Padjadjaran Journal of International Law

ISSN: 2549-2152, EISSN: 2549-1296

Volume 4, Number 1, January 2020

Is ASEAN's Practice of Non-Interference and Regional Particularism Principles a Source of Hindrance for Human Rights Law Enforcement in South East Asia?

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Abstract

In the ages of Duterte and his extrajudicial killing policies, of Aung Sang Suu Kyi and the Rohingya systemic persecution, of Malays rejecting the ratification of International Convention for Eradication of Racial Discrimination (ICERD), and other unfortunate events spanning across the region, South East Asia was largely suffering from various grave breaches of human rights violations. As the subcontinent umbrella organization, however, ASEAN's hand has been largely tied when facing the issues pertaining in their region, despite pledging their commitment to establish protection and enactment of human rights law in its continent since 2007. Some experts say that its inability to perform meaningful actions is mainly attributable to its "non-interference policy", a principle adopted by ASEAN with several unique characteristics that differs its practice with other organization practicing similar belief, mixed with a misguided application of implementation regarding "regional particularism". This paper aims to understand the establishment of such principles' implementation and how they influence the organization's approach against violations of human rights happening under its member-states' governments.

Keywords: Human Rights Violations, Non-Interference, Regional Particularism

Apakah Praktik Non-Intervensi dan Prinsip Kekhususan Regional ASEAN Adalah Rintangan bagi Penegakan Hak Asasi Manusia di Asia Tenggara?

Abstrak

Pada zaman Duterte dan kebijakan pembunuhan di luar proses hukumnya, Aung Sang Suu Kyi dan penganiayaan sistemik etnik Rohingya, orang-orang Malaysia menolak ratifikasi Konvensi Internasional untuk Pemberantasan Diskriminasi Rasial (ICERD), dan berbagai peristiwa malang lainnya yang terjadi di berbagai daerah, Asia Tenggara menderita berbagai pelanggaran berat hak asasi manusia (HAM). Namun, sebagai organisasi yang memayungi sub-benua, tangan-tangan ASEAN sebagian besar terikat ketika menghadapi masalah-masalah yang berkaitan dengan wilayah mereka, meskipun berjanji untuk membangun perlindungan dan pemberlakuan undang-undang hak asasi manusia di benua itu sejak 2007. Beberapa ahli mengatakan bahwa ketidakmampuannya untuk melakukan tindakan yang berarti terutama disebabkan oleh kebijakan non-intervensi-nya, sebuah prinsip yang diadopsi oleh ASEAN dengan beberapa karakteristik unik yang berbeda praktiknya dengan organisasi lain yang mempraktikkan prinsip serupa, yang kemudian dicampur dengan implementasi "kekhususan regional" yang problematik. Artikel ini bertujuan untuk memahami pembentukan implementasi prinsip tersebut dan bagaimana hal itu

mempengaruhi pendekatan organisasi terhadap pelanggaran hak asasi manusia yang terjadi di bawah pemerintahan negara-negara anggotanya.

Kata Kunci: Kekhususan Regional, Non-Intervensi, Pelanggaran HAM

A. INTRODUCTION

Human rights is one of the fundamental protections enshrined to each and every human being, it is then no wonder that the global community has tried their hardest to make sure that these rights were not only endorsed, but also legally protected. There has been universal bodies and instruments created to safeguard the rights of the people, such as the Universal Declaration of Human Rights—which, while formed as a declaration, constitutes as customary international law and thus must be obliged by all civilized nations—and organizations such as Amnesty International, Human Rights Watch, and of course, the United Nations Human Rights Council (UNHRC), led by Office of High Commissioner of Human Rights (OHCHR). Attempts to ensure that human rights Among these approaches are regional-based movements; an approach that focuses on the enforcement of human rights on specific regions—such as particular continents or sub-continents, basing their movements on similarities and common grounds. Examples of these movements are European Commission of Human Rights and European Court of Human Rights, which covers the scope of European countries exclusively and works under the supervision of the Council of Europe, which is intertwined with the European Union (EU).¹ Such approach were credited as useful and effective, providing a necessary intermediary function between State domestic institutions that violate or fail to enforce human rights and the global

system² because they address not only the universal standards and methods, but also the particularities exclusive within each region (i.e. the needs, priorities and conditions of the regions), something that a general approach lacks.³

