

democracy at the grassroots level. From this vantage point, BATMAN has been a success. Whether from the perspective of *barangay* government institution, NGO and popular organization viewpoints, or citizen attitudes towards governance, much has been achieved. The most clear-cut change has occurred among leaders of popular organizations. 'They have evolved beyond their initial orientation as political activists who expose and oppose the wrong doings of government from outside formal state structures. They no longer merely point out what is wrong or lacking, but they have become actual participants in the change process, proposing solutions and alternatives, working for reforms from outside and inside government' (Santos 2004).

Elections to Parties

Many BATMAN areas quickly moved from *barangay* development planning to electoral intervention. From elections, it is a short step to issues related to political parties. Concerns were practical and political: How do you link the people who get elected so they can work together to elect more people at higher political levels? Who will work to change the legal and policy frameworks that determine spaces for participatory politics? These issues were discussed as early as October 1997 at the beginning of BATMAN. 'Explored were the various possibilities that might arise from linking up the program visibly with a specific political party. In the end, the participants agreed that there is a need for a progressive national vehicle which can

infuse sustainability into the governance efforts of individual barangays' (Conference Report 1997:2).

Although Akbayan was not founded until three months after this discussion, BATMAN has been associated with Akbayan since its inception. It has been a complex and at times contentious relationship. BATMAN does not have a formal, organizational relationship with Akbayan or any other political party. After an acrimonious debate on the nature of relations between IPG, the BATMAN secretariat and Akbayan, IPG formally asserted its independence as a civil society formation, an assertion that Akbayan also formally affirmed.³

3. At a meeting between the Akbayan Executive Committee and the board of the IPG, the Akbayan Executive Committee said that: 'Akbayan does not claim the Institute for Politics and Governance as its political institute. It has no veto powers over its internal decisions nor a claim to participate in the election of an executive director or the hiring of its staff. It is within Akbayan's program to defend the autonomy of institutions of civil society from institutions of the state and political parties who want to get into the state ... On the other hand, the history of the Institute for Politics and Governance and Akbayan has generated a relationship of closeness. The Institute for Politics and Governance was set up by members of political blocs that made up Akbayan, and individuals from the Philippine Democratic Party and the Liberal Party, to facilitate and assist in the work of progressive political groups and to help set up progressive political initiatives ... Akbayan does not claim ownership of the Institute for Politics and Governance but reserves the right of their members who are members of the board of the Institute to make decisions on their own from the vantage point of Akbayan's interests.' Minutes of the Joint Meeting of the IPG Board and the Akbayan Executive Committee, 13 July 2001.

Because BATMAN works closely with Akbayan at both the national and local levels, however, the relationship continues to be a subject of discussion. The problem is not that Akbayan's role is hidden behind the 'front' of BATMAN nor that there is an underground relationship.⁴ The problem is more that the dominant Left experience, that of the national democratic movement, is one in which NGOs and people's organizations are being used, their integrity compromised by hidden party control. Non-national democratic Left groups continue to be influenced by this perspective to the point where, even within Akbayan, prior to the party's formal position on the issue, some leaders believed that the party should have veto power over BATMAN.

Since the dominant Left experience is so different, it is difficult to imagine, even more, to organize a relationship where civil society groups such as BATMAN are autonomous but working close to, and parallel with, a political party such as Akbayan – a relationship that is negotiated along the way. While the current relationship is mutually beneficial, there is a danger that Akbayan will push its agenda within BATMAN to the point of compromising BATMAN's integrity. Conversely, organizations within BATMAN might use BATMAN and its political and other resources to achieve certain goals within Akbayan.

Working with a party such as Akbayan will enable a project like BATMAN to link up its municipalities with each other, leverage resources from national line agencies, and most importantly, become oriented towards a 'progressive national political project'. For Akbayan, BATMAN is important for identifying reform-oriented local politicians who can be recruited into the party and push its good governance agenda. But roles

have to be clearly delineated to minimize friction. This cannot be done if differences and conflicts are swept under the rug.

Because BATMAN has been slow to develop programmes at the municipal level, Akbayan has stepped in and developed its own programme for assisting Akbayan mayors. The Akbayan Government Affairs Committee has slowly developed capacity for assisting Akbayan mayors with governance problems, ranging from revenue generation to service delivery. When BATMAN finally gets around to developing its own municipal programmes, if nothing else because non-Akbayan reform mayors also need assistance, there will be more than enough to do. But the relationship between the party governance programme, and BATMAN's civil society programme will have to be carefully delineated to prevent conflicts and misunderstanding.

In a careful evaluation of the BATMAN experience, one common conclusion is that while it was necessary to establish a *barangay* base, BATMAN will have greater political impact only if it succeeds in scaling up to the municipal level (Estrella & Izatt 2004). Without organized intervention for participatory democracy at the municipal level, the potential gains from *barangay*-level intervention cannot be clinched. Worse, with few exceptions, the generation of funds for *barangay* projects have had to be done through old circuits of patronage.

Scaling up to the municipal level is not only logical, it is also inevitable. This is because, as has been pointed out in Santos (2004), 'municipal/city government have the power to affect drastically the programs and reform initiatives at the *barangay* level. For instance, a *barangay* official, who is in opposition to the mayor or any key official

4. The standard practice in Marxist-Leninist parties in the Philippines is to have an underground party controlling above-ground organizations, including political parties.

in the municipal/city government, can have a very difficult time obtaining the release of his/her *barangay* Internal Revenue Allotment. Municipal/city governments, headed by the mayor, have the power to determine resource availability, budget allocations, the provision of support services and the kinds of development programmes. With political will, they can implement reforms in government, such as promoting participatory planning, combating corruption and improving revenue collection. Our reform gains in the *barangays*, complemented with initiatives at the municipal/city level, would expand the scope for reforms and have greater impact on alleviating poverty and achieving genuine political reforms.'

If scaling up is the main organizational challenge for BATMAN, locating its politics within a broader Left frame is its main theoretical challenge. Interrogating 'official' governance and democratization discourse is only a requisite beginning. Even more important is finding BATMAN's place in the ongoing reorientation of the Philippine Left. It is not as if the process has not been started. What needs to be done is to systematize theoretical work, undertake an organized process of summation of often unsystematized theoretical unities from practice, and open debate on contentious issues. Relating to ongoing international debates on similar issues can also help to sharpen issues and accelerate the process.

Locating – as it were, 'scaling up' – BATMAN discourse within a 'Left-Right' framework is particularly important because of the convergence of what has been called 'revisionist neo-liberalism' and certain strands of 'post-Marxism'. According to Mohan and Stokke (2000), these two intellectual streams converge in '... the belief that states or markets cannot be solely responsible for ensuring social equality and economic well-being, and recognise thus the need to consider the local

as the site of empowerment and hence as a locus of knowledge generation and development intervention'.

But, Mohan and Stokke continue, '... these two different strands still present important differences in emphasis. Neo-liberalism focuses on institutional reforms and social development through community participation and empowerment, but within the established social order, that is without sacrificing the power and privileges of the powerful. On the contrary, post-Marxism supports a more radical view of empowerment, mainly based on social conscientization and mobilization (building collective identities) to challenge hegemonic interests within the state and the market. In this line, empowerment of marginalised groups requires a structural transformation of economic and political relations towards a radically democratised society' (Mohan & Stokke 2000:249).

Most BATMAN activists would probably say, 'What's the big deal? It's clear we stand on what you call the "post-Marxist" side whether we call ourselves Marxist or not.' True enough. But without consciousness of the distinction, the danger of cooptation or the related pitfall of opportunism, of being used while taking money from neo-liberal local governance projects, is great. At the same time, it will be difficult to identify areas of convergence with reformers who may operate within a neo-liberal framework, but who work on projects such as anti-corruption, which is a common concern. Finally, without maps for navigating the white waters of local governance discourse, we cannot maximize the empowerment potential of local governance projects such as BATMAN.

Because of the ideological hegemony of Maoist armed struggle through most of the 1970s and 1980s, Left theorizing on open, unarmed strategies has been slow and painful. While Maoist ideological

hegemony was broken with the massive splits within the Communist Party of the Philippines in the first half of the 1990s, Maoists continue to ideologically intimidate other Left groups. Often unconsciously, other Left groups still measure their being 'revolutionary' with unexamined standards set by the Communist Party of the Philippines. This has not necessarily been a problem for BATMAN, but because it works closely with political parties such as Akbayan, and self-consciously ideological political blocs, BATMAN's theoretical formation has been affected.

One approach that has been influential within BATMAN is what might be called theoretical pluralism: '... Participation can be likened to a multiple-lane highway where different vehicles traverse different lanes. Slow-moving vehicles look at participation from the vantage point of building empowered sustainable communities and promoting alternative governance models. Vehicles using the fast lane are those that view participation from the vantage point of political society – movements that try to seize 'moments of state ruptures' through heightened political participation that directly challenges the legitimacy of elite rule and the *status quo*. Both vehicles, however, do not compete but complement each other in the sense that the multiple-lane highway goes to one direction ... By weaving these struggles together, it will somehow hasten the work of each individual form and build on the strengths of each other while minimising possible setbacks brought about by the rigidity of using only one form of struggle' (Villarin 2004). Elaborating on the concept, Villarin calls 'moments of state ruptures' occasions when '... political and even social movements ... try to seize "moments of state ruptures" through heightened political participation that directly challenges the legitimacy of elite rule and the *status quo*'.

