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**Is the AICHR an Unwanted Human Rights Body in the ASEAN?
the Answer from The International Organizational Law Perspective**

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ABSTRACT

The AICHR is a remarkable achievements of ASEAN after having the ASEAN Charter in 2007. However, since the TOR of AICHR has a serious institutional defect that makes the AICHR unable to protect peoples' human rights, the AICHR could not be act as a human rights guardian in the region. It leads to the question whether the ASEAN and its member states want the body to be established to protect the people in the region? The answer to this question is important to figure out the future human rights mechanisms in the region. The question will be addressed through qualitative and normative legal research. Field research was conducted to resolve some questions that are not provided in the literature to enrich the understanding on the topic from the ASEAN elites, practitioner, and academican. It finds that the institutional defect and less political support showed that ASEAN and its member states do not want to have a reliable regional human rights mechanism. However, it finds that there were the evolutionary approach that has conducted by the AICHR despite that situation to promote human rights in the region. The study suggests the AICHR to use strong words of the TOR and the ASEAN Charter to enhance their performance and reliability. A new approach for human rights mechanisms that sets in a formal way; under a legal-binding instrument are more favorable. Therefore, if the AICHR show that characteristic, it will be supported by the ASEAN and its member states.

Keywords: ASEAN, ASEAN Charter, AICHR, Human Rights, International Organization

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A. INTRODUCTION

Intergovernmental Commission on Human Rights (AICHR) is one of big achievement for Association of Southeast Asian Nations (ASEAN), and it indicates that the organization has fulfilled its mandate to establish human rights body as stipulated in article 14 of the ASEAN Charter. However, since the TOR of AICHR has a serious institutional defect that makes the AICHR unable to protect peoples' human rights, the AICHR could not be act as a human rights guardian in the region. It leads to the question whether the ASEAN and its member states seriously committed to protect human rights of the people in the region through the establishment of the AICHR.

Accordingly, this paper seeks to answer the question above from the view of International Organizational Law. The discussion divides into three main parts which are: first, a brief overview about the International Governmental Organization (IGO) and human rights protection; second, the work of the AICHR; and third, the discussion whether the AICHR is favorable or unfavorable human rights body in ASEAN.

The question will be addressed through qualitative and normative legal research. Field research was conducted to resolve some questions that are not provided in the literature to enrich the understanding on the topic from the ASEAN elites, practitioner, and academician.

B. THE IGO AND HUMAN RIGHTS' PROTECTION

The role of the IGO in the development of human rights world wide is significant. Universal human rights protection regime have been developed there, and it depends weightly on the policy and commitment of its member states. Ideally, when member

states of the IGO agreed to established human rights mechanisms under the organization, they will fully committed to implement it without any reason. Unfortunately, the fact shows that human rights always have a problem with the enforcement at any level: national, regional, and international levels.² Universal human rights protection for all is only on paper. Many countries have ratified most core human rights treaties, but human rights face hard times, including in the southeast Asian region.

To seek how the IGO should ideally work for human rights, this part will briefly discuss about the development of international organizations. The development of international organizations including regional organization and its function to maintain peace and security are an area that much discussed by a scholar such as Ademola Abas, Christoph Schreuer, Marten Zwanenburg, Simma, Mosler, Joseph Nye.³ According to that literature, the most important among them is the formation of the European Community, a body that would pioneer the European Union's founding later on. A massive wave of regionalism started surging during the 1960s, where there were rapid developments of regional organizations. These organizations' outstanding growth was motivated by several interests, from

² Moeckli, Daniel, Sangeeta Shah, David Harris, and Sandesh Sivakumaran, eds. *International Human Rights Law*, Oxford University Press, 2014, 391. Moeckli stated in his book that implementation phase is the main challenge including in The UN human rights systems where they successfully bring universal human rights.

³ Read Abass, Ademola, *Regional Organisation and the Development of Collective Security Beyond Chapter VIII of the UN Charter*, Oregon USA: Hart Publishing, 2004, 1-7; Schreuer, Christoph. "Regionalism v. Universalism", *Eur. J. Int'l L.* 6,1995, pp. 477; Zwanenburg, Marten. "Regional Organizations and the Maintenance of International Peace and Security: Three Recent Regional African Peace Operations". *Journal of Conflict and Security Law*, vol. 11, no. 3,2006,pp. 484; Hummer, Waldemar, and Michael Schweitzer, "Chapter VIII Regional Arrangement" in *The Charter of the United Nations: A Commentary*, edited by B. Simma, H. Mosler, and United Nations, Oxford: Oxford University Press, 1995.; Joseph S Nye, *International Regionalism*, Boston: Little Brown, 1962.

the establishment of micro-economic organizations to macro-regional ones.

Such rapid development has made it difficult for academicians to distinguish between the types of these regional organizations. This difficulty was raised due to no clear definition of regional organization in the United Nations (UN) Charter. Therefore, the work of scholars on this view very much influences the development of the definition. By wording, regionalism, Hummer and Schweitzer stated that an organization is not- universal.⁴ Although defining it from only the wording of regionalism is inadequate.⁵ Joseph Nye defines a regional organization as "a limited number of states linked together by a geographic relationship and a degree of mutual interdependence".⁶ Nye also argues that the important roles played by regional organizations are different, depending on their characteristics. These features are influenced by numerous factors such as geography and the availability of organizational sources and structures. The difference in factors would later affect the mechanism and procedure of dispute settlement between the member states of a regional organization, including in human rights cases.⁷ The scholarly works on the universalist and regionalist regional organization features and the UN will mainly be referred. Besides, scholars' works on the UN human rights mechanisms, both charter, and treaty-based mechanisms, will be included in this study to find out a lesson or future mechanism that would be suited for ASEAN.

The struggle between universalist and regionalist sentiments played a prominent role in the drafting of the UN Charter.⁸ The

focus discussion at that time was on the issue of peace and security; meanwhile, other regional activities out of this issue received scant attention.⁹ Hendrikson argues that The UN Charter has always given room for a regional organization to maintain peace and security.¹⁰ It is the aim of the creation of regionalism within the UN. Despite Hendrikson, Jan Klabbers is one of the leading players in this area.¹¹ Most literature concludes that the relation between the UN and regional organizations, according to chapter VIII, should be seen as a partnership in a more universalist view. Unfortunately, the discourse on this concept remains ongoing so that it can be interpreted in many ways. The most important thing is an agreement that the regional organization shall help create, maintain, and preserve world peace and security based on Chapter I, Articles 1 and 2 of the UN Charter.