It is then no surprise that ASEAN member-states would like to come up with its own regional human rights instruments, completed with empathetic capacity to the situations of the region. Enter AICHR, which, while structurally independent from ASEAN, is still working under the observation and supervision of the organization. As a human rights body, AICHR bore the responsibility of enacting human rights and making sure that human rights violations in South East Asia are taken care of, or, at least, reviewed and noticed. However, this relationship resulted in a newfound problem, as according to recent assessments, AICHR's contribution to gatekeeping human rights implementation in South East Asia has been very minimal. Mainly functioning as a consultative, borderline educational body rather than a strict panel that could outwardly call out the misdeeds of its member-states,⁴ AICHR is shackled by its lack of independence and weak protection mandates. One of the prime examples of its problems was the arrangement of its representatives; the people in charge of the body was directly appointed by member states' government, who "shall be accountable to the appointing government."⁵ Consequently, members are tied to their government and would be open to a higher likelihood of protecting their

¹ N., "The Asean Human Rights Declaration And The Implications Of Recent South East Asian Initiatives In Human Rights Institution-Building And Standard-Setting" *International and Comparative Law Quarterly*, Volume 63, Issue 01, 2013, p. 67.

² D. Shelton, "The Promise of Regional Human Rights Systems" in BH Weston and SP Marks (eds), *The Future of International Human Rights*, Leiden: Brill Nijhoff, 1999, p. 353.

³ H. Hashimoto, *The Prospects for a Regional Human Rights Mechanism in East Asia*, London: Routledge, 2004, p. 1

⁴ H. Bui, "The ASEAN Human Rights System", *Asian Journal Of Comparative Law*, Vol. 11, Issue 1, 2016, p. 129.

⁵ Article 3 of Terms of Reference of ASEAN Intergovernmental Commission of Human Rights (TOR AICHR) 2009.

government's misdeeds rather than fully and objectively investigate any reports of possible human rights abuses.⁶

Alongside the establishment of the prestigious body, several instruments to protect human rights in South East Asia have also been enacted, with ASEAN Declaration of Human Rights (ADHR) being the umbrella document for these stances. All of the official documents produced regarding human rights, however, are not legally binding to the government who has signed them and only serve as moral guidance for the conduct of its member-states.⁷ In addition, even if ADHR have any legally binding powers to its signatories, several of its articles were crafted in such a way one could possibly infer that it was trying to make leeways for the member-states to differ from human rights responsibilities through claimants of regional or national particularisms. These so-called limitations are nothing new to ASEAN, whom historically had made several similar statements subtly alienating human right's universality in the 1990s and had even reaffirmed such statements within the written document of the Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights in 1991 (Bangkok Human Rights Declaration).⁸

These unwillingness to properly utilize the AICHR as a tool to protect human rights rather than a shield to hide member-states' misdeeds, paired with the continuous denial of human rights' nature, shows that ASEAN as an Organization formed these establishments with fundamentally flawed foundations, using "regional particularism approach" as a systematic gateway to legitimize ignorance to blatant human rights abuse happening within the region, committed by its member-states. The author believes that these methodical loopholes and leeways were stemming from

its quite exclusive non-interference policy, which is arguably inconvenient when dealing with human rights issues pertaining within the region.

South East Asia has, unfortunately, often been marred by massive and systematic breaches of human rights. The Human Rights Watch Report as per 2018 were filled with cases of arbitrary detention towards oppositions to ruling government (Cambodia), the systematic persecution and abuse towards the Rohingya ethnics (Myanmar), Extrajudicial killings (Philippines, Indonesia), unaccountable military powers (Thailand), Migrant Workers and Labor Exploitation (Singapore), and systematically oppressed religious minority (Malaysia)⁹. These were non-exhaustive lists, and the actual report is worth 62 pages, detailed with various methods of abuses against human rights. It is safe to say that ASEAN has a widespread crisis of human rights violations and abuse, and firm steps must be taken against it in order to ensure that these abuses will not prevail.

B. ASEAN AND ITS GENERAL APPLICATION OF NON-INTERFERENCE AND REGIONAL PARTICULARISM

The idea to form ASEAN dated back to the 1960s; at the height of the cold war of the western hemisphere and the rise of popularity regarding the formulation of Regional Organizations, six countries—Indonesia, Singapore, Malaysia, Thailand, and the Philippines—gathered at Bangkok to form the foundations of what would be the leading organization for South East Asian countries. The agreement to form the Bangkok Declaration on the 8th of August 1967 marked the birth of ASEAN, a regional platform for the sub-continent to mainly conduct cooperation, collaboration

⁶ H. Bui, *Loc.Cit.*

⁷ N. Doyle, *op. cit.*, p. 74.

⁸ Paragraph 8 of Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights (Bangkok Human Rights Declaration) 1991.

