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**CAN THE ASEAN HUMAN RIGHTS SYSTEM BE EFFECTIVE IN
PREVENTING AND DEALING WITH HUMAN RIGHTS ABUSES IN
THE REGION?**

A Thesis to obtain a Master's Degree in Law, in
the specialty of International and European Law

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2020, November

ACKNOWLEDGEMENTS

I would like to start by thanking my parents and my aunt Eva for all the support, for being such incredible examples of strength and determination, for fighting and believing in me even when I fail to do so. Thank you for being responsible for the successes in both my personal and professional lives and for all the dreams that I already saw coming true. Without you and all your unconditional love none of this would be possible.

To my sister thank you for the endless hours by my side, listening to me or even in silence. Thank you for all the support and patience and for being the best confident and life companion I could ever wish for - my person.

Thank you to the rest of the family, for all the support, unity, care, love and for always having the right words of encouragement and a smile at every moment I needed. I feel tremendously lucky for having you.

Thank you to all my friends, for always being by my side throughout my journeys, at the best and worst moments. In this work I would like to specially thank my friend Sérgio for all the patience, support, and encouragement throughout these two years.

To Dr. Professor Jeremy Sarkin a special thank you for all the guidance and comprehension throughout this process, and specially for being such an inspiration, for always trying to incite our critical spirit and awareness about the reality of world in such a remarkable way, for passing on passion and motivation to always go further.

Finally, the most distinctive thank you to two of my pillars and biggest sources of strength, my uncle Carlos, and my grandmother Alice, for whom no further words are needed and to whom I dedicate this work that marks the end of such an important life stage.

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LIST OF ABBREVIATIONS

ACHPR – African Commission on Human and People’s Rights

ACtHPR – African Court on Human and People’s Rights

AHRD – ASEAN Human Rights Declaration

AICHR – ASEAN Intergovernmental Commission on Human Rights

ASEAN – Association of Southeast Asian Nations

AU – African Union

COE – Council of Europe

CSOs – Civil Society Organizations

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

EU – European Union

IACHR – Inter-American Court of Human Rights

OAS – Organization of the American States

UDHR – Universal Declaration of Human Rights

UN – United Nations

ABSTRACT

Why is Southeast Asia the stage of the some of the greatest atrocities committed against human rights in the twentieth-first century? Why has an unprecedented wave of protests swept across Thailand? Why are the Rohingya still one of the most discriminated people in the world, subjected to the most horrendous atrocities? Why in Philippines President Rodrigo Duterte, continued his murderous “war on drugs”? Why are there human rights activists in Cambodia under threat and forced to leave the country? What is the role of regional human rights systems in the protection and promotion of human rights? Are they really capable of uphold human rights in their regions? Why does ASEAN remain unresponsive to human rights violations? Is it a success disguised in failure?

These questions and many others related to the widespread human rights violations in Southeast Asia are all intrinsically connected and an answer to them is intended to be found in the present work. Throughout the world regional human rights systems have been established, being considered the main pillars in the protection and promotion of international human rights standards. Notwithstanding, and unlike the European, African, and Inter-American regional systems, ASEAN, established in 1967, has been proven to be extremely ineffective in upholding human rights in the region. In the year of 2020 many are the examples of mass atrocities committed against ASEAN member states civilians, proving that the system is deeply flawed and incapable of giving a proper response to the inhuman conscience shocking acts that are taking place across the region. ASEAN human rights system seems to be irremediably built upon rhetoric and whose framework is for many considered to be nothing more than a strategy to divert attentions with a mere appearance of compliance with international human rights standards, showing a tendency to watch with a blind eye. The present dissertation intends to give a critical analysis of both procedural and substantive flaws, while making a pertinent comparison to the three regional human rights systems mentioned above in order to seek for lessons to be learned.

Keywords: ASEAN; Human Rights; Regional Human Rights Systems; Rohingya Crisis; AICHR; AHRD

RESUMO

Porque é que em pleno século XXI continua o Sudoeste Asiático a ser palco de algumas das maiores atrocidades cometidas contra os direitos humanos? Porque é que na Tailândia está a ter lugar uma onda de protestos sem precedentes? Porque é que os Rohingya continuam a ser uma das, senão a população mais discriminada do mundo? Porque é que nas Filipinas o Presidente Rodrigo Duterte continua a levar a cabo a “guerra das drogas” responsável pela morte de milhares de inocentes? Porque é que ativistas de direitos humanos no Camboja se encontram sob ameaça e obrigados a abandonar o país? Qual o papel dos sistemas de direitos humanos regionais na proteção e promoção dos direitos humanos? São eles verdadeiramente capazes de assegurar os direitos humanos nas suas regiões? Porque é que a ANSA permanece apática e sem resposta para com as violações de direitos humanos na região? Será este sistema um fracasso escondido por detrás de uma máscara de sucesso aparente?

Todas estas questões, e muitas outras relacionadas com os inúmeros episódios de violação de direitos humanos no Sudoeste, se encontram intrinsecamente conectadas, pretendendo o presente trabalho encontrar uma resposta para elas. Pelo mundo vários foram os sistemas de direitos humanos regionais que se estabeleceram, sendo considerados dos principais pilares na proteção e promoção das normas internacionais de direitos humanos. Não obstante, e contrariamente ao que se tem vindo a verificar nos sistemas regionais Europeu, Africano e Interamericano, a ANSA, criada em 1967, tem vindo a mostrar-se ser extremamente ineficaz em assegurar direitos humanos na região. No presente ano de 2020 são incontáveis os exemplos de atrocidades em massa cometidas contra a população dos países membros da ANSA, fazendo-se, assim, prova de que o

sistema se encontra imbuído em lacunas e incapaz de dar resposta à situação dos direitos humanos na região. O sistema de direitos humanos da ANSA parece irremediavelmente construído sob retórica e uma mera aparência de consonância com as normas internacionais de direitos humanos, podendo aplicar-se mesmo a expressão de que “o pior cego é aquele que não quer ver”. A presente dissertação tenciona oferecer uma análise crítica das falhas processuais e substantivas inerentes ao sistema, fazendo igualmente uma comparação pertinente com os três sistemas regionais acima referidos na tentativa de encontrar lições a ser tidas em conta pela ANSA.

Palavras-Chave: ANSA; Direitos Humanos; Sistemas de Direitos Humanos Regionais; Crise dos Rohingya; CIDHA; DDHA

INDEX

INTRODUCTION	12
1. The Role of Regional Systems in the Protection and Promotion of Human Rights	15
1.1. Are Regional Systems an effective tool to enforce Human Rights?	15
1.2. The Role of Intergovernmental Organizations and their relationship with the codification of International Law – To what extent can we expect effectiveness of these bodies in the field of human Rights?	20
2. The Association of Southeast Asian Nations (ASEAN)	24
2.1. Origins: A brief historical approach and Structure	24
2.2. ASEAN Responsiveness and Cohesiveness – Current episodes of human rights violations	28
3. Why is ASEAN incapable of ensuring an effective protection of Human Rights in the Region? – A look into the Procedural and Substantive Flaws	32
3.1. ASEAN Mechanisms – Procedural Limitations	34
3.1.1. The ASEAN Intergovernmental Commission on Human Rights (The AICHR).....	34
3.1.2. ASEAN Human Rights Declaration.....	42
3.2. Substantive Limitations	46
3.2.1. Universalism Vs. Relativism – To what extent can the way through which ASEAN interprets Human Rights jeopardise an effective guarantee of universal Human Rights standards?.....	46
3.2.2. The ASEAN Way and the role of the Principle of Non-Interference - How can the ASEAN <i>modus-operandi</i> and the narrow acceptance of the Principle of Non-Interference severely limit the efficiency of the system? ..	53
3.2.3. The Relationship between ASEAN and Civil Society	56
4. Case Study: Myanmar – ASEAN responsiveness to the Rohingya Crisis	59
5. The other Regional Human Rights Systems – Are there lessons to be learned?	66
5.1. The European Regional Human Rights System	66
5.2. The Inter-American Regional Human Rights System	71
5.3. The African Regional Human Rights System.....	73

6. The creation of an independent court – Would it be the key to transform ASEAN in a system more capable of properly enforcing Human Rights in the region? 77

CONCLUSION 84

REFERENCES 86

INTRODUCTION

As the twenty-first century opens the world still struggles against the most hideous atrocities committed against human rights. And particularly, gross human rights abuses by states, never mind other types of human rights violations, continues unabated around the world. And even though the number of human rights violations committed by states is considered to be on decline¹, at this precise moment many states continue creating the heinous scenarios across the globe.

East Asia is not an exception, since, in the words of Alexander Bellamy, for much of the Cold War, “people in East Asia were arguably at greater risk of death by genocide and mass atrocities than anyone else in the world”². And the conscience shocking inhumanity against civilian populations episodes that predominantly take place in Southeast Asian countries make many wonder if ASEAN is a remedy or, on the contrary, a tool that has been used to hide the continue spreading disease.

But while ones argue that ASEAN is a system merely created with the intention to divert attentions, built upon an appearance of conformity with international law and actual reluctance to a pursue stronger agenda in realizing human rights protection at the regional level, others believe that the inclusion of a commitment to human rights in the organization’s principles is already a positive development that would never take place before the creation of the ASEAN Charter in 2007.

Truth is that for more than four decades, ASEAN has been constantly criticized for not having a human rights system, specially when compared to the long path that the European system had already travelled. Also, the Inter-American and the African human rights’ systems had gained more significance, which throw a spotlight on the Asian gap.

¹ J. Sarkin, “Humanitarian Intervention and the Responsibility to Protect in Africa”, in D. Zimble and J. Okopari (eds.), *The African Human Rights Architecture*, Sunnyside, Jacana Media (2008), p.45

² Alexander J. Bellamy, “The Other Asian Miracle? The Decline of Mass Atrocities in East Asia,” *Global Change, Peace & Security* 26, no. 1 (2014)

Even though being a controversial theme, regional human rights systems, when well-established, are considered to be main pillars of the international system in the protection and promotion of human rights, being responsible for helping localise international human rights norms and standards while reflecting the particular human rights concerns in the region. Notwithstanding, the ASEAN human rights system is one that requires increasing efforts to be strengthened.

In this regard there is a question that appears to be inevitable: Is ASEAN human rights system a success disguised in failure?

Episodes of mass atrocities in Southeast Asian countries have been recurrent, being numerous the examples across almost all of them, as it is going to be briefly referred in this work. So, what is missing? Why is the ASEAN human rights system flawed to the point of being nothing but ineffective regarding the protection and promotion of human rights?

The present work intends to make an analysis of the mechanisms and instruments of the ASEAN and also of its relationship with civil society organizations in order to decodify the present flaws that severely threaten the system's effectiveness. More, specifically this work will focus on the AICHR and the AHRD, as the most prominent regional figures created to supposedly promote and protect the human rights in the region.