Richard Burchill provides the fact that regional arrangement today develops a more normative project beyond what has been possible at the universal level, such as human rights protection.¹² This remarkable achievement rests how exactly the Regional Organization's role within the framework of international human rights law and how this role and function pursue harmony in International Human Rights Law. Some scholars also wrote in this specific issue, such as Martin, Francisco Forrest, Stephen J. Schnably, Richard Wilson, Jonathan Simon, Mark Tushnet, Peter Baehr, and Simon SC Tay.¹³ However, Richard Burchill, Jan

⁴ Hummer, Waldemar and Michael Schweitzer, "Chapter VIII Regional Arrangement" in *The Charter of the United Nations: A Commentary*, edited by B. Simma, H. Mosler, and United Nations, Oxford: Oxford University Press, 1995.

⁵ *Ibid.*

⁶ Joseph, *supra* note 3 at 33.

⁷ *Ibid.*

⁸ Christoph, *supra* note 3 at 478.

⁹ *Ibid.*

¹⁰ A.K Hendrikson, "The Growth of Regional Organization and the Role of the United Nations" in *Regionalism in world politics: regional organization and international order*, edited by Louise L'Estrange Fawcett, and Andrew Hurrell, Oxford: Oxford University Press, 1995, 126.

¹¹ Jan Klabbers, *An Introduction to International Institutional Law*, Cambridge: Cambridge University Press, 2002.

¹² Richard Burchill, "Regional Regimes in Comparative Perspective" in *American Society of International Law Proceedings of the Annual Meeting*, 2011, pp. 309.

¹³ Martin, Francisco Forrest, Stephen J. Schnebly, Richard Wilson, Jonathan Simon, and Mark Tushnet, *International Human Rights and Humanitarian Law: Treaties, Cases, and Analysis*, Cambridge: Cambridge

Klabbers, and Christoph Schreuer are prominent scholars working on this issue. The study will also contribute to addressing these theoretical questions in the South East Asian region under the ASEAN.

Phan, a law scholar from the National University of Singapore (NUS), who proposes a "selective approach" to establish an ASEAN Court of Human Rights in his dissertation writing, is one of the scholars who comprehensively and distinctively study this issue. He argues that this approach could be implemented in the region.¹⁴ A selective approach is an approach that targets the leading and the more advanced states of South East Asia, in contrast to the inclusive approach that covers all ASEAN member states.¹⁵ His research is one of the most comprehensive researches to discuss the idea of the Southeast Asian Court of Human Rights; the vital output of his work is a Blueprint proposal for a Southeast Asian Court of Human Rights.¹⁶ Although Roger S. Clark, the editor of his book, argued that this blueprint is useful for a practical scheme if only the political will be summoned.¹⁷ Slightly different from Clark, it would argue that the usefulness or creation of such a system relies not only on mere politics but also on other factors, including law itself.

Despite Phan, Wictor Beyer, on his master thesis at Lund University, brings this issue comprehensively. Referring to the title "Assessing an ASEAN Human Rights Regime A New Dawn for Human Rights in Southeast

Asia?" shows his pessimism on the regime. His final word on his thesis admits that the human rights regime has limited authority to ensure that the Member States comply with human rights norms.¹⁸ He is indeed speaking about the ASEAN but in a very brief. In the dominant term, he concludes that ASEAN is working in the opposite direction to what they agreed to protect human rights. Does it true? It would be deeply discussed in this study.

Another important work is the work of Vivit Muntabhorn, an expert on ASEAN human rights from Thailand. One of his research, which was requested by the European Parliament's Subcommittee on Human Rights in the form of a briefing paper on the Development of The ASEAN Human Rights Mechanism, finds it very useful to be engaged in the discourse.¹⁹ In 2013, Vivit Muntabhorn also published a quite well-known book titled "Unity in Connectivity? Evolving Human Rights Mechanisms in the ASEAN Region."²⁰ His outstanding work is highly relevant as the author addresses, in brief, some of the exciting dynamics in the negotiations in setting up the AICHR and how there exist at present very different perceptions of human rights regionally and how they should be addressed. Like many other Asian scholar's thoughts on human rights, he did not analyze comprehensively about the relation of ASEAN and AICHR to realize human rights protection in the region. He focuses on the work of AICHR.

University Press, 2006; Baehr, Peter, *Human Rights: Far Better or Far Worse?* In Philip Alston, *Lesson Relating to Bill of Rights from The Pre-Twentieth Century Experience*, pp. 55; Simon S.C. Tay, "Human Rights, Culture, and the Singapore Example", *McGill LJ* 41, 1995, pp. 743.

¹⁴ Phan, Hao Duy, *A Selective Approach to Establishing a Human Rights Mechanism in Southeast Asia: The Case for a Southeast Asian Court of Human Rights*, The Netherlands: Martinus Nijhoff Publishers, 2012, 127; Phan, Hao Duy, "A Blueprint for a Southeast Asian Court of Human Rights", *APLJ*, vol. 10, 2009, pp. 384.

¹⁵ *Ibid.*, at 129.

¹⁶ Hao, *A Blueprint for a Southeast Asian Court of Human Rights*, 385.

¹⁷ *Ibid.*

¹⁸ Beyer, Wictor, "Assessing an ASEAN Human Rights Regime A New Dawn for Human Rights in Southeast Asia?," Master thesis, Faculty of Law Lund University, *International Human Rights Law*, 2011.

¹⁹ Directorate-General for External Policies Of The Union Directorate Policy Department Briefing Paper Development Of The ASEAN Human Rights Mechanism. This briefing paper was requested by the European Parliament's Subcommittee on Human Rights. Author: Vitit Muntabhorn, Professor at the Faculty of Law, Chulalongkorn University, Bangkok, Thailand Administrator Responsible: Anete Bandone Directorate-General for External Policies of the Union Policy Department WIB 06 M 85 rue Wiertz 60 B-1047 Brussels

²⁰ Jones, William J, and Vitit Muntabhorn, "Unity in Connectivity - Evolving Human Rights Mechanisms in the ASEAN Region", *Hum. Rts. L. Rev.*, vol. 14, 2014, pp. 573.