⁹ Human Rights Watch, "Human Rights in South East Asia", Reports of 2018, p. 6. ("HRW Reports")

regarding economic growth, social progress and cultural development between states.¹⁰ Starting out with six countries, the organization soon welcomed other four members—Brunei Darussalam on 7th of January 1984, Viet Nam on 28th of July 1995, Lao PDR and Myanmar on 23rd of July 1997, and Cambodia on 30th of April 1999—summing its member-states into 10 countries.¹¹ The organization takes form of a cooperation and collaboration platform more than anything else, and It adopted several fundamental principles as its core to support this form, with non-interference principle placed upfront, split into 2 separate phrasings; “*The right of every State to lead its national existence free from external interference, subversion or coercion*” and “*Non-interference in the internal affairs of one another*”.¹²

While the non-interference principle is well-known and commonly practiced by many intergovernmental organizations around the world—including the United Nations—what differs ASEAN’s take on this principle is that it practices the doctrine beyond mere behavioural norm, but rather a characteristically particular understanding and subsequent practices of this norm.¹³ As Bellamy and Dumond put it; “*Despite the fact that the Association has made no attempt to define what it means by ‘interference’, regional practice prior to the mid 1990s suggests that it was construed as a continuum of involvement in the domestic affairs of states that ranged from the mildest of political commentary through to coercive military intervention.*”¹⁴ To simply put it, the non-interference policy is used not only as an ideal, but also as a political

tool to prevent any possible acts of ASEAN’s member-states that could possibly undermine, and thus upset, any dominant domestic authority within its sub-continent.¹⁵ This adaptation of such principle is largely rooted in 2 factors; one, they shared historical experience of being colonized in objectively the majority of the modern century, and even in their independence, were constantly being forced of external ideologies by many states, especially western states in the height of the cold war in order to search for allies. These experiences manifested into the belief that sovereignty and independent government free of external clutches is the key to achieve domestic stability and, consequently, regional stability.¹⁶ Two, their priority is assigned to preserving domestic stability as internal security matters are considered to be of fundamental importance. This factor stems from the countries’ fragility of the social and political order, which has made the domestic field their main security focus.¹⁷

This principle is translated into the inner workings of its organizations, which takes form as a consultative body that has little power to shape the decisions and actions taken by their member-states. ASEAN’s form as an intergovernmental organization means that it holds no higher sovereign position over its member-states, as member-states do not relieve part of their sovereignty to be governed by the organization. For example, ASEAN’s parliamentary body could only generate moral suasion as opposed to a legally binding document that the EU Parliament

¹⁰ Section SECOND point (1) of the Association of SouthEast Asian Nations Declaration (Bangkok Declaration) 1967.

¹¹ Association of SouthEast Asian Nation (ASEAN), Establishment of ASEAN, <https://asean.org/asean/about-asean/>, accessed on the 23rd of December 2018.

¹² Article 2 of Treaty of Amity and Cooperation in SouthEast Asia (TOC ASEAN) 1976.

¹³ Katsumata, “Reconstruction of diplomatic norms in South East Asia: the case for strict adherence to the

“ASEAN way””, *Contemporary SouthEast Asia*, Vol. 25, Issue 1, 2003, p. 479.

¹⁴ A. J. Bellamy And C. Drummond, “The Responsibility to Protect in South East Asia: between Non-Interference and Sovereignty as Responsibility, *The Pacific Review*, Vol. 24, Issue 2, 2011, p. 185

¹⁵ M. Molthoff, “ASEAN and the Principle of Non-Interference”, <https://www.e-ir.info/2012/02/08/asean-and-the-principle-of-non-interference/>, accessed on 24th of December 2018.

¹⁶ *Ibid.*

¹⁷ Katsumata, *Loc. Cit.*

could produce.¹⁸ Provisions alluding to non-interference principle is also put into these documents,¹⁹ which then, even if they are able to bind the member-states into the provisions agreed upon, the existence of the principle could still prohibit the organization and, consequently, its extensions, to interfere within the internal affairs of its member states if any allegations of misdeed were to be brought up. ASEAN had also shown a rather apparent disdain upon its member-states attempting to break the self-nobled principle, as with the case of ASEAN's blatant attempt to organize international protest against Vietnam's intervention towards the Khmer Genocide happening in Cambodia around the late 1970s.²⁰ In the general sense, ASEAN is extremely cautious in making sure that while it does create moral suasion and/or new suggestions to its member states, it makes it in a way that would not oblige such member states to follow their agreed upon rules, hence the forms of most documents being a declaration rather than legally binding conventions or treaties.

