

ASEAN HUMAN RIGHTS MECHANISM: WEAKNESSES AND THE WAY TO MOVE FORWARD

EL MECANISMO DE PROTECCIÓN DE LA ASOCIACIÓN DE NACIONES DEL
SUDESTE ASIÁTICO (ASEAN): DEBILIDADES Y FORMAS DE AVANZAR

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Abstract

This article provides a general assessment of the Association of Southeast Asian Nations (ASEAN) human rights mechanism. First, this article will provide general information about the ASEAN and the human rights situation in this region. Then, it will dive deeper into the ASEAN human rights mechanism, particularly the two central bodies of this mechanism –the ASEAN Commission on Human Rights (AICHR) and the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC). Specifically, this article provides an analysis and assessment of the limitations of the ASEAN human rights mechanism and offers some suggestions on short and long-term solutions to improve this mechanism.

Keywords: ASEAN; ASEAN Human Rights Mechanism; Human Rights; Southeast Asia.

Resumen

Este artículo propone un análisis general sobre el mecanismo de protección de la Asociación de Naciones del Sudeste Asiático (ASEAN). Primero, proporciona información general sobre la ASEAN y sobre la situación de los derechos humanos en la región. Luego, profundiza en el mecanismo de protección de los derechos humanos, particularmente en sus dos cuerpos centrales: la Comisión de Derechos Humanos de la ASEAN (AICHR) y la ASEAN para la Promoción y Protección de los derechos de las mujeres y los niños (ACWC). Específicamente, el trabajo proporciona un análisis sobre las limitaciones del mecanismo de la ASEAN y ofrece algunas sugerencias de mejora a corto y largo plazo.

Palabras clave: ASEAN; Mecanismo de Derechos Humanos; Derechos Humanos; Sudeste de Asia.

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In 1967, five countries in Southeast Asia established the ASEAN. This intergovernmental organization later expanded and currently has ten Member States. Although the ASEAN's original goal was only to promote economic development, cooperation, and to maintain regional stability and peace, the purpose of protecting and promoting human rights is then later also agreed upon. The ASEAN has established a human rights mechanism –the only sub-regional human rights mechanism in the Asia Pacific region. Despite this, the ASEAN human rights mechanism is said to be “toothless” or “built with teeth but refuse to bite”².

2 The ASEAN Declaration Bangkok on 8th August 1967. Available at: <https://asean.org/the-asean-declaration-bangkok-declaration-bangkok-8-august-1967/> [last viewed August 10, 2019].

This article aims to analyze the weaknesses of the ASEAN human rights mechanism and suggest proposals for improvements to this mechanism. This article will be divided into the following main sections.

Part 1 of the article will provide comprehensive information about the ASEAN and the condition of the ASEAN's human rights based on various sources of information. Meanwhile, part 2 of the article will carefully analyze the ASEAN human rights mechanism through an assessment of the organizational structure and performance of the AICHR and the ACWC. The assessment will be based on the essential characteristics for a regional human rights mechanism and comparison with other human rights systems/mechanisms around the world.

Based on the information and assessments in part 2, part 3 of this article will focus on clarifying the substantive and procedural limitations of the ASEAN human rights mechanism. This section will also provide some suggestions that would effect both the short and long-term future to help the ASEAN human rights mechanism effectively promote and protect human rights in the future.

While analyzing and assessing the weaknesses of the ASEAN human rights mechanism, this article also acknowledges that the stronger commitments and political will of each ASEAN member state play an especially important role in the process to improve this mechanism.

1. Overview of the ASEAN and the condition of human rights in ASEAN Member States

1.1 Overview of the ASEAN

The ASEAN is a regional intergovernmental organization established on August 8, 1967 under Bangkok Declaration. The ASEAN was originally established with five founding Member States, including Thailand, Malaysia, Indonesia, Singapore, and the Philippines. Brunei, Vietnam, Lao, Myanmar, and Cambodia took turns in 1984, 1995, 1997 and 1999 respectively. As set out in its Bangkok Declaration, the ASEAN aims to:

- (i) accelerate economic growth, social progress, and cultural development in the region;
- (ii) promote regional peace and stability;

- (iii) foster active collaboration and mutual assistance on matters of common interest;
- (iv) provide assistance to each other in the form of training and research facilities in the educational, professional, technical, and administrative spheres;
- (v) collaborate more effectively for the higher utilization of their agriculture and industries, the expansion of their trade;
- (vi) promote Southeast Asian studies; and
- (vii) maintain close and beneficial cooperation with other international and regional organizations³.

Thus, initially the establishment of the ASEAN was primarily for economic cooperation and regional peace stabilization. Member States have not directly addressed the aspect of promoting and protecting human rights, but it is arguable that such an aspect is included in the aim of promoting justice and the rule of law. In 2007, the ASEAN Member States signed a binding instrument—the ASEAN Charter⁴—to recognize the ASEAN as a legal person. All the aims noted in the Bangkok Declaration are re–stated at the Charter. Additionally, the ASEAN Member States agreed on the aim specifically to promote and protect human rights and fundamental freedoms (article 1(7) of the ASEAN Charter).

Principles

The ASEAN Charter stipulates the fourteen principles of the ASEAN, including a number of principles that lay the foundation, and affect the promotion and protection of the following human rights in the ASEAN, namely:

- (1) respect for the independence, sovereignty, equality, territorial integrity, and national identity of all ASEAN Member States;
- (2) non–interference in the internal affairs of ASEAN Member States;
- (3) respect for the right of every Member States to lead its national existence free from external interference, subversion, and coercion;
- (4) respect for fundamental freedoms, promotion, and protection of human rights and promotion of social justice.

³ The Charter of the Association of Southeast Asian Nations. Available at: <https://asean.org/storage/2012/05/The-ASEAN-Charter-26th-Reprint.pdf> [last viewed August 10, 2019].

⁴ *Ibidem*, Preamble, p. 2.

Although article 2 of the ASEAN Charter does not directly acknowledge the principle of consensus, it is a core principle of the ASEAN. The principle is addressed at the beginning of the Charter as follows: “We are, peoples of Member States of ASEAN... respect the fundamental importance of... the principle of [...] consensus...”⁵. Through practice, this principle is interpreted as all the ASEAN decisions are made only when all ASEAN Member States agree upon. Article 21(2) of the ASEAN Charter provides an exception to the principle of consensus, under which the formula of flexible participation, including the formula of the ASEAN minus X, can be applied to the implementation of economic commitments. However, this provision is only applicable for economic commitments and the formula of flexible participation is only applied when the consensus of the Member States is obtained. Consequently, the consensus principle is criticized as a constraint to the decision making of the ASEAN, especially on sensitive issues that are likely to have a substantial effect on economic, social, and political interests of one or more Member States⁶.

Organizational structure

The apparatus of the ASEAN is defined from Chapter IV to Chapter X of the ASEAN Charter, and includes the following agencies:

- (1) The ASEAN Summit consists of heads of state or heads of government of Member States. The ASEAN Summit is a biannual meeting in which the supreme policy-making body of ASEAN consider, giving directions to, and decide critical issues related to the realization of ASEAN goals and the benefits of ASEAN Member States. The ASEAN Summit regularly convenes

5 Further reading: VILLANUEVA, Kevin H.R., et al., *ASEAN Consensus: The Intangible Heritage of Southeast Asian Diplomacy*, ASEAN@50, 2017, Vol. 4 Building ASEAN Community: Political – Security and Socio – cultural Reflections (20), pp. 88–122; NGUYEN, Hong Hai, *Time to reinterpret ASEAN’s consensus principle*, East Asian Forum (e-journal), 2012, Available at: <https://www.eastasiaforum.org/2012/07/27/time-to-reinterpret-asean-s-consensus-principle/> [last viewed March 7, 2019]; and LUQMAN, Nik, *Is ASEAN Consensus A Blessing or Curse – or Both?*, in Reporting Asian (e-journal), 2015. Available at: <http://www.aseannews.net/asean-consensus-blessing-curse/> [last viewed March 7, 2019].

6 ASEAN Charter, art. 7.

twice a year or for extraordinary meetings according to the agreements of member countries⁷.