James Munro's work indirectly studied such relations (between ASEAN and AICHR) from an individual state perspective. It must be used because ASEAN's policy as an institution could not be separated from the state's policy.²¹ Again, it confirms the need to seek the policy of ASEAN as the main organization. It is one of the paper that truly examine the reason behind the states establishing the AICHR, and at the same time, the paper also discusses the enforcement of human rights. This article seeks the driving forces behind the creation of other international human rights mechanisms.

Like Munro's study, quite a recent study of Avery Poole is also fascinating and essential in this area.²² Poole specifically asked, "Why did ASEAN create a regional human rights body?". This article makes the case that more attention should be paid to legitimacy in the study of regional norms." Poole concludes that the reasons for creating it were not because of an ideational commitment by ASEAN to address many human rights problems but to depict to the outside world that ASEAN was relevant, credible, and addressing human rights."²³

In line with Munro, Nicholas Doyle has a similar conclusion.²⁴ There is one fascinating paper which Yuval Ginbar wrote.²⁵ Yuval was questioning on human rights phenomenon in ASEAN in an exciting way. The first question is, "Does all this herald a

new era of steady progress towards the realization of human rights in Southeast Asia, or are these developments little more than a legitimacy-seeking, 'window-dressing' exercise, for not to be followed by any concrete implementation?". Second, He continues with, "OR, perhaps worse, is ASEAN on the road to launching a new, alternative and possibly more restrictive version of human rights to rival the by-and-large uniform version prevailing internationally as well as in other regions?".²⁶ The second question is out of mainstream thought, and it needs to find out more in this current study. Besides his outstanding question, his article provides critical points for this current study as it aims to chart regional human rights developments in ASEAN and provide a brief overview of the critical instruments adopted so far. The article is also questioning the part of human rights realization in southeast Asia and pointing out ASEAN in all manner to answer this question. However, he feels that "While it is far too early to attempt a definitive answer to the questions posed, it is hoped that some insight may thereby be gained into the promises, and perhaps risks, that these developments hold." So, this study will also contribute to redressing his challenge.

Among those pessimist research findings, similar to Phan, Seth R Harris's studies are very optimistic. Unfortunately, not specifically in the context of ASEAN, but in a broader context of Asia. He proposes to form a regional covenant in the Asian region.²⁷ Although this article is not entirely relevant, the discussion is fascinating as an inspiration for this current study. It is indeed true that the human rights covenant is the primary or fundamental instrument that must be presented before any other arrangement of human rights.

²¹ Munro, James, "Why States Create International Human Rights Mechanisms: The ASEAN Intergovernmental Commission on Human Rights and Democratic Lock-in theory", *Asia-Pac. J. on Hum. Rts. & L.*, vol 10, no. 1, 2009.

²² Poole, Avery, "The World is Outraged: Legitimacy in the Making of the ASEAN Human Rights Body", *Contemporary Southeast Asia*, vol. 37, no. 3, 2015, pp. 355-80.

²³ *Ibid.*, at 374.

²⁴ Doyle, Nicholas, "The ASEAN Human Rights Declaration and the Implications of Recent Southeast Asian Initiatives in Human Rights Institution-Building and Standard-Setting", *International & Comparative Law Quarterly*, vol. 63, no. 1, 2014, pp. 67-101.

²⁵ Ginbar, Yuval, "Human Rights in ASEAN—Setting Sail or Treading Water?", *Human Rights Law Review*, vol. 10, no. 3, 2010, pp. 504-518.

²⁶ *Ibid.*, at. 505.

²⁷ Harris, Seth R., "Asian Human Rights: Forming a Regional Covenant", *APLPJ*, vol.1, 2000.

Why ASEAN miss the step? Some answer lies in the work of Tan Hsien-Li. She is a very prominent human rights expert in the region.²⁸ This article finds the need to have a thorough study and grasp of the erstwhile regional commitments to building a reliable regional human rights body. Suppose She argues that further attention should be paid to civil society groups and other stakeholders in the ASEAN human rights development process. In that case, there can be meaningful dialogue and substantive input.

Returning back to the discussion on the human rights implementation problem in the early of this section, Eric Posner, a professor at the University of Chicago Law School, supported this claim that although international human rights law is one of our most outstanding moral achievement, little evidence shows that it is effective. They are many cases against human rights. He argues that human rights failed to accomplish their objectives.²⁹

An obligation to implement human rights is mainly in the hand of the states. However, the International Governmental Organizations (IGOs) also have their responsibility to ensure that states fulfill their obligations. The IGOs should actively involve in assisting and providing support for states. Ideally and according to their constitution, the role of IGOs supposed to be more active than the Non-Governmental Organizations (NGOs) as the IGOs are legally mandated to review or monitor states' compliance to their human rights obligation. There is a clear role of the IGOs to enforce human rights accordingly. Unfortunately, few pieces of research only on this issue. Perhaps, due to the difficulties of getting information and data from the main source (person or policymaker inside

the organization).³⁰ More research is either on NGOs' role or the implementation of international human rights law by states at the domestic level.³¹

There is a strong reason why the IGOs must be more active in dictating states to enforce human rights to their limits. One of the reasons is that the IGOs is a center or a hub of all human rights obligation, not only rules' collector. When states agree to be bound by the international human rights instrument, states already give their "piece" of sovereignty to be ruled by the system they created and agreed as laid down in the constituent instrument. The IGOs have an implied power from states to run the organization. When there is a breach of international human rights law by the states, the IGOs must not only dictate State to act to stop the violence but in case of states remain to violate human rights; the IGOs must act beyond dictating states in protecting the human rights of the people.