But beyond the general prevention of external powers meddling into a state's internal affairs, ASEAN's decision-making approaches have also appeared to be greatly influenced by common concerns for mainly accommodating justifications to the decisions taken by these internal domestic governments.²¹ ASEAN uses something called "regional particularism", a phrase that essentially means that each region has a special case that the general international public could not relate to or solve, and thus they should be subject to unique perceptions that could lead to certain exceptions and/or derogations when it comes to the previously agreed laws.²² This belief also stems from the first half of the

non-interference policy established in TOC ASEAN, which emphasizes in rights to lead its national existence free from external subversion or coercion.²³ By justifying that actions taken by the internal government of a state as part of a solution dealing with 'regional particularism', it also consequently ward off any possible intervention coming from external powers who are deemed 'contextually unaware' of the problems faced by such state. However, what then concerns the general public is the fact that these two principles are then used by ASEAN and its member-states to deliberately ignore blatant violations of human rights happening within its region. The next section will examine the relevance of using non-intervention and regional particularism when dealing with human rights abuses.

C. DEALING WITH HUMAN RIGHTS ABUSES THE ASEAN WAY: CAUTIOUS STEPS OR A LOST CAUSE?

ASEAN is not short of allegations of human rights abuses—quite the opposite, it is actually overfilled with them. By March 2018, more than 688,000 Rohingya had fled from Rakhine to neighboring Bangladesh to escape mass killings, sexual violence, arson, and other abuses amounting to crimes against humanity by the security forces in Myanmar.²⁴ In the Philippines, President Rodrigo Duterte's so-called "war on drugs" has claimed 12,000 lives of primarily poor urban dwellers, including children. Most of these are victims of extrajudicial killing operations, either performed by the Philippine Drug Enforcement Agency (PDEA) or unidentified gunmen, launched since June 2016, after Duterte took office.²⁵ Indonesia has also faced backlash in regards

¹⁸ T. Koh, 'ASEAN and the EU: Differences and Challenges', <https://www.straitstimes.com/opinion/asean-and-the-eu-differences-and-challenges>, accessed on 24th of December 2018

¹⁹ Article 2 letter (e)-(f) of the ASEAN Charter

²⁰ A.J. Bellamy and Drummond, *Loc. Cit.*

²¹ M. Molthoff, *Loc. Cit.*

²² A. T. Leonhard, "Regional Particularism: The Views of the Latin American Judges on the International Court of Justice", *University of Miami Law Review*, Vol. XXII, Issue 3, 1968, p. 680.

²³ TOC ASEAN, *Loc. Cit.*

²⁴ HRW Reports, *Op. Cit.*, p. 26.

²⁵ *Ibid*, p. 35.

of the tight security and allegations of military abuse within the region of West Papua,²⁶ and general mistreatment against their minority with the conviction of Basuki "Ahok" Tjahja Purnama over violation of unclear blasphemy laws being the forefront poster case.²⁷ Issues like sexual orientation and gender identity, women's rights, and freedom of expression are faced by several states in SouthEast Asia, with laws detailing specified discriminations against the oppressed being passed by state parliamentary bodies. On the early days, these behaviors were often justified by persistent external threats that would need internal compromise. However, since the early 1990s, along with the closing of the Cold War and the progression to globalization, it has been getting harder for ASEAN leaders to justify their actions as part of a national agenda in order to maintain integrity.²⁸

The world had taken a specific interest within this matter; in August 2018, the United Nation Secretary General Antonio Guterres called for Myanmar to cooperate in order to end the suffering of the people of Rohingya in Rakhine State.²⁹ A UN Independent Investigation has also been launched in order to properly assess what happens, and the influx of Rohingya refugees were also directly handled by the United Nations High Commission for Refugees (UNHCR). As for the extrajudicial killing under the regime of Rodrigo Duterte, the United Nations Special Rapporteur on summary and arbitrary executions had

shown disagreement and even condemnation towards the Philippines President, who severely undermines the impacts of his actions.³⁰ Indonesia had also been slammed by several states regarding its treatment in West Papua, and while the petition for West Papua's independence is rebuffed by the United Nations decolonization committee, it still does not negate the apparent human rights abuses happening within the region.³¹ Many relevant resolutions have also been produced by the United Nations Security Councils (UNSC) regarding various topics of human rights abuses and perpetuation of religious extremism in the form of terrorism in South East Asia, especially relating in the humanitarian crisis in Myanmar.³² In short, the UN and other organizations around the world concerned with human rights abuses, have taken firm stances in regards to current allegations of violations of these rights in South East Asia. However, these global actions would be futile without the help of the regional organization most intimate with its members regarding their internal conducts.

ASEAN itself, as the subcontinent main organization, did not include human rights as part of its original purposes back in formulating the Bangkok Declaration in 1967. However, it does gradually realize its responsibility to safeguard human rights within the region, and the phrase was later included within ASEAN Charter in 2007, when the term "human rights" first arose in any of its organizational documents.³³ While

²⁶ *Ibid*, p. 16.

²⁷ *Ibid*, p. 15.