- (2) The ASEAN Coordinating Council composed of ASEAN Foreign Ministers, which is in charge of preparing for ASEAN Senior Meetings, and coordinating the implementation of the Summit's agreements and decisions. The Coordinating Council also monitors all of ASEAN activities with the assistance of the Secretary-General of ASEAN. The ASEAN Coordinating Council meets at least twice a year⁸.
- (3) The ASEAN Community Councils include ASEAN Political-Security Community Council and ASEAN Socio-Cultural Community Council. Each Council has its own purview and be responsible for ensuring the implementation of relevant decisions of the ASEAN Summit as well as coordinating the work of different sectors under its purview⁹.
- (4) The ASEAN Sectoral Ministerial Bodies are ASEAN Ministerial Conferences in all areas of cooperation, which are responsible for implementing agreements and decisions of the ASEAN Summit, and petition Community Councils concerned with solutions to implement and actual implementation of the decisions of the ASEAN Summit¹⁰.
- (5) The Secretary-General of ASEAN and ASEAN Secretariat are the most permanent bodies of ASEAN, tasked with implementing ASEAN decisions and agreements, support and monitor the progress of ASEAN agreements and decisions, and submit annual reports on ASEAN activities to the ASEAN Summit¹¹.
- (6) The Committee of Permanent Representatives to the ASEAN consists of a Permanent Representative with the Ambassador's mandate in the ASEAN, located in Jakarta, and is tasked with representing the countries' executives of the ASEAN's daily affairs. The function of the ASEAN Standing Committee is to support Coordinating Councils and Sectoral Ministerial

7 *Ibidem*, art. 8.

8 *Ibidem*, art. 9.

9 *Ibidem*, art. 10.

10 *Ibidem*, art. 11.

11 *Ibidem*, art. 12.

Conferences, coordinate activities with the national ASEAN Secretariat and Sectoral Ministerial Conference, coordinate with the ASEAN Secretary–General and the ASEAN Secretariat on all relevant issues, support ASEAN foreign affairs, and receive other duties entrusted by the Coordinating Council¹².

- (7) The ASEAN National Secretariats are the Member States' focal points for coordination, in general, and specifically coordination of ASEAN cooperation within each country¹³.
- (8) In 2009, based on article 14 of the ASEAN Charter, the AICHR was appointed the task of promoting human rights awareness in the ASEAN strata and increasing cooperation between the governments of ASEAN Member States to protect human rights¹⁴. The functions, tasks, and activities of this agency will be clarified later in this article.
- (9) The ASEAN Foundation supports the ASEAN Secretary–General and cooperates with relevant ASEAN agencies to assist the construction of the ASEAN Community via raising awareness of ASEAN identity, the interactions between people, and close cooperation in business, civil society, researchers, and other groups in the ASEAN¹⁵.

1.2 The condition of human rights in ASEAN

An assessment of the status of human rights in the ASEAN is never an easy task due to the recognition, assurance, and protection of human rights, as well as how differently each country and region respond to violations of rights affected by various factors, including, but not limited to, the economic, social,

12 Ibidem, art. 13.

13 Art. 14 of the ASEAN Charter is the legal basis for the establishment of the ASEAN Human Rights Body which will promote the protection of human rights and fundamental freedoms. According to art. 14(2), the status, working methods, etc., of such a body will be determined by the ASEAN Foreign Minister Meeting.

14 ASEAN Charter, art. 15.

15 BEYER, Wictor, *Assessing an ASEAN Human Rights Regime: A New Dawn for Human Rights in Southeast Asia?*, Lund University, Faculty of Law, Master thesis, 2011, p.15. Available at:

<https://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1979974&fileId=1981167> [last viewed August 10, 2019].

and political situation. Also, the ASEAN is a region with a large population and is one of the most diverse areas in the world. Therefore, an assessment of the status of human rights in this region will only be relative. However, within the scope of this article, the condition of human rights in the ASEAN region will be assessed based on the level of participation of ASEAN Member States in basic international human rights conventions and reports, and evaluations from non-governmental organizations to ensure certain human rights in the ASEAN Member States.

In general, in the international context, the condition of human rights in the ASEAN Member States has always attracted much attention. In the recent cycles of Universal Periodic Review, ASEAN Member States have still received a relatively large number of recommendations, of which they usually choose to accept a portion of (Table 1).

TABLE 1

ASEAN Member State	Date of latest UPR appearance	Number of Recommendations	
		Accepted	Noted
Brunei	May 2014	97	78
Cambodia	January 2019	Data not yet available**	
Indonesia	May 2017	167	58
Lao PDR	January 2015	18	80
Malaysia	November 2018	Data not yet available**	
Myanmar	November 2015	135	146
Philippines	May 2017	103	154
Singapore	January 2016	118	120
Thailand	November 2016	187	62
Viet Nam	January 2019	Data not yet available**	

* Updated 28 February 2019

** Countries were reviewed very recently, but their summaries on recommendations were not available yet

Furthermore, none of the ASEAN Member States have ratified/acceded to all nine core international instruments on human rights. Most ASEAN Member States have ratified/acceded between seven and nine of the treaties while two out of ten Member States have only ratified/acceded two treaties. Three

ASEAN Member States have not ratified the International Covenant on Civil and Political Rights (ICCPR), and two of them also have yet to ratify the International Covenant on Economic, Social and Cultural Rights (ICESCR). However, all ASEAN Member States have ratified the Convention on the Rights of the Child (CRC), the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), and the Convention on the Rights of Persons with Disabilities (CRPD). This fact reflects the ASEAN's selective approach to human rights that will be further explained later in this article (Table 2).

TABLE 2

ASEAN Member State	CERD	ICCPR	ICESCR	CEDAW	CAT	CRC	ICMW	CPED	CRPD	Total ratification
Brunei				X	O	X			X	3/9
Cambodia	X	X	X	X	X	X	O	X	X	8/9
Indonesia	X	X	X	X	X	X	X	O	X	8/9
Lao PDR	X	X	X	X	X	X		O	X	7/9
Malaysia				X		X			X	3/9
Myanmar			X	X		X			X	4/9
Philippines	X	X	X	X	X	X	X		X	8/9
Singapore	X			X		X			X	4/9
Thailand	X	X	X	X	X	X		O	X	7/9
Viet Nam	X	X	X	X	X	X			X	7/9
Percentage of ratification	70	60	70	100	60	100	20	10	100	

X signifies signed and ratified

O signifies signed only

CERD – Convention on the Elimination of All Forms of Racial Discrimination

ICCPR – International Covenant on Civil and Political Rights

ICESCR – International Covenant on Economic, Social and Cultural Rights

CEDAW – Convention on the Elimination of All Forms of Discrimination Against Women

CAT – Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

CRC – Convention on the Rights of the Child

ICMW – International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

CPED – International Convention for the Protection of All Persons from Enforced
Disappearance

CRPD – Convention on the Rights of Persons with Disabilities

According to the Fund for Peace (Fragile States Index), from 2006 to 2014, the human rights situation in ASEAN Member States is not getting better when the proportion of human rights violations of most ASEAN Member States is quite high despite a downward trend in recent years¹⁶. Notably, in a few ASEAN Member States, human rights violations tend to increase, such as Brunei, Thailand, Vietnam, etc. (Picture 1, on page 12).

Meanwhile, the protection of necessary moral rights from violations in ASEAN States is also not getting better (Picture 2, on page 13). The protection of human rights in a few States has experienced positive changes but nothing significant. Based on the analysis of Our World in Data, the overall human rights scores of ASEAN States are not impressive. There are eight countries that have scores under 0 and two others have scores 1.98 and 1.70 (the values range from around -3.8 to around 5.4, and the higher is better)¹⁷.

PICTURE 1¹⁸

In 2018, Freedom House published a report on political rights and civil liberties which concluded that half of all ASEAN States are ranked as not free,

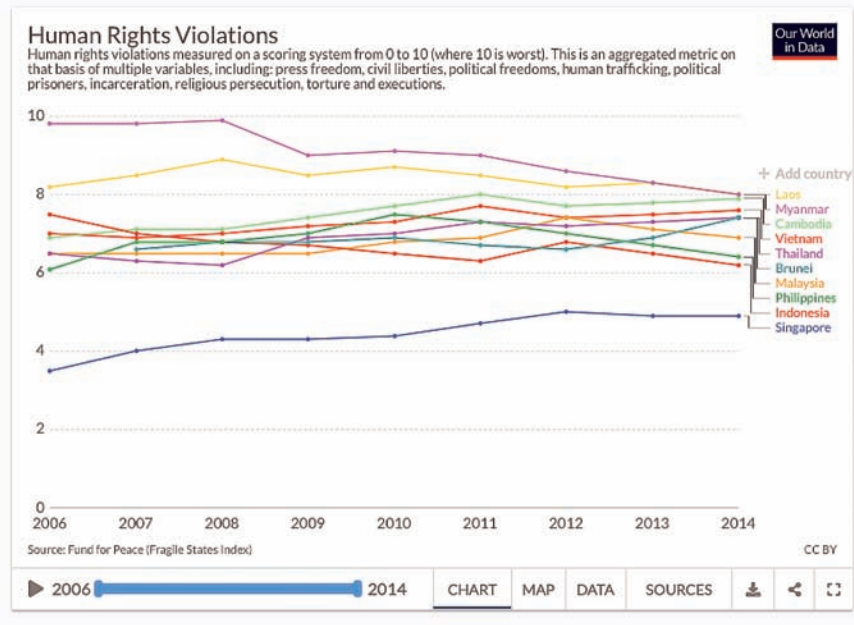
16 The Fragile States Index provides analysis relating to economic, political, and social issues in countries all over the world. In the political sphere, the Fragile States Index contains human rights and rule of law indicators, which reflect the relationship between the state and its population, insofar as fundamental human rights are protected and freedoms are observed and respected. Similarly, the Our World in Data provides comparative data and analysis in several fields, including violence and rights. See: Fragile States Index (2019), Comparative Analysis of ASEAN Member State. Available at: <https://fragilestatesindex.org/comparative-analysis/> [last viewed August 10, 2019]; and Our World in Data, Human Right Violations. Available at: <https://ourworldindata.org/grapher/human-rights-violations?tab=chart&time=2006..2014&country=BRN+KHM+IDN+LAO+MYS+MMR+PHL+SGP+THA+VNM> [last viewed August 10, 2019].