C. THE WORK OF THE AICHR: BETWEEN ACHIEVING PURPOSES AND MAINTAINING PRINCIPLES

The AICHR is an inter-governmental body and an integral part of the ASEAN organizational structure. It is a consultative body.³² Unlike the Commission of human rights at other regions, the AICHR is the only institution that explicitly stated the character of the commission as an intergovernmental body. It indicates that

²⁸ Tan, Hsien-Li, "The ASEAN Human Rights Body: Incorporating Forgotten Promises for Policy Coherence and Efficacy", *S.Y.B.I.L.*, vol. 12, 2008, pp. 239.

²⁹ Eric Posner, "The case against human rights," *The Guardian*, <https://www.theguardian.com/news/2014/de/c/04/-sp-case-against-human-rights> accessed March 9, 2020

³⁰ Hans-Otto Sanoand Tomas Max Martin, "11. Inside the Organization. Methods of Researching Human Rights and Organizational Dynamics", *Research Methods in Human Rights: A Handbook*, 2017, pp. 253.

³¹ Some of them are: Thomas George Weiss and Leon Gordenker, "NGOs, the UN, and Global Governance", *Lynne Rienner* (1996).; Ann Marie Clark, Elisabeth J. Friedman, and Kathryn Hochstetler, "The Sovereign Limits of Global Civil Society: a Comparison of NGO Participation in UN World Conferences on the Environment, Human Rights, and Women", *World Politics* 51, no. 1, 1998, pp. 1-35.; Jackie Smith, Ron Pagnucco, and George A. Lopez, "Globalizing Human Rights: The Work of Transnational Human Rights NGOs in the 1990s", *Hum. Rts. Q.* 20, 1998, pp.379.

³² TORAICHR, Art 3.

the ASEAN does not want to have a strong or supranational institution. Besides, it indicates that the ASEAN way remain exists. The naming of "intergovernmental" is unique. It implies to the works of the AICHR in particular to the institution's independence and to some extent, to achieve the purpose of protecting the people's human rights.

According to the TOR, the AICHR's work shall be guided by several fundamental principles as stipulated in article 2 of the ASEAN Charter in particular principle of respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States; non-interference in the internal affairs of ASEAN Member States; respect for the right of every Member State to lead its national existence free from external interference, subversion and coercion; adherence to the rule of law, good governance, the principles of democracy and constitutional government; respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice; upholding the Charter of the United Nations and international law, including international humanitarian law, subscribed to by ASEAN Member States; and respect for different cultures, languages and religions of the peoples of ASEAN, while emphasising their common values in the spirit of unity in diversity.³³

The AICHR must also respect for international human rights principles: including universality, indivisibility, interdependence, and interrelatedness of all human rights and fundamental freedoms, as well as impartiality, objectivity, non-selectivity, non-discrimination, and avoidance of double standards and politicization.³⁴ Also must respect other guiding principles: the recognition that the primary responsibility to promote and protect human rights and

fundamental freedoms rests with each Member State;³⁵ the pursuance of a constructive and non-confrontational approach and cooperation to enhance promotion and protection of human rights;³⁶ and the adoption of an evolutionary approach that would contribute to the development of human rights norms and standards in ASEAN.³⁷

The principles (sovereignty and non-interference principles) as stipulated in the TOR will also face many uncertainties in their work. Many things seem in contradiction to the aim of this new human rights body. However, the purpose stated in the TOR, from the institutional perspective, opens a possibility to create an enforcement mechanism that can protect the peoples of ASEAN's human rights if the ASEAN political leader supports the AICHR. Which, in the case of Rohingya, has not there yet. The AICHR must face the other challenge because the AICHR has to bear in mind national and regional particularities and mutual respect for different historical, cultural and religious backgrounds, and also have to take into account the balance between rights and responsibilities. The AICHR has to find an appropriate human rights mechanism that suits the region's interests and needs but remains well-function as a human rights protection body. Therefore, many are saying that until today ASEAN has no human rights mechanism. In fact, with those limitations, the AICHR tries to create such mechanisms. It will discuss further in the upcoming section.

Despite dealing with member states' national interest, the AICHR also has to deal with the international human rights regime at the same time. The establishment of the AICHR has to enhance ASEAN regional cooperation and international cooperation, meaning complementing national and international efforts on the promotion and

³³ TORAICHR, Art 2.1.

³⁴ TORAICHR, Art 2.2.

³⁵ TORAICHR, Art 2.3.

³⁶ TORAICHR, Art 2.4.

³⁷ TORAICHR, Art 2.5.

protection of human rights by upholding international human rights standards.³⁸ However, this function is not easy to implement as the AICHR has to comply with the ASEAN way and all principles stipulated in the TOR, which often contradict the international human rights standard.

Defining and contextualizing the ASEAN fundamental principles is a big challenge. In practice, every human rights enforcement is a form of interference in domestic affairs, a justified one. It also happened in other regions. Unfortunately, strong or unwanted human rights diplomacy, including any measures act by ASEAN institutions, including the AICHR, is regarded as interference.³⁹ Therefore, instead of protecting people from human rights violations conducted by the alleged state, ASEAN will be silent to any human rights violation in other states to respect other states' sovereignty and maintain peace and stability. There is indeed a misconception of the ASEAN member states defining the principle of non-interference in the human rights context.⁴⁰

In principle, the doctrine of non-interference is a fundamental principle in international law and recognized as a *jus cogens*. Theoretically, when member states agree to be bound by human rights norms and mechanisms, state allows other states or stakeholders to "watch" their human rights implementation. The principle of non-interference (non-intervention) would not be infringed in this context. Besides, it will maintain peace and stability.⁴¹ Many countries can well accept the application of this principle at international fora. Most countries are parties to many international

human rights treaties is proof of this acceptance. All ASEAN member states are also parties to many core human rights treaties. It means that supposedly ASEAN has no problem in accepting universal human rights norms as well as its enforcement mechanism, which means that the ASEAN should fully-supported the AICHR to fully-functioned as a human rights body. In practice, all ASEAN member states submit their universal periodic review to the UN Human Rights Council. Besides, countries are actively involved at many the UN human rights agenda. So, when the AICHR works toward this direction by introducing several soft laws or mechanisms of human rights at the UN level into regional level, member states and ASEAN institutions should not be resistant anymore.⁴²

Ideally, both as an institution and member states, ASEAN should not be afraid of having strong human rights mechanisms as in other regions. Peace, stability, and prosperity as the main goals of ASEAN could not be achieved without respecting human rights.⁴³

In the development, fortunately, in some cases, member states have sometimes interfered in the affairs of their regional neighbors or endorsed interference by fellow members or other States.⁴⁴ These had happened in peace, without any hostilities or war between member states. In a positive note, there is no absolute rejection. This kind of good practice must be always supported and developed. The interview revealed many programs and activities of the AICHR both institutionally and personally towards this direction.⁴⁵

Another important thing concerning these principles (non-intervention, sovereign equality and ASEAN way) is also often being claimed as a traditional

³⁸ TORAICHR, Art 1.6.