This approach is a reflection of the ideological heterogeneity of BATMAN and the Philippine Left as a whole. It has been useful for enabling ideologically diverse groups to form coalitions and to coexist in new multi-tendency parties such as Akbayan. But, at some point, theoretical contradictions between the propositions that underlie the different 'lanes' have to be grappled with. This orientation is understandable given the ideological history of the Philippine Left. It is an intermediate step between the Maoist 'protracted peoples' war' and varieties of 'national liberation movement' frameworks and what might be called a 'radical democratic option'. It prevents a radical break with the past and enables groups who subscribe to it to think of themselves as 'revolutionary'. In other words, it is an approach, I would insist, that is different from the underlying assumptions of BATMAN, which I would characterize as closer to a 'radical democratic option'.

One problem is that a 'state ruptures' orientation is akin to the Maoist and national liberation movement framework in its focus on 'seizing the [central] state'. This is in direct contradiction to the 'local governance' framework of BATMAN. This is not just a matter of division of tasks or different 'lanes' of vehicles going in the same direction. Working towards 'state ruptures' outside of an armed struggle strategy means vulnerability to coup attempts and other ways of forcing a radical break in the distribution of power at the national level. For BATMAN, the problem is that a 'state ruptures' framework is hesitant about, if not averse to, political reform, and the slow, painstaking accumulation of power through a combination of electoral and mass struggles work. Saying both approaches can coexist hides the judgment underlying the assignment of the 'slow lane' to 'building empowered sustainable communities and promoting alternative governance models'.

This issue needs to be explored and debated intensively because it has many ramifications. The Latin American experience clearly shows that a strategy of slow accumulation of power in local politics has been more productive than old national liberation strategies or its later non-armed version 'transition through rupture'. Lula's ascension to the presidency in Brazil was built on his Workers Party's accumulation of power and experience in local politics. In Mexico, on the other hand, the Party of the Democratic Revolution (PRD), which is oriented towards 'transition through rupture', is moving further and further away from achieving national power.

Cross-cutting divergences between old Left discourse and new Left ideas, between anti-state NGO discourse and newer ideas pushing civil society intervention in political party formation, have not been carefully debated in the Philippine progressive movement. People have tended to be reticent about discussing these issues. But precisely because of this reticence, suspicions about BATMAN being a 'front' of Akbayan continue to circulate. In the end, what may be required is not that discourse settles into a single, stable order but that more people accept that unstable, shifting, negotiated relationships are more productive of the participatory democracy we are fighting for.

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Social and Libertarian Democracy: Competing Models to Fill the Frame of Liberal Democracy

Thomas Meyer*

Two Opposing Concepts of Democracy

In the global arena and within most present-day societies, two opposing varieties of democracy are competing for spiritual and political dominance: libertarian and social democracy. Both claim to be appropriate strategies for the institutional implementation of freedom and justice, but contradict each other in all relevant institutional options beyond the minimum requisites of the institutions of liberal democracy. They thus represent two different ways of giving the concepts of freedom and justice relevance and meaning

in social, economic, cultural and political life.

The distinction between libertarian and social democracy in today's world is of crucial importance for both democratic theory and practical politics in individual countries and in the global order as a whole. It accounts for a substantial part of the differences over how to shape the process of globalization as it occurs in the world today.

Libertarian Democracy

From a scientific point of view, libertarian democracy is characterized by the fact that although the state itself is structured along democratic, constitutional lines, the shaping of economic and social living conditions is, for the most part, regarded as a private domain that should remain beyond the reach of political intervention and structuring.

In terms of this conception, in a constitution that guarantees freedom, the political institutions of liberal democracy find their societal equivalents only in a free market economy combined with free ownership of private property and

individual responsibility of citizens for their own social and economic well-being.

Claims for the overall responsibility of government to shape social structures, regulate the economy and conduct redistributive policies in order to implement the basic values of freedom and justice for the less well-off are perceived as an illegitimate invasion of the state into the citizen's private domain of freedom. Corresponding with civil rights and the democratic freedom of choice in political life in the realm of social and economic life are – in terms of this conception – the unhampered institutions of freedom of

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ownership, private autonomy, private contracting and the self-regulating market. The most recent formula to give an operational meaning to this conception of democracy is the Washington Consensus.

Experiences with the practical performance of this model in real life in the course of the last two centuries speak an unambiguous language. Since there are always wide differences in the social, educational and personal prerequisites of individual persons in each given society, libertarian democracy results in a series of violations of universal basic rights when put into practice.

First, in social and economic life, the results are substantial. Because there are often disparities in the opportunities and choices open to different classes of people, large parts of such a society are denied the social goods of a decent life.

Second, a large segment of the population is regularly doomed to a state of economic and social dependency and want, thus being excluded from large parts of societal, social and cultural life.

The Claim of Social Democracy

Social democracy today is not just an idea of how to overcome the weaknesses and flaws of libertarian democracy, it is basically a reality in a variety of European countries.

It was the historical experience with the shortcomings and contradictions of libertarian democracies in nineteenth century Europe that led to the conception of social democracy and increasing support

Basic Rights

The starting point of the concepts of social democracy in its modern form is the United

Third, the economic dependency and want of large groups of citizens assume such proportions that those who are affected by them cannot exercise their democratic civil rights in real terms. The result is a defective type of democracy that denies relevant parts of the citizenry their civil and political rights.

Hence, libertarian democracy tends to become an élite or 'delegative type of democracy' (O'Donnell 1994) that restricts the opportunities of full democratic participation to a limited number of well-off citizens. Such societies have tendencies towards social disintegration, usually with rising costs for a variety of more repressive ways of integration. In times of crisis, the high degree of societal disintegration always tends to be a risk for democratic stability and sustainability.

It needs to be stressed here that libertarian democracy is not equal to 'Western democracy' as, since the middle of the nineteenth century, in practically all European societies, it has been successfully challenged by its opponent: social democracy.

for it in most European countries, particularly after the Second World War and the world economic crises of the 1920s that paved the way for it.

This model has been constantly in a process of change and modernization throughout its existence, but on the basis of a well-defined set of basic values and rights, institutional preferences and guidelines for policy making.

Nation's Covenant on Basic Rights of 1966. This document – which is a valid part of

international rights – declares five groups of basic rights: civil, political, social, economic and cultural rights.

The first two groups of rights are well known. They form the foundation of liberal democracy. Civil rights include the freedom to speak and the freedom to associate and to assembly; political rights are those such as the right to form political parties and to vote. But the other three groups of basic rights are also considered to be of equal importance and validity: social rights are rights to social protection, social security, education, healthcare and the like, economic rights concern the rights to work, to fair payment and to decent working conditions, and cultural rights protect the opportunity to participate in the culture of one's society and to give expression to one's own cultural identity.

The idea behind this five-dimensional concept of basic rights is that freedom and the opportunity to personal development and full participation of all individuals in social life should be guaranteed to every human being in full independence from his/her social status and wealth.

A Rights-based Welfare State

The state fulfils its obligations to act on several levels. It offers social protection against risks that violate its citizens' basic rights; guarantees them equal educational opportunities, not only for acquiring skills, but also for partaking in broader cultural life; and it safeguards their dignity in economic and social contexts. To accomplish those ends, it may need to regulate markets in a capitalist economy and guarantee a functioning public sphere, among other things.

Social democracy is basically characterized by a comprehensive social welfare state that ensures the protection of the basic rights alluded to earlier as well as maintaining a

The covenant declaring universal civic, political, social, economic and cultural basic rights is ratified by 148 countries from all cultural zones and stages of development in the world of today. It represents the normative basis of modern-day social democracy. In all cases, where the basic rights of persons are jeopardized by risks for which political authorities should reasonably assume responsibility, the state has a *prima facie* duty to act. It must ensure that the life chances of citizens subject to such risks are not inferior to those of citizens who have not been victimized by equivalent risks.

Indeed, in the first instance, the state has an obligation to prevent such risks from occurring at all. If it cannot do that, it must compensate 'losers' for the consequences of the risks they have undergone. But all citizens are likewise obligated to make whatever contribution they can towards avoiding or compensating for such risks by their own efforts. Social democracy, thus, is about social citizenship (Marshall 1992).

just distribution of life chances. It likewise contributes to economic efficacy and growth as well as to social cohesion and political stability. The social state acts as a kind of shock absorber, damping down the insecurities generated by market capitalism by underwriting state-sponsored security guarantees that are independent of the market.

It provides a minimum income to individuals and families, while offering effective protection against sickness, poverty in old age and unemployment. Moreover, it provides a range of social services such as child supervision and care for the aged.

In economically advanced democracies there are three types of social state: the universalistic social state on the Scandinavian pattern; the conservative version well-represented in Continental Europe; and the liberal model characteristic of the Anglo-Saxon countries. These types of social state may be distinguished in part by ascertaining whether and to what degree they have institutionalized social civic rights.

One condition for the achievement of social democracy is that there must be a constitutionally guaranteed civic right to social services. The liberal social state, in which there is only a form of poor relief without any legally binding claim on the part of recipients, would thus fail to meet the criterion for social democracy. The other two variants, by contrast, clearly have institutionalized social civic rights.

A Regulated Social Market Economy

As employment, fair salaries and workers participation are – in terms of these basic rights – considered to be crucial political objectives, the social regulation of markets is a political necessity. Government responsibility for the broad outcome of the economic process and for the treatment of the individual in economic life cannot be discharged. All must be given the chance to participate in economic decisions concerning their fate and their dignity.