17 Our World in Data, Human Rights Scores. Available at: <https://ourworldindata.org/grapher/human-rights-score?tab=chart&country=VNM+LAO+KHM+IDN+MMR+MYS+PHL+BRN+SGP+THA> [last viewed 10th August 2019].

18 Fragile States Index (2019), Comparative Analysis of ASEAN Member State. Available at: <https://fragilestatesindex.org/comparative-analysis/>.

while the rest are classified as only partly free. Thus, the proportion of ASEAN

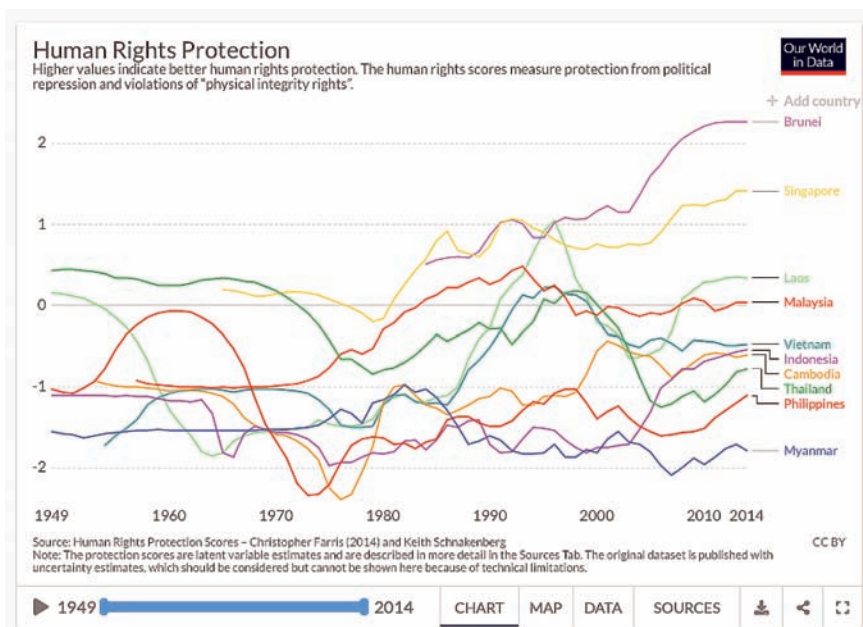
Fragile States Index – Human Rights Dimension



States ranked as “not free” account for 50%, which is higher than the overall 21% rate of the entire Asia Pacific region¹⁹.

¹⁹ Freedom House, *Freedom in the World 2018, Democracy in Crisis (Asia–Pacific)*. Available at; <https://freedomhouse.org/report/freedom-world/freedom-world-2018> [last viewed March 3, 2019]; and Freedom House (2018), *Freedom in the World 2018 – Table of Country Scores*. Available at: <https://freedomhouse.org/report/freedom-world-2018-table-country-scores> [last viewed March 3, 2019].

PICTURE 2²⁰



2. The ASEAN human rights mechanism

2.1 Regional human rights systems

Regional human rights systems consist of regional instruments which localize international norms and standards, and regional human rights mechanisms that enforce those norms and standards²¹. Therefore, regional human rights systems can respond quickly to the condition of human rights in the region and play an important role in the promotion and protection of human rights. It is clear that there is no "universal" form of a regional human rights mechanism; and in fact, there should not be just one form since each region has its own

20 Idem.

21 Office of the United Nations High Commissioners for Human Rights, *An Overview of Regional Human Rights Systems*. Available at: <https://bangkok.ohchr.org/programme/regional-systems.aspx> [last viewed March 3, 2019].

characteristics with varying degrees of human rights conditions. However, the United Nations' Office of High Commissioner on Human Rights introduced the "ideal" regional human rights mechanism with the following minimum responsibilities, power, and structure²²:

- (1) monitoring: to observe the overall condition of human rights in the region through the Member States submitted reports and on-site visits; to issue and publish the periodic reports; and to develop the early warning system for the prevention of gross violations of human rights and other international crimes, such as genocide, crimes against humanity, etc.;
- (2) Communications: to receive, investigate, and decide on communications from individuals and non-governmental organization; if necessary, to adopt precautionary measures to prevent irreparable harms to persons; to give recommendations, including appropriate remedies, to the Member States in cases where human rights violations are found; and to help ensure their compliance via reporting mechanisms;
- (3) Capacity building and education: to provide and contribute to human rights training programs; to raise public awareness on human rights; to respond to requests for advice from Member States and advise them; to conduct promotional country visits; to encourage ratification or accession of international human rights treaties; to cooperate and consult with international, regional, national and local institutions; non-governmental organizations that are competent in the field of promotion and protection of human rights; and publicize the reports on human rights; and
- (4) Composition and support: the regional human rights mechanism shall be independent of the ASEAN governments and provided adequate resources and a certain level of privileges and immunities in order to conduct its activities effectively.

The above characteristics can be found in most regional human rights systems, including those in Europe, America, and Africa.

22 Office of the United Nations High Commissioners for Human Rights, *Principles for Regional Human Rights Mechanism* (non-paper). Available at: <https://bangkok.ohchr.org/programme/asean/principles-regional-human-rights-mechanisms.aspx> [last viewed March 28, 2019].

European system

The oldest regional human rights system was established in Europe under the European Convention on Human Rights and Fundamental Freedoms in 1951 (ECHR). The system originally consisted of the part-time European Court of Human Rights (ECtHR); the European Commission of Human Rights, which later reformed to become the full-time ECtHR;²³ and the Committee of Ministers of the Council of Europe. The ECtHR has jurisdiction to: (1) decide on individual complaints related to violations of the protected rights under the ECHR allegedly committed by the Member States; (2) consider inter-state complaints; and (3) give advisory opinions on the interpretation of the ECHR and its protocol²⁴. The Committee of Ministers of the Council of Europe monitors the execution of the ECtHR's judgments²⁵. However, the jurisdiction of the ECtHR on the economic, social, and cultural rights is limited²⁶ since the ECHR does not contain those rights.

However, under the Council of Europe, there are also the Committee of Social Rights (CSR) and the European Committee for the Prevention of Torture (ECPT). The CSR examines the State Members' annual reports on

23 Under the ECHR, the ECtHR does not have power to receive individual complaints directly. These complaints shall be submitted to the European Commission of Human Rights to decide whether it is well-founded before transferred to the ECtHR. However, under Protocol 11 of the ECHR, which came into force in 1998, the European Commission of Human Rights no longer exists, and the ECtHR has the full power to directly receive and consider all individual complaints related to violations of civil and political rights. Further information at: Council of Europe, Historical background: The European Convention on Human Rights of 1950. Available at: <https://www.coe.int/en/web/tirana/european-court-of-human-rights> [last viewed April 10, 2019].

24 The ECtHR only has advisory jurisdiction from August 2018 under Protocol 16 of the ECHR. See: DZEHTSIAROU, K., & O'MEARA, N., *Advisory jurisdiction and the European Court of Human Rights: A magic bullet for dialogue and docket-control?*, Legal Studies, Volume 34, Issue 3 September 2014, 444-468.

25 See: Council of Europe, About the Committee of Ministers. Available at: <https://www.coe.int/en/web/cm/about-cm> [last viewed August 10, 2019].

26 EUROPEAN PARLIAMENT, *The role of regional human rights mechanisms*, 2010, p. 15. Available at: [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/410206/EXPO-DROI_ET\(2010\)410206_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/410206/EXPO-DROI_ET(2010)410206_EN.pdf) [last viewed August 10, 2019].

the implementation of the Charter and considers the individual complaints concerning the violations of social rights recognized under the Charter. Meanwhile, the ECPT only focuses on setting up regular visits to detention facilities within the Member States that ratified the European Convention for the Prevention of Torture²⁷.