³⁹ Aguirre, Daniel, and Irene Pietropaoli. "Human Rights Protection the ASEAN Way: Non-Intervention and the Newest Regional Human Rights System". *International Human Rights Law Review* 1, no. 2, 2012, pp. 281.

⁴⁰ Zain Maulana, Interview by Author, Through Zoom Meeting, 30 April 2020.

⁴¹ Corthay, Eric, "The ASEAN Doctrine of Non-Interference in Light of the Fundamental Principle of Non-Intervention", *APLPJ* 17, 2015, pp. 41.

⁴² Eric Paulsen, Interview by Author, Through Whatsapp Video, 20 April 2020

⁴³ *Ibid.*,

⁴⁴ *Ibid.*,

⁴⁵ *Ibid.*,

commitment in the Southeast Asian regions and, therefore, need to moderate it.⁴⁶ This kind of view or critique to ASEAN is no longer effective in enhancing human rights protection in the region. Instead, this kind of critique makes member states hesitate to any input or suggestion. The ASEAN ways, especially, has also strength side, not only the weakness. Its strength is that the value of ASEAN has made this region peaceful and stable since it was established in 1967. What makes human rights very slow progress is not because of the existence of these principles and values but the political will of ASEAN and its member states' leader.⁴⁷ The role of the ASEAN leader plays a vital in many aspects of life, including human rights. However, ASEAN has to show to the world that the existence of those principles and values maintains peace and security between states and can protect the human rights of the people in the region.

The former ASEAN Secretary-General Surin Pitsuwan stated that the AICHR is still in its formative years. Therefore it was not there yet to stand firm as an independent human rights body. Currently, according to Surin Pitsuwan, the establishment of the AICHR is the ASEAN's achievement, now human rights have become an official dialogue in the region without fundamentally challenging ASEAN existed norms.⁴⁸ Furthermore, the ASEAN proof their commitment to finally established the AICHR. It has to be understood by many outsiders who always devalue the existence of the AICHR. It was inappropriate to say that the AICHR does not look like going to mean anything.⁴⁹ Yuyun, in her interview, argues that ASEAN is progressing not only in

processing human rights.⁵⁰ The AICHR needs time to change. On another positive note, the "ASEAN way" is believed to build stable relations amongst ASEAN member states [with certain conditions].⁵¹ The AICHR, despite its support from all member states, slowly but sure will function as the guardian of human rights for all peoples in the South East Asian region despite their challenges.

D. THE AICHR IS AN UNFAVORABLE HUMAN RIGHTS BODY IN ASEAN

According to the history of ASEAN human rights body, ASEAN as an institution appears caught between member states, other international organizations, especially the UN, and their citizen to convince their commitment to support their new human rights body – the AICHR. Apart from member states, the ASEAN as the main institution has to keep supporting the AICHR and keep developing this human rights body into a stronger body with its enforcement power. This responsibility is indeed mainly in the hand of ASEAN's leader, but in reality, this obligation seems only in the hand of the AICHR itself. Lack of discussion on this issue at the level of the ASEAN leader forum. Important to note that the existence of AICHR did not end the task or obligation of ASEAN both as an institution and member states on human rights protection work. There is also an explicit obligation that starting from the Charter, the ASEAN member states have to bring human rights in their cooperation.⁵²

The ASEAN Charter is a legal document that endows the organization with a legal capacity and a legal obligation. The concept

⁴⁶ Davies, Mathew, "The ASEAN Synthesis: Human Rights, Non-Intervention, and the ASEAN Human Rights Declaration". *Georgetown Journal of International Affairs*, 2013, pp. 57.

⁴⁷ Tae-Ung Baik, *Emerging regional human rights systems in Asia*, Cambridge University Press, 2012, 225.

⁴⁸ Avery Poole, "The World is Outraged": Legitimacy in the Making of the ASEAN Human Rights Body". *Contemporary Southeast Asia*, 2015, pp. 372.

⁴⁹ *Ibid.*, at.373.

⁵⁰ Wahyuningrum, Interview by Author, Through Zoom Meeting, 15 April 2020.

⁵¹ Kheng-Lian, Koh, and Nicholas A. Robinson, "Strengthening Sustainable Development in Regional Inter-Governmental Governance: Lessons from the ASEAN Way", *Sing. J. Int'l & Comp. L.* 6, 2002, pp. 642.

⁵² Phan, Hao Duy, *A Selective Approach to Establishing a Human Rights Mechanism in Southeast Asia: The case for a Southeast Asian Court of Human Rights*, Martinus Nijhoff Publishers, 2012, 101.

of the legal capacity of IGOs and how its application in ASEAN is essential to be discussed as a foundation for ASEAN to “bravely” work independently apart from member states. It is important to discuss since ASEAN tends to lose their direction on their integration through ASEAN, particularly on human rights cooperation. Of course, ASEAN has their own path on patterning its organization, not to copy-cat other regions, however, learning and experiencing other regions or other organizations are essential to build a stronger and impactful institution for the people in the Southeast Asian region. So, it likes a reminder for ASEAN and its member states on their aim when creating the IGOs called the ASEAN.

Chen, Lung-chu defines IGOs as created by states to promote their common purposes, which they are agreed. In the global constitutive process, the IGOs serve dual functions: first, they act as distinctive participants in decision making; second, they provide necessary authority structures for other participants (stakeholders).⁵³ There are also material aspects of the IGOs that must be fulfilled: functionality, centralization, and transparency.⁵⁴ These aspects are important to assess the IGOs’ credibility.