In practice, the political economy of social democracies may accommodate a wide range of variations. The relationship between politics and the market is characterized by specific areas of tension: productivity and growth, flexibility and innovation are constantly pitted against the principles of social justice and social security. Hence, the fundamental goal of political economy in a social democracy is to harmonize the market's operation with the policy requirements generated by liberal,

Citizens, too, have certain obligations that complement their basic rights: these are not simply to accept the dignity of all human beings, but to actively assume responsibility for their own lives. Every citizen is obliged to request the aid of the community only to the extent that his or her own efforts to earn a living have not met with success. This is a precondition for the maintenance of the entire social security system.

Thus, each government is committed to ensure equality of opportunity and justice, not only in the political realm, but also in economic and social life. Providing the basic opportunities in life to people is a political responsibility of the democratic state. In order to do so, the state needs to be organized as a rights-based welfare state.

political, economic and social basic rights.

Of course, the functional capacity of the market should ideally be maintained in all of its productive aspects. Yet the goals of rising living standards and free consumer choice have to be balanced against those of full employment, ecological sustainability and long-term economic growth prospects. The coordinated market economy is, therefore, a more appropriate arrangement for social democracy than the liberal market system, since the latter often lacks the institutional means to balance productive against social aims.

For the political regulation of markets to succeed, a suitable legal framework must be created, and various micro- and macroeconomic strategies for managing supply and demand need to be instituted in order to insure the primacy of the common good and basic rights over individual private interests. In principle,

the political community must be in a position to influence the market sub-system so as to minimize potential conflicts between the rationality of individual economic decisions and goals that have been defined politically as being in the interest of society at large. Yet economic enterprises need to have sufficient latitude to continue and to enhance the socially desirable entrepreneurial activities they engage in.

Although the level and type of welfare state and social market economy depend on the degree of development of a country and its cultural traditions, the principles of the political economy of social democracy need to play a constitutive role under all conditions and at any level of development. How best this is facilitated is a matter of concrete political decision in each specific situation.

A Regulated Social Market Economy

Essentially, a democracy always has three different approaches to achieve public goals (models of governance):

1. Through the market, when it is a question of procuring goods and services to be procured against payment.
2. Through the state, when it is a question of public goods which will benefit all and must if necessary be procured through instruments of power.
3. Through civil society, when it is a question of collective goods whose procurement is to be facilitated through a (voluntary) act of solidarity on the part of society.

Deciding which of the three approaches should be used for realizing which of the social tasks is, in itself, a matter that can only be settled through democratic means. It is in the very nature of a vibrant democracy that an optimal balance can be reached time and again, depending on experiences gained using each of these three approaches in rotation. Obviously this largely depends on the extent to which citizens are willing to involve themselves in the interest of public welfare.

For social democracy, societal democratization and an active civil society play a crucial role. In enterprise and at the shop floor level this means an appropriate kind of workers' co-determination. In most other societal sectors it requires forms of

participation of the workforce that allow for both the protection of the human dignity of the individual worker and employee and a sufficient degree of effectiveness in the output of the respective societal sub-system (such as administration, schools, health services and the like).

Most important is the building up of an active civil society. Not only does it offer opportunities for citizens to advance their own interests and exert a democratizing influence on representative procedures, but it also allows for the provision of supplementary social support. Furthermore, civil society promotes the political socialization of the citizenry, and assumes important society-wide steering functions.

Another fundamental element of social democracy is an open, discursive political public sphere. This requires the freedom of the press and other mass media, together with every citizen's freedom to express his/her own opinion. This is one of the essential conditions for success in the process of political integration undertaken by social democracy. A functioning public sphere not only provides individuals with information and arguments, but also enables citizens to reach agreement about the values that will shape their commonwealth, for example, in matters of educational, economic and social policy.

A free, multifarious and vibrant civil society forms an indispensable basis for a strong and effective democracy. Civil society is the sum total of all initiatives, unions, associations, organizations and networks in which people are voluntarily engaged with the objective of pursuing the welfare of the community apart from their own.

Experience has shown that dictatorships, once they have torn down a democracy, invariably aim at quickly regulating, curtailing or even altogether smothering the life of civil society. The mere presence of several political parties does not, for the most part, result in a functioning democracy if these parties do not have their roots in an active civil society. These insights are as old as democracy itself, although more often than not they are not adequately considered.

In this understanding of civil society it is important to note that it is not just voluntary association that defines civil society but also the incorporation of public welfare. Thus, a band of robbers or an anti-democratic group does not form part of a civil society as per this definition.

Active engagement in a civil society, neighbourhood action group, human rights group, environment protection group, citizens' organization or religious or social group is, in a way, on a par with state action, for, like the state, it is aimed at public welfare, although unlike state action, civil society engagement is voluntary. In another respect it is akin to economic action, for it is also voluntary and oriented to securing benefits, although engagement is on an honorary basis.

But, apart from guaranteeing public goods through voluntary action, civil society has four other directly political functions that make it indispensable for democracy:

1. Citizens engaged in small community initiatives also acquire the capacity to act in the political field. They learn how politics function, acquire useful information for successful action and the skills for goal and success-oriented community action.
2. With this political expertise and the ability to assert themselves, civil society organizations steadily and consistently work on political parties closely linked to their goals. They encourage them to act in a goal-oriented manner. Many active members of civil society involve themselves in parties so that they can re-establish the parties' linkages with social interests and values. Through the public pressure they exert from outside, civil society initiatives also act as a constant check on the actions of parties.
3. Civil society initiatives could also consistently check whether party and government action actually bring about the desired results in society, and whether parties and governments are directly involved in the achievement of these results.
4. As lobby groups too, civil society initiatives are, for the most part, respected in the roles they assume *vis-à-vis* state administrations, parliaments and governments as well as economic enterprises.

Where civil society is vibrant and multifarious, parties, administrations and governments quickly realize that their words must be followed by deeds. They learn that their programmes must be effective and that sub-standard action and corruption pose a threat. Civil society is therefore the most potent, effective and flexible link between the living world of society and the world of big politics, including political parties. Civil society is certainly no substitute for either political parties or large economic associations, let

alone the institution of democracy. Yet, the quality, measure and stability of a

democracy are crucially determined by the efficacy of civil society.

Theory and Practice

Social democracy is not just a theory nor an utopia but good practice in several European societies and – in its own way – also in Japan. The policies of these countries ensure their citizens against social risks and grant social and political participation. It turns out that a culturally universal model of democracy finds its fullest expression in social democracy, since all five categories of basic rights are most effectively secured by it. Social democracy should, therefore, be

considered a condition for the achievement of full participatory and sustainable democratization. By contrast, libertarian democracy, which is concerned exclusively with the assignment of civic and political rights while ignoring social and economic ones, deserves to be labelled a ‘defective’ democracy. It can neither ensure the efficacy of basic rights in the real world, nor can it secure the equality and political autonomy of its citizens.

Progressive Globalization

Social democracy is not only a model for the nation-state, but also a project for progressive globalization. It guarantees the efficacy of democracy even under conditions of social and economic globalization. In the current phase of globalization, the tussle between the proponents of libertarian democracy and social democracy is one of the major issues of conflict in the international political arena and in individual societies. There are two questions on the agenda everywhere:

1. Should social democracy be retained even in an era of global market competition, or relinquished for alleged competitive advantages?

2. Can the international political arena be politically shaped at all? If so, is this only in terms of minimum political coordination or even for a macroeconomically regulative social and ecological fixing of the markets?

While the advocates of libertarian democracy contend that globalization has, to a large extent, destroyed the meaning and possibilities of social democracy, the champions of social democracy point to another aspect: there are not only limits to the welfare state from globalization but also social limits to globalization.

Political Consequences for Globalization

Since the 1970s there has been a strengthening of tendencies towards the global integration of economic markets and transnational social linkages in areas as important as information technology, communication, travel, environmental pollution, the spread of disease and

migration, among others. Under these circumstances, the democracy of a nation-state loses any scope it may have had to influence developments, to the extent to which the causes of such politically significant impacts (such as environmental damage, unemployment, immigration,

spread of disease, etc.) increasingly lie beyond its borders.

The basis for the functioning of a democracy, which is essentially the capacity to address all the problems in its area of jurisdiction, is politically lost. And obviously, where democracy is no longer in a position to solve the basic problems for which it has been established, it loses its significance and *raison d'être*.

A globalization that is merely economic proves first and foremost to be a process of silent de-democratization. In order to re-acquire democratic powers of decision making, the extent of the impact of democratic decisions must be just as great as the radius of the impact of interlinked problems whose resolution the majorities in societies demand. To the extent to which interlinked problems cross national borders, democracy must again tackle them in adequate measure if it is not to be devalued. This involves the creation of instruments of political action in order to again facilitate the social and ecological re-embedding of the markets on a global scale after they have crossed the national domain. Thus, what the globalized world needs are political decision-making structures, forms of transnational cooperation that meet the requirements of actual globalization. For the transnational level, democracy must be reinvented.

The European Union constitutes an experiment in this direction. Other associations of regional cooperation, such as the South Asian Association for Regional Cooperation (SAARC) and the Association of Southeast Asian Nations (ASEAN), have likewise trodden the path of regional political cooperation. The expansion of these associations of regional cooperation, their progressive democratization and the establishment of mutual linkages between them are important constituents in the process of establishing a global democracy.

Global democracy needs effective forms of uninterrupted cooperation while safeguarding the natural sources of life and ensuring financial stability, balanced economic growth, the satisfaction of basic needs world-wide and decent working and living standards. At the same time, we cannot shut our eyes even in future to massive human rights violations beyond our own borders. There is something like a common body of world citizens' rights from which every citizen can claim protection for his basic rights from all other citizens, even through the political organization of the nation-state and the region will continue to remain primarily responsible and in charge.