Firstly, it will be made an analyses of the role of regional human rights systems in general, as well as of the intergovernmental organizations and their relationship with the international humanitarian law. After that, attention will be paid in particularly to the ASEAN human rights system, its origins and structure and it will be mentioned some of the most recent human rights violations episodes in the region to prove how ineffective the system as been in providing proper responses. Special emphasis will be given to the analysis of the procedural and substantive flaws in ASEAN, as well to the Rohingya Crisis in Myanmar to expose, in practice, how the present flaws in the system interfere with the role ASEAN should play. Finally, an evaluation of the European, Inter-American and African human rights systems will be made in an attempt to seek for lessons to be learned and it will be

discussed the possibility of the creation of a judicial branch, as a key figure to ensure effectiveness against atrocities in Southeast Asia.

1. The Role of Regional Systems in the Protection and Promotion of Human Rights

1.1. Are Regional Systems an effective tool to enforce Human Rights?

Quoting Steven Pinker, in comparative terms, “the world’s civilians are several thousand times less likely to be targeted today than they were 70 years ago”³. Does this mean that we are taking the right steps towards a world where Human Rights atrocities could be appropriately addressed?

In the world as it is right now it is impossible to conceive a unified or static international human rights system. Over the last decade the relatively brief evolution of the Human Rights system has led to a complex structure that compromises numerous institutions of diverse decision-making authority, enforcement capacities, and mechanisms⁴. Taking in consideration the time frame, the “quiet revolution” that has been witnessed can be seen, in part, as a consequence of an unfolding commitment which was undertaken in the wake of the World War II and spread throughout the globe, including to countries in East Asia⁵. Truth is that the 20th Century was irremediably marked by numerous historical events which called attention for an urgent need to establish law enforcement and human rights⁶. Thus, in December 10 of 1948 the Universal Declaration of Human Rights was established and until this day is considered a remarkable milestone in history as the first foundation of Human Rights, encompassing, among others, the responsibility of states to protect the fundamental rights of all individuals under their jurisdiction.

³ Steven Pinker and Andrew Mack, “Why the World Is Not Falling Apart,” *Slate Magazine*, December 22, 2014, accessed December 30, 2017

⁴ Donoho, Douglas, “Human Rights Enforcement in the Twenty-First Century”, Vol.5, *Georgia Journal of International and Comparative Law* (2006)

⁵ Steven Pinker, *The Better Angels of Our Nature: Why Violence Has Declined* (New York: Viking, 2011)

⁶ William A. Schabas, “The Trial of the Kaiser”, Oxford: Oxford University Press, 2018, pp. 3-10

Notwithstanding considerable improvements, in essence, the international system seems to face serious difficulties regarding the enforcement and implementation of human rights in a world which is sadly still characterized by oppression, autocratic governments, poverty, and armed conflict. In fact, one of the major limitations of the international human rights system has been its general inability to enforce human rights standards⁷, in part, due to a variety of institutional, conceptual, and jurisprudential weaknesses, and thus, proving to be inadequate to meet the challenge of effectively realizing human rights in the 21st century.

Among other institutions created to suppress some of the flaws in the Human Rights field, alongside the UN Human Rights system, other regional human rights systems have arisen throughout the globe, namely Intergovernmental Organizations, such as the Organization of the American States' American Commission on Human Rights and the Council of Europe's European Court of Human Rights, the African Union and the Association of the Southeast Asian Nations. But the creation of these institutions has definitely been subject of extensive debates.

On one hand regional human rights protection mechanisms are seen as one of the main pillars of the international system for the promotion and protection of human rights⁸. But on the other hand, some are the authors, such as Nsongurua Udombana⁹ and Cesare Romano¹⁰ who argue that the establishment of regional systems is a "step in the wrong direction"¹¹, as they decentralize human rights enforcement away from the United Nations, focusing almost exclusively on

⁷ D. Donoho, "Human Rights Enforcement in the Twenty-First Century", 35 Georgia Journal of International and Comparative Law (2006)

⁸ Directorate-General for External Policies of the Union, "The Role of Regional Human Rights Mechanisms", Policy Department (2010)

⁹ Nsongurua J. Udombana, An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication?, 28 Brook. J. Int'l L. (2003)

¹⁰ "Entities should not be multiplied unnecessarily." Cesare P.R. Romano, The Proliferation of International Judicial Bodies: The Pieces of the Puzzle, 31 N.Y.U. J. INT'L L. & POL. 709 (1999)

¹¹ M. Robbins, "Powerful States, Customary Law and Erosion of Human Rights Through Regional Enforcement", 35 California Western International Law Journal (2005)

region-specific needs that can vary, and moving away from the universality of human rights.

It is contended that with the adoption of the Universal Declaration of Human Rights by the United Nations General Assembly in 1948 the international community formally committed itself to worldwide protection of human rights. Nevertheless, with the development of regional human rights institutions, whose aim, in this perspective, is seen as only taking in consideration specific social and cultural characteristics of each region of the world, it is feared that human rights become marginalized, jeopardizing the purpose behind the creation of international human rights which consists in binding the states of the world together for the protection of individuals worldwide. Thus, human rights, heralded as universal, should not vary from nation to nation nor from region to region, with the risk of undermining the role of international human rights law by drawing arbitrary boundaries which deprive some people from having access to rights that are granted to citizens of other states. Finally, according to these authors, states should be more focused on democratizing the UN, wherein all voices could be effectively heard, instead of diverging attention and resources from the UN system of universal rights. Only this way they find it possible for human rights to be truly “human”, being applied to all peoples¹² without exceptions.

On the other hand, while the perspective above is not to be completely disregarded, it is impossible to ignore the fact that regional systems are far more attractive when it comes to the protection and promotion of human rights for a variety of reasons¹³.

It is not under discussion the fact that the UN has been playing a crucial role by influencing the legal norms that serve the basis of the international human rights system, as well as the efforts made to make human rights norms transversal to the

¹² Ibid.

¹³ Jeremy Sarkin, “The Role of Regional Systems in Enforcing State Human Rights Compliance: Evaluating the African Commission on Human and People’s Rights and the New African Court of Justice and Human Rights with Comparative Lessons from the Council of Europe and Organisation of American States.” 1(2) *Inter-American and European Human Rights Journal* 199-242 (2009)

entire international community¹⁴. Notwithstanding, it has to be recognized that the work at a regional level has the potential to deliver more effective responses in the human rights field. This can be justified not only by the fact that human rights bodies have the capacity to adapt the language in their human rights treaties depending on the cultural context they are inserted in and which make them more legitimate at the eyes of their member states, but also due to the fact that they cover a significant smaller number of member states which often share common historical, cultural and political features and thus it is undoubtedly easier to apply pressure in order to convince member states to comply with human rights law. Furthermore, regional systems are known for being more accessible, cheaper for litigants, and more effective in the work they do than international courts¹⁵.

Nevertheless, the fact that Regional Human Rights Systems have been proven to be more effective, with more prompt and adequate responses in the protection and promotion of human rights than the UN does not mean that the work of this last should be undermined. It is quite the opposite, they should rather be seen as complementary to the UN system as well as also operating in the regional context, reflecting regional particularities¹⁶. Authors argue that these regional-level human rights mechanisms have the capacity to navigate places beyond the states, but at the same time, sufficiently local for them to be more accessible the UN human rights mechanism, offering next resort for victims of rights infringements to whom there are neither available avenues for seeking domestic redress, nor a national justice system ready to respond. Furthermore, many times the national systems have proven insufficient especially in the cases where they are unwilling to monitor, act and offer redress to individuals in case of violations and these situations require regional arrangements to overcome or prevent lacunae and

¹⁴ Thomas Buergenthal, "The Evolving International Human Rights System," *American Journal of International Law* 100, no. 4 (2006)

¹⁵ R. Smith, *TextBook on International Human Rights* (Oxford, Oxford University Press 2007)

¹⁶ Weston, L. et al, 'Regional Human Rights Regimes: A Comparison and Appraisal' *Vanderbilt Journal of Transnational Law* 20, No 4 (1987)

further enhance promotion and protection of human rights¹⁷. In this regard it is important to refer that regional human rights systems are also capable of reinforcing international human rights norms while they try to shape national policies, inciting more human rights friendly practices, and, once these are implemented, they can also help to prevent the process from ratcheting back¹⁸. Regionalism can also profit from critical economic and political linkages that create practical incentives for state compliance. A regional focus also has advantages for institutional legitimacy by increasing connections between decision-makers and local populations.

With all that has been said it can be concluded that regional systems are definitely playing a significant role in the protection and promotion of human rights, holding states accountable and crucially giving individuals access to redress. Each regional system is expected to expand, elaborate, translate, or adapt the universal human rights to a particularized historical, political, and cultural setting. However, as well as it is true that regional systems are capable of breaking new ground and introduce novel ideas and norms in the language of the human rights movement¹⁹, it is also identically true that these systems are far from being exempt of imperfections. As it is going to be subject of analysis throughout the next chapters, regional human rights systems throughout the globe arise with a range of procedural and substantive flaws which vary from one to another.

The truth is that as states are scarcely held accountable in their countries, and in their own courts for Human Rights atrocities, the international community has tried to sought alternative mechanisms for centuries²⁰ and it is without a doubt that

¹⁷ Muntarbhorn, V. 'Human Rights Monitoring in the Asia-Pacific Region' in Gudmundur Alfredsson (et. al) (eds.) *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller* (2nd ed.) (Martinus Nijhoff Publishers 2009)

¹⁸ Croydon, S. 'Towards a regional human rights mechanism in the Asia Pacific?: Exploring the potential of the Asia Pacific Forum. *The Pacific Review* (2014)

¹⁹ Makau Mutua, "Standard Setting in Human Rights: Critique and Prognosis", *Human Rights Quarterly*, Vol.19, No.3, 2007

²⁰ J. Sarkin, "The Historical Origins, Convergence and Interrelationship of International Human Rights Law, International Humanitarian Law, International Criminal Law and International law; Their application from at least the Nineteenth Century", *1 Human Rights and International Legal Discourse* (2007)

accountability at the international and regional level is thought to be far more possible, and more likely to lead to positive results. Although, one should not forget that while states have the primary task of protecting human rights, they have also been the major perpetrator of human rights violations²¹. Moreover, states are the ones holding the power to determine what international law is and what mechanisms should exist to determine whether they have complied with their obligations under international law. This can be considered a substantive flaw that is capable of affecting any of the regional human rights systems, as the international community has largely relied upon voluntary compliance to ensure that states adhere to their human rights and other obligations. But voluntary compliance has limitations²².

1.2. The Role of Intergovernmental Organizations and their relationship with the codification of International Law – To what extent can we expect effectiveness of these bodies in the field of human Rights?