There is a classic international law doctrine called *finalité intégrée* of the state or *finalité fonctionelle* with respect to international organizations in the international plane. Simply to say, ‘functional limitation’ of an organization’s capacity and competence differs from the member states. A capacity usually relates to a general condition such as to conclude treaties; meanwhile, competence is more concrete and specific.⁵⁵ In her book, Brölmann, Catherine clearly explain the concept of competence in practice. For

example, in the case where Competence may account for a prohibition on parrot imports issued by the International Committee for Bird Preservation to a customs agreement concluded by the European Community in lieu of its member states. The “competence” should refer to all other aspects of the ‘powers’ of the organization (essentially this revolves around the relationship between the organization and its member states); and the degree to which the organization can take binding measures.⁵⁶

International law also recognizes attributed and implied power, which one to another are fighting. To overcome the conflicts of both the attribution doctrine (often thought to be too rigid) and the implied powers doctrine (sometimes thought to be not rigid enough), some writers have proposed a third source of powers, the Inherent Powers Doctrine. Finn Seyersted founded this doctrine in the 1960s as an addition to his ‘objective theory’ of the personality of international organizations.⁵⁷ Once the IGOs established, it possesses the inherent powers to perform all those acts which they need to achieve their goals. It is not because of any specific source of power (as other two doctrines), but due to the inhere in organization hood. The act must be deemed legally valid as long as the act are not in breach of their constituent instrument.

The IGO is also a subject of international law. However, this recognition remains a problem in practice. For a long time, it was widely held that states – only nation-states were the exclusive subjects of international law.⁵⁸ Only a degree of autonomy has been posed by the international organization, as stated in the organization’s definition.⁵⁹ Ideally, the IGO assist in the development of

⁵³ Lung-chu, 61.

⁵⁴ Brölmann, Catherine, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties*, Bloomsbury Publishing, 2007, 24.

⁵⁵ *Ibid.*, at.91.

⁵⁶ *Ibid.*, at. 92.

⁵⁷ Jan Klabbbers, *An Introduction to International Institutional Law*, Cambridge University Press, 2009, 73-75.

⁵⁸ Lung-chu, supra note at 65.

⁵⁹ Catherine, supra note 54 at 17; Two other core definition are: that 1) have been created by states; 2) possess a degree of permanency.

authoritative prescriptions in both the public and private sectors.⁶⁰ However, in practice, the international organization's proper scope of powers is very limited and merely a matter of interpretation.⁶¹ Usually, in the UN context, it is in the hand of the Court; how about ASEAN? is there any indication that ASEAN is moving towards to apply this concept of autonomy subject of international fully?

ASEAN as an international organization that is based on the principles of consent, cooperation, and the pursuit of common aims and objectives as stipulated in the ASEAN Charter, is also a subject of international law.⁶² It possesses an international legal personality that differs from member states' power as in their constituent instrument. This power is essential to fulfilling their primary powers and functions entrusted to them.⁶³

According to Diane A Desierto, ASEAN, based on its satisfaction on an organization's international legal requirements, with its new charter, ASEAN has an "objective" legal personality.⁶⁴ Meaning that the ASEAN currently views as a "distinct legal entity from its Member States." Unfortunately, nothing clarifies the Charter on the attribution of power between ASEAN and its member states. It creates a handicap. Diane A Desierto suggests ASEAN revise their international legal personality concept in the charter.⁶⁵ Ideally, under the ASEAN Charter, it generates corresponding international legal obligations and responsibilities of ASEAN and its Member States, especially in recognizing, enforcement, and protecting

core human rights norms.⁶⁶ Not only the AICHR, ASEAN as an institution, has the authority to work on human rights issues apart from member states, including in developing human rights mechanism. So, the future of AICHR will be set by the work of AICHR itself and the ASEAN main institution.

According to Yuyun, the AICHR complies with how ASEAN has been working. The AICHR does not bring foreign agenda into their work and policy. However, at the same time, the AICHR shows its loyalty to the international norms of human rights where member states see that as an "outsider" which consist of many foreign agenda.⁶⁷ In this case, ASEAN often has a different point of view from the AICHR. ASEAN's main organization remains far away from supporting international human rights norms fully.

Assessing ASEAN's seriousness in having the AICHR can also be seen in the relation between the ASEAN as the main institution and the AICHR. Flinterman compares this to the UN-Secretary General (UN-SG) that has played an important role in highlighting the relevance of human rights in all its policies. So, the ASEAN SG shall also act as an important leader, he or she should use any powers to help realize all the ASEAN organization's objectives, including human rights.⁶⁸ According to Rafendi Djamin and other former AICHR Representatives, the position thesis and action of the ASEAN SG is very weak and minimum.⁶⁹

Challenges remain with the Governments. In this case, Government leaders, ministers (of foreign affairs) have to be aware of the relevance of human rights and of the fact that human rights are not only relevant within your own state but also in other states and that each state has a

⁶⁰ Lung-chu, supra note at 68.

⁶¹ Jan, supra note 57 at 61.

⁶² Lung-chu, supra note at 65.

⁶³ Bantekas, Ilias, and Lutz Oette, *International Human Rights Law and Practice*, Cambridge University Press, 2nd edn., 2013, 785.

⁶⁴ Desierto, Diane A, "Universalizing Core Human Rights in the New ASEAN: A Reassessment of Culture and Development Justifications against the Global Rejection of Impunity", *Goettingen J. Int'l L.* 1, 2009, pp. 92.

⁶⁵ *Ibid.*, at.92.

⁶⁶ *Ibid.*, at.93.

⁶⁷ Wahyuningrum, Interview by Author, Through Zoom Meeting, 15 April 2020.

⁶⁸ Cees Flinterman, Interview by Author, Through Skype, 23 April 2020.

⁶⁹ Interviews with some AICHR Representatives.

role to play in protecting and promoting human rights in the region where that state is situated as well as in the rest of the world. By recognizing their roles, they open up any opportunity for the AICHR to develop stronger human rights mechanism.⁷⁰ Dinna acknowledges that very little action of ASEAN and other organs to human rights.⁷¹ However, currently, many regular interface meetings with certain ministers. Besides, the AICHR work plan 2021-2026 also put many agendas on these issues. It is good to create a positive environment for human rights both at the national or regional level.⁷² All interviewees strongly suggest that ASEAN and other organs should support the work of the AICHR, and, therefore, make the AICHR stronger.