Related to composition, the ECtHR includes judges nominated by the Member States and selected by the Parliamentary Assembly of the European Council.

The Inter-American system

In the Americas, the Organization of American States was founded in 1948 and led to the establishment of the Inter-American Commission on Human Rights in 1959. Since 1961, the Commission has the authority to review complaints of individuals and conduct country visits to the Member States. In 1969, under the American Convention on Human Rights, the Inter-American Court of Human Rights (IACtHR) was established to carry out adjudicatory and advisory functions. Relating to adjudicatory functions, the IACtHR examines cases referred to it by either the Commission or a State party of the Convention. The IACtHR also has advisory jurisdiction over the interpretation of the Convention, its protocols, and other treaties regarding human rights in the American States. The advisory opinions of the IACtHR may be requested by all Member States of the Organization of America States²⁸.

The African system

In 1987, African countries established the African Commission on Human Rights (ACHR), based on Africa's Charter of Human and Peoples' Rights (Banjun Charter). The ACHR is a semi-judicial body with the capacity to review periodic reports of Member States' individual and inter-state complaints. Additionally, in 2004, the African Court on Human and Peoples' Rights (ACtHPR) established under the Protocol of the Banjun Charter. The ACtHPR complements

27 RAMCHARAN, Robin, *ASEAN's Human Rights Commission: Policy Considerations for Enhancing its Capacity to Protect Human Rights*, UCL Human Rights Review, Volume 3, 2010, pp. 211–212.

28 CIUCA, Aurora, *Comparative View on Regional Human Rights Protection Mechanisms*, 2012, p.3. Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2089486 [last viewed August 10, 2019].

and supports the ACHR in promoting and protecting human rights throughout the complaint and advisory procedure²⁹.

Different from the ACHR, the ACtHPR only considers complaints against the Member States of the Protocol referred by the ACHR, the African Union, individuals, or non-governmental organizations. However, since the Banjun Charter contains not only civil political rights, but also economic, social, and cultural rights; rights to solidarity; rights of refugees; and rights of peoples, as well as obligations of individuals (to family, society, state, community), the jurisdiction over individual complaints of the ACHR and the ACtHPR are actually broader compared to the ECtHR and the IACtHR³⁰. Related to the composition, eleven members of the ACHR are also the judges in the ACtHPR³¹.

2.2 The ASEAN human rights mechanism

Unlike other regions, although the idea to establish an independent regional human rights system came early³², to date, there is no such system in Asia. Since 1982, the United Nations has organized a seminar, "National, Local and Regional Arrangements for the Promotion and Protection of Human Rights in the Asian Region", to discuss the establishment of a human rights system in Asia³³. However, this idea was too ambitious and unfeasible for Asian Pacific countries. Therefore, in subsequent discussions, the idea of building a regional human rights mechanism

29 RAMCHARAN, Robin, *ASEAN's Human Rights...*, Op. Cit., pp. 218-219.

30 CIUCA, Aurora, *Comparative View on...*, Op. Cirt., p. 2.

31 Idem.

32 In the 1960s and 1970s, the United Nations Commission on Human Rights set up a study group to research the establishment of a regional human rights commission in all parts of the world, including Asia. The United Nations General Assembly also passed resolutions on the regional arrangement for the promotion and protection of human rights, for example the United Nations General Assembly, Resolution A/RES/32/127 (1977).

33 The seminar was organized by the United Nations in Colombo, Sri Lanka, in 1982. The representatives of nineteen countries, organizations, and United Nations agencies attended the seminar.

More information in: KO SWAN SIK, et al (1993), *Asian Yearbook of International Law*, Volume 3, s.l.: Martinus Nijhoff Publishers, 1994, p.389; and DHALIWAL, Shveta, *Human Rights Mechanism in South Asia*, s.l.: Routledge, 2016, Chapter 4.

turned into a regional human rights cooperation, and finally narrowed as the sub–regional human rights mechanisms developed³⁴. This solution is considered reasonable to gradually build the regions’ human rights system in the future³⁵. The ASEAN’s human rights mechanism is set up based on such a suggestion.

2.2.1 The ASEAN Intergovernmental Commission on Human Rights (AICHR) Objectives and principles

As mentioned in 1.1, the AICHR was established based on article 14 of the ASEAN Charter to promote and protect human rights. However, the ASEAN Charter does not have specific regulations on the organizational structure or specific working methods of the AICHR to “promote and protect human rights”. These

34 During the period of 1982 to 2007, various seminars and workshops were organized to discuss the arrangement of a regional human rights system in Asia, including the Manila Workshop (1990), the Seoul Workshop (1994), the Kathmandu Workshop (1996), the Amman Workshop (1997), the Tehran workshop (1998), the Beijing Workshop (2000), the Bangkok workshop (2001), etc.

In workshops before 1994, the main objective of the discussion was regional arrangements. However, in the Seoul Workshop in 1994, the Chairman concluded that regional cooperation should begin at sub–regional initiatives and development of a regional arrangement should be through a “building blocks” approach. In 1996, the conclusion of the workshop in Kathmandu included that “*any regional arrangement would need to be based on the needs, priorities, and conditions prevailing in the region*” and “*the diversities and complexities of the region would require extensive consultations among states in the regions*”. In the Tehran Workshop in 1998, some participants expressed concerns that no currently existing regional arrangement (as in Europe and the Americas) could serve as an appropriate model for Asia Pacific due to the diversity of the region. Therefore, participants agreed that technical cooperation aimed at national capacity building should be the foundation toward the establishment of a regional mechanism. The turning point was taken place in the New Delhi Workshop in 1999, when the United Nations expressed the new aim as setting up a “*regional Cooperation*” instead of “*regional arrangements*.” In 2002, Asian States reviewed the initiatives for the development of regional or sub–regional arrangement for the promotion and protection of human rights. Later, the initiatives taken by the ASEAN and the South Asian Association for Regional Cooperation endeavored for the protection and promotion of human rights.

Further reading at: CHIAM, Sou, *Asia’s experience in the quest for a regional human rights mechanism*, Victoria University of Wellington Law Review, Volume 40, Issue 1 (2009): pp. 127–148, pp. 133–137.

35 EUROPEAN PARLIAMENT, *The role of regional human rights mechanisms*, 2010, Op. Cit. p. 82.

contents are indeed defined at the Term of Reference of the AICHR (TOR)³⁶. Since the AICHR is an agency that was established based on article 14 of the ASEAN Charter, the primary purpose of this agency is to "propagate and protect human rights". This purpose is specified in article 1 of the TOR, including:

“1.1 To promote and protect human rights and fundamental freedoms of the peoples of ASEAN;

1.2 To uphold the right of the peoples of ASEAN to live in peace, dignity, and prosperity;

1.3 To contribute to the realization of the purposes of ASEAN as set out in the ASEAN Charter to promote stability and harmony in the region, friendship, and cooperation among the ASEAN Member States, as well as the well-being, livelihood, welfare, and participation of ASEAN peoples in the ASEAN Community building process;

1.4 To promote human rights within the regional context, bearing in mind national and regional particularities and mutual respect for different historical, cultural, and religious backgrounds, and taking into account the balance between rights and responsibilities;

1.5 To enhance regional cooperation to complement national and international efforts on the promotion and protection of human rights; and

1.6 To uphold international human rights standards as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and international human rights instruments to which the ASEAN Member States are parties”.

In general, the purposes mentioned above are detailed and consistent with the primary purpose of the Charter. However, it is worth noting that article 1.6 of the TOR stipulates that one purpose of the AICHR is

“... [t]o uphold international human rights standards”, while article 1.4 recognizes another purpose is “[t]o promote human rights within the

36 Term of Reference of ASEAN Intergovernmental Commission on Human Rights. Available at: <https://www.asean.org/storage/images/archive/publications/TOR-of-AICHR.pdf> [last viewed August 10, 2019].

regional context, bearing in mind national and regional particularities and mutual respect for different historical, cultural and religious backgrounds...”.

The TOR has no other provisions that address the priority of the above purposes. Therefore, there is arguable possibility that the AICHR and its Member States may use “regional particularities” or “Asian values” to justify human rights violations committed in the region. This concern has been addressed by many scholars and civil societies³⁷, including the Solidarity for ASEAN Peoples’ Advocacies (SAPA) –a joint platform for advocacy of regional and national civil society organizations. Further, in their 2008 report named *A Performance Report on the first year of the ASEAN Intergovernmental Commission on Human Rights*, the SAPA recommended that the AICHR should “adhere to international human rights law and standards”; and article 1.4 should give way in the event that there is a clash between national and regional particularities, binding international human rights law, or universally recognized standards.