Discussions on this have been going on for almost two decades, and the first practical steps towards the globalization of democracy have been taken. They have by no means gone far enough, although they are mostly in the right direction. A global government seems neither a realistic nor a desirable solution to the problem of global democracy. It is unrealistic because sooner or later important and influential nation-states would refuse to accept this solution; it is undesirable because the growing distance of economic centres from the societies affected by their actions will only serve to further reduce chances of democratic influence in more respects than one.

As a model for a solution, the concept of global governance is the most highly approved internationally, stands the best chances of being realized and offers the best prospects of solving effectively the most weighty problems of globalization.

Governance means steering or regulating through political means, that is, by involving governmental action but without this being confined to action by governments alone. Global governance means simultaneously expanding four

different forms of political coordination and regulation that are, again, linked to each other and complement, monitor and influence each other.

1. The expansion of the global political organization, the United Nations, into a body that can discuss social and economic issues, reach agreements and influence their implementation. Thus, there is, for instance, talk of setting up a World Security Council for economic affairs.
2. Increasing and improving regional political cooperation between states, such as in the European Union, ASEAN or SAARC. These associations could – on a broad regional scale – collectively address a significant proportion of the social, economic and ecological problems that crop up in individual countries. With their enhanced leverage they could, in turn, play a role in the global shaping of economic, ecological and social development.
3. Enhancing, improving and, most importantly, democratizing transnational regimes. The term ‘regime’ refers to transnational political regulation in a specific area that poses problems, such as, for instance, the liberalization of global trade, ecology, basic social conditions and the exploitation of the seas. The World Trade Organization is an example of such a regime. A transnational regime sets down a binding, transnational settlement of the problem in a contract, with an independent authority and a well-regulated procedure of arbitration also

being established for the same. A global social democracy is not only concerned with the democratization of existing regimes but also with the enhancement or re-establishment of such regimes that address issues such as working conditions, social standards, global financial flows or the eradication of unemployment.

4. Transnational civil society has proved itself to be an influential political network. The initiatives of civil society could, on the one hand, link up the interests of people in their living environments with the actions of large political institutions in a manner that is more immediate than is the case with political institutions. As lobby organizations and watchdogs, they could condemn the actions of concerns and organizations that go against the interests of the population, thereby ushering in changes. But, on the other hand, they can also solve a series of problems on their own through their coordination.

In a world of global markets and global social influences, democracy also calls for globalization.

Negative globalization, involving the mere dismantling of borders for market expansion, must be balanced by a positive or progressive globalization of establishing political structures of responsibility. In this age of globalization, the latter is on the agenda of all true democrats. This is what social democracy means in the world of today.

Conclusions

To sum up, three conclusions can be drawn in order to mark the characteristics of social democracy:

First, social democracy is neither a system,

nor a patent remedy for all social and economic diseases, nor is it a ready-made model that can be exported to every other place in the world. It is a pragmatic approach to give equal value and

importance to all five basic rights – civil, political, social, economic and cultural – in the framework of liberal democracy. Its institutions need to be shaped to suite the concrete conditions of individual countries under the influence of economic globalization.

Second, there are undisputable successes in the dimensions of welfare protection, social justice, the expansion of democracy,

economic performance and democratic stability in those countries that embark on the way of social democracy. Social democracy is an approach that works, but it needs constant endeavours and readjustments.

Third, in an era of globalization, social democracy requires simultaneous implementation at both levels: within individual countries and in the global arena.

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'The Relevance of Social Democratic Parties and Progressive Movements in East and Southeast Asia'

Conference Summary

Norbert von Hofmann*

The Friedrich-Ebert-Stiftung (FES) Office for Regional Cooperation in Southeast Asia and the FES Manila Office jointly organized an international conference on 14 and 15 October 2004 in Manila, the Philippines, on the relevance of social democratic parties and progressive movements in East and Southeast Asia.

There were about 50 participants, representing 13 political parties and social movements, from Burma, Germany, Indonesia, Japan, South Korea, Malaysia, Mongolia, New Zealand, the Philippines and Thailand, as well as the Socialist International Secretariat.

Initial Stock-taking

The Asia-Pacific region is, in every respect, highly diverse. This applies to the state of democratic development too.

On the positive side of the democratic spectrum are New Zealand and Australia, with a Western and European form of democracy. Then there are Japan and South Korea with USA-influenced democracies, followed by the Philippines, Indonesia and Thailand, where voters are able to use democratic elections to change the political leadership. In Malaysia and Singapore, an increased political openness can be observed, but not to the extent of a possible change in leadership. China, Vietnam and Laos are still controlled by one-party systems. On the other end of the democratic spectrum is North Korea, which was not part of the discussion, and, of course, Myanmar/Burma. The conference participants listened carefully

to the report of the NLD (Burma National League for Democracy) representative and took note that very little political development and no progress can be observed, despite the efforts of many friends from all over the world. The participants assured the NLD and the Burmese people of their continuing support and sympathy.

Nevertheless, many countries in the region have a common recent history: many have experienced military governments, dictatorships and/or are still struggling for more democracy.

Prior to the 1997 Asian economic and financial crisis, it was assumed that strong leadership was necessary to push the countries in Asia forward and to ensure economic growth. Most governments rejected 'Western-style' democracy and

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actively promoted 'Asian values'. The turning point came when people discovered that their leaders were not nearly as competent as they pretended to be. With the decline of economic growth, autocratic leadership began weakening.

Despite all the hardships, the economic and financial crisis has also had some positive elements:

- it speeded up the opening up of economies;
- it forced Asians to become more aware of corporate governance;
- it made the region concentrate on its real competitive strength;
- it provided a hard lesson about globalization; and, most importantly,
- it showed the emergence of more open and democratic governments.

The slowing-down of economies, which brought enormous hardship, especially for workers and farmers, did not slow down the demand for more democracy; on the contrary, democratization increased in the region.

The economic crisis encouraged people to analyse their governments' policies. As one participant said, 'The time was right for changes as the neo-liberals had to show their face. We now live in an era of change and with the hope for more democracy'.

However, 9/11 is to some extent threatening these new developments because a number of countries have increased security at the expense of democracy – Japan, Malaysia and Singapore were examples mentioned. Suddenly, the Internal Security Acts of Malaysia and Singapore became internationally acceptable. Despite this setback, there were many positive developments mentioned during the discussions. For example:

- In Mongolia, despite the fact that the

recent elections did not turn out as many had hoped, the country was able to form a democratic government.

- In Japan, the struggle against re-militarization and against a change of constitution has seen growing support from young people.
- In South Korea, the successes of the newly formed Democratic Labour Party in recent elections are changing the political landscape.

It was hotly debated to what extent social movements and social democratic parties had contributed to these positive developments. Some argued that reforms came from other, much larger groups, and primarily from so-called 'people power', as it needs a much wider constituency than social movements or political parties.

Three indicators for positive democratic developments were named:

- the state of human rights;
- the amount of political freedom; and
- the size of the 'democracy index'.

However, others saw these three indicators as just a description of 'libertarian democracy'. It is certainly important to have these liberal rights, but in order to promote social democracy it is essential to add social, economic and cultural rights as well.

This description of social democracy was seen by all participants as an international concept and not a purely Western model. Clearly, within this framework, all nations have to build their own institutions with reference to the situation, needs and culture in their respective countries. In this context, the question of whether political parties are out of fashion was raised. From a European point of view it was noted that young people are more interested in *ad hoc* events than in long-term structures or commitments. This tendency is further

strengthened by the media. However, in the end, all agreed that democracy needs political parties because long-term visions, objectives and programmes need vehicles like political parties, but it may be that such vehicles require some form of modernization and change. How to bring about such change was one issue discussed, as was the question of who are the agents of change. One answer was the demand for larger coalitions with social movements, NGOs or churches. Neither in Asia nor in Europe are workers sufficient in number as a base for social democratic or labour parties to win elections. It is necessary to open political parties to other parts of society.

It was also mentioned that it is necessary to address the needs and issues of the people when talking about democracy. Political parties have to sell issues and not 'social democracy'. Politics have to be more pragmatic, identifying and addressing the problems of voters. 'Ideology does not feed people!' It is also important to work on all levels: local and communal issues are as important as national issues.

Answering the question 'Has social democracy made gains?', the participants replied overwhelmingly 'Yes'. The various presentations at the conference, especially from newly established political parties, were proof of this statement.

In South Korea, the Democratic Labour Party, formed by trade unions and social movements, has developed from an extreme leftist position towards a more modern approach acceptable to a larger number of voters. In the Philippines, Akbayan has also developed out of social movements and leftist organizations into a more mainstream social democratic party. In Thailand, Mahachon is a party of concerned intellectuals and the middle class who have moved from the centrist Democrat Party to a more social democratic left. In Malaysia, the People Justice Party (Keadilan) brought together social movements, political parties and civil society to form a progressive opposition party.

The cases of Keadilan and Akbayan show how difficult it is to agree on a common platform in cases where several NGOs and social movements with different agendas and political backgrounds join forces. Undoubtedly, social movements can have and have had positive impacts on political parties in the same way as trade unions. However, social movements cannot replace social democratic parties.

Several participants remarked that the words 'socialism' or 'social democracy' are discredited in a number of countries in the region. However, it is not the name that defines a social democratic party, but rather its content that makes it 'social democratic'.

Defining Social Democracy in a Globalized World

Social democracy is neither a Western nor an Asian concept. It has to be accepted as an ideology. Social democratic parties are based on programmes and not on persons. The content or platform may differ from country to country. However, social justice was seen as the base for social democracy in Asia; social justice plus democracy or democracy plus social justice. The third component is solidarity – within the party

and within the movement, as well as with the weaker parts of society.