Intergovernmental organizations (IGO) are classical International Organizations created by “a treaty or other instrument governed by international law which possess their own international legal personality”, involving two or more nations. Their members are primarily states and, in some cases, other IGOs or even non-governmental actors. While some have universal membership, others impose limitations by using a number of criteria, such as geographical location or shared values (as it happens in the European Union)²³. These bodies, when formed by treaties, are more able to bring advantages than a mere grouping of nations,

²¹ J. Sarkin, “Colonial Genocide and Reparations Claims in the 21st Century. The Socio-Legal Context of Claims under International Law by the Herero against Germany for Genocide in Namibia, 1904-1908 (Santa Barbara, Praeger Security International 2009)

²² Ibid.

²³ OECD (2019), “The Contribution of International Organizations to a Rule-based International System: Key Results from the Partnership of International Organizations for Effective Rulemaking”

because they are subject to international law, having the ability to enter into enforceable agreements among themselves or with states.

As main purposes IGOs encompass the creation of a mechanism that would allow peoples throughout the globe to work more successfully together in the areas of peace and security, while also dealing with economic and social issues²⁴.

In this current era of increasing globalization, IGOs have come to play an incredibly significant role in international political systems and global governance interest.

These bodies can easily be found in between the complex relationship of Human Rights with International Law, within which it is possible to point out two different types of legal documents. On one side it is possible to find binding documents, such as treaties, that specify enforceable legal obligations for states, meaning that they can be forced to change some aspects of regional territorial sovereignty, as is the case of the International Covenant on Civil and Political Rights (ICCPR). On the other side there are the non-binding legal documents, which are also recognized by “soft law”, such as the Universal Declaration of Human Rights that codifies norms into international law without a legal obligation for states to adhere to them.

This distinction between the two types of norms becomes even more pertinent given the fact that the lack of enforceability consubstantiates one of the most glaring weaknesses of the International Human Rights Law. Truth is that, while the world has been assisting to the growing creation of bodies for protecting Human Rights, as it is the United Nations Human Rights Council, Intergovernmental Organizations lack the ability to police or prosecute states that consistently violate Human Rights²⁵, precisely because they are limited to forms of “soft touch” enforcement.

²⁴ <https://hls.harvard.edu/dept/opia/what-is-public-interest-law/public-service-practice-settings/public-international-law/intergovernmental-organizations-igos/>

²⁵ Rhona K. M. Smith, “Human Rights in International Law,” in Human Rights Politics and Practice 3rd Edition, ed. Michael Goodhart (Oxford: Oxford University Press, 2016)

In this regard and considering that human rights are constant and transversely being violated in various extents throughout the world, the question wondering why this type of approach is adopted, even proving not to be effective, may arise. And the answer relies on the fact that international human rights bodies want to avoid setting states from the international human rights system apart altogether²⁶. When weighs are put on a scale it is found more beneficial for the long-term prospects that states with weak Human Rights systems participate in the international system than to incite them to just opt-out due to apprehensiveness regarding an infringement on their sovereignty. This way there is still the possibility of achieving some positive results no matter the time taken by each society. There is no size-fits-all formula and that does not mean that we should consider some cases as lost causes, it is only a matter of understanding that each state has its own time to evolve progressively and that different approaches must be undertaken when considering different contexts.

Considering what was said, in order to lead human rights systems in the right direction, IGOs can undertake distinct fronts. Firstly, they can function as “norm diffusers”, encouraging states to adopt certain rules of behaviour, as it is the case of the Organization for Security and Co-operation in Europe (OSCE). Secondly, these bodies can also work while supporting civil society organizations, which can play the role of “norm entrepreneurs”, with the creation and diffusion of novel norms, and thus introducing new norms and persuading states to adopt them. IGOs can play this indirect role in assisting “norm entrepreneurs”, more specifically, by promoting activities of local civil society organizations and international non-governmental organizations within their member states by lending them financial support or through giving them spaces to formally advocate for their causes²⁷.

²⁶ Barelli, Mauro. “The Interplay Between Global and Regional Human Rights Systems in the construction of the Indigenous Rights Regime”, *Human Rights Quarterly* Vol.32, No.4 (2010)

²⁷ Thomas Buergenthal, “The Evolving International Human Rights System,” *American Journal of International Law* 100, no. 4 (2006), 804

It must be referred, in this context, that the lack of enforceability is one of the most glaring weaknesses of international human rights law²⁸. IGOs with bodies responsible for protecting human rights, such as the UN's Human Rights Council, lack the ability to police or prosecute states that consistently violate human rights²⁹. While most states claim to respect and protect the human rights of their citizens, it is no secret that only few consistently meet all of the obligations and standards that are codified in international law. Furthermore, several states acknowledge the existence of international human rights law, but they do not accept its legitimacy.

The international human rights system, unsurprisingly, is complex because it consists of a vast network of laws, norms, and institutions. IGOs, in particular, are unique actors because, as it was already referred, they have the ability to both directly enforce human rights law and indirectly promote the spread of new human rights norms. At the same time, however, they must also grapple with their limited enforcement capabilities and in many cases, an inability to issue binding declarations which would force states to alter their behaviour.

In spite of the limitations imposed by the lack of enforceability, the codification of human rights in international law has allowed a "norm diffusion" process through the international system, being the norms adopted by states as a result of concerted efforts by IGOs³⁰.

Furthermore, IGOs can also improve human rights by providing effective ways of punishing states whose human rights practices fall short of an agreed upon standard³¹. As an example, one can take a look at the European Union, where consequences, such as severe economic and political sanctions, exist for member states that fail to live up to the community's agreed upon standards. Furthermore, the EU can also choose to withhold offers of membership to prospective members

²⁸ Hannah Moscrop, "Enforcing International Human Rights Law: Problems and Prospects" (2014)

²⁹ Emilie M. Hafner-Burton, "International Regimes for Human Rights," *Annual Review of Political Science* 15 (2012), 266

³⁰ Susan Park, "Theorizing Norm Diffusion Within International Organizations," *International Politics* 43, no. 3 (2006)

³¹ Greenhill, Brian "The Company You Keep: International Socialization and the Diffusion of Human Rights Norms", *International Studies Quarterly* Vol.54, No.1 (2010)

with inadequate human rights records, as it happened with Turkey³². In cases like these IGOs are able to influence domestic human rights practices by agreeing to provide the goods of international cooperation only to the states that comply with a set of minimal human rights standards.

Another way by which IGOs might influence states' human rights performance is through a socialization effect, which refers to behavioural changes as a result of a shift of a state's interests after interacting with other states. States might therefore come to respect human rights because they follow a "logic appropriateness", rather than a "logic of consequences"³³.

Even though being undeniably crucial the role played by IGOs in the human rights field, especially as "norms diffusers" and supporters of civil societies as "norms entrepreneurs", truth is that it is not sufficient condition for a successful norm diffusion³⁴. In other words, there are domestic conditions and specific local concerns that shape how human rights laws and norms are accepted or denied, such as the limitations imposed by the denial of human rights universality in ASEAN, which is going to be subject of analysis further.

2. The Association of Southeast Asian Nations (ASEAN)

2.1. Origins: A brief historical approach and Structure

The Association of Southeast Asian Nations (ASEAN) was established on August 8 of 1967 with the signing of the Bangkok Declaration by the five founding countries, namely Thailand, Indonesia, Malaysia, Philippines, and Singapore. Later on, it was time for the other five countries to join, being that Brunei Darussalam joined on January 7 of 1984, Vietnam on July 28 of 1995, Lao PDR and Myanmar on July 23 of 1997 and, finally, Cambodia joined on April 30 of

³² Happold, Matthew (2000) Fourteen Against One: The EU Member States' Response to Freedom Party Participation in the Austrian Government. *The International and Comparative Law Quarterly* 49 (4)

³³ March, James G., and Johan P. Olsen. (1998) The Institutional Dynamics of International Political Orders. *International Organization* 52 (4)

³⁴ Amitav Acharya, "Whose Ideas Matter?: Agency and Power in Asian Regionalism" (Cornell University Press, Ithaca and London (2009)

1999³⁵. Initially, this Organization was formed to promote economic development and regional stability and has significantly contributed to the reduction of interstate war in the region³⁶.

Within the period that encompasses its establishment in 1967 and the adoption of the ASEAN Charter in 2007, ASEAN member states were characterized by operating as a loosely bound, informal organization³⁷, with clear preference for diplomacy and non-binding forms of cooperation, referring to a what was thought to be a distant future the possibility of any kind of deeper legal and political cooperation. Notwithstanding, the adoption of the ASEAN Charter in 2007 led to a shift of perspectives, rising hopes for an integrated and coherent ASEAN Community based on the rule of law, human rights, and democracy³⁸.

Regarding to the role played in the field of human rights, and as it is going to be concluded after an analysis in chapter five, it has been witnessed that ASEAN's response in conceptualizing human rights has not been as fast and effective as the ones offered by other regional systems. Nevertheless, this situation is reasonably justified by the fact that when the UDHR was adopted by the UN on December 10 of 1948, ASEAN had other concerns to face that other regional systems did not. This includes the fact that several member states of ASEAN were still preoccupied with their respective domestic political affairs, and some were still fighting colonialism (as is the case of Indonesia) or had not yet declared independence (such as Malaysia)³⁹. Southeast Asian countries were, thus, more concentrated on strengthening internal security and economic development.

³⁵ See ASEAN Secretariat, "ASEAN Member States", online: ASEAN <http://www.asean.org/asean/asean-member-states>

³⁶ Timo Kivimäki, "East Asian Relative Peace and the ASEAN Way," *International Relations of the Asia-Pacific* 11, no. 1 (2010)

³⁷ Duxbury, Alison, and Hsien-Li Tan. *Can ASEAN Take Human Rights Seriously?* Vol.16. Cambridge University Press, 2019

³⁸ "Cebu Declaration on the Acceleration of the Establishment of an ASEAN Community by 2015", established in Cebu, Philippines on January 13 of 2007

³⁹ Li-ann Thio, *Implementing Human Rights in ASEAN Countries: "Promises to keep and miles to go before I sleep"*, 2 Yale Hum. Rts. & Dev. L.J. (1999)

However, in the years that followed the end of the Cold War, Western countries began to place considerable pressure on Southeast Asian countries to adopt policies that would demonstrate commitment to the protection of human rights in the region. At a first stage, ASEAN member states invoked the argument of the “Asian values” which, according to them, conflicted with the Western human rights norms. This resistance discourse of ASEAN gave rise to fierce debates, where many claimed that this ideology only existed for the purpose of justifying domestic repression under the guise of being necessary for development⁴⁰.