Related to principles, article 2 of the TOR reiterates most of the ASEAN’s principles as stated in the ASEAN Charter, in particular:

- (1) respect for the independence, sovereignty, equality, territorial integrity, and national identity of all the ASEAN Member States;
- (2) non–interference in the internal affairs of the ASEAN Member States;
- (3) respect for the right of every Member State to lead its national existence free from external interference, subversion, and coercion;
- (4) adherence to the rule of law, good governance, the principles of democracy, and constitutional government;
- (5) respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice;
- (6) upholding the Charter of the United Nations and international law, including international humanitarian law, subscribed to by the ASEAN Member States; and

37 Solidarity to Asian Peoples’ Advocacy/Task Force on ASEAN and Human Rights (2010), *Hiding Behind Its Limits – A Performance Report on the first year of the ASEAN Intergovernmental Commission on Human Rights* (AICHR), p. 3. Available at: https://www.forum-asia.org/uploads/books/AICHR@1_web.pdf [last viewed August 10, 2019].

(7) respect for different cultures, languages, and religions of the people of the ASEAN, while emphasizing their shared values in the spirit of unity in diversity.

Additionally, article 2(3) of the TOR provides that the ASEAN Member States have a primary responsibility to promote and protect human rights and fundamental freedoms.

Based on these above mentioned principles and the status of the AICHR, it can be understood that the AICHR will not be able to carry interventional activities to ensure the fulfillment of the obligation to promote and protect human rights within the Member States.

Status

Article 3 of the TOR states that the AICHR is an integral part and consultative body of the ASEAN organizational structure. Further, article 4 of the TOR stipulates fourteen mandates and functions of the AICHR. These mandates and functions can be divided into the following groups:

- (1) To develop strategies, action programs, and cooperation framework for human rights in the region;
 - (2) To enhance awareness of human rights in the ASEAN region and improve the capacity to fulfill obligations under international human rights conventions that the ASEAN States are members of;
 - (3) To promote accession and fulfill all members’ obligations of international and ASEAN regional treaties on human rights;
 - (4) To consult or engage in dialogues with international and regional organizations, non–Member States, other ASEAN bodies, civil society, etc., on issues related to the promotion and protection of human rights; to collect information from the Member States to develop research reports and conventional approaches and positions on human rights in the ASEAN; and
 - (5) To give advisory opinions or technical assistance on human rights matters requested by other ASEAN bodies; to issue annual reports on AICHR activities; to perform other tasks assigned by the Ministerial Conference.
- Although there is no definition of the “consultative body” and what mandates such body should have, in his research, Gorawut Numnak suggested that a consultative body shall have three characteristics: (i) need to be able to issue

reports and make complaints; (ii) can be consulted and make recommendations; and (iii) need to consult and reach consensus among its members before making decisions³⁸. Since the AICHR has no mandate or ability to make complaints relating to human rights violations to the ASEAN Summit or other international human rights protection mechanisms, it is not actually qualified as a competent “consultative body” in human rights field.

Composition

Under article 5 of the TOR, the AICHR includes one representative from each Member State; and these representatives must be selected on the basis of their qualifications and prestige in the field of human rights, including gender equality. These members will work for a term of three years and may be appointed one more consecutive term. Moreover, according to article 5.9 of the TOR, the AICHR Chairperson is a representative appointed by the country holding the ASEAN chairmanship (alternating between the ASEAN States). Additionally, article 5.4 of the TOR stipulates that “Member States should consult, if required by their respective internal processes, with appropriate stakeholders in the appointment of their Representatives to the AICHR”.

However, to date, only a few States have appointed AICHR representatives through “open process” while most other countries have appointed government officials who may not have resigned from their current position after the appointment³⁹. In the first term of the AICHR, only Indonesia and Thailand publicly recruited and appointed two independent human rights experts as representatives of the AICHR. The other representatives in the same term were appointed through the unpublic process, and some of them did not have

38 NUMNAK, Gorawut, et al, *The Unfinished Business: The ASEAN Intergovernmental Commission on Human Rights*, Freidrich Naumann Stiftung Für die Freiheit, 2009, Hintergrundpapier, Nr. 14/ December 2009, p. 6.

39 There is no published information on the appointment procedure for AICHR representatives in the ASEAN Member States, except for Indonesia and Thailand.

Further information: Solidarity for Asian Peoples’ Advocacy/ Task Force on ASEAN and Human Rights (2016), A report on the performance of the ASEAN Human Rights Mechanism in 2016: Have they passed the litmus test?, p.6. Available at: <https://www.forum-asia.org/uploads/wp/2017/12/Performance-Report-AICHR-2016-FORUM-ASIA-2.pdf> [last viewed August 10, 2019].

enough experience in the human rights field⁴⁰. In the 2016–2018 term, among ten AICHR representatives, there were four members who were government officials, two former ambassadors, two independent experts, one lawyer, and one national human rights commissioner⁴¹. Gender equality is also not seriously considered or guaranteed during the appointment process. Since the AICHR's establishment in 2007, only about thirty percent of the total representatives have been women.

Thus, unlike other human rights systems in other regions, members of the AICHR may still be tied to the country that nominated them. Consequently, the AICHR is not entirely independent and effective.

Financial guarantee and other support

According to articles 8.3–8.6 of the TOR, the budget of the AICHR is funded by the States (both in the form of voluntary contribution and in the form of obligation) and other sources from non-ASEAN States. The AICHR must prepare and submit a yearly budget plan which must be approved by the ASEAN Foreign Minister Meeting based on the recommendation of the ASEAN Committee of Permanent Representatives.

There is no official information on the funds that are contributed by ASEAN States or the support of non-ASEAN States. According to the AICHR's 2017 annual report, from 2011 to 2016, the AICHR only uses 71.68% of its annual budget⁴² and in its annual report in 2018, the AICHR shortly stated that the

“AICHR has improved on the utilisation of its budget, by strengthening accountability and good governance, improving budget management processes, and enhancing its external relations”⁴³.

40 *Ibidem*, p. 5.

41 *Ibidem*, p. 15; and AICHR, *AICHR Representatives 2016–2018*. Available at: <https://aichr.org/aichr-representatives-1/> [last viewed March 3, 2019].

42 ASEAN, *The ASEAN Intergovernmental Commission on Human Rights (AICHR) Annual Report 2017*, July 2017–June 2018, p.5.

43 ASEAN, *The ASEAN Intergovernmental Commission on Human Rights (AICHR) Annual Report 2018*, July 2017–June 2018, p. 13.

However, according to some sources, at the time of the establishment of the AICHR, each member state contributed \$20,000 as the seed funding of the AICHR. This amount is negligible compared to the operating budget of the Council of Europe (437 million EUR in 2019)⁴⁴; the Organization of American States (85 million USD in 2018)⁴⁵; and the African Union (515 million USD in 2018)⁴⁶.

Additionally, under articles 8.1–8.2, the AICHR is not entitled to access or use this fund. The five year cycle and the annual budget plans of the AICHR must be vetted by the Committee of Permanent Representatives before being submitted to the ASEAN Ministers Meeting for final approval.

Under article 7.2 of the TOR, the AICHR does not have its own secretariat. It states that all activities of the AICHR will be supported by the ASEAN Secretariat. It was not until 2010 that the ASEAN established the Assistant Director for Promotion and Protection of Human Rights – a team under the ASEAN Secretariat – to support the work of the AICHR. This group is indeed responsible for other ASEAN bodies besides helping the AICHR.

Therefore, it is reasonably concluded that the AICHR does not have the financial autonomy and support needed to carry out its tasks.

2.2.2 The ASEAN Commission on Women and Children (ACWC)

As mentioned in section 1.2 of this article, all ASEAN States have joined the CEDAW and the CRC. Therefore, the establishment of a body for rights of women and children in the ASEAN takes place more conveniently and quickly

44 According to published information, since 2012, the Council of Europe has adopted a biennial Program and Budget. The Budget is voluntarily contributed by the Member States. The money is used to implement the Program, which is structured around three pillars: human rights, rule of law, and democracy. The budget for human rights takes 43% of the overall budget. Further reading: Council of Europe in Brief, Budget: <https://www.coe.int/en/web/about-us/budget> [last viewed March 3, 2019].

45 Council on Foreign Relations, The Organization of American States. [Available at: <https://www.cfr.org/backgrounder/organization-american-states> [last viewed March 3, 2019].

46 Institute for Peace and Security Studies (2018), 'Amid reforms, AU announces record low 2019 budget' [Available at: http://ipss-addis.org/news/news_and_events/amid_reforms-au_announces_record_low_2019_budget.php [last viewed March 3, 2019].

than establishing an independent body for promoting and protecting human rights, like the AICHR.