Interviewees also highlight the ASEAN Summit's role. The ASEAN Summit output also reflects how serious ASEAN is to human rights and supports the AICHR. Rafendi thought that the ASEAN Summit and the AMM did not give support to make the AICHR stronger until now.⁷³ It can be shown in the case of Rohingya where they only see the Rohingya case as a humanitarian case, and therefore they do not involve the AICHR.⁷⁴ Human rights have been viewed as a political issue by States. The establishment of the AICHR since the beginning clearly shows that the AICHR is merely a political product. If there is a change of politics to human rights at the national level to a more positive movement, then the AICHR will also be improved at the regional level. Therefore, it needs to find a strategy to make member states respond and be responsible for human rights, first and foremost at their national level.

Another interesting finding in this study is institutional support from the ASEAN. As

has been said previously, the AICHR closely works with the Secretary-General and the ASEAN Secretariat. How it applies in reality? Rafendi Djamin said that the fact was not that ideal. ASEAN is a member state-driven institution, meaning that the Secretary-General's ASEAN Secretariat does not have such a power or adequate power as secretary-general of other international or regional institutions when member states give more authority to decide concerning the institutional environment, finance, and everything.

That is reflected in the fact that after the Charter, ASEAN issued the Committee of Permanent Representative (CPR) based on its TOR. So, instead of the AICHR, the CPR is also a new institution after the Charter.⁷⁵ The ASEAN Charter provides for the establishment of the Committee of Permanent Representatives to ASEAN (CPR), which shall be constituted by the Permanent Representatives of ASEAN Member States at Ambassadors' rank Jakarta. The Chairmanship of the Committee is in line with the annual rotation of ASEAN Chairmanship.⁷⁶

According to its Terms of Reference (TOR) and the ASEAN Charter, the CPR covers multiple ASEAN structure layers. While the TOR specifies the CPR's reporting line to the ASEAN Coordinating Council, its initiatives and recommendations also feed into policy discussions at the sectoral, ministerial, and summit levels, including ASEAN's external partners. The CPR's tasks may generally be categorized as follows:⁷⁷

- a) Monitoring and implementing Leaders' decisions;
- b) Coordinating cross-pillar issues;
- c) Strengthening relations with ASEAN's external partners; and

⁷⁰ Cees Flinterman, *supra* note 68.

⁷¹ Dinna Prapto Raharja, Interview by Author, Through Google Hangout, 22 April 2020.

⁷² Wahyuningrum, *supra* note 67.

⁷³ Rafendi Djamin, Interview by Author, Through Skype, 17 April 2020.

⁷⁴ *Ibid.*,

⁷⁵ *Ibid.*,

⁷⁶ ASEAN Secretariat, "Committee of Permanent Representatives", [asean.org, https://asean.org/asean-structure/committee-of-permanent-representatives/](https://asean.org/asean-structure/committee-of-permanent-representatives/) accessed 20 August, 2019.

⁷⁷ *Ibid.*,

- d) Providing substantive and administrative direction and support to the ASEAN Secretariat.

The CPR conducts its regular internal meetings at least once a month to discuss several administrative and substantive issues. The Committee is assisted by a Working Group that comprises the Deputy Permanent Representatives and other officials from the 10 Permanent Missions of Member States to ASEAN.⁷⁸ Accordingly, Rafendi views the CPR as the one who is driving the secretary chair on day to day basis.⁷⁹

Actually, with the CPR's existence, the Secretary-General is more scrutinized by member states through the Directorate-General of each ASEAN member state. They have meeting every week to give guidance, derive, and comment on the work of the SG. It means that every change in institutions has to have their support through the ASEAN member states' consensus. Without the consensus, nothing is Gonne's walls. The CPR shows that the ASEAN member states do not commit to unity and integration fully under the ASEAN organization.⁸⁰

Rafendi argues that the secretariat should ideally be an independent secretariat that will go across pillars and support all three pillars (socio-culture, political security, and economic). Furthermore, by a stronger institutional development of the ASEAN Secretariat, the AICHR will be fully supported. As has been stated above, Article 7 of the ASEAN Charter gave the Secretariat-General the authority to directly ask and request the AICHR in consultation with the ASEAN Foreign Minister Forum or Meeting to table human rights concerns that need to be addressed by the AICHR. This direct link between the SG and the AICHR can be used to see how

the Secretary-General compiles the ASEAN community pillars' work related to human rights issues. The compilation will be reported to the AICHR, and the Secretariat General can highlight and can request a particular issue that needs to be addressed by the AICHR. However, in practice, this authority is hard to use. Once Dr. Surin Pitsuwan successfully brought this idea to the table. However, After him, it seems did not run well; different SG has a different capacity or even interest or passion for doing or not to do with human rights.⁸¹

Despite the AICHR, there is human rights division under the political pillar of ASEAN. Other ASEAN Sectoral Bodies are more engaged with the AICHR. Furthermore, more sectorial bodies embrace the norm of human rights and integrate that into their work (norm change attitude). Unfortunately, ASEAN member states did not follow this positive norm change attitude from the ASEAN sectorial bodies.⁸²

The ASEAN's level of seriousness to support the AICHR can also be captured through the review of the TOR of AICHR. Many have questioned why the TOR of AICHR has not yet reviewed until now. According to the TOR itself, it must be reviewed every five years. So, supposedly two times review. The answer is appointing to the ASEAN member states who are unable or unwilling to bring the issue at the ASEAN Ministerial forum level.

The AICHR has requested reviewing the TOR for three times, but has not responded positively until 2019. At the retreat after the 52nd AMM in July 2019, the AMM tasked the SOM to establish a Panel of Expert (PoE) to prepare to review the TOR of AICHR, including possible modalities to be pursued. The current PoE consist expert from the Cambodia, Malaysia, Indonesia, and Thailand. It needs ten members to begin to work. There is hope for some changes and

⁷⁸ *Ibid.*,

⁷⁹ Rafendi Djamin, *supra* note 73.