However, this debate came to an end with the 1997’s Asian financial crisis, which caused widespread social unrest and toppled governments. As a result, ASEAN was powerless to respond, and has emerged from the crisis enduringly weakened, its image tarnished, and its relevance constantly questioned⁴¹. This was a benchmark to lead state leaders to rethink their policies and years later, in 1993, in consultation with the UN, several Asian states signed the Bangkok Declaration, which affirmed the universality of human rights and assumed the commitment of signatory parties to “principles contained in the Charter of the United Nations and the Universal Declaration on Human Rights”⁴², being the very first step taken by ASEAN member states to formally engage with the International Human Rights Regime. Question is: To what extent was this step taken seriously? In chapter three an analysis is made concerning the current denial of the universality of human rights, in spite of this apparent acceptance.

As it is going to be further referred the most prominent human rights development in ASEAN was, undoubtedly, the adoption of the ASEAN Charter which came to replace the Bangkok Declaration. This charter gave birth to the ASEAN Intergovernmental Commission of Human Rights (AICHR) in 2009 and to the ASEAN Human Rights Declaration (AHRD) in 2012, which are considered the

⁴⁰ Philip Eldridge, *The Politics of Human Rights in Southeast Asia* (New York: Routledge, 2002)

⁴¹ Jones L. (2012) ASEAN after the Cold War: Capital, Crisis, Conflict. In: ASEAN, Sovereignty and Intervention in Southeast Asia. Critical Studies of the Asia Pacific Series. Palgrave Macmillan, London

⁴² United Nations, “Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights,” conclusion date: April 2nd, 1993

most outstanding figures in the role played by ASEAN in regard to the protection and promotion of human rights.

Even though significant steps were taken, questions remain as to the ability of ASEAN to improve the practical realisation of rights in member states. And in this regard, the AICHR and the ADHR flaws are going to be subject of analysis in the following chapter. But before that, an analysis of the ASEAN structure may be found pertinent, because in order for a human rights mechanism to work there must be working institutional arrangement that supports the implementation of the agreed human rights norms. It is in the Article 14 of the Charter that it is possible to find the legal basis for the establishment of a human rights mechanism, stating that “in conformity with the purposes and principles of the relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN human rights body”, also clarifying the position of human rights bodies within ASEAN main organs.

More specifically, human rights are subject of the discussions of the ASEAN Political Security Community (APS), which aims to promote political development in adherence to the principles of democracy, the rule of law and good governance, respect for the protection of human rights and fundamental freedoms⁴³.

Concerning to the overall ASEAN system it can be firstly mentioned that it is divided in two parts, namely the so-called Main Organs and the Human Rights Actors⁴⁴. Withing the first group, it is possible to identify the ASEAN Summit, composed by state leaders; the ASEAN Coordinating Council, headed by a Foreign Minister; the Secretary General and the Community Council, which comprehends

⁴³ ASEAN. *ASEAN Political Security Community Blueprint* (2009). Available at: www.aseansec.org/22337.pdf

⁴⁴ Hadiprayitno, I. “The Institutionalisation of Human Rights in ASEAN”. In. A. Buyse et al (eds). *Defending Human Rights: Tools for Social Justice* (Antwerp: Intersentia, 2012)

the Political Security Community, the Economic Community, and the Socio-Cultural Community.

On the other group, withing the Human Rights Actors, it can be found the ASEAN Intergovernmental Commission on Human Rights, the Intergovernmental Bodies, namely the ASEAN Committee on Migrant Workers (ACMW), the ASEAN Commission for the Promotion pf Women and Children Rights (ACWC) and the Working Group for Human Rights Mechanism (This one divided into the Representatives of Parliaments, National Human Rights Commissions, Civil Society Organizations and the Academia); and the ASEAN Civil Society Conference and ASEAN People Forum, which undertakes Civil Society Organizations⁴⁵.

In conclusion, taking in consideration the two distinct models (the intergovernmental model and the governmental and non-governmental model) of governance within the ASEAN structure, only the second group allows non-State actors to officially contribute to de development and the progress of institutionalizing human rights in ASEAN. Also, the only organ that is going to be subject of analysis in this work is the AICHR for unarguably being the most important human rights organ of ASEAN.

2.2. ASEAN Responsiveness and Cohesiveness – Current episodes of human rights violations

Now that a brief presentation of the history and structure of ASEAN was given it is apposite to look into the performance of the system in the promotion and protection of human rights.

In the past four decades ASEAN member states have witnessed a significant reduction in mass atrocity crimes, which can be seen as due to a decrease in the use of mass atrocities as a tool of war, rising incomes, and the spread of

⁴⁵ ASEAN Structure, online: <https://asean.org/asean/asean-structure/>

democracy⁴⁶. However, the effectiveness of ASEAN as a regional security institution has been subject to continuing debate among policy makers, academics, and practitioners⁴⁷.

While some view ASEAN as one of the regional organizations responsible for the success of the post-World War II human rights revolution⁴⁸, argue that ASEAN genocide and mass atrocities prevention norms and mechanisms are the reason for the reduction of mass atrocity crimes in East Asia, and see the “ASEAN way” as a positive model for other regional organizations⁴⁹; others state that ASEAN and its regional institutions are mere “talk shops”, being structurally ineffective in resolving inter-state conflict⁵⁰.

Truth is that, being equipped with an arsenal of instruments and mechanisms to take action in the promotion and protection of human rights, it was hoped that ASEAN would be able to respond more adequately to the violation of rights committed by its member states. Sadly, this has not been the case. Evidence of this passivity can be found by comparing ASEAN's reactions towards the human rights abuses in the region, where it is consistently found with great unenthusiasm, choosing to "remain silent" and “powerless”⁵¹.

Why is the ASEAN human rights system irresponsive to the violation of rights? Does ASEAN lacks teeth or is unwilling to bite? An answer to these questions

⁴⁶ Frank, David A. (2018) "The Reduction of Mass Atrocity Crimes in East Asia: The Evolving Norms of ASEAN's Prevention Mechanisms," *Genocide Studies and Prevention: An International Journal*: Vol. 11: Iss. 3

⁴⁷ Rizal Buendia (2020), “ASEAN ‘Cohesiveness and Responsiveness’ and Peace and Stability in Southeast Asia”

⁴⁸ Alexander J. Bellamy, ed., *The Responsibility to Protect: A Defense* (Oxford: Oxford University Press, 2015)

⁴⁹ Mikio Oishi, “Can ASEAN Cope with ‘Human Insecurity’ in Southeast Asia? In Search of a New ASEAN Way,” in *Human Insecurities in Southeast Asia*, Vol. 5, eds. Paul J. Carnegie, Victor T. King, and Zawawi Ibrahim (New York: Springer, 2016)

⁵⁰ Jones, D.M., and Smith, M. (2007). Making Process, Not Progress: ASEAN and the Evolving East Asian Regional Order, *International Security*, 32 and Nishihara, M. (2016). A Separate Group for the ‘Maritime’ ASEAN Nations. *PacNet*, No. 63

⁵¹ BUI, H. (2016). The ASEAN Human Rights System: A Critical Analysis. *Asian Journal of Comparative Law*, 11(1), 111-140

urges to be found in a century where human rights violations episodes have repeatedly scarred the consciousness of humankind.

Myanmar, for instance, is described as one of the darkest pieces of the human rights map, being one of the world's greatest violators of human rights⁵². As such, the Rohingya Crisis in Myanmar going to be further analysed to highlight the ineffectiveness of ASEAN's internal processes and practices for addressing human rights violations.

But, unfortunately, it is not just Myanmar. Countries across Southeast Asia have shown signs of increasing human rights violations or moves away from democracy⁵³ and few of the most recent horrendous events that have been taking place in the region are going to be briefly mentioned to prove the clear responsiveness and cohesiveness of ASEAN towards human rights atrocities.

Among other episodes, there is the current situation of human rights in Cambodia as an element of enormous concern, considering the recent moves to dissolve the opposing political parties, which take to the conclusions that there is an urgent need to re-establish an effective democratic system on the country, as well as create political space for civil organizations in a country who is seeing its political activists obligated to flee out of the country due to prosecution and retaliation, and constant attacks on political opposition, media and human rights defenders⁵⁴. As an Intern at the Portuguese Embassy in Thailand I had the opportunity to hear, in first hand, the testimony of Cambodian activists (namely from the ANFREL, COMFREL and the ADHOC) who have desperately been trying to call into attention is the role that could be played by ASEAN, the EU and the remaining international community, who are in a position where some pressure can be made towards the Cambodian Government. Europe, for instance, was suggested to

⁵² Hao Duy PHAN, *A Selective Approach to Establishing a Human Rights Mechanism in Southeast Asia: The Case for a Southeast Asian Court Of Human Rights* (Leiden and Boston: Martinus Nijhoff Publishers, 21) at 54

⁵³ Vincent Bevins, "It's not just Burma: Human rights are under attack across Southeast Asia, advocates say," *Washington Post*, September 8, 2017.

⁵⁴ Human Rights Watch, Cambodia (2019), online: <https://www.hrw.org/world-report/2020/country-chapters/cambodia>

suppress the benefits that Cambodia holds under the EBA (Everything but Arms) scheme.

Furthermore, there is also the Philippines, which being the second-largest member of the Association of Southeast Asian Nations (ASEAN) is yet run by Rodrigo Duterte since 2016, whose brutal “war on drugs” has killed thousands of people and extrajudicial killings by police continue on a regular basis. There must also be referred the massive killings of political activists, community leaders and human rights defenders, as well as the constant attacks on Civil Society⁵⁵.

In Indonesia, a democratic country and the most populous in the region, saw one of the country's most popular politicians imprisoned after being convicted of committing blasphemy against Islam earlier this year and explicit violations on fundamental freedoms have also been verified⁵⁶.

Lastly, reference must be made to Thailand and its most recent events which are in the centre of attention and spread across the news of the entire world, since an unprecedented wave of protests took place in the attempt of calling attention to the acute need for major democratic reforms⁵⁷. It is of common knowledge that Thailand has always been the stage of gross human rights violations, but being in the year of 2020 and assisting to these kind of atrocities makes one truly wonder why is the world falling apart and still proper answers are missing to address episodes that for some people would never become more than an unrealistic take of a movie. The most recent protests started withing the middle of the coronavirus pandemic on June, when high school and university students decided to put an end to a longstanding taboo, and risked prison sentences, to demand the power and wealth of the country's monarchy be curbed. As a response the authorities are

⁵⁵ Human Rights Watch, Philippines (2020), online: <https://www.hrw.org/world-report/2020/country-chapters/philippines>

⁵⁶ Human Rights Watch, Indonesia (2020), online: <https://www.hrw.org/world-report/2020/country-chapters/indonesia>

⁵⁷ The Guardian, “Thailand protests: everything you need to know” (2020), online: <https://www.theguardian.com/world/2020/sep/22/thailand-protests-everything-you-need-to-know>

attempting to contain the protests by arresting activists and have also manipulated social media and geo-blocked content that is found critical of the royal family.