The idea of establishing a separate agency for ASEAN women and children was first introduced in 2004 within the framework of the Vientiane Action Plan and officially included in the ASEAN community's plan in 2009 (2009–2015 Roadmap for the ASEAN Community). After that, the ASEAN Social–Cultural Community adopted the Terms of Reference of Commission on Women and Children (TOR–ACWC). The ASEAN Commission on Women and Children (ACWC) was officially established on April 7, 2010, and had its first meeting in 2011 to nominate ACWC representatives. Thus, unlike the AICHR, the ACWC was established based on a non–legally binding document. On the other hand, while the AICHR is an independent agency under the ASEAN Charter, the ACWC is placed under the socio–cultural pillar (under the ASEAN Social–Cultural Community Council).

The purposes, principles, status, mandates and functions, and funding of the ACWC will likely resemble those of the AICHR. Accordingly, the ACWC is a consultative body to promote and protect women's and children's rights, taking into consideration the different historical, political, sociocultural, religious, and economic context in the region and the balances between rights and responsibilities (article 2.1). The ACWC also aims to promote the well–being of women and children, along with their development, empowerment, and participation in the ASEAN Community (article 2.3). Under article 8 of the TOR–ACWC, the ACWC's five year cycle and annual budget plan shall be submitted to and approved by _the ASEAN Ministerial Meeting on Social Welfare and Development (AMMSWD).

In terms of composition, each Member State will appoint one representative of children's rights and one representative of women's rights. Like representatives of the AICHR, representatives of the ACWC must have sufficient qualifications in the field that they represent, selected based on gender equality. Unlike the AICHR's representatives, according to article 6.4. of the TOR–ACWC, representatives of the ACWC shall be appointed through an open, transparent, selective, and inclusive process.

There is currently no specific information on the process of selecting representatives of ACWC member countries. However, according to

statistics, the female representation in the ACWC is much higher than in the AICHR⁴⁷.

2.2.3 The performance of the ASEAN human rights mechanisms

The effectiveness of the ASEAN human rights mechanism can be assessed through the execution of the AICHR and the ACWC, and the effectiveness of cooperation among these bodies.

According to the TOR, the AICHR issues work plans for each five year cycle⁴⁸. Based on those work plans, every year the AICHR organizes many annual or special meetings to approve the annual program of activities or concept notes for the thematic studies of the AICHR. Based on these plans, the AICHR carries out activities that are mainly workshops and training courses. Additionally, the AICHR also has constructive engagements with the ASEAN agencies, such as the ASEAN Ministers, the ASEAN Secretariat, the Committee of Permanent Representatives of ASEAN, the ACWC. The AICHR also organizes dialogue sessions with other regional countries or organizations and conducts several consultations with civil society organizations.

The number of the AICHR's annual activities is quite impressive considering the lack of support. For example: in 2017, the AICHR organized three regular meetings and three special meetings, twelve seminars, five meetings and consultations with ASEAN agencies, five meetings with external partners, and three meetings with CSOs⁴⁹; in 2018, the AICHR held three meetings, one special meeting, and sixteen conferences and seminars on specific topics. For over ten years of operation, the AICHR's greatest achievement was the successful draft of the ASEAN Human Rights Declaration (AHRD) in 2012. The AHRD was

47 Currently, the ACWC has sixteen female representatives out of a total of twenty representatives. Some Member States, such as Cambodia and Laos, have female representatives in both fields of women's and children's rights.

Further information: ASEAN, Resumes of the (ACWC) Representatives [Available at: <https://acwc.asean.org/resources/other-documents/resumes-of-the-acwc-representatives/>] [last viewed March 3, 2019].

48 Art. 8.1 Term of Reference of ASEAN Intergovernmental Commission on Human Rights.

49 ASEAN, The ASEAN Intergovernmental Commission on Human Rights (AICHR) Annual Report 2017, July 2017–June 2018, p. 4.

later adopted at the meeting of ASEAN States on November 18, 2012. Despite the criticism of CSOs at the time of adoption, it is undeniable that the AHRD also promotes human rights⁵⁰. It is worth noting that the AHRD is one of the rare human rights instruments that explicitly stipulates rights not yet recognized under the Universal Declaration of Human Rights, such as the right to safe water and sanitation (article 28.e.); the right to a safe, clean, and sustainable environment (article 28.f.); protection from discrimination in treatment for people suffering from communicable diseases, including HIV/AIDS (article 29); the right to development (article 36); and the right to peace (article 30).

Similar to the operations of the AICHR, over the years, the ACWC has organized various workshops and seminars, as well as issued dozens of thematic reports that it set up in its two five year cycle work plans. For example, in 2016, the ACWC carried out four meetings; launched a Regional Review on Law, Policies, and Practices; and published a thirty page guideline on how to handle victims of human trafficking. However, the performance of the ACWC work plans is not appreciated⁵¹. Limited by the TOR-ACWC, these activities are only aimed at promoting human rights, leaving the protection aspect largely ignored.

Under the ASEAN Charter, the AICHR can coordinate and consult with other ASEAN agencies, including the ACWC. Similarly, under article 7.7 of the TOR-ACWC, the ACWC shall cooperate with the AICHR and other sectorals related to women and children matters. However, no information is known about the coordination between these two commissions. In the AICHR's Annual Report of 2018, cooperation activities between the AICHR and the ACWC

50 Immediately after the ADHR was adopted, fifty civil society organizations issued a joint statement showing their opposition to the Declaration. These organizations argued that the ADHR failed to recognize the universality of human rights, contrary to the common standards that the international community was recognizing and protecting. Many scholars also agree with the views of these CSOs. See: Reporting ASEAN, Around the Region: Critics slam adoption of 'flawed' ASEAN Rights Declaration [Available at: <http://www.aseannews.net/critics-slam-adoption-of-flawed-asean-rights-declaration/>] [last viewed February 28, 2019]. DAVIES, Mathew, *An Agreement to Disagree: The ASEAN Human Rights Declaration and the Absence of the Regional Identity in Southeast Asia*, Journal of Current Southeast Asian Affairs, Vol.3/2014, pp. 107-129.

51 NUMNAK, Gorawut, et al, *The Unfinished Business: The ASEAN Intergovernmental Commission on Human Rights'...*, Op. Cit., pp. 22-34.

are briefly mentioned. Accordingly, by the middle of 2018, the AICHR and the ACWC organized their first joint activity called the AICHR–ACWC Training Workshop on the CRC⁵². To date, there is still no information on the coordination between the AICHR and the ACWC.

3. What is needed to move forward

3.1 What the ASEAN Human Rights Mechanism lacks

3.1.1 Substantive limitations

Firstly, the ASEAN’s approach to human rights is based on particularism and relativism.

Despite the significant differences in economic, social, and political systems, ASEAN States have a common view of “Asian values”. Asian values have greatly influenced how these countries view human rights issues, and these values are the weaknesses that lead to the inefficiency of the human rights protection mechanism in this region. There is currently no exact explanation for the content of Asian values. However, Asian values can be interpreted as a respect for the common interests of the community rather than the interests of individuals. Accordingly, individuals are

“... not able to be, but a member of a nuclear, family, clan, neighborhood, community, nation, and state [...] Asian whatever they do or say they must keep in mind the interests of others [...] [T]he individual tries to balance his interests. Consequently, Asian individuals have a higher sense of community than Western countries; Asians work hard for the common good of society and accept that social stability and harmony are more important than individual rights”⁵³.

52 Ibidem, p. 10.

53 KOH, Tommy, *The 10 values which undergird east Asian strength and success*, International Herald Tribune, December 11–12, 1993, p.6; See also: SUNG–JOO, Han (ed.), *Asean Values: An Asset or a Liability?*, Changing Values in Asia: Their Impact on Governance, 2003, pp. 63–71 (e–journal). Available at: http://www.jcie.org/researchpdfs/global_gov/8_H%20Sung-Joo.pdf [last viewed August 8, 2019].

See also the comments of KUAN YEW, Lee, “*Society vs. the Individual*”, Time, 14 June 1993; FAREED

Such behavior of Asian people is said to be motivated by the idea that when social order is placed higher than individualism, all individuals of the community can live safely and enjoy life to the fullest; the state is responsible for ensuring such an environment. The existence of "Asian values" is reflected in the fact that ASEAN States often choose to accede to a number of human rights such as the CRC, the CRDP, instead of the ICCPR or the ICESCR.

While endorsing Asian values, the ASEAN also supports the "particularism" and "cultural relativism" of human rights. According to the theory of "particularism" and "cultural relativism", human rights are not universal but rather are differentiated on the grounds of national and/or regional particularities⁵⁴.

Consequently, both the TOR-AICHR and the TOR-ACWC contain multiple purposes, including the promotion and protection of human rights, taking into consideration the "national and regional particularities"; the balancing of rights and duties; upholding national security, public order, public health, public safety, and public morality. The refusal of the universalist approach of human rights by the ASEAN is also express through article 7 of the ADHR, which states:

"... 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".