All participants agreed that social democratic parties and politics have a chance in a globalized world, even if globalization has forced social democracy into a more defensive position. Democracy, even if it is accepted worldwide, is not sufficient. What is needed is

more than just democracy, it is social democracy. Only social democracy can solve the problems of globalization. The values of social democracy remain the same, regardless of whether they apply on a local, national, regional or international level. Solidarity means sharing with those who are less fortunate and this applies to individuals in local communities as well as to nation-states in a globalized world.

Four important elements were seen as necessary to cope with the negative aspects of globalization:

1. To democratize international institutions, foremost among them the Security Council of the United Nations. In this context, the demand of European social democratic parties for

a Social and Economic Security Council was mentioned;

2. To democratize the Brenton-Woods institutions, including the acceptance of core labour standards in international trade agreements;
3. To strengthen and enlarge the scope of transnational or international civil society groups; and
4. To strengthen regional cooperation and integration by adding a social dimension to these groupings, for example, in the Association of Southeast Asian Nations, where presently only an economic and a security dimension exist.

For all participants, nation-states are by no means irrelevant in the era of globalization. Nation-states are still at the forefront of guaranteeing the rights of their citizens.

Strengthening International Solidarity

International cooperation and networking of social democratic parties and social movements were discussed in the final session of the conference. All speakers raised the issue of the importance of international solidarity. Young parties can learn from the struggle of older parties. The struggle for social democracy cannot be fought at a nation-state level alone. External help is needed for changes for the better. Social democratic parties want to share experiences within the region and with other parts of the world. The Philippine participants recalled that the solidarity of parties and movements in East and Southeast Asian countries was of great importance for their political struggle.

For this part of the discussions, it was helpful to have the presence of the General Secretary of the Socialist International (SI), Luis Ayala. According to Luis Ayala, the membership of the SI presently stands at 168 parties in more than 130 countries. Unfortunately, the SI in Asia has not been

as successful as the SI in other parts of the world.

With regard to the SI's policy, Luis Ayala stressed the following points. The centre of the SI has moved away from Europe to other continents and regions, Brazil and South Africa being two good examples. The recent victory of the Spanish Socialist Party has to be seen as a victory for all social democratic parties world-wide. The emphasis of the SI is presently on ensuring good global governance, reforming the United Nations, democratizing the Brenton-Woods institutions, promoting peace, as well as fighting unilateralism and poverty.

The participants agreed that it is essential for the SI to engage with all the leading groups and parties in the region, including the Communist Party of China, the rulers in North Korea and the Cambodian People's Party (CPP) in Cambodia. But the participants urged the SI to be very cautious

about accepting new members into the social democratic family who share the name but not the values. The under-representation of the SI in Asia should not lead to compromises when accepting new member parties.

Finally, several suggestions were made about how to continue with a loosely organized forum of social democratic parties and movements in East and Southeast Asia without duplicating the SI Asia Pacific Committee. The forum should include and

engage movements and parties which are newly formed and which might be interested in joining the family of social democratic parties at a later stage. A number of suggestions for themes for the forum were made, including Burma, industrial and social policy, good governance and practical issues such as how to organize and how to campaign. Bilateral cooperation and the exchange of information on ongoing activities were also encouraged.

ASEAN after AFTA: What's Next?

Hank Lim and Matthew Walls*

Achievements and Challenges of AFTA

The achievements of the ASEAN Free Trade Area (AFTA), seen in the context of the Association of Southeast Asian Nation's (ASEAN) traditional trade relations, are substantial. When it was signed in 1992, AFTA called for the reduction of tariffs on Inclusion List (IL) goods to 5 per cent within 15 years. Initially, the tariff reduction schedule allowed ASEAN members 15 years to reduce tariffs to 5 per cent or less in two steps: first, five to eight years to lower tariff rates to 20 per cent, and then another seven years to lower them to 5 per cent. At the time, the average tariff rate for goods on the IL was already well below 20 per cent, at 12.76 per cent. As some members felt ASEAN was ready for a quicker pace, an amendment to the CEPT (Common Effective Preferential Tariff) in 1995 shortened the timeline by five years to 2002.

By 2002, the target had been largely met: tariffs on IL goods had been lowered among the ASEAN-6 from an average 12.76 per cent in 1993 to 1.96 per cent in 2003. Almost all the lines on the IL (98.62 per cent) are below the 5 per cent CEPT target. The ASEAN-6 countries have gradually shifted more products from their Temporary Exclusion Lists (TEL) and General Exception Lists (GEL) on to the IL. The GEL, which makes an exception for products on the basis of national security, health or cultural reasons, contains

292 lines, or about 0.65 per cent of all tariff lines in ASEAN. The TEL, which temporarily makes an exception for products at the request of member states and along with the consent of others, contains 218 lines, or about 0.49 per cent of all tariff lines.¹

ASEAN's four newer members have also agreed to timelines that would reduce tariffs on their IL goods to 5 per cent or less: Vietnam by 2006, Myanmar and Lao PDR by 2008 and Cambodia by 2010. They have put 60.89 per cent of their total tariff lines on the IL. Their TEL lines account for 25.09 per cent of their total lines.

The success of ASEAN's member states in reducing their tariffs has given momentum to accelerate the zero tariff goal. In the 2003 CEPT package, ASEAN-6 countries agreed to have zero tariffs on 60 per cent of their IL goods by 2003, a target they slightly surpassed (60.89 per cent). By 2010, all goods on their IL lists will have zero tariffs; Cambodia, Myanmar, Laos and Vietnam (CLMV) are to follow in 2015.

As a first step in economic integration then, AFTA achieved a moderate amount of success. Nevertheless, the failure of intra-ASEAN trade to flourish as hoped for revealed some of the weaknesses inherent in AFTA, and the fact that tariff reductions alone were not enough to stimulate trade,

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1. Dennis, D.J. and Yusof, Z.A. 2003. Developing Indicators of ASEAN Integration – A Preliminary Survey for a Roadmap. Regional Economic Policy Support Facility, Project 03/001, Jakarta.

and hence create synergistic growth. Although tariffs were lowered, intra-ASEAN trade as a percentage of total trade did not increase. Total intra-ASEAN trade did increase *per se*, from US\$44.2 billion in 1993 to US\$174.39 billion in 2003, but its share of total trade rose less than 1 per cent, from 21.7 per cent in 1993 to 22.08 per cent in 2003.² This situation might have been different today had it not been for the 1997 Asian financial crisis. Until 1997, intra-ASEAN trade had been growing 10 per cent a year; the crisis severely curtailed this growth. To generate growth and finances, member states focused on increasing foreign exports to their major partners. Indeed, the crisis had a greater impact upon intra-ASEAN trade than trade with non-members.

The decision of ASEAN countries to increase exports to non-ASEAN trade partners reflects the fact that intra-ASEAN trade is competitive rather than complementary. Most ASEAN countries share similar resource inputs and are similarly engaged in producing high-tech and labour-intensive exports, which are mostly bought by non-ASEAN countries. For instance, electronics and computer products account for 50 per cent of all ASEAN trade, but are ranked fortieth in terms of intra-ASEAN trade.³ In addition, total lines on the IL, despite having drastically lower tariffs, account for as little as 5 per cent of ASEAN's total trade by some estimates.⁴

The need for a stronger dispute settlement mechanism also became evident after several trade disputes proved to be irresolvable. Thailand and Malaysia, for

instance, failed to agree upon a compensation package after Malaysia's auto industry was exempt from tariff reductions until 2005. Similarly, Singapore and the Philippines also had trouble finding a solution to satisfy both sides after the Philippines decided not to reduce tariffs on 11 petrochemical products. Although the Philippines had signed the CEPT agreeing to lower tariffs, the government unilaterally decided that the petrochemical industry was in its national interest, which seemed to make their previous CEPT commitments unreliable.

Overcoming some of the challenges and obstacles that are blocking the greater economic integration envisioned by the ASEAN Economic Community, therefore, will be a difficult task for ASEAN countries. Firstly, although tariff reduction implementation has generally been a success, the utilization of the concessions under CEPT has been very low due to the following factors:

- lack of clear and transparent procedures for obtaining the necessary documentation for concession rates;
- lack of credibility and mutual trust between preference-receiving and preference-granting countries;
- a low margin of preference between ASEAN tariffs and Most Favoured Nation tariffs, which makes the whole process of filling out the necessary documentation unattractive; and
- the lack of awareness about the concessions under AFTA.⁵

Secondly, the non-tariff barriers that exist in the region still need to be eliminated or

2. The Thirty-sixth ASEAN Economic Ministers Meeting Joint Media Statement, Jakarta, 3 September 2004, <http://www.aseansec.org/16377.htm>

3. Magiera, S. 2003. 'Enhancing the Benefits of ASEAN Economic Integration'. Paper (tabled by Indonesia as a non-paper) at the Special Meeting of ASEAN Economic Ministers, July.