With all of these events happening at the eyes of the world, why does ASEAN remain unresponsive? What is missing for it to ensure effectiveness in the promotion and protection of human rights in ASEAN member states? In the chapters below an analysis of the substantive and procedural factors that contribute for ASEAN's ineffectiveness is going to be made in order to try to give an answer to this question.

3. Why is ASEAN incapable of ensuring an effective protection of Human Rights in the Region? – A look into the Procedural and Substantive Flaws

After the end of the Cold War ASEAN countries sought to create shared norms between 1997 and 2007, leading to a community building between 2008 and 2015⁵⁸. Not to mention that it is argued that ASEAN has demonstrated a constructive capacity to coordinate with institutions, mechanisms, and relevant government actors of the ten member states within their organization to promote genocide prevention⁵⁹.

As it was already referred, one of the most prominent milestones, and even considered a turning page in the history of ASEAN, has been the adoption of the ASEAN Charter on 20 November of 2007 on the occasion of the Thirteenth ASEAN Summit⁶⁰. As a major breakthrough in terms of institutionalization, the creation of this Charter, ratified by the ten member states and which entered into force in 2009, has enhanced ASEAN's standing as a rule-based organisation⁶¹. This Charter officially asserts respect for human rights and fundamental freedoms,

⁵⁸ Noel M. Morada, "Southeast Asian Regionalism, Norm Promotion and Capacity Building for Human Protection: An Overview," *Global Responsibility to Protect* 8, no. 2-3 (2016)

⁵⁹ (James Waller, *Confronting Evil: Engaging Our Responsibility to Prevent Genocide* (Oxford: Oxford University Press, 2016)

⁶⁰ Deinla, Imelda, "The development of the rule of law in ASEAN: The state and regional Integration" (2017), *Australia National University*

⁶¹ Directorate General for External Policies, Policy Department (2013), "ASEAN: Integration, Internal Dynamics and External Relations"

as well as the rejection of unconstitutional and undemocratic changes of government.

It is undeniable that the most remarkable change in comparison with the past practice was the inclusion of democracy and human rights objectives, which are explicitly stated in the Charter: “to strengthen democracy, enhance good governance and the rule of law, and to protect and promote human rights and fundamental freedoms, with due regard to the rights and responsibilities of the member states”. This passage came to, in some extent, unsettle the predominant denial of the universality of human rights, which was often counterposed to the already mentioned “Asian values”⁶².

In the last decade significant steps towards improvements on human rights have been made in the region, namely through the creation of the ASEAN Intergovernmental Commission on Human Rights in 2009, with the aims of promoting human rights, and the adoption of the ASEAN Human rights Declaration in 2012, which was the pioneer to demonstrate what ASEAN means when it uses the concept of ‘human rights’. Notwithstanding it cannot be affirmed that a Human Rights Mechanism has been established yet. Scholarly discussions have been taken place pointing out numerous criticisms on the role of the AICHR and the substantive content of the AHRD in promoting and protecting human rights of peoples of the Southeast Asian Countries covered by the organization.

As it is easy to conclude from the episodes mentioned on the previous chapter, it is impossible to close our eyes to the fact that from 2010 until this day, even with the referred changes, no significant improvements on human rights were registered through the activity of AICHR or the norms compose the AHRD to protect ASEAN peoples.

But why do ASEAN instruments and mechanisms remain ineffective towards the protection of human rights?

⁶² Langguth, G. (2003) “Asian values revisited”, Asia Europe Journal, 2003

In this chapter will be focusing on the instrument and the mechanism that play the most influential roles in shaping the system for human rights in the organization, namely the AICHR and the AHRD, and respective procedural and substantive flaws. This way it will be possible to understand what is missing in the ineffective ASEAN system and what changes must be undertaken in order to ensure effectiveness in the protection of human rights in the region.

3.1. ASEAN Mechanisms – Procedural Limitations

3.1.1. The ASEAN Intergovernmental Commission on Human Rights (The AICHR)

The AICHR was established with the Cha-Am Hua Hin Declaration as a result of the Fifteenth ASEAN Summit in 2009⁶³. Being considered the mechanism with the potential to uphold human rights principles, as well as their promotion the AICHR should feel under considerable pressure to live up to the high expectations created regarding its success. Concerning to the tasks that should be undertaken by the body, on the Foreign Ministers Meeting it were stipulated the following ones:

- The development of strategies of the promotion and protection of human rights at the regional level by engaging in a dialogue with Member States, academia, and civil society organizations, as well as, if required, other national, regional, and international institutions concerned with the promotion of human rights
- The drafting of papers and studies
- Capacity building, the promotion of full implementation of international human rights standards
- The submission of annual reports on its activities to the ASEAN Foreign Ministers Meeting

Regarding its structure, the AICHR is composed by nominated representatives of each Member States who are answerable to their states and its functioning is

⁶³ ASEAN, The AICHR, online: <https://asean.org/asean-political-security-community/asean-intergovernmental-commission-on-human-rights-aichr/>

regulated by the Terms of Reference, which were drafted after intense negotiations by the High-Level Panel. According to those TOR, the AICHR is a political body designed to be a merely consultative and without independent power.

That said, one can already take a glimpse on one of the most prominent shortcomings of the AICHR – the lack of authority to issue binding decisions, consider cases, or conduct investigations. This missing functions, as well as the lack of binding requirements for independence and expertise of the AICHR members. Another strongly contested provision of the TOR is the one referring to the exclusively consensus-based decision-making process. This last inevitably implies that each state is able to reject any criticism of its human rights records by veto⁶⁴.

Even though the existence of a human rights body is of crucial importance for the protection and promotion of human rights, due, in part, to the role of implementing principles of human rights, the perceived failure of AICHR to respond to the regression of human rights in Southeast Asia has led civil society advocates to dismiss it as a meaningful human rights body⁶⁵.

Furthermore, it is argued that the AICHR was created not only to give response to the needs of ASEAN member states, but also because a regional human rights institution is nowadays considered a “standard” of any regional system⁶⁶. Given this, one may question the intentions behind the creation of this human rights body. Was there a real intention to create a mechanism to address human rights issues or does this falls in the rhetoric of ASEAN, according to which only appearances matter? Is this rhetorical approach one of the reasons why human rights remain unaddressed by AICHR or is just a matter of procedural flaws? Truth is that the AICHR has been criticized as nothing less than a tool of ASEAN, a façade for

⁶⁴ Ginbar, Y., ‘Human Rights in ASEAN: Setting Sail or Treading Water?’ *Human Rights Law Review*10, No. 3 (2010)

⁶⁵ Alan Collins (2019) From commitment to compliance: ASEAN's human rights regression?, *The Pacific Review*, 32:3, 365-394

⁶⁶ James Munro, “The relationship between the Origins and Regime Design of the ASEAN Intergovernmental Commission on Human Rights”, *The International Journal of Human Rights*, Vol.15, No.8, 2011, pp. 1185-1214

member states to justify their new duty to set human rights on the regional agenda⁶⁷.

Firstly, attention will be paid to the AICHR procedural flaws and to the extent in which they limit the body's performance. In this regard four fundamental human rights mechanism flaws must be mentioned, namely the fact that these mechanisms generally lack independence; the commission's weak mandates; and the fact that the AICHR lacks a formal mechanism for receiving complaints for human abuses; and the reliance upon consensus-based decision-making.

To begin with, concerning to the first limitation, it is undeniable that the lack of independence is a considerable stone in the middle of the path of the AICHR. According to the Office of the High Commissioner for human rights independence must be a prerequisite for the existence of regional human rights mechanisms, being that both the body, as well as its members must be independent from national governments⁶⁸. Independence is a vital characteristic for ensuring legitimacy to any human rights mechanism. Indeed, the credibility of human rights bodies intrinsically relies on the independence of political organs⁶⁹.

Notwithstanding, looking into both ASEAN's Committee and Commissions for human rights one can easily see that their structure completely disregards this crucial standard. In this regard attention must be paid to what provisions of articles 3, 5(9), 9 and 5(2) of the TOR, which have great impact on the independence of the Commission due to the peculiar strong connections established between governments and the AICHR⁷⁰.

⁶⁷ Abubakar Eby Hara, "The struggle to uphold a regional human rights regime: the winding role of ASEAN Intergovernmental Commission on Human Rights (AICHR)", *University of Jember - International Relations, Jember, Indonesia* (2019)

⁶⁸ OHCHR, "Principles for Regional Human Rights Mechanisms (Non-Paper)", online: <https://bangkok.ohchr.org/principles-for-regional-human-rights-mechanisms-non-paper/>

⁶⁹ Caroline MUSCAT, "Human Rights Body Has to Be Independent" *Times of Malta* (31 May 2014)

⁷⁰ TAN Hsien-Li, *The ASEAN Intergovernmental Commission on Human Rights* (Cambridge: Cambridge University Press, 2011)

As a consequence of Article 3 of the TOR, the AICHR cannot be considered as more than a mere “consultative intergovernmental body”⁷¹. As such, it is irremediably structured in a way that incites a closer relationship with governments.

Secondly, in accordance with article 5(9) the ASEAN Foreign Ministers make all final decisions on amending, reviewing, and interpreting the AICHR's functions and mandates⁷².

Thirdly, article 5(2) establishes that the member states' governments are responsible for nominating and replacing the members of the AICHR, who "shall be accountable to the appointing Government"⁷³.

These provisions allow AICHR representatives to utilise the mechanism in the way it suits them the best, which can be extremely problematic, because being the ASEAN's body responsible for the protection of human rights, it is under the complete control of its states and while states have the primary task of protecting human rights they have also been the major perpetrator of human rights violations⁷⁴.

This idea of danger intrinsic to the control of Commissions by states, as a result of a clear lack of independence, was also criticized in the context of the African regional human rights system, regarding the dependence of the African Commission for Human and People's Rights⁷⁵.

So, taking in consideration all that has been said, it can be concluded that dependent human rights bodies would have two main interrelated effects on human

⁷¹ *Terms of Reference of ASEAN Intergovernmental Commission of Human Rights* (July 2009), art 3 [TOR]

⁷² *Terms of Reference of ASEAN Intergovernmental Commission of Human Rights* (July 2009), art 5(9) [TOR]

⁷³ *Terms of Reference of ASEAN Intergovernmental Commission of Human Rights* (July 2009), art 5(2) [TOR]

⁷⁴ J. Sarkin, “Colonial Genocide and Reparations Claims in the 21st Century. The Socio-Legal Context of Claims under International Law by the Herero against Germany for Genocide in Namibia”, 1904-1908 (Santa Barbara, Praeger Security International 2009)

⁷⁵ Olufemi AMAO, "African Regional Human Rights System" in Baderin and Ssenyonjo, eds, *supra* note 123, 235

rights in the region⁷⁶. The first would be the politization of human rights and the second the decreased ability to hold governments responsible for their human rights obligations. Furthermore, the conflict of interest between the AICHR's members, governments and victims of human rights abuses interferes with the AICHR's impartiality when performing its duties.