²⁸ J. D. Ciorciari, "Institutionalizing Human Rights in South East Asia", *Human Rights Quarterly*, Vol. 34, 2012, p. 698.

²⁹ A. McConnell, "UN Chief Calls for Security Council to Work with Myanmar to End 'Horrendous Suffering' of Rohingya Refugees", <https://news.un.org/en/story/2018/08/1017952>, accessed on the 25th of December 2018.

³⁰ De Guzman, "UN rep slams Duterte's remark on extrajudicial killings", <http://cnnphilippines.com/news/2018/09/28/UN-Agnes-Callamard-Rodrigo-Duterte-extrajudicial-killings.html>, accessed on the 25th of December 2018.

³¹ B. Doherty and K. Lamb, "West Papua Independence Petition is Rebuffed at UN", <https://www.theguardian.com/world/2017/sep/30/west-papua-independence-petition-is-rebuffed-at-un>, accessed on the 25th of December 2018.

³² United Nations Security Council (UNSC), 'UN Documents for Myanmar', <https://www.securitycouncilreport.org/un-documents/myanmar/>, accessed on the 25th of December 2018.

³³ Article 1 point (2) and Article 2 point (1) letter (i) of the Charter of Association of SouthEast Asian Nation (ASEAN Charter), 2007.

the inclusion of safeguarding human rights as part of ASEAN's main purpose and principles are relatively new, ASEAN is ambitious in forming a sustainable system for the sub-continent to be able to safeguard human rights implementations in the area. Within its charter, the idea for a regional human rights body exclusively for South East Asia, under the observation of ASEAN, was enshrined in Article 14, which states that "[...] ASEAN shall establish an ASEAN human rights body."³⁴ The formal establishment of this body was finalized in 2009, after the Terms of Reference (TOR) of AICHR was adopted by the ASEAN Foreign Minister Meeting in July and the 10 AICHR representatives from each member state were appointed and inaugurated at the 15th ASEAN Summit in Cha-am Hua In, Thailand, on 23 October. Alongside the formation of a human rights commission, ASEAN had also taken the steps of forming a unified declaration called ASEAN Human Rights Declaration, which was finalized in 2012. While the declaration in and of itself was not legally binding, it is regarded as one of the most prominent steps in establishing the commitment to protect human rights in ASEAN.

However, these attempts of safeguarding human rights had been hindered by the very principles guiding ASEAN's existence, which are the non-interference principle and its regional particularism, often referred to as the "ASEAN Way".

1. Cases Regarding Practices of Regional Particularisms within Human Rights Enforcement in ASEAN

Particularism emphasizes special interest of special powers,³⁵ and The qualification as particularism rests on

two basic assumptions shared by all theories within this paradigm. The first sees order as possible only within the particular polity; it cannot extend to humankind as a whole. The second assumption asserts that a polity is only viable if particular: its internal cohesion depends upon something that is exclusively shared by all members. Consequently, the polities are conceived as competing, even conflicting, and the denial of the possibility of common comprehensive public order entails that external conflicts can easily escalate.³⁶ Deriving from this, Regional Particularism could be translated as a trait shared by all members of a specific community that is not shared by other communities, and thus such particularisms need specialized rules for their special circumstances. In international law, this principle is continuously battling with Universalism, a belief in which at the core of things, every human being shares the same equal amount of human rights, and thus should be presented as such and should not be subject to any exception that could reduce/derogate their rights.³⁷

As a human rights body directly under the supervision and observation of ASEAN, AICHR does not escape the normative perception of The ASEAN Perspective. Its mandate is enshrined in its Terms of Reference. However, unlike most human rights bodies, AICHR was designed as a consultative intergovernmental body, which means that, instead of being independent and inquisitive to governments, it was designed to accommodate proximity with the domestic regimes present in ASEAN.³⁸ This hypothesis is supported by

³⁴ Article 14 of the ASEAN Charter.

³⁵ P. Wallenstein, "Universalism vs. Particularism: On the Limits of Major Power Order", *Journal of Peace Research*, Vol. 21, Issue 3, 1984, p. 243.

³⁶ A. V. Bogdandy and S. Dellavalle, "Universalism And Particularism As Paradigms Of International Law",

Institute for International Law and Justice, New York University School of Law, Working Paper 3, 2008, P. 28
³⁷ Oxford Public International Law, 'Universality', <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1497>, accessed on the 25th of December 2018.