4. Ibid.

5. The Task Force on the Rules of Origin intends to adopt substantial transformation as an alternative principle for some sectors to encourage greater use of the CEPT scheme, though the details have yet to be finalized.

harmonized. Licensing procedures, technical standards and customs procedures have remained major obstacles to the trade liberalization process. Thirdly, the lack of a supranational institution within ASEAN to enforce mutually agreed decisions among member countries as well as the traditional ASEAN way of doing things have slowed the progress of the implementation of AFTA commitments. Fourthly, with the extension of AFTA membership to CMLV, the ASEAN grouping has become more diversified in terms of political regimes and economic priorities. This has also made the decision-making process more time consuming, which has in turn slowed down the progress of economic integration. Lastly, with the

proliferation of bilateral free trade agreements (FTAs) initiated by some member countries, the effectiveness of AFTA as a preferential trading arrangement could be minimized. There is a possibility that bilateral FTAs will create regional trade diversion effects, as many of the goods and services traded within ASEAN can be substituted by similar goods and services produced by extra-ASEAN trading partners. Those five challenges and distortions, however, can be minimized if ASEAN member countries effectively implement AFTA, the ASEAN Framework Agreement on Services (AFAS) and the ASEAN Investment Area (AIA), and steadily move towards the creation of an ASEAN Economic Community.

ASEAN Economic Community

As proposed in the Bali Concord II, the ASEAN Economic Community (AEC) is to have many features of a common market. The declaration called for the AEC to have a free flow of goods, investment and services, and a freer flow of capital and labour by 2020. Unlike a common market, the AEC restricts the flow of labour to skilled labourers and business persons, and does not plan to impose a uniform tariff rate on non-members. For this reason, some proponents of the AEC have called it an 'FTA-plus'. Others, who would like to see a fully economically integrated ASEAN, have suggested that ASEAN adopts a 'Common Market-minus' framework. This would act like an FTA-plus at the beginning, but would delay the deep integration measures needed for a common market until after 2020. This might be more agreeable to newer members, as it would grant them greater flexibility as they begin reforming their economies and integrating them into ASEAN.

The purpose of the AEC, as explained in the Bali Concord II, is to make ASEAN into a single market and production base that would be more economically competitive and attractive to investors. It will incorporate all the existing trade and investment agreements, fast-track the integration of priority sectors and make the AEC a rules-bound body.

The declaration, however, does not elaborate on how trade disputes would be settled. Although a Protocol on a Dispute Settlement Mechanism was adopted by ASEAN in 1996, many feel that an independent panel of adjudicators, like the European Court of Justice, will be necessary if ASEAN members are to seriously commit themselves to the AEC.

The Bali Concord II has little in the way of details. It is not intended to be a blueprint for the AEC; this was signed in Vientiane in November 2004. While the Bali Concord II states the need for clear

timelines, none are laid down. The declaration does, however, say that ASEAN will adopt the recommendations of the High Level Task Force on ASEAN Economic Integration, whose report provides detailed suggestions as well as dates. If its recommendations are adopted, the framework of the AEC would be significantly different from AFTA.

The Task Force's report provides a comprehensive strategy to accelerate economic integration, and also recommends several new features, including an independent panel to solve trade disputes.⁶ It names 11 sectors as priority sectors for integration, assigning responsibility for each to various ASEAN members: wood, automotives, rubber, textiles, agriculture, fisheries, electronics, e-ASEAN, healthcare, air transport and tourism. The integration cause would be advanced by moving quickly on these sectors. It recommends the following steps:

- zero tariffs;
- the immediate elimination of trade barriers;
- faster and simplified customs;
- faster harmonization of Mutually Recognized Agreements (MRAs);
- standards and regulations.

Services relating to these sectors should be liberalized by 2010. For tourism, the report recommends an intra-ASEAN travel visa by 2005, and urges members to draw up an agreement on skilled labour mobility by the same year. These steps should be combined with an outreach and promotional programme to establish pan-ASEAN companies, with divisions located according to the comparative advantages of countries. This includes outsourcing, more intra-ASEAN investing and an

eventual 'ASEAN brand' for goods and services.

At the Thirty-sixth ASEAN Economic Ministers Meeting in September 2004, ministers endorsed the Framework Agreement for the Integration of the 11 priority sectors and the Roadmaps for Integration of the Priority Sectors. Both were ratified at the Tenth ASEAN Summit in Vientiane in November 2004.

For the non-priority sectors, the High Level Task Force set out long-term timelines. For the liberalization of trade in goods, it recommended clearer and standardized Rules of Origin by the end of 2004; a database for non-tariff measures, which should be eliminated by 2005, following World Trade Organization (WTO) standards (now on-line on the ASEAN website); for customs, a Green Lane for CEPT products for quicker clearance by 2004; MRAs for five sectors by 2005 (electrical and electronics equipment, telecommunications equipment, cosmetics, pharmaceuticals and prepared foodstuff), with others to follow.

At the 2004 Informal ASEAN Economic Ministers Meeting in Indonesia, an ASEAN inter-agency task force was established to design the 'ASEAN Single Window' to 'ensure the expeditious clearance of imports through single submission of data, single data processing and single decision-making for the release of goods'.⁷ The task force comprises staff from various government agencies such as health and trade, customs, standards and conformance.

The Task Force's recommendations for trade in services are less specific. It urges that each round of negotiations should set

6. ASEAN Secretariat. 2003. 'Recommendations of the High-Level Task Force on ASEAN Economic Integration'. www.aseansec.org/hltf.htm

7. ASEAN Secretariat, 20 January 2004. Press release, www.aseansec.org/15662.htm

clear targets and schedules for the sectors involved, with all sectors liberalized before 2020. The depth and scope of liberalization is meant to go beyond WTO commitments. On the free flow of capital, the Task Force adds nothing new, suggesting that the implementation of the Roadmap for Integration of ASEAN in Finance is enough. For investment, it calls upon ASEAN members to speed up the transfer of sectors from the TEL to the IL, beginning in 2004. It also recommends creating a mechanism to monitor progress in each country. One innovative feature it says ASEAN should adopt is sub-regional free-trade zones (FTZs). These would encourage investors to structure their companies across ASEAN, based upon member states' comparative advantages. This would create the necessary economies of scale and complementarity ASEAN needs to remain competitive. Tax incentives could also be used to push companies in this direction.

Wherever progress stalls or measures cannot be agreed upon by all ASEAN members, the Task Force calls for members who are ready to liberalize to use the ASEAN 10-X method, implementing their measures between themselves, with others joining in at a later date. The 10-X principle is similar to Thaksin and Goh's 2+X; the difference is simply a matter of emphasis. The latter makes it obvious that only two countries are needed. The 10-X principle vaguely states that any grouping under 10 is sufficient.

The greatest structural change to the ASEAN Secretariat, if adopted, would be the new judicial institutions in the Dispute Settlement Mechanism. There are five of them. The ASEAN Consultation to Solve Trade and Investment Issues (ACT), based upon the European Union's SOLVIT⁸

mechanism, provides for government agencies within each member state to provide information and help to businesses that run into trade issues, with a solution to be provided within 30 days of a request from a company. However, this is not a legally binding agreement. A Terms of Reference for ACT was endorsed at the Informal ASEAN Economic Ministers Meeting in 2004, and ratified at the ASEAN Summit in Vientiane. It came into force upon signing in Vientiane, Lao PDR on 29 November 2004.

The ASEAN Legal Unit would provide legal advice to governments (now established) and to the ASEAN Compliance Body (ACB), the third institution. This body is modelled on the WTO's Textile Monitoring Body, and is the first court of dispute. It would review a trade dispute and issue a judgment that is not legally binding but can be used by the parties involved in the dispute either to take steps to settle the dispute at that stage, or to move to the next. Its terms of reference were endorsed at the Tenth ASEAN Economic Ministers Meeting in 2004, and it is also now established.

The next stage after the ACB is the 'Enhanced Dispute Settlement Mechanism', which establishes two judicial bodies. These independent judiciaries are the final court of dispute. The rationale for them is to ensure that trade disputes are resolved on legal grounds only, rather than politically. The Enhanced Dispute Settlement Mechanism would be modelled on the WTO Dispute Settlement Mechanism (DSM). A dispute panel would have three independent figures from both ASEAN and non-ASEAN countries. The panel would not be a standing court. Appeals would go to an appeals board staffed according to WTO procedures. The

8. SOLVIT is an on-line problem-solving network in which EU member states work together to pragmatically solve problems that arise from the misapplication of internal market law by public authorities.

Task Force does not explicitly call for the use of sanctions, but notes that sanctions, along with other 'effective mechanisms' could be used for non-compliant members. This would only apply to trade disputes where the countries in dispute cannot resolve their differences through negotiations. The DSM would encourage countries to use negotiations first, though

it would not be a requirement.

A draft of the Protocol on Enhanced ASEAN DSM was approved 'in principle' at the Thirty-sixth ASEAN Economic Ministers Meeting in September 2004, and ratified at the Tenth ASEAN Summit in Vientiane.

Challenges and Opportunities

Regional Complementarity and Diversification

The creation of an AEC with borderless markets and harmonized trading rules will enable companies to build economies of scale and divide labour according to the comparative advantages of individual ASEAN countries. Foreign and ASEAN investors would want to invest in the AEC because it allows companies to efficiently distribute their resources based upon their productivity needs rather than a country's trade regulations.

In its current structure, ASEAN is divided by members' political borders, which throw up protectionist policies that do more harm than good to the region's economies. Instead of encouraging cooperation, these antagonistic policies lead to greater competitiveness, where one country pointlessly reproduces an industry that another ASEAN member does better. It would be better for ASEAN countries to concentrate on developing or exploiting their comparative advantages. Wherever a comparative advantage in one country complements a comparative advantage in another, these two industries can be joined together by a company.