How can we expect the AICHR to be effective in the protection and promotion of human rights if its functioning is completely influenced by the political will of member states? When we take a look into the current human rights atrocities in ASEAN countries, it is easily concluded that the great majority is committed by states themselves and due to the referred limitation, from a legal perspective, it is impossible to hold those governments accountable for their human rights violations.

Even if it is only a mere consultative body, independence is as crucial as it would be if the AICHR had judicial capacities. Being able to provide opinions and receive information independently from its constituent governments is of primordial importance.

The second limitation under scrutiny the AICHR relates to the Commission's weak mandates. But is the lack of an effective protection mandate in the region a result of the HR system design or does ASEAN detain all the tools needed to implement its responsibility to protect but lacks the will to act in accordance?

From the TOR arises an obligation for ASEAN member states to respect, protect and fulfil the human rights of their citizens⁷⁷, meaning that they not only should abstain from directly infringing human rights, but also proactively protect them from being violated by third parties. It must be seen as a "responsibility to protect".

⁷⁶ Hien, B. U. I. "The ASEAN human rights system: a critical analysis." *Asian Journal of Comparative Law* 11, no. 1 (2016)

⁷⁷ *Terms of Reference of ASEAN Intergovernmental Commission of Human Rights* (July 2009), arts 1, 2, 4 [TOR]

Normally, this responsibility rests first and foremost with states⁷⁸, being a doctrine that was unanimously adopted by the UN World Summit in 2005. ASEAN member states joined the whole membership of the UN in making a solemn commitment to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity⁷⁹. Nevertheless, when states are either incapable of or "unwilling" to fulfil this responsibility, the responsibility would "shift" to regional mechanisms, in this case, to the AICHR.

The concept of responsibility to protect is applied in all other well-known regional human rights systems in the world, including the Inter-American, African, and European systems.

As stated by the High-Level Advisory Panel on the Responsibility to Protect in Southeast Asia, although the protection of human rights is part of the principles outlined in its Terms of Reference, this has not yet been fully operationalized. As a result, AICHR is criticized for focusing entirely on the promotion of human rights in the region. The AICHR has also been severely criticized among doctrine for only concentrating its attentions on "promotional work" and not on its protection mandate⁸⁰. International community has also witnessed the lack of the AICHR on actively protecting individuals whose rights have been violated or on addressing past wrongs⁸¹, undermining the ability of the AICHR to serve as an authoritative regional voice that can name and put under scrutiny states and actors who violate human rights.

In comparison and on the contrary the African Commission, for instance, has performed its obligation to protect through different mandates. The mandates

⁷⁸ Vaclav Havel, Desmond Tutu, Irwin Cotler and Jared Genser, "The Responsibility to Protect", *Published to Oxford Scholarship Online*: January 2012

⁷⁹ High-Level Advisory Panel on the Responsibility to Protect in Southeast Asia, "Mainstreaming the Responsibility to Protect in Southeast Asia: Pathway Towards a Caring ASEAN Community", presented at the United Nations, New York (2014)

⁸⁰ 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* (Leiden and Boston: Martinus Nijhoff Publishers, 2012)

⁸¹ Matthew Davies, "An Agreement to Disagree: The ASEAN Human Rights Declaration and the Absence of Regional Identity in Southeast Asia," *Journal of Current Southeast Asian Affairs* 33, no. 3,

involve receiving communications about violations of rights, communicating them to states, and investigating them.

Apart from its periodic meetings, the AICHR has been exclusively involved in some promotion and capacity-building work, including support for conferences on various human rights issues such as statelessness, maternal health, and preparations for the ASEAN Human Rights Declaration⁸².

If, like Africa, the protection mandate only encompasses the competence to receive information, communicate with governments, and undertake investigations, then there are authors who consider that the AICHR already has this legal capacity⁸³. This is for them justified on some provisions of the TOR that justify activities that fulfil the responsibility to protect, such as the ability to "develop strategies" for the "protection of human rights" in order to find information from state parties on the protection of rights. These authors also argue that the AICHR has the legal ability to acquire information from member states in order to protect rights, which can be used to conduct investigations. But can one really affirm that there is nothing in the language of the TOR that would prevent the AICHR from investigating human rights violations? It seems to be a too broad interpretation of the provisions. None of the stipulations in the TOR of the AICHR talk about the capacity to monitor human rights practices in ASEAN member states, such as the power to investigate, monitor or enforce, failing to provide a protecting mechanism capable of receiving complaints from individuals or groups⁸⁴.

Nevertheless, even if this blur in the language of the TOR did not exist, truth is that at least the lack of independence of the Commission previously analysed would stop the AICHR from fulfilling its protection mandate. So, even though authors would consider that the AICHR is equipped with tools to protect rights,

⁸² Vitit Muntarbhorn, Directorate General for External Policies, Policy Department, "Development of the ASEAN Human Rights Mechanism", 2012

⁸³ Yuval GINBER, "Human Rights in ASEAN - Setting Sail or Treading Water" (2010) 10(3) Human Rights Law Review

⁸⁴ Vitit Muntarbhorn, Directorate General for External Policies, Policy Department, "Development of the ASEAN Human Rights Mechanism", 2012

realistically, it cannot do so because it is dependent on governments, which are often also the institutions being investigated.

As a third limitation it must be referred the fact that, unlike other regional human rights bodies, the AICHR does not currently have a formal mechanism for receiving complaints of human rights abuses. Furthermore, the AICHR is limited to reporting on individual member's human rights situations and does not include discussion of human rights concerns affecting the region. AICHR cannot accept complaints from non-government organizations about human rights violations or issues obtaining to member states⁸⁵. Currently, there is no way for individuals or civil society organizations to report human rights abuses to the body, which significantly contributes to the ineffectiveness of the AICHR. This cannot be seen as a surprise, because the AICHR is thus prevented from adequately respond to allegations of human rights abuses without a mechanism to collect information in the first place⁸⁶.

Finally, attention must be paid to the limitations imposed by the TOR reliance upon consensus-based decision making. This process may be considered harmful, given the fact that it unconditionally offers member states veto power, meaning that states, as consistent human rights violators, are conceded the ability to bypass any forms of punitive action⁸⁷. Additionally, the ASEAN region is peculiarly characterized by the wide range of political systems and cultural norms from its member states, being that some are still struggling in the path towards the establishment of an effective democracy. This way the consensus-based decision-making can turn to be problematic because they will either fail to reach a consensus

⁸⁵ High-Level Advisory Panel on the Responsibility to Protect in Southeast Asia, "Mainstreaming the Responsibility to Protect in Southeast Asia: Pathway Towards a Caring ASEAN Community", presented at the United Nations, New York (2014)

⁸⁶ Vitit Muntarbhorn *Unity in Connectivity? Evolving Human Rights Mechanisms in the ASEAN Region* (Brill Nijhoff 2013); Vitit Muntarbhorn 'Briefing Paper. Development of the ASEAN Human Rights Mechanism' (European Parliament 2012).

⁸⁷ Michele Staggs Kelsall, "The new ASEAN Intergovernmental Commission on Human Rights: Toothless Tiger or Tentative First Step?", Analysis from the East-West Centre, No.90. 2009

or reach a consensus which represents a weak response to serious human rights violations⁸⁸.

With all that was said under consideration, it is possible to conclude that the AICHR has not fully functioned as a regional human rights mechanism capable of meeting individuals and civil society's expectations. It can actually be affirmed that the purpose of the AICHR to protect human rights seems to have lost its way because it lacks an institutional framework in the region.

In this regards it can be found legitimate that questions have been raised not only about AICHR's power to navigate the complexity between regional and domestic politics of human rights, but also about whether expectations towards their active roles to implement the ASEAN Human Rights Declaration are realistic. Is there a institutional refusal?⁸⁹

3.1.2. ASEAN Human Rights Declaration

The area of human rights has experienced a dramatic increase in legalization in the post WWII period, being that detailed treaties involving diverse human rights had been widely ratified and had entered into force. Nevertheless, these treaties had weak enforcement mechanisms.

In this regard the AHRD arises as a significant milestone document in the history of ASEAN in the field of human rights. On November 18 of 2012, at the twenty-first ASEAN Summit in Phnom Penh the AHRD was adopted by the ASEAN heads of state⁹⁰, being its uniqueness intrinsically linked to the fact that it represents the first instance in which member states with incredibly vast different histories and policies regarding human rights had agreed to a shared set of

⁸⁸ Ian Niccolo V. Tobia, "Confessing to the Politicization of the ASEAN Human Rights Agenda: A Case for the Modification of the Consensus Rule," *Thammasat Review* 15, no. 1 (2012)

⁸⁹ Langlois, A. Human Rights, "Orientation," and ASEAN. *Journal of Human Rights* 13, No. 3 (2014)

⁹⁰ Nicholas Doyle, "The ASEAN Human Rights Declaration and the Implementation of Recent Southeast Asian Initiatives in Human Rights Institution-Building and Standard-Setting", *The International and Comparative Law Quarterly*, Vol.63, No.1, pp. 67-101 (2014)

principles on this issue area⁹¹. There is no doubt that at first sight this can be interpreted as a genuine intention to establish a proper regional human rights mechanism in a region which historically had adopted an apathetic position towards international cooperation in the field of human rights.

Notwithstanding, the AHRD's drafting process, a task that was undertaken by the AICHR and its representatives in accordance with article 4.2 of the TOR, was fraught with controversy. In fact, the draft of the document was entirely under the responsibility of the AICHR, making outside observers feel concerned that its representatives, as appointed by the governments of ASEAN member states, would not act in a fully independent manner during the drafting process because the body's Terms of Reference stipulate that they can be withdrawn by their appointing government at any time⁹². Moreover, there is the fact that the drafting of the document was conducted in secret, being that neither drafts of the document nor the terms of reference provided to human rights experts involved in the drafting process were officially made available to the public. Civil society organizations were also notably excluded from the drafting process, which consubstantiates a reason to think that the process was extremely restricted⁹³.