⁸⁰ *Ibid.*,

⁸¹ *Ibid.*,

⁸² Wahyuningrum, *supra* note 67.

the possibility of changes in roles and function.⁸³ The AICHR highly appreciates that the 52nd ASEAN Foreign Ministers Meeting has tasked the SOM to establish a panel of experts to discuss the suggestion to review the TOR of the AICHR.⁸⁴ It needs to be monitored for further implementation.

In 2014, the AICHR conducted a self-assessment and submitted the result to AMM on how to improve its mandate to promote and protect human rights. There are lists of a point from the assessment: Mainstream human rights across three pillars of the ASEAN Community; Assist the provision on technical assistance and capacity building for the promotion and protection of human rights, upon request, including for the establishing or strengthening the national human rights institution or any other mechanisms that are suited for that ASEAN member states; Seek the establishment of a dedicated unit within the ASEAN Secretariat to support the work of the AICHR; Establish national secretariat/ unit/ office to assist AICHR rep for its national work; Hold annual consultation between the AICHR and civil society; Engaged in thematic visits to share best practices on the promotion and protection of human rights organized by inviting member states; Be invited by any ASEAN member states voluntarily, to engage in dialogue on national implementation of human rights commitment. Unfortunately, the AMM only took a note without follow up.

According to the fact above, Rafendi strongly argues that there is no interest and no appetite of ASEAN leaders, and they do not want the AICHR to “live” in ASEAN. The shortfall of their consensus on this matter just a waste of running a business. Until when ASEAN has to wait for member states who reluctant to human rights. It will only

delay the process.⁸⁵ Fortunately, the AICHR did not wait the process with nothing.

Responding to this issue, according to Amara, the role of the ASEAN always refers to the role of ASEAN Member states (AMS). Their roles in responding to human rights issues vary from case to case. The AMS tend to take cautious strategy on human rights issues related to civil and political rights (including cases of Rohingya, Khmer Rouge, Sombath Samphone, and Wanema riot), possibly because civil and political rights issues usually involved states actions. Furthermore, with the non-interference principle, ASEAN Member States do not want to go beyond the sovereignty of their own boundary. AMS responses to economic, social, and cultural rights tend to be more proactive, even though still very slow.⁸⁶ Unlike Yuyun, she argues that the movement of human rights activism, including in the AICHR’s body, influences the state’s behavior. She thought that non-interference and the state’s sovereignty principle have moved towards less influence.

There has been a remarkable growth of international action since 1945 when human rights were not even widely accepted as a legitimate issue-area. Jack Donnelly (1986) explained four typologies of international regimes of human rights after examining eight international and regional human rights regimes on (a) its utility in noneconomic issue-areas, and (a) the nature, extent, and evolution of international cooperation on human rights. He argues that the growth of attention to human rights can be explained largely by expanding perceptions of moral interdependence and community, increased national commitment, the growing ideological appeal of human rights, and

⁸³ Rafendi Djamin, *supra* note 73.

⁸⁴ Summary of the AICHR Report 2019-2020.

⁸⁵ Rafendi Djamin, *supra* note 73.

⁸⁶ Amara Pongsapich, Interview by Author, Through E-mail, 16 April 2020.

changes in international power distributions.⁸⁷

Using the regime analysis framework, Donnelly divided the evolution of international human rights into: (1) A declaratory regime which involves the creation of norms but no international decision making; (2) The promotional regime, which adopts international standards as guidelines, that can "range from strong, explicit, detailed rules toward vague statements of amorphous collective aspirations." It engages in activities such as information exchange, promotion, and technical assistance, and has attempted to develop certain monitoring principles; (3) Implementation regime which has "international standards with self-selected national exemptions: generally, binding rules that nonetheless permit individual states to 'opt-out'." Its activities include monitoring and policy coordination; and (4) Enforcement regime, which has "(a) authoritative international norms: binding international standards, generally accepted as such by states"

Applying Donnelly's typology on the human rights regime, ASEAN categorizes it as a promotional regime. It requires more national commitments to human rights and better understanding and capacity to address human rights issues to move towards implementation. Donnelly also pointed out that distribution of power at the international level on human rights discourses and arrangements will contribute tremendously to move the region from a Promotional regime to an Implementation regime.⁸⁸ Since ASEAN is not a supranational organization, the enforcement regime will not exist. It can only be existed if ASEAN and its member states have a strong will to have it.

E. CONCLUSION

On the one hand, ASEAN's human rights are very promising. ASEAN has recognized human rights as an important objective in multi-national cooperation. On the other hand, as long as the ASEAN structure remains intergovernmental, meaning that the consensus of all ASEAN states is needed for every measure, the structure will remain weak.⁸⁹ The only condition that could change is the political will of the ASEAN leader. If they serious about having an effective human rights mechanism, then it will be achieved.

The process of the AICHR's establishment shows how shaky the body is. Therefore, it gives some idea why the AICHR has not done anything significant in many human rights violations in the region as well as in the institution-building improvement. Non-intervention and sovereignty principles always mention as the main hindrance in the work of the AICHR and are claimed as a traditional commitment in South East Asian regions by many commentators. However, this kind of critique of ASEAN is no longer effective in enhancing human rights protection in the region. Both principles are the core principles in international relations and therefore, international law exists. It was not because of these principles' existence but the political will of ASEAN and its member states' leader which make human rights institution-building process in Asia including Southeast Asian region has been very slow. In sum, both the ASEAN and its member states do not want a powerful and supranational AICHR.

However, since it finds that there were the evolutionary approach that has conducted by the AICHR despite that situation to promote human rights in the region. The study suggests the AICHR to use strong words of the TOR and the ASEAN Charter to enhance their performance and reliability. A new approach for human rights

⁸⁷ Jack Donnelly, "International Human Rights: a Regime Analysis", *International Organization*, 1986, pp. 599-642.

⁸⁸ *Ibid.*, pp. 599-642.

⁸⁹ Cees Flinterman, *supra* note 68.

mechanisms that sets in a formal way; under a legal-binding instrument are more favorable. Therefore, if the AICHR show that characteristic, it will be supported by the ASEAN and its member states.

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