For instance, a comparative advantage for CLMV is their cheap labour costs. A firm in Singapore or Malaysia, therefore, could outsource its labour-intensive work to one of these countries, and let its local office concentrate on research and development. The set-up would be mutually beneficial. However, at this point in time, this would be a costly and lengthy process with all the different tariffs, non-tariff barriers, customs procedures and product standards that currently exist in different ASEAN countries. Under the AEC, transparent rules and the expedited movement of goods and services would allow a company to act as if it is working within one country. ASEAN would, in effect, offer a work and investment environment comparable in scale to that of China or India. Giving companies and investors the opportunity to expand their company bases across ASEAN also gives them more chances to diversify their production. This will be essential in CLMV, where economies have a narrow production base.

Recouping Foreign Direct Investment

Foreign direct investment in ASEAN has fallen drastically since its apogee in 1997. In that year, ASEAN drew US\$34 billion in foreign direct investment (FDI). Within

a year, that number had dropped to US\$18.5 billion, and by 2000 it stood at a 10-year low of US\$11 billion. It climbed in 2001 only to drop again in 2002, to

US\$12.4 billion.⁹ However, ASEAN's share of global FDI has more than doubled since 1999, to 19 per cent in 2002.¹⁰ This is despite the fact that FDI in 2002 was US\$7 billion less than 1999's total, and reflects a world-wide drop in investment because of that year's sluggish global economy. The most recent statistics show that FDI rose in 2003 by 48 per cent to US\$20.34 billion.

While ASEAN saw a net decline in its share of global FDI after the Asian financial crisis, China, India and Latin America, among others, saw their shares rise. This shift has been attributed to the low labour costs of these countries, and also, in the case of China and India, to their high growth rates, their enormous consumer markets and, most importantly, to the fact that their trade policies and regulations cover a huge market. ASEAN, in contrast, has different rules and procedures

depending upon the country. If ASEAN is to remain competitive with these countries, it has to offer a similarly favourable investment environment and create rules and procedures that apply across ASEAN. This is especially important for CLMV, which has little capital of its own and is dependent upon foreign aid and FDI to build its infrastructure and develop its industrial capacity.

Intra-ASEAN FDI can play a role in this respect. After the Asian financial crisis, intra-ASEAN FDI dropped at an even greater rate than non-ASEAN FDI. It currently stands at about 11 per cent of ASEAN's total FDI.¹¹ If the economies of the ASEAN-6 achieve greater growth and CLMV continue to exhibit strong 5-8 per cent growth, ASEAN investment in CLMV should increase and help these countries as they try to catch up with the ASEAN-6.

Facilitating Trade

Most of the measures needed to facilitate trade are already contained within the previous trade agreements of AFTA, AFAS and AIA, or are in the list of recommendations for the AEC that the High Level Task Force has submitted to the ASEAN Secretariat. Mutual recognition agreements, simplified and expedited customs procedures, harmonized product standards, transparency on non-tariff barriers and simplified taxation schemes: these correctives have all been identified, even set out in a targeted timeline by the Task Force. MRAs, for instance, are to be developed by 2004 or 2005 for five sectors: electrical and electronic equipment, telephone and communications equipment cosmetics, pharmaceuticals and prepared foodstuffs.

The problem is not that these changes have not been identified. In fact, there has been no shortage of changes to streamline, speed up or simplify current bureaucratic trade policies and procedures. The problem is that ASEAN has lacked the mechanisms and deadlines needed to implement the changes. The liberalization of services, for instance, has hardly progressed, despite all ten members having signed AFAS over eight years ago. The hidden non-tariff barriers that governments use to protect these industries have barely been identified or removed. To investors, ASEAN's lack of progress to its stated objectives can hardly inspire confidence.

9. ASEAN Secretariat. 2002. 'Statistics of Foreign Direct Investment in ASEAN'. <http://www.aseansec.org/14549.htm>

10. ASEAN Secretariat. 2003. 'Joint Press Statement of the Sixth ASEAN Investment Area (AIA) Ministerial Council Meeting', 1 September, Phnom Penh. <http://www.aseansec.org/15068.htm>

11. ASEAN Secretariat. 2002. 'Statistics of Foreign Direct Investment in ASEAN'. <http://www.aseansec.org/14549.htm>

Choosing a Framework

Since the Declaration of Bali Concord II was more of an agreement in principle than a blueprint, the final framework for the AEC has yet to be chosen. The High Level Task Force has recommended that the AEC be an AFTA-plus model, with a free flow of goods, capital and skilled labour, but without a harmonized external tariff. Other groups have recommended the Common Market-minus model, arguing that since ASEAN's Most Favoured Nation tariffs and intra-ASEAN tariffs on most of its IL items are the same, it would be advantageous for ASEAN to converge their individual external tariffs towards a low external tariff of members such as Singapore, Brunei and Malaysia.¹² ASEAN will have to choose one framework and proceed from that.

ASEAN also has to decide how to strengthen the DSM. Most observers, including the High Level Task Force, have urged the necessity of having an independent judicial panel to rule on trade disputes, as well as a standing court of appeal. Similarly, they have also recommended giving more finances and a larger staff to the ASEAN Secretariat. The Vientiane Action Plan will likely include a clause that will stipulate whether each member is to contribute the same amount or if it will be based upon per capita GDP.¹³ CLMV will definitely want to see the latter.

Above all, the final framework for the AEC must provide a more concrete mechanism that is able to accomplish the objectives by the required timelines as they are set out in the agreements. Only a few years ago, after the failure of ASEAN to contain

or limit the damage of the Asian financial crisis and its inability to influence Myanmar to free Aung San Suu Kyi, critics were calling ASEAN irrelevant. This was despite having signed AFTA, AFAS and AIA. Having signed a declaration to deepen their economic, social and security ties, ASEAN countries have re-energized the association and given it a potentially even greater relevance than it has ever had before. However, this potential has to be translated into results if the AEC is to move ahead and CLMV are to successfully integrate into ASEAN.

Until the Bali Concord II, ASEAN functioned as an intergovernmental organization composed of countries forming consensus-based agreements. The AEC will require the association to establish some form of regional institution that has a limited authority over itself. ASEAN leaders have publicly adopted the ASEAN 10-X and 2+X methods for moving along the integration process. This will hopefully persuade others to join. Unfortunately, it also risks allowing the first two or three members to establish the rules of the game, which latecomers will have little choice but to adopt. Finding a framework and a mechanism to advance the changes it needs to make will require having all ten member countries satisfied that its individual needs are recognized and can be realistically met. Otherwise, the agreement might get bogged down by delays to protect domestic industries, a spirit of minimum compliance, or a lack of political will in the face of public protest at job losses and industry shutdowns.

12. ASEAN-ISIS. 2003. 'Towards an ASEAN Economic Community: A Track-Two Report to ASEAN Policy Makers'.

13. Yong Chanthalangsy. 2003. 'From Phnom Penh to Vientiane: Lessons for ASEAN's New Members'. Presentation at a roundtable organized by the Cambodian Institute for Cooperation and Peace and Friedrich-Ebert-Stiftung, Phnom Penh, 27-28 November.

The Vientiane Action Plan

ASEAN leaders finalized the details of the AEC at the Tenth ASEAN Summit in Vientiane in November 2004, and also signed the Vientiane Action Plan (VAP) to follow upon the six-year Hanoi Plan of Action (HPA) which ends in 2004. The HPA was launched in December 1998 and was the first of several action plans conceived to realize the ASEAN Vision 2020's goal of 'a concert of Southeast Asian Nations, outward looking, living in peace, stability and prosperity, bonded together in partnership in dynamic development and in a community of caring societies'.

AFTA was one step that has pushed ASEAN towards realizing Vision 2020. The new AEC will build upon AFTA by increasing economic integration, bridging the divide between the ASEAN-6 and CLMV, and bringing greater economic benefits to the region as a whole. In formulating the VAP, care has to be taken to ensure that the needs of CLMV are addressed. The HPA has, by many accounts, failed to realize its potential, largely because there were too few initiatives and not enough money. Even as ASEAN countries work towards a blueprint for the AEC, this problem remains a factor. At the sixth High Level Task Force Meeting in May 2004, the ASEAN Secretariat announced that it has enough funds to pursue only 35 per cent of its projects. The Initiative for ASEAN Integration (IAI) lacks funding for 20 per cent of its projects, worth approximately US\$12.7 million, and has only partial funding for nine other projects totalling US\$16.8 million in value.

The VAP, encompassing as it does not only economic but also socio-cultural goals, should also include greater attention to sustainable development. While the HPA had the protection of the environment and the promotion of sustainable development as one of its ten objectives, the Bali

Concord II has no mention of sustainable development, and fails to note its importance in realizing both its economic and socio-cultural objectives. This is despite the fact that the ASEAN Vision 2020 calls for 'a clean and green ASEAN with fully established mechanisms for sustainable development to ensure the protection of the region's environment, the sustainability of its natural resources and the high quality of life of its peoples'.

Some of the environmental goals of the HPA – the establishment of a centre of environmentally sound technologies and stronger institutional and legal capacities to implement environmental agreements – have not been realized. These goals should not only be reiterated in the VAP, but also expanded to include the promotion of sustainable development through tax incentives, green subsidies or better-than-CEPT tariffs for green products, the harmonization of eco-labelling programmes, timber certification schemes and ISO 4000, and capacity-building efforts under the IAI for CLMV. The latter has especially been neglected under the IAI, which has only one out of 73 projects dealing with sustainable development. There are no workshops on reforestation, environmental assessments, or linkages between trade and the environment.