One of the supporters of the particularism approach of human rights argues that "... it is necessary for a developing society to first succeed in economic development before it can attain the social and political freedom that is found in [...] developed countries"⁵⁵. In contrast, in "Human Rights and Asian Values: A Defense of 'Western' Universalism", Jack Donnelly expresses his concern that such

Zakaria, *Culture Is Destiny: A Conversation with Lee Kuan Yew*, *Foreign Affairs*, 73, no. 2 (1994).

As cited in Takashi INOBUCHI, Edward NEWMAN (1997), Introduction: "Asian values" and democracy in Asian (e-journal), Available at: <http://archive.unu.edu/unupress/asian-values.html#INTRODUCTION> [last viewed August 10, 2019].

54 HIEN, Bui, *The ASEAN Human Rights System: A Critical Analysis*, *Asian Journal of Comparative Law*, 11 (2016), p. 120.

55 MAHBUBANI, Kishore, *Can Asian Think?* (s.l.: Marshall Cavendish International Asia), 2010, p. 90.

thinking might sacrifice economic and social rights since the realization of these rights requires greater economic resources⁵⁶. Some others point out that there is no study that could give statistics support to the claim that fundamental freedoms and economic development are in conflict. The particularism approach to human rights also “allow[s] human rights violations in the name of pursuing economic flourishing”⁵⁷.

The concerns over the ASEAN’s particularism relating to human rights are reasonable since the condition of human rights in the regions has not been improved over the years.

The ASEAN’s principle “non-interference of internal affairs” and “consensus”

The non-interference principle is one of the ASEAN’s core principles that is stipulated in the ASEAN Charter and most of instruments of the region. The non-interference principle is considered a strict limitation on the States ability to comment on the domestic affairs of other States so as to maintain the regional order. It raises doubt that States are not responding toward regional issues because they are unable to do so, or they are not willing to act against the problems with the principle as a justification⁵⁸. To fulfill the obligation under the principle of non-interference, ASEAN States have to guarantee:

- (i) refraining from criticizing the actions of a member government towards its own people, including violation of human rights, and from making the domestic political system of states and the political styles of governments a basis for deciding their membership in the ASEAN;
- (ii) criticizing the actions of states which were deemed to have breached the non-interference principle;
- (iii) denying recognition, sanctuary, or other forms of support to any rebel

56 The view of Jack Donnelly on the particularism is analyzed by HIEN, Bui, *The ASEAN Human Rights System...*, Op. Cit., p. 101.

57 KINGSBURY, Damien and BARTON, Greg, *Difference and Tolerance: Human Rights issues in Southeast Asia*, Australia: Deakin University Press, 1994, pp. 2–3, cited in HIEN, Bui, *The ASEAN Human Rights System...*, p. 124.

58 TOBING, Dio Herdiawan, *Conference Paper: The limits and possibilities of the ASEAN Way: the case of Rohingya as humanitarian issue in Southeast Asia*, 2016, p.153.

group seeking to destabilize or overthrow the government of a neighboring state;

- (iv) providing political support and material assistance to the Member States in their campaign against subversive and destabilizing activities⁵⁹.

Adherence to the above mentioned limitations under the principle of non-interference might limit the ASEAN States in their making-decision process of specific controversial issues, including State's sovereignty and human rights.

Additionally, the principle of consensus in decision-making goes hand-in-hand with non-interference. According to the principle, no decision of the ASEAN or its bodies can be approved without the consensus. The principle of consensus is a "double-edged sword". On the one hand, the consensus has helped the ASEAN maintain internal unity in dealing with critical issues and ensuring equal rights and responsibilities of the Member States. On the other hand, since ASEAN Member States have diverse interests, the principle prevents the ASEAN from making decisions in controversial or sensitive matters. In cases where the ASEAN States cannot agree upon a matter, they agree to make no decision and follow their own interests⁶⁰.

Consequently, over the years, the ASEAN has remained silent on its regions' various conditions of human rights which have been pointed out by the international community, such as extrajudicial killings for drug crimes in Philippines, the humanitarian crisis in Myanmar, the application of the death penalty over homosexual activities in Brunei, etc.⁶¹.

3.1.2 Procedural limitations

Lack of independence

59 ACHARYA, Amitav, *Constructing a security community in Southeast Asia*, London: Routledge, 2009, 2nd ed. p.72. Available at: <https://fmc90.files.wordpress.com/2010/05/constructing-a-security-in-asean.pdf> [last viewed March 3, 2019].

60 NARINE, Shaun, *ASEAN into the twenty first century: Problems and prospects*, The Pacific Review 1999, pp. 357-380. Available at: <http://dx.doi.org/10.1080/09512749908719296> [last viewed August 10, 2019].

61 SINGH, Ananya, *ASEAN's silence on human rights violations spells doom for Southeast Asia*, 2017. Available at: <https://qrius.com/aseans-silence-human-rights-violations-spells-doom-southeast-asia-2/> [last viewed April 10, 2019].

In general, independence is a critical factor for human rights mechanisms, including regional human rights mechanisms. The human rights mechanism, irrespective of its form –the court, the committee, or the like– can only be reliable and effective when it is independent of political bodies. Here, independence should be understood as institutional, compositional, and financial independence. It is clear that the ASEAN’s human rights mechanism is not independent for the following reasons:

Firstly, as stated in 2.2.2 and 2.2.3 of this article, both the AICHR and the ACWC depend on the ASEAN States since they have the power to approve or deny their action and budget plans.

Secondly, representatives of the AICHR and the ACWC are not wholly independent due to a significant number of these representatives continuing their roles as government officials even when designated as representatives.

Weak protection mandate and lack of cooperation

Both the AICHR and the ACWC are solely consultative agencies. Consequently, the activities of these commissions in particular, as well as the ASEAN human rights system in general, are primarily aimed at promoting human rights but cannot yet fulfill their purpose of protecting human rights. Additionally, the AICHR and the ACWC only focus on promoting certain types of rights that are considered less controversial. Some of the objectives set out in the action plans are not implemented in practice. While the AICHR was established under the ASEAN Charter –a binding instrument– the ACWC was based on a non-binding one and put under the socio-cultural pillar. Therefore, the action plans of the two commissions are drafted independently and approved by two different bodies of the ASEAN. Although the terms of references of both commissions stipulate the ability to cooperate between them, in reality, the cooperation is negligible. Thus, there are possible gaps or overlaps in the activities of the two commissions, leading to the inefficiency of the ASEAN human rights system.

3.2 Suggested solutions

3.2.1 To establish a human rights court

Finding solutions to the development of the ASEAN human rights mechanism is not a simple task as it requires substantive and procedural redress of the current mechanism.

One of the most mentioned solutions is the establishment of an ASEAN human rights court⁶². This suggested court, like the existing successful human rights courts in other parts of the world, will serve as the ASEAN human rights protection body. It will have jurisdiction over individual complaints as well as intergovernmental complaints. This solution seems to make sense as all human rights systems in other regions are based on human rights courts. In fact, since 1995, when the ASEAN set up the Working Group for an ASEAN Human Rights Mechanism, the establishment of a court which could render binding decisions was one of the options⁶³. However, some scholars argue that the establishment of an ASEAN human rights court is too ambitious and too challenging for the ASEAN States for the following reasons⁶⁴:

First, it is difficult to find a suitable position for an ASEAN human rights court to ensure its independence and effectiveness. As in the human rights system in the Americas and Africa, human rights courts exist in tandem with human rights committees. While the committees are in charge of monitoring and promoting human rights, the courts can issue binding decisions and give advisory opinions to protect the rights⁶⁵. Since ASEAN has not yet agreed upon

62 See: DE JONGE, Alice, *Book Review: A Selective Approach to Establishing a Human Rights Mechanism in Southeast Asia*, Australian Journal of Asian Law, 2014, Vol. 15, No. 2; YORDAN, Gunawan & TAREQ MUHAMMAD AZIZ, Elven, (2017), *The Urgency of ASEAN Human Rights Court Establishment to Protect Human Rights in Southeast Asia* (Conference Paper), Available at: https://www.researchgate.net/publication/330652193_The_Urgency_of_ASEAN_Human_Rights_Court_Establishment_to_Protect_Human_Rights_in_Southeast_Asia [last viewed August 10, 2019]; and KOSHY, Shaila (2016), *Baby steps towards an Asean court* (e-journal), Available at: <https://humanrightsinasean.info/article/baby-steps-towards-asean-court.html> [last viewed March 15, 2019]; QURATUL-AIN BANDIAL (2013), *Call to set up ASEAN human rights court*, The Brunei Time/Asia News Network (e-journal). Available at: <https://www.asiaone.com/asia/call-set-asean-human-rights-court> [last viewed March 15, 2019]; and YEE, Jovic (2017), *Civil Society Groups push for ASEAN human rights court*, Inquirer.Net (e-journal), Available at: <https://globalnation.inquirer.net/155778/civil-society-groups-push-asean-human-rights-court> [last viewed March 15, 2019].