In this regard, the UN Commissioner for Human Rights stated that "This is not the hallmark of the democratic global governance to which ASEAN aspires, and it will only serve to undermine the respect and ownership that such an important declaration deserves"⁹⁴. And the UN also expressed concern that the Declaration

⁹¹ Matthew Davies, "An Agreement to Disagree: The ASEAN Human Rights Declaration and the Absence of Regional Identity in Southeast Asia," *Journal of Current Southeast Asian Affairs* 33, no. 3

⁹² *Terms of Reference of ASEAN Intergovernmental Commission of Human Rights* (July 2009), art 5(2) [TOR]

⁹³ Catherine Shanahan Renshaw, "The ASEAN Human Rights Declaration 2012," *Human Rights Law Review* 13, no. 3 (2013)

⁹⁴ UN Office of the High Commissioner for Human Rights, "UN Rights Chief Welcomes Focus on Human Rights and Democracy, Calls for Review of ASEAN Draft Human Rights Declaration," news release, November 8, 2012

was not compatible with global standards and could be used as a shield for continued rights violations⁹⁵.

On their perspective, the drafters of the AHRD claim that the document was created with the aim to uphold standards of the UDHR, while also taking in consideration the regional context of the region. Even though, there is a considerable number of authors who consider that the Declaration is deeply flawed, encompassing provisions that severely undermine the universality of human rights, as it is going to be further analysed.

The Declaration contains a clear enunciation of the duties of ASEAN member-states to respect, promote and fulfil the human rights and freedoms, also setting provisions established in the UDHR, the right to development⁹⁶ and the right to peace⁹⁷. However, it is possible to point out some expressions of reluctance throughout the document. Article 6 is one of those examples, where the enjoyment of rights ‘must be balanced with the performance of corresponding duties as every person has responsibilities to all other individuals, the community and...society’. This provision is undoubtedly problematic since it has the potential for oppressive effect by acting as a source of justification for derogation by the state invoking the norm⁹⁸. The Article 7 reintroduces two concepts of the Bangkok Declaration era, namely “indivisibility” and “peculiarity”, as an attempt to while asserting the universality, indivisibility, interdependency and interrelatedness of all human rights and fundamental freedoms, stipulating, at the same time, the importance of recognizing the particularities and differences exist both at the regional and national level⁹⁹.

One of the main concerns regarding the writing of the AHRD results from article 8, which has the potential to reverse the modality of human rights on a regional

⁹⁵ Daniel Baer, “Keynote Address to the US-ASEAN Symposium on the ASEAN Human Rights Declaration”, Washington, DC (2012)

⁹⁶ *ASEAN Human Rights Declaration* (2012), Art. 35, 36 and 37

⁹⁷ *ASEAN Human Rights Declaration* (2012), Art. 38

⁹⁸ L Thio, “Implementing Human Rights in ASEAN Countries: Promises to Keep and Miles to Go before I Sleep” (1999)

⁹⁹ *ASEAN Human Rights Declaration* (2012), Art. 7

basis, limiting by law the exercise of human rights and freedoms for the purpose of securing the recognition of human rights and the freedom of others. This is clearly incompatible with international law. This last allows certain rights to be subjected to limitations only under specific and narrowly defined situations, but even when that happens, those limitations are subject to tight conditions, specifically tests of legality, legitimacy, necessity, and proportionality. On the contrary the AHRD allows for limitation on the bases of general welfare of people in a democratic society and, being this category so broad it can be interpreted to encompass almost all state activity.

Many exist who argue that the use of Asian ways or values in the AHRD is an explicit specific form of cultural relativism that will join other features, such as the lack of determination to ratify core treaties.

Yet, despite such criticism for containing rudimentary commitments to relativism and for having a self-limiting article, authors argue that the Declaration stands as the first Southeast Asian charter of human rights and contains commitments not only to economic, cultural and social rights, but also to far more contentious civil and political rights, pushing the mentalities of some states beyond their comfort zone¹⁰⁰. The AHRD may prove to be a significant development for human rights in SEA as a source of “soft law”, which exert some normative influence on human rights in the region.

On the other hand, more sceptic opinions arise stating that the AHRD is declaratory of certain rights but contains no binding undertakings that ASEAN member states respect them, therefore playing an insignificant role in advancing human rights in the region for not having the ability to force states to commit to the protection of human rights.

¹⁰⁰ Davies, Mathew (2014), An Agreement to Disagree: The ASEAN Human Rights Declaration and the Absence of Regional Identity in Southeast Asia, in: *Journal of Current Southeast Asian Affairs*, 33

From what was referred it is possible to adopt a perspective according to which these new initiatives may in fact be a distraction and a retrograde step in the human rights protection in Southeast Asia. This because while appearing to address international and national bodies' concerns regarding human rights in ASEAN states they in fact amount to political rhetoric, or, indeed, risk fragmenting those human rights norms which are currently recognized by ASEAN states.

3.2. Substantive Limitations

3.2.1. Universalism Vs. Relativism – To what extent can the way through which ASEAN interprets Human Rights jeopardise an effective guarantee of universal Human Rights standards?

After the analysis of the procedural flaws in the ASEAN system it is now time to turn attentions to its substantive limitations, even though they are all intrinsically connected as it is going to be concluded. In fact, as well as ASEAN's achievements, also the flaws cannot be imputed to a single factor, there is a need to consider all the factors, being structural or substantial, combined¹⁰¹. I think it was already possible to take a glimpse on how structural factors alone cannot lead to the reduction of mass atrocities. It is, indeed, needed an appropriate cultural and ideational norms¹⁰².

In the world we live in today states are made pressure to ratify international norms and comply with human rights and with such ratifications, as well as through the creation of regional human rights bodies and documents, they claim to respect and protect the fundamental rights and freedoms of their citizens. But the truth is that very few, in practice, consistently meet all of the obligations and standards codified in international law or they simply choose not to accept its legitimacy¹⁰³.

¹⁰¹ Alexander J. Bellamy, ed., *The Responsibility to Protect: A Defense* (Oxford: Oxford University Press, 2015)

¹⁰² Jeremy Bellamy, *The Other Asian Miracle?*; Jennifer M. Welsh, "Norm Contestation and the Responsibility to Protect," *Global Responsibility to Protect* 5, no. 4 (2013)

¹⁰³ Rhona K. M. Smith, "Human Rights in International Law," in *Human Rights Politics and Practice 3rd Edition*, ed. Michael Goodhart (Oxford: Oxford University Press, 2016)

In the case of ASEAN, its states are bound to human rights as parties of the ICCPR and ICESCR, as well as through the AHRD itself. All instruments of human rights, namely the UDHR, the ICCPR, the ICESCR, The ECHR and the AHRD, have established basic rights undeniably recognised worldwide. Aside from Brunei, Malaysia, Myanmar, and Singapore, the other six members of ASEAN are parties to both International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights. Another example is the Vienna Declaration and Programme of Action (VDPA) adopted by the World Conference on Human Rights in 1993, which representatives of the ASEAN countries attended.

All these facts could lead to the idea that ASEAN fully accepts the universality of human rights. But as it was already possible to see on the analyses of its procedural flaws, relativism is well spread through ASEAN's instruments and mechanisms.

Regarding the concepts of universalism and relativism, two schools of thought are dominant¹⁰⁴. The first school has inherent the idea that human rights are universal, being applied to all human beings regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and that all human beings are born free and equal in dignity and rights¹⁰⁵. Concerning to the second school it claims that human rights are not universal and that they should rather be differentiated on the grounds of national and regional particularities¹⁰⁶. According to the second perspective, a universal homogenization of rights is a complete utopia because the existence of different values of considerably different regions and countries imply a different interpretation of human rights, claiming sensitivity towards the complexity that arises from the

¹⁰⁴ Henry J. Steiner, Philip Alston & Ryan Goodman, *International Human Rights in context: Law, Politics, Morals* 539 (2007)

¹⁰⁵ Universal Declaration of Human Rights (1948), Art. 1

¹⁰⁶ Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights, Bangkok, 17 December 1991, para 8 (Bangkok Declaration)

diversity of backgrounds, cultures, geography and phases of development among nations of the world¹⁰⁷.

The relativism is seriously connected to the concept of “Asian values”, which was already referred in a previous chapter and that saw its strength undermined with the Asian financial crisis in 1997-1998 and states became more vulnerable, changing their position towards human rights and being possible to note a tenuous progress towards acceptance of human rights discourses and democracy¹⁰⁸. Even though, it was not in a sufficient extent as it is going to be concluded.

It is not a surprise to say that the majority of Southeast Asian countries clearly support the cultural relativism school of thought. But, coherently or not, they are also parties of key treaties that protect human rights, such as the Convention on the Elimination of All Forms of Discrimination Against Women from 1979 and the Convention on the Rights of the Child from 1989; and the majority has already ratified the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), all of which recognize and uphold the principle of universality.

But if states are unwilling to comply with human rights international law why do they act as they want to subject themselves to international and regional principles and institutions? Well, the answer relies on the pressure that is well made by the international community, because in order to join regional institutions it is often required. In other cases, states have been willing to sacrifice a portion of their sovereignty, because they think that those new institutions are all about theory and that, in practice, they will not make an impact on them.

A truth that cannot be denied is the one according to which ASEAN rejects the universalist approach to human rights, existing a considerable number of facts that prove that. The clear adherence to relativism can be found in the texts of ASEAN

¹⁰⁷ Alatas, A. *A Voice for Just Peace: A Collection of Speeches by Ali Alatas*. (Singapore: ISEAS, 2001)

¹⁰⁸ Ramcharan, R., ‘ASEAN’s Human Rights Commission: Policy Considerations for Enhancing its Capacity to Protect Human Rights’. *UCL Human Rights Review* 3 (2010)

instruments regarding to human rights, not only undermining the application of international legal standards, but also inciting human rights violations by states offering them justification for that.

To be more specific, there are three fundamental features that should be taken under consideration, namely the limitation of human rights by invoking regional and national particularisms, the balance required between rights and duties, and the fact that the principles of legitimacy, proportionality and legality are completely disregarded. Some of this factors have been already mentioned during the analysis of the procedural flaws, but now they are going to be listed in a more detailed way.

Concerning to the first element, one can directly pay attention to the AHRD itself. In article 7 it is possible to read that “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”¹⁰⁹. This can be seen as an express restriction on human rights, but in fact it is still subject of debate. If for some that is clear, others argue that the second part of the article does not authorize states to call on regional specificities to discard universal human rights¹¹⁰. Making a comparison between article 7 of the AHRD and article 5 of the VDPA, some argue that the only intention behind the writing of article 7 was to call attention to the different context of the region and not to superimpose it to universal rights. Both the AHRD and the VDPA make reference to the idea of national and regional particularities with the expressions of, respectively, “bearing in mind” and “must be borne in mind”. Nevertheless, while in article 5 of the VDPA it is expressly affirmed that human rights are universal, being the references made to regionalism and nationalism supplementary, in article 7 one cannot say the same. There is nothing in this last article safeguarding the universality of

¹⁰⁹ *ASEAN Human Rights Declaration* (2012), Art. 7

¹¹⁰ Catherine Shanahan Renshaw, "The ASEAN Human Rights Declaration" (2013), 557–579, 13 *Human Rights Law Review*

human rights, attention being paid almost exclusively to regional conditions¹¹¹ and shows an intention to limit fundamental rights through them.