As economic integration deepens under the AEC, greater harmonization is needed on environmental policies that are affected by trade. Already, Singapore has signed a free trade agreement with the United States of America that has environmental clauses guaranteeing that the signatories will maintain their current level of environmental protection and strive to improve it, as well as ensuring that neither country will lower standards to attract trade. Infractions incur monetary fines that are spent on correcting the environmental

problem. The USA-Singapore FTA is said to be a model agreement that the USA will use when signing with other ASEAN countries. The environmental chapter in the USA-Singapore FTA is not meant to be a form of 'green protectionism', but rather to ensure that both parties cooperate to guarantee a standard of environmental protection that is achievable given each country's respective financial resources and

environmental expertise. In designing the AEC and the VAP, ASEAN has both the means and the opportunity to ensure its people can enjoy sustainable use of its resources and a high quality of life. To that extent, it is important that ASEAN's environment ministers are involved in designing the VAP, as was called for in the 2003 Yangon Resolution on Sustainable Development.

ASEAN and East Asian Integration

ASEAN-China FTA

On 4 November 2002, in Phnom Penh, ASEAN and China signed the Framework Agreement on Comprehensive Economic Cooperation between ASEAN and China (ACFTA). The agreement goes beyond this and explicitly aims at the establishment of an ASEAN-China Free Trade Area within ten years. This initiative is of major economic and political significance to both ASEAN and China. The negotiations, conducted by the ASEAN-China Trade Negotiation Committee, will produce schedules for tariff reductions and eliminations from January 2005 to 2010 for ASEAN and China, and from January 2005 to 2015 for the newer members of ASEAN.

From the start of negotiations, China was more interested in negotiating the issues and agenda for an FTA. This is partly because China is represented by a single entity while ASEAN is composed of the original six ASEAN countries and CMLV. Even among the original ASEAN-6 countries, there is a wide range of views, and differing domestic political, economic and social configurations and priorities. And it is also partly because ASEAN economies are growing much slower and are less dynamic than China's. ASEAN's negotiating posture has seemed more reactive than proactive in identifying opportunities in the FTA negotiation process with China.

The ASEAN-China Agreement is not strictly an FTA but extends to comprehensive economic cooperation. If the scope of the FTA discussions had been limited, negotiations would have been protracted and it would have been more difficult to achieve a positive-sum game result for both sides. Therefore, the scope of the ASEAN-China FTA had to be broad and contain trade, facilitation and development objectives, rather than just focus on trade liberalization.

Even if both sides agree on the scope and specific details of the FTA arrangement, there is a possibility that there might be a delay or even a capitulation to a 'dirty ASEAN-China FTA' (diluted FTA) if economic growth and macroeconomic conditions in ASEAN and China do not substantively improve. This might occur, for instance, if ASEAN fails to attract enough FDI to generate sufficient sources of growth during the period of negotiations. Alternatively, if there were large-scale unemployment or serious structural dislocations in China arising from liberalizing its domestic economy, the FTA process would be seriously disrupted.

The ASEAN-China FTA is based on the assumption or hypothesis that it is a positive-sum game, meaning that both parties will benefit. The prevailing

perception is that in the initial period China would gain relatively more than ASEAN. China, however, is prepared to recycle its economic benefits to ASEAN countries through larger outflows of FDI, tourism and more imports of ASEAN agro-related industrial goods and services. In the long run, trade creations and intra-regional investment flows would generate positive income effects to offset the initial period of negative substitution effects.

ASEAN-China FTA negotiations will not be easy or straightforward because their economies are not complementary; they compete and export to the same external markets. To overcome this initial structural incompatibility, China has offered a set of 'early harvest' benefits to ASEAN, which means that China will offer preferential tariffs to ASEAN exports but there will be no reciprocal treatment for China's exports to ASEAN, particularly to CMLV.

ASEAN-Japan Comprehensive Economic Partnership

At the Ninth ASEAN Summit in Bali in October 2004, the leaders of ASEAN and Japan signed the ASEAN-Japan Comprehensive Economic Partnership (AJCEP). In contrast with ACFTA, AJCEP is at an initial stage and lacks both details and a programme of implementation.

preference to bilateral trading arrangements with the ASEAN-6 at the expense of newer ASEAN members, since the ASEAN-6 is economically more important to Japan than CMLV.

In terms of economic structures, ASEAN and Japan are complementary. ASEAN is rich in natural resources while Japan is rich in technology and investment capital. However, the Japanese economy is saddled with many forms of restrictions and non-competitive economic practices, such as high tariffs and quotas on rice imports, explicit and implied restrictions on financial and banking services, and many forms of trade impediments in domestic sector. Because of these structural impediments in the Japanese economy, it is not possible to negotiate a standard free trade area.

The success of AJCEP is very much dependent on Japan's interest in and capacity to assist ASEAN's industrial upgrading and competitiveness. After the Asian financial crisis in 1997, it became acutely evident that many ASEAN economies require major structural re-organization and upgrading. Without those changes in the real and financial sector, ASEAN economies would not be able to take full advantage of a comprehensive economic partnership with Japan. FDI has radically shifted in favour of China and the gravity of economic dynamism and growth has contributed to the widening of an economic gap between Northeast and Southeast Asian countries.

As AJCEP is being negotiated, Japan is also undertaking bilateral FTAs with individual ASEAN economies. Thailand, Malaysia and the Philippines have shown an interest in entering bilateral FTA negotiations with Japan. Japan, therefore, has to ensure that the bilateral trade policy approach is consistent with the regional framework in order to minimize the 'spaghetti bowl syndrome' in the East Asian region. There are indications that Japan is giving more

Japan has to extend substantive technical and financial assistance to ASEAN countries with a view to radically re-organizing and restructuring their economies. Otherwise, the proposed AJCEP would not benefit both sides. Specifically, ASEAN countries need to improve the quality of their labour forces and upgrade the infrastructure of administration and governance in public and private sectors. It is imperative for

ASEAN to retain and attract FDI as a source of economic growth. ASEAN must be economically vibrant to minimize social and political instability. In turn, a viable and vibrant ASEAN economy would have the capacity to be the critical 'hub'

connecting the rival economic powers of Japan and China. Such a regional environment is a precondition for the establishment of a prosperous and stable East Asia in the twenty-first century.

Summary and Conclusions

At the Seventeenth Meeting of the ASEAN Free Trade Council on 1 September 2003 in Phnom Penh, ASEAN ministers discussed various issues related to the implementation of the CEPT Scheme, the realization of AFTA, the implementation of the ASEAN Integration System of Preference (AISP), the liberalization of Information and Communications Technology goods under the e-ASEAN Framework Agreement, the elimination of non-tariff barriers, the CEPT Rules of Origin and some implementation problems relating to the CEPT-AFTA Scheme. It was noted that, after ten years, AFTA has been virtually realized as regional tariffs on 98.62 per cent of products in the CEPT IL of the ASEAN-6 are now within the 0-5 per cent range. With the completion of the transfer of products from the Sensitive Lists to the IL by 2003, only 247 tariff lines or 0.50 per cent of all products traded in the region would remain out of the CEPT Scheme. The average CEPT rate for the ASEAN-6 has gone down from 12.76 per cent in 1993 to 1.91 per cent in 2003. At the same time, the new ASEAN members (CLMV) are also keeping pace with older members in implementing their CEPT commitments. The average CEPT rate for CLMV at the end of 2003 was 6.22 per cent, down from 6.77 per cent in 2003.

In nominal terms, these are all very good achievements. However, the percentage of intra-ASEAN trade has not significantly changed, hovering at around 20-23 per cent, and the percentage of CEPT products under the AFTA scheme remains very small

compared to its total trade with the rest of the world. In other words, growth in ASEAN economies is basically driven by external trade and investment. ASEAN therefore urgently needs to move fast and boldly in creating competitive production clusters and greater regional domestic demand to increase sources of growth from within the region. ASEAN member economies, especially the more developed economies of Singapore, Malaysia and Thailand, must engender policies towards resource-pooling and market-sharing with a view to creating competitive and complementing production bases and expanding domestic demand as envisaged in the concept of AEC.

In the short run, there is serious concern over the slow progress in eliminating unnecessary non-tariff measures. Member economies are urged to complete the process of verifying known non-tariff measures, notifying members of their import licensing procedures and cross-notifying other members' non-tariff measures, as well as setting a deadline for the complete elimination of non-tariff measures. Otherwise, the gains of AFTA will be offset by non-transparent non-tariff measures.

Other measures are equally vital, such as the work in improving and strengthening the CEPT Rules of Origin, standards and mutual recognition agreements, and the harmonization of technical and products standards, which are important in facilitating the movement of goods under AFTA.

Now that the AEC has been launched, the implementation of the ASEAN Integration System of Preferences is more compelling in order to integrate CMLV into the regional market for trade in goods. Furthermore, the ASEAN-6 must initiate in earnest development assistance to CLMV. Without this development assistance, CMLV members will have difficulty integrating their economies with the ASEAN-6 and the concept of an AEC will have less credibility and effectiveness in creating a consumer market of 500 million and a credible economic entity in Southeast Asia. This commitment should be embodied in the new VAP, which should reflect a development agenda that is both economically and environmentally sustainable.

Beyond AFTA and the AEC, ASEAN must gradually integrate economically with the expanding and dynamic Northeast Asian economies of China, Japan and South Korea. Increasing East Asian integration is not a policy choice but a policy necessity for ASEAN in order to keep its economy vibrant and competitive in the global market place. By default, ASEAN's position as the 'hub' of East Asia should be leveraged for maximum gain. How much benefit ASEAN can derive from its 'hub' position is critically dependent on how well and effectively ASEAN can move forward from the ASEAN Free Trade Area to the ASEAN Economic Community.