³⁸ Article 3 of TERMS OF REFERENCE AICHR.

the fact that ASEAN Foreign Ministers are the sole determining factors for reviewing and making final decisions regarding amendments and interpretations of the AICHR's functions and mandates,³⁹ and that the country residing as chair for the commission would be originating from the same country of ASEAN's chairholder for that year—so for example, if Singapore holds the position of the chair in ASEAN, then the country would also hold the position of the chair in AICHR.⁴⁰

These mechanisms were the opposite of what a human rights body should be. According to the United Nations, close affiliation with state governments would result in the impairment of the body's independence, which is crucial to ensure that the reports, investigations, and actions taken regarding allegations of human rights abuses would not be compromised.⁴¹ However, beyond that, this could be perceived as a manifestation of a misguided "regional particularism" principle, for within its design, AICHR had not only deviated from the general standards of the general international law, but also designed it in such a way that the essential elements of AICHR would not be fixed or constant. The fact that core items of the body such as mandates and functions are constantly up for a new interpretation or change would mean that there is a large possibility that the scope of AICHR's actions would be constantly jeopardized under whatever convenience that happens to make itself present within the ASEAN council.⁴² It

also shows that AICHR has little to no willingness to follow the strict, universal standard and would rather follow regional perception which allows states—who most commonly are main perpetrators of such abuses—to have a large amount of control over what classifies as 'human rights violations'.⁴³

The ASEAN Perspective also once again accommodates this particularism, and Article 7 of the ADHR is a perfect example of a highly debatable provision relating to these limitations, stating;

*"The realization of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds."*⁴⁴

The provision above had inadvertently created a perception that ASEAN supports and promotes human rights and fundamental freedoms, so long as they do not counter the existing contextual system established in the state in question.⁴⁵ To sum it, whenever a particular aspect of human rights is perceived to work against the national system, the system would be the one who emerges as winners. While some argue that the wordings of this provisions are still in line with the world's view of fitting particularism into a fundamentally universal concept,⁴⁶ this argument could be easily debunked. The international standard, as encased in article 5 of Vienna Declaration and Programme of Action (VDPA), mentions that it is *"the duty of states, regardless of their political, economic, and cultural system, to promote and protect all human rights and fundamental*

³⁹ *Ibid*, Article 9.

⁴⁰ *Ibid*, Article 5 point 9.

⁴¹ Office of High Commissioner for Human Rights (OHCHR), "Principles for Regional Human Rights Mechanisms."

⁴² Tan Hsien Li, *The ASEAN Intergovernmental Commission on Human Rights*, Cambridge: Cambridge University Press, 2011, p. 157.

⁴³ M. A. Baderin and M. Ssenyonjo (eds), "International Human Rights Law: Six Decades After the UDHR and

Beyond", *Farnham and Burlington, VT*: Ashgate Publishing Limited, 2010, p. 242-243.

⁴⁴ Article 7 of the ASEAN Human Rights Declaration (AHRD) 2012.

⁴⁵ H. Bui, *Op. Cit*, p. 121-122.

⁴⁶ K.S. Renshaw, "The ASEAN Human Rights Declaration 2012", *Human Rights Law Review*, Vol. 13, Issue 3, 2013, p. 557.

freedom.”⁴⁷ This article, while acknowledging that different backgrounds and beliefs exist throughout the world, does not allow these differences to be the reasons of exclusion for any human rights, meaning that this particular provision affirms that human rights, all human rights, are universal.⁴⁸ Contextually, this is of course different with the interpretations of article 7, which explicitly and blatantly uses these listed differences as an excuse to derogate and diminish certain aspects of human rights,⁴⁹ no matter how strict the interpretation for this article might be. And even if the member-states had defended the provision as ‘The ASEAN Perspective’ that does not in any way contradict international laws and customs,⁵⁰ studies and researches have shown that the drafting on ADHR focuses much more on limiting the existing rights, rather than promoting and protecting them, and even goes as far as accommodating several worrying statements of states—Laos and Vietnam being the most prominent out of all drafters.⁵¹

Beyond these conceptual contradictions with International Law concepts, regional particularisms implemented in interpreting and practicing the enforcement in human rights could cause serious consequences. By adhering the standards into something that of a state's personal view rather than an international standard, it gives chance for oppressive governments to be able to excuse their actions as not part of grave breaches of human rights under this notion. And when this particular

principle is adopted by ASEAN, specifically AICHR, it limits the organization's possible works and contributions in dealing with human rights abuses since the body would have little power to challenge the state's stance.⁵²

2. Case Regarding Practices of Non-Interference Doctrine within Human Rights Enforcement in ASEAN

In ASEAN, a characteristic norm emerged when the organization or its member-states take legal decisions in international matters. This characteristic is often dubbed as ‘The ASEAN Way’, a method of consideration and decision making exclusively belonging to ASEAN states. These methods are usually characterised by four main traits; sovereign equality, quiet diplomacy, non-recourse to use or threat to use of force, non-involvement in bilateral disputes, non-interference and quiet diplomacy.⁵³ Hiro Katsumata would like to also add a trait that later on characteristically was perceived to belong to this notion; the decision making through consensus.⁵⁴ This principle translates into every inner workings of ASEAN and the organizations associated and/or supervised by it.