63 Working Group for an ASEAN Human Rights Mechanism. Available at: <https://www.aseanhrmech.org/aboutus.html> [last viewed August 10, 2019].

64 HIEN, Bui, *The ASEAN Human Rights System: A Critical Analysis...*, Op. Cit., pp. 134-139.

65 Ídem.

a binding instruments on human rights, the possibility to establish a human rights court within ASEAN is unclear.

One of the few scholars who directly mentioned the institutional difficulty of establishing a human rights court in the ASEAN is Phan Duy Hao. In his research, Phan Duy Hao proposes to establish a human rights court outside of the ASEAN that has jurisdiction over the entire region rather than limited to the ASEAN States. It likely that the ASEAN will not able to create a court due to the principles of non–interference and consensus, the proposal of Phan Duy Hao is reasonable. The establishment of a court for the whole Asia region will no longer be hindered by the mentioned principles of the ASEAN. However, this proposal is also questionable. The promotion of the establishment of a human rights system in Asia was initiated in the 1980s, but there was no progress. To date, there are still no binding instruments for human rights in the ASEAN. Therefore, establishing a regional human rights court with the power to issue binding decisions and creation of a mechanism that guarantees the effectiveness of such decisions would take a long time.

Second, much progress is needed in order to facilitate an ASEAN human rights court. A human rights court cannot perform effectively if it is not established based on a binding document. Further, the court can only really act as a human rights protection body when it has enough tools to do so. For example, the ECtHR was established based on, and to ensure, the rights enshrined in the ECHR. In light of the Convention, the ECtHR has the power to receive direct petitions, review them, and issue binding decisions⁶⁶. Since the ASEAN currently has no binding human rights instruments, the construction of a binding instrument is the first required move to create a substantive basis for a human rights court. However, the principles of non–intervention and consensus can become significant obstacles.

3.2.2 Other options

In addition to the suggestion of establishing a national human rights court, many other proposes have been made to improve the ASEAN human rights mechanism, such as⁶⁷:

66 European Convention on Human Rights, arts. 19–51.

67 RAMCHARAN, Robin, *ASEAN's Human Rights Commission: Policy Considerations for Enhancing its Capacity*

- (1) establishing a reporting mechanism;
- (2) creating a human rights body to promote and protect economic, cultural, and social rights;
- (3) establishing a human rights body to provide country visits to the Member States, including visits to their detention facilities;
- (4) establishing a human rights body to provide a system of special rapporteur; and
- (5) to set up a mandate to existing human rights bodies to provide advisory service and technical assistance to the Member States.

In addition to the long-term solutions outlined above, this paper presents some feasible short-term solutions to improve the ASEAN human rights mechanism as follows:

(1) Consider amending the TOR-AICHR and the TOR-ACWC

The TOR-AICHR and the TOR-ACWC should be revised to (i) add mandates to the AICHR and the ACWC to protect human rights; and (ii) add more detailed regulations on the experience and independence requirements of the representatives of the AICHR and the ACWC.

This option is feasible due to article 9.6 of the TOR-AICHR and article 10.2 of the TOR-ACWC which stipulate the review of amendments to these instruments. The amendments shall focus on strengthening the protection mandate of the AICHR and the ACWC. Additionally, the establishment of a mechanism for monitoring and giving recommendations on certain human rights situations in Member States is suggested⁶⁸. In fact, in the ASEAN's operational orientation to 2025 called "ASEAN 2025: Forging Forward Together", research towards the

to Protect Human Rights..., Op. Cit., pp. 221-223.

68 In 2009, a Filipino lawyer sent a petition to the AICHR to request consideration of the Maguindanao massacre. In 2012, the Malaysian Government was also reported to the AICHR by civil groups for the poor treatment of the Bersih demonstrators. Those cases reflect the need to create a mechanism in which the ASEAN and the AICHR can express their concerns of human rights issues.

Read: EBY HARA, Abubakar, *The struggle to uphold a regional human rights regime: the winding role of ASEAN Intergovernmental Commission on Human Rights (AICHR)*, Revista Brasileira de Política Internacional, 2019, Vol. 62 No. 1 (e-journal). Available at: http://www.scielo.br/scielo.php?pid=S0034-73292019000100211&script=sci_arttext [last viewed October 20, 2019].

revision of the TOR–AICHR has been put forward⁶⁹. Such a plan should also be set for reviewing the TOR–ACWC.

(2) Strengthen activities that promote accession to the United Nations’ core human rights instruments.

Over the years, the AICHR has done an excellent job promoting the ratification of international human rights conventions. Since 2012, ASEAN States have signed/ ratified many international human rights instruments, such as the Committee Against Torture (CAT), the CRPD, etc. However, some core human rights instruments seem to be ignored, such as the ICCPR, the ICESCR, the International Convention on the Protection of the Rights of all Migrant Workers and Families (ICMW), and the CEDAW, while some of them are essential foundations for the respect, protection, and fulfillment of human rights. Recently, the AICHR has had several activities to promote ASEAN Member States to join the CAT⁷⁰ – a convention deemed “sensitive”. Therefore, the addition of activities to promote the ratification of core international human rights instruments, such as the ICCPR and the ICESCR, is feasible in the coming period. Ratification of core international instruments of human rights also helps each ASEAN State, and the ASEAN as a whole, gradually change its particularism approach on human rights. Consequently, the other options, such as to adopt a binding human rights instrument or to establish a human rights court will be more realistic.

(3) Strengthening cooperation between the AICHR, the ACWC and other stakeholders

As stated previously in this article, the collaboration between the AICHR and the ACWC is still fragile regardless what their TORs allow each of them to do. In 2018, the AICHR and the ACWC had publicized joined activities⁷¹, which

69 ASEAN, 2015, *ASEAN 2025: Forging Forward Together*, p. 27.

70 See: ASEAN, 2016, *ASEAN Regional Plan on the Elimination of Violence against Children*, p.14; ASEAN, 2018, *ASEAN authorities brush up on anti-torture practices*: <https://asean.org/asean-authorities-brush-anti-torture-practices/> [last viewed March 3, 2019]; and APT, 2013, *Fostering regional cooperation for torture prevention in ASEAN*, https://apt.ch/en/news_on_prevention/fostering-regional-cooperation-for-torture-prevention-in-asean/ [last viewed March 3, 2019].

71 NUMNAK, Gorawut, et al, *The Unfinished Business: The ASEAN Intergovernmental Commission on Human Rights’...*, Op. Cit.

could be considered as the beginning for more effective cooperation in future. Additionally, civil society does not have an open environment to engage in all cooperation activities with the ASEAN States' governments. In the "ASEAN's structured engagement of civil society organizations", Askabea Fadhilla comments concerns that "ASEAN officials viewed civil society as subversives and dissidents, in a similar way to how they were seen in their home countries"⁷². Recently, the ASEAN planned to cooperate more with civil society for the promotion and protection of human rights⁷³. It is expected that the AICHR and the ACWC can exchange information, receive recommendations, and organize joined activities with civil society.

4. Conclusion

The ASEAN is the earliest established sub-regional organization in Asia. The organization's contributions to peace and regional development are undeniable. The ASEAN has also created a mechanism to promote and protect human rights with its own characteristics. This article has provided information on the establishment and operation of the ASEAN human rights mechanism based on comparing the standards and patterns of regional human rights systems to assess weak points of this mechanism.

Based on the above information and analysis, it can be concluded that the ASEAN's human rights mechanism is not as effective as expected. From a policy perspective, the ASEAN may consider the following issues.

Firstly, in the short term, the ASEAN should consider amending the TOR of the AICHR and the ACWC; strengthen coordination between these agencies, as well as between them and international organizations and civil society; and adding activities to promote accession to basic human rights conventions, especially that ICCPR and the ICESCR.

72 FADHILLA, Askabea, *ASEAN's structured engagement of civil society organizations*, ASEAN Studies Program. Available at: <https://thcasean.org/read/articles/202/ASEANs-Structured-Engagement-of-Civil-Society-Organizations> [last viewed August 10, 2019].

73 ASEAN, 2015, *ASEAN 2025: Forging Forward Together*, Op. Cit., pp. 26-28.

Secondly, in the long term, the ASEAN should change its approach to human rights and develop binding human rights documents, including documents laying the foundation for the establishment of a regional human rights court.

To achieve improvements of the ASEAN's human rights mechanism, the ASEAN States which have obligation to respect, protect and fulfill human rights, needs to show stronger commitments and political will.

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