Mr. Marzuki Darusman
Executive Director
Human Rights Resource Center
University of Indonesia, Depok Campus
Depok 16424
Indonesia
Phone/Fax: (+62-21) 7866 720
Email: info@hrrca.org

28 November 2014

Dear Mr. Darusman,

We are writing to you today to express our concerns regarding the underlying basis of your organization's upcoming report, *Keeping the Faith: A Study of Freedom of Thought, Conscience, and Religion in ASEAN*.

At the outset, we would like to thank your organization for inviting our colleagues from the International Commission of Jurists and Human Rights Watch to attend the Freedom of Religion Experts Consultation Meeting, which was held in Jakarta, on 8 October 2014.

If you recall, after the presentation of the draft report's synthesis by the lead researcher, Professor Jaclyn Neo, our colleagues present at the meeting raised concerns regarding how the report on freedom of religion is anchored on Article 22 of the ASEAN Human Rights Declaration (AHRD). Our letter today aims to reiterate, expound further, and put on record the points raised by our colleagues at the meeting.

In short, by applying the AHRD in place of other international instruments that are far more protective of human rights, the report actually weakens the protections to which everyone in the ASEAN region is due.

No international human rights instrument is perfect. Indeed, the human rights movement can and must live with the imperfections inherent in texts that come from negotiated political compromises, some of them made many decades ago.

However, the AHRD is not simply an instrument with one or two flawed provisions or inartfully worded pieces of text. Because the most egregious provisions of the AHRD are contained within the General Principles (Articles 6, 7, and 8) that overlie and qualify all of the proceeding substantive articles, each constituent provision that follows is rendered flawed.

To illustrate, Article 8 of the General Principles provides:

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

As noted by your HRRC colleagues at the meeting, the language of this provision, in large measure, replicates that of Article 29 of the Universal Declaration of Human Rights. However, we would like to point out that the lifting of this provision from the UDHR disregards more than

60 years of defining standards concerning restrictions, limitations and derogation in international human rights law through numerous universal and regional treaties and declaratory instruments. In fact, under existing international law and standards, many human rights are not subject to restrictions or limitations. Only a small number of rights may be restricted.

For instance, under the International Covenant on Civil and Political Rights (ICCPR), only a few rights embodied therein may be restricted (e.g. freedom to manifest one's religion or beliefs, freedom of association and assembly, freedom of expression). The restriction of these rights is subject to strict conditions, which do not extend to the widely elastic "general welfare" clause, as contained in Principle 8 of the AHRD. It must be noted that most public legislation is purportedly done in the interest of the "general welfare". Hence, human rights obligations are designed to place limits on what may be enacted in the general welfare, not the converse.

To emphasize, AHRD's article 8 subjects to limitations and restrictions all rights, including those that are universally accepted as peremptory norms of international law for which no derogation is permitted even in states of emergency (e.g. the right not to be tortured).

Another egregious General Principle is AHRD's article 6, which states:

> *The enjoyment of human rights and fundamental freedoms must be balanced with the performance of corresponding duties as every person has responsibilities to all other individuals, the community and the society where one lives.*

Article 6 is clearly incompatible with international human rights standards. The construction of this provision essentially suggests a form of conditionality, i.e., that the enjoyment of rights is contingent upon the performance by the individual of certain duties. Such a notion is abhorrent to the ideal that all human rights are inalienable. Article 6 may easily be seized on by ASEAN member states as a basis on which to argue that a failure to respect and protect rights may be excused by the failure of the victim to discharge a corresponding "duty".

At the meeting in Jakarta, during the discussions on this topic, an HRRC staff member responded to representatives from ICJ and Human Rights Watch that the language of some provisions come from international instruments, pointing out that Article 7 of the AHRD comes from the unanimously agreed Vienna Declaration and Programme of Action (VDPA).

We reiterate and emphasize that Article 7 of the AHRD perverts the objective of Article 5 of the VDPA. Article 7 of the AHRD states:

> *… [T]he realization of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical, and religious backgrounds.*

On the other hand, Article 5 of the VDPA provides that "it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms." Article 5 of the VDPA merely notes the significance of national and regional particularities, but does not make these the framework and context within which human rights are realized.

As regards the human right to freedom of thought, conscience and religion specifically - while the language of AHRD Article 22, taken on its own, may not vary considerably from provisions in international human rights instruments, the freedom of individuals to enjoy this basic right under Article 22 is severely restricted by the General Principles analysed above. This means that Article 22 cannot be used in any meaningful way to protect this right in ASEAN, since Member States may invoke any or all of the numerous and sweeping grounds provided by Articles 6-8 to avoid protecting, respecting or fulfilling this right.

Thus anyone protesting violations of the right to freedom of thought, conscience and religion under international law in the region, such as prohibiting the use of "Allah" by non-Muslims in Malaysia, the persecution - both through laws and in practice - of the Ahmadiyya in Indonesia; the treatment of the Rohingya and the proposed interfaith marriage law in Myanmar; the discriminatory provisions in Brunei Darussalam's revised Penal Code; or the imprisonment of peaceful religious activists in Viet Nam, can find no support in Article 22 of the AHRD. This is because under the AHRD, Member States can claim to justify such laws, policies or action, which they would not have under any international human rights instruments. For instance ASEAN Member States might claim that such laws, policies or actions are necessitated to ensure that

the right is "balanced with the performance of corresponding duties" by the communities affected (Article 6 AHRD); argue that they are legitimate as reflecting the respective states' "legal, social, cultural, historical and religious background" (Article 7 AHRD); or insist that they are justified on grounds of "national security" (Article 8 AHRD). The subjective, atomistic and relativist approach reflected in these General Principles is an obstacle to any attempt to challenge such assertions.

In light of the concerns mentioned above, we consider it not only ineffective but also damaging for human rights proponents to apply/use the AHRD when assessing human rights performance or conduct in the region. It is most especially potentially harmful to the international human rights *acquis* developed and crystalized in the nearly 70 years since the establishment of the United Nations and identification of the advancement of human rights as one of the principle purposes of the UN Charter.

Among them, the 10 ASEAN Member States have already deposited some 58 instruments of ratification or accession covering nine human rights treaties (not even including in the count optional protocols). The AHRD, in one manner or another, falls below the standards contained in those treaties. It therefore undercuts many hundreds of legal human rights obligations assumed by ASEAN Member States.

If the objective is to hold ASEAN Member States to their commitments, then it seems the place to start would be the legally binding commitments they have already made. Regional instruments can only serve a useful purpose when they reinforce and provide additional human rights protections to those already contained in universal documents.

The undersigned organizations and other civil society groups supported the elaboration of an ASEAN human rights instrument as a means of enhancing international human rights protections, much in the manner that such instruments were developed in the regions of Europe, Americas, Africa, and even the League of Arab States. The outcome, however, went terribly wrong and we therefore consider it important to discredit an instrument that may serve as an opportunity for States to circumvent their international human rights obligations and to do real damage to the universal human rights architecture.

Very truly yours,

Sam Zarifi
Regional Director for Asia and the Pacific
International Commission of Jurists

Brad Adams
Director, Asia Division
Human Rights Watch

Richard Bennett
Director, Asia Pacific Programme
Amnesty International

David Diaz-Jogeix
Director of Programmes
Article 19

Brittis Edman
Southeast Asia Programme Director
Civil Rights Defenders

Jessica Stern
Executive Director
International Gay and Lesbian Human Rights Commission

Ryan Silverio
Regional Coordinator
ASEAN SOGIE Caucus