Back in the late 1970s, the Cambodian government—who, at the time of the event, was not member of ASEAN—was involved in one of the largest modern genocide cases; thousands of people were killed at the hand of the state under the rulin of the then-leader, Pol Pot, and countless others were constantly abused and tortured. Under this situation,

⁴⁷ Article 5 of the Vienna Declaration and Programme of Action (VDPA) 1993.

⁴⁸ H. Bui, *Op. Cit.*, p. 122.

⁴⁹ *Ibid.*

⁵⁰ J. D. Ciorciari, *Op. Cit.*, p. 700.

⁵¹ P. Robertson, ‘ASEAN's Road to Nowhere?’, <https://www.hrw.org/news/2012/04/26/aseans-road-nowhere>, accessed on the 25th of December 2018.

⁵² *Ibid.*

⁵³ J. Haacke, “ASEAN's Diplomatic and Security Culture: A Constructivist Assessment,” *International Law Review Of The Asia Pacific*, Vol. 57, Issue 3, 2003, p. 59.

⁵⁴ H. D. Phan, ‘A Blueprint For a South East Asian Court Of Human Rights’, *Asian-Pacific Law & Policy Journal*, Vol. 10, Issue 2, 2008, p. 387.

Vietnam—who was also yet to become a member of ASEAN at the time of the event—decided to launch a full military intervention to dethrone Cambodia’s genocidal regime. Responding this, ASEAN launched a decade-long worth of condemnation against Vietnam’s actions, even going as far as organizing an international opposition against Vietnam and making sure that Cambodian Khmer Rouge Regime, the main perpetrator of such genocide, retained their seat in the UN up until 1992.⁵⁵ This is the primary example that is often used by experts when showing just how serious does ASEAN take their non-intervention principle.

In the general scheme of things, ASEAN has continuously and explicitly stated that any regional body working under ASEAN’s direct order or supervision must adhere to the principles of the organization, including its infamous non-interference principle. AICHR, as an intergovernmental body built from the aspirations enshrined under article 14 of ASEAN Charter, was no exception to this rule, and its responsibility to bow to ASEAN’s non-interference principle is written within its Terms of Reference.⁵⁶ However, the practice of non-interference doctrine is beyond mere cautions. Rather, it is incorporated in the forming of the body that is AICHR.

By making AICHR a consultative body primarily used for socializing and educating human rights and its implementations, ASEAN gives AICHR a very limited mandate that could hinder the overall mission of safeguarding human rights in the region.⁵⁷ This is in contrast with other human rights bodies throughout the world, who had at least

quasi-judicial capacity to investigate and call out actions regarding cases of human rights. The writer takes an example in the Organization of American States (OAS)’s, which enacted the Inter-American Commission on Human Rights (IACHR). In this case, the IACHR has a very broad and effective mandate that does not stop only in promoting, but also systematically protecting human rights through its petition system, which resulted in about 12,000 individual cases of alleged human rights violations being processed as per 1997.⁵⁸ Comparing these functions to the AICHR, it is clear that AICHR still does not have what it takes to effectively deal with regional human rights issues. However, it is argued that this perhaps is just how ASEAN wants AICHR to be; a body with systematic limitations enough to ward off unwanted intervention to any member-states. With the body being strictly limited as a consulting body, it will not have capacity to intervene in the internal affairs of a state when it is unasked for, even when the organization deems that intervention or at least further investigation is necessary. Their input is being limited to an ask-only basis, serving the state the power to make the call of when they are willing to let AICHR work, and what type of work is AICHR allowed to do.⁵⁹ Additionally, Within the draftings of the AICHR Terms of Reference, there were also notions suggested from Laos’ that “*the realization of rights must depend on principles including; non-confrontation, avoidance of double standards, and non-politicization.*”⁶⁰ These suggestions could be a roadmap for categorizing attempted intervention from other states as part of a confrontational,

⁵⁵ A.J. Bellamy and Drummond, *Op.Cit.*, p. 185.

⁵⁶ Article 2 point 1 letter (b) and (c) of TERMS OF REFERENCE AICHR.

⁵⁷ HRW Reports, *Op. Cit.*, p. 3

⁵⁸ Organization of American State (OAS), “What is the IACHR?”,

<http://www.oas.org/en/iachr/mandate/what.asp>, accessed on 25th of December 2018.

⁵⁹ H. Bui, *Op. Cit.*, p. 130.

⁶⁰ Article 3 and 2 point 4 of the TERMS OF REFERENCE AICHR.

political agenda, and thus painting as if humanitarian intervention in dire situations as an act frowned upon.⁶¹ We hypothesize that these regulations were specifically designed to protect states when they take actions that constitute human rights violations.

This hypothesis is supported by the fact that AICHR's state representatives were chosen and delegated by each respective member states, rather than a merit based selection.⁶² Compared to IACHR, whose membership process is a selection based on personal track records and has no systematic attachment to their states whatsoever when serving as part of IACHR,⁶³ AICHR is designed in a way so that the representatives are owing their position towards their appointing state, and thus would be more likely to aid their representing state rather objectively assessing in the interest of the general population's consensus of human rights enforcements in investigations regarding an alleged abuse committed by a state.⁶⁴ This would serve within the interest of non-intervention principle, as a representative system built to defend the member states rather than that of the general population's interest of being protected would decrease the possibility of a probing investigation into a state which had allegedly committed human rights violations. It also adds insult to the injury that these members' representatives do not have the electoral mechanism to ensure their competence as qualified human rights experts.⁶⁵

It is also worth noting that ASEAN has no human rights court mechanism, as opposed to most regional

organizations around the world. It is obvious that ASEAN needs one; its national courts often fell short with cases of human rights violations, especially those committed by states.⁶⁶ Proposals of Human Rights Law has been proposed by various academicians, however after decades of existing, hopes were beginning to dim for the existence of a Human Rights Court in South East Asia, as the organization made no significant steps to build a transparent system to solve human rights issues.⁶⁷ And even if the creation of a human rights court is within the immediate agenda of ASEAN, its concept as regional judicial body would have difficulties navigating around ASEAN's non-interference policy, as its the judicial body would most likely seek jurisdiction over internal matters of a state, which constitutes as an intervention against the state's domestic court.⁶⁸

In short, the formulation of a human rights mechanism prioritizing non-intervention principle and regional particularism could not accommodate the dire necessity of human rights enforcement in South East Asia.

D. CONCLUSION

While it is necessary as an intergovernmental organization to maintain a clear lining of its mandate so not to interrupt the sovereignty of a state, what must be noted is that human rights is a particularly universal issue, and that all humans have to be rewarded the same equal rights. Non-Interference, in this case, would not work best when it comes to grave breaches of human rights, as moral suasion and condemnations are not enough

⁶¹ G. Clarke, "The Evolving ASEAN Human Rights System: The ASEAN Human Rights Declaration of 2012", *Northwestern Journal of International Human Rights*, Vol. 11, Issue 1, 2012, p. 12.

⁶² TERMS OF REFERENCE AICHR, *Op. Cit*, Article 9.

⁶³ Article 34 of the American Convention on Human Rights (ACHR) 1969.

⁶⁴ H. Bui, *Op. Cit*, p. 129.

⁶⁵ *Ibid*.

⁶⁶ J. D. Ciorciari, *Op. Cit*, p. 699.

⁶⁷ H. D. Phan, *Op. Cit*, p. 385

⁶⁸ *Ibid*, p. 386-387.

incentives for domestic leaders to halt their actions. ASEAN needs to form a basic mechanism that would be able to allow its human rights body, the AICHR, to expand its capacity beyond mere educational and socializing tools, but rather an effective human rights body that could rightfully investigate, report, and effectively solve issues of human rights violations. AICHR memberships should also be revised so that they would not be systematically attached to any member states of ASEAN, and would have a credible merit and track record to support their human rights safeguarding mandate, and not be mere extension tools for states to protect their interests and dignity within the AICHR Council. As for the documents affirming ASEAN's so-called commitment to safeguarding human rights, provisions that allude towards the vilification of humanitarian intervention as part of a political and therefore heinous agenda should be highly reconsidered.

Secondly, applying "regional particularism" through 'The ASEAN Perspective' also does not in any way support human right's universality, while at the same time, it creates perception that ASEAN and its member states are interested in maintaining their misdeeds rather than actually working on approaching human rights enactment so that it would reach universal standards. In the future, the human rights documents produced by ASEAN should focus more on the universal standards and perceptions, without excusing derogations of human rights as a prerogative rights of a state based on the argument of regional particularism. In addition, the human rights body of ASEAN should not be designed to continuously accommodate the member-state's interest through constantly-changing mandates and mechanisms based under the consensus of the Foreign Ministers of ASEAN. Instead, it should hold firm and fixed mandates in order to continuously safeguard human rights in South East Asia without constant changes and uncertainties.

In the end, ASEAN should always be open in reformations and changes of perception in order to evolve in betterment, especially facing the changing global situation.

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