The fact that ASEAN is trying to use the AHRD to limit human rights with economic, political, and other background issues is seen as a clear denial of the universality of fundamental rights and freedoms¹¹².

While some find no space for doubts in this regard, there are still others who find arguments to counterpose, saying that the rejection of the universality of rights can be legitimately justified by a compromise on the ground of economic context. These authors¹¹³ tend to argue that that universal human rights are a "Western" concept which cannot apply to non-western countries with lower economic capabilities.

But is the fact that it could be more challenging for non-western countries to enforce Human Rights a plausible justification to move away from the universality perspective? Does it make sense to overstep the fundamental rights and freedoms and justify that using arguments regarding lack of economic stability? In my opinion these arguments are a hand full of nothing, simply showing unwillingness to compromise with the international standards. Furthermore, there is no logic on creating concepts such as "Western" human rights. Human rights are global, transversal, referring to rights and freedoms that belong to on and each one of us and that should be above all other concept and always put in first place. I do believe and I do not discard the idea that it is more difficult to realize human rights in a developed society, but the lack of economic success in developing countries cannot be used as an excuse to indiscriminately violate human rights on those regions. Human rights are universal and should be granted to every human being.

¹¹¹ Nicholas Doyle, "The ASEAN Human Rights Declaration and the Implications of Recent Southeast Asian Initiatives in Human Rights Institution-Building and Standard Setting" (2014), *International and Comparative law Quarterly* 67

¹¹² Hien, B. U. I. "The ASEAN human rights system: a critical analysis." *Asian Journal of Comparative Law* 11, no. 1 (2016): 111-140.

¹¹³ Yash Ghai, "Rights, Social Justice, and Globalization in East Asia", *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999)

Being a challenging task for ASEAN countries to enforce fundamental rights and freedoms cannot have the same meaning as it being impossible. If there is true will from Member States, no matter how long the path is or how many obstacles are found in the way, there is always the possibility to make some improvements, step by step, until the final destination. It is not convincing to call for economic achievement before fundamental rights can be protected, it is a work that shall be undertaken as a priority and that can be done in a more progressive way.

Furthermore, those who argue that economic stability shall be prioritized, forget that the costs of denying civil and political rights may bring about severe consequences for the countries' financial systems, because it incites corruption¹¹⁴.

The second limitation concerned the balance required between rights and duties whose discussions have been varied. Truth is that among ASEAN member states' culture the idea of the existence of particular duties constituting preconditions for the enjoyment of rights cannot be seen as a surprise. And once again the figure of the "Asian values" takes its role. This concept has been constantly called as an argument to justify relativism in the ASEAN region.

Explicit reference to the required balance between rights and duties can be found on the TOR of the AICHR, state the following: "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."

Also, the AHRD itself imposes these restrictions throughout the document, conditioning fundamental rights on particular duties or obligations.

Even though, what is obviously a deny of the universality of human rights for some, is justifiable for others. An example of this is the statement of the Ministry for Foreign Affairs and Head of the Delegation of the Republic of Indonesia, who

¹¹⁴ Jack Donnelly, "Human Rights and Asian Values: A Defence of Western Universalism" in *Bauer and Bell, eds*, supra note 93

defends that idea that the balance between human rights and individual duties is consistent with article 29 of the UDHR and therefore justifiable¹¹⁵.

But is this interpretation in line with the truth? It appears to be the complete opposite, since the UDHR does not convey that the performance of those duties is a condition for one's enjoyment of rights, and thus being the universality of Human Rights explicitly undermined in the ADHR, inciting violations of those rights in the name of getting a balance between rights and responsibilities.

The third and last limitation that must be referred is the non-consideration for the principles of legitimacy, proportionality, and legality. As it was already mentioned, the AHRD refers to national law, security, and morality to deprive human rights to be granted unconditionally. Don't these provisions encourage the governments to act against human rights? shouldn't the existence of Human Rights norms and standards be seen as a limit to governments and to fight against the abuse of power? It is inevitable to recognize that using national laws would undermine a state's compliance with international human rights standards, serving to provide ready-made justifications for human rights violations of people within the jurisdiction of ASEAN governments¹¹⁶.

Article 8 is one of the examples that clearly strengthens the power of this limitation by stating that "the exercise of rights shall be subjected to limitations only as determined by law, and to meet the just requirements of "national security, public order, public health, public safety, and public morality"¹¹⁷. Unlike the ECHR, which also employs restrictions on human rights, the AHRD does not apply this restriction to a select number of rights, but to every right. The problem is not in the restrictions themselves, but rather in the way they are chosen to be used. Of course, there are qualified rights that tend to compete with one another, and states are given a "margin of appreciation" to balance the conflicting rights. Notwithstanding, this

¹¹⁵ Ali Alastas, Ministry for Foreign Affairs and Head of the Delegation of the Republic of Indonesia, Statement before the Second World Conference on Human Rights, Vienna, 14 June 1993

¹¹⁶ Human Rights Watch, "Civil Society Denounces Adoption of Flawed ASEAN Human Rights Declaration, AHRD falls far below international standards" (2012)

¹¹⁷ *ASEAN Human Rights Declaration* (2012), Art. 8

conflict has to be careful and properly analysed. States can only be able to apply such restrictions if their decisions satisfy three strict tests: the condition of legality, the condition of legitimacy and the condition of proportionality¹¹⁸. If this requirements are not effectively met risk of states expanding their power to restrict human rights becomes overpowering.

3.2.2. The ASEAN Way and the role of the Principle of Non-Interference - How can the ASEAN *modus-operandi* and the narrow acceptance of the Principle of Non-Interference severely limit the efficiency of the system?

In Southeast Asian countries, human rights and international supervision by human rights mechanisms have always been seen as a threat to their so valued sovereignty¹¹⁹. This is probably the main reason why the *ASEAN Way* plays such a remarkable role in the region. It is known as the norm of collective decision-making through networked civil societies in Southeast Asia, being, as it was already briefly referred, characterized by the emphasis it gives to informal interactions, minimal institutional development, and peaceful settlement of disputes. According to this norm there must exist a high degree of respect for the right of every member state to lead its national existence free from external interference, subversion, and coercion¹²⁰.

The *ASEAN Way* is, indeed, credited for its ability to moderate and mollify brewing tensions between ASEAN states and between them and extra-ASEAN states, being also responsible for encouraging negotiations to avert armed conflict¹²¹. Notwithstanding, it has been severely criticized when it comes to the

¹¹⁸ Olivier De Schutter, "International Human Rights Law: Cases, Materials, Commentary", *Université Catholique de Louvain, Belgium* (2019)

¹¹⁹ Caballero-Anthony, M., "Human Rights, Economic Change and Political Development", *Human Rights and International Relations in the Asia Pacific* (1995)

¹²⁰ Indrayanti, Kadek Wiwik, and Nanda Saraswati. "A Legal Analysis of Cultural Necessity to Complete the Human Rights System in ASEAN." (2019): 62-83

¹²¹ Rizal Buendia (2020), "ASEAN 'Cohesiveness and Responsiveness' and Peace and Stability in Southeast Asia"

resolution of the growing intra-regional territorial conflict the world has been assisting to.

This way of decision-making, being a concept of inter-state relation and regional cooperation that consists of the avoidance of formal mechanisms and legalistic procedures for decision-making, and reliance on *musyawarah* (consultation) and *mufakat* (consensus) to achieve collective goals¹²², consubstantiates a cultural paradigm. Thus, one of the most criticized provisions of the TOR, as it was also already referred, is precisely the one that refers to decision-making by consensus only, which gives ground for states to reject criticism of their human rights records by veto.

Furthermore, this decision-making process entails inevitable lengthy and protracted negotiation, given the inexistence of a timetable and the reliance on unanimity and on negotiations that are undertaken until all parties have reached an agreement¹²³. This approach has crystallized into ASEAN's diplomacy and security culture, opposing to legally binding treaties and procedures, and giving preference to and informal mechanisms of dispute settlement or dispute avoidance.

Truth is that the ASEAN consensus-based decision-making would be inevitably ineffective at some point when dealing with issues where fundamental rights and freedoms would be counterposed to national interests, such as sovereignty and territorial integrity. These last would be always given priority. This way, despite its inherent flexibility, decision-making on regional or international cooperation based on a consensus approach remains hostage to the imperative of national interest¹²⁴.

In this regard, and as an intrinsic characteristic of the *ASEAN Way*, reference must be made to the principle of non-interference, being that the norm and value of non-

¹²² Acharya, A., "Ideas, Identity and Institution-Building: From the ASEAN Way to the Asia-Pacific Way?" *The Pacific Review* 10 (3). pp. 319-346 (1997)

¹²³ Mak, J.N., "The ASEAN process ('Way') of multilateral cooperation and cooperative security: the road to a regional arms register?", *MIMA-SIPRI Workshop on An ASEAN Arms Register: Developing Transparency*, Kuala Lumpur (1995)

¹²⁴ Acharya, A., "Ideas, Identity and Institution-Building: From the ASEAN Way to the Asia-Pacific Way?" *The Pacific Review* 10 (3). pp. 319-346 (1997)

interference into the affairs of another country in the region is considered one of the fundamental and binding principles of ASEAN. In fact, this principle is present in ASEAN documents since its founding in 1967, namely in the Zone of Peace, Freedom and Neutrality Declaration of 1971, the Treaty of Amity and Cooperation of 1971 and even on article 2 of the ASEAN Charter of 2007.

If it is true that it is due to the existence of this principle that ASEAN member states have experienced a significant decrease in the number of mass atrocities as a result of armed conflict between states in the region since the end of the Cold War¹²⁵, it is also equally true that this principle, in some way, offers protection to the states that commit human rights violations against its citizens.

Since its creation, the application of the principle of non-interference has been extremely strict, being considered one of the major obstacles for ASEAN human rights bodies to interpret their mandates and their functions effectively¹²⁶. Practical and clear examples of the detrimental role of the principle of non-interference in intra-states affairs are the impracticability of interference in the Rohingya Genocide, which is going to be subject of a more detailed analysis in the next chapter, and the indiscriminate killings of Pattani minorities in Southern Thailand. Both led to massive refugee crisis, causing tremendous instability in the region and ASEAN only has the option to watch with a blind eye¹²⁷, due to the fact that this norm prevents ASEAN from being relevant and capable of addressing world changes and regional challenges.

While ASEAN tries to send a good image into the international community by building human rights mechanisms and instruments, it also upholds the principle of non-interference concerning to internal affairs, jeopardizing the meaningful work that could be effectively developed by them. The question that I find pertinent in this regard is the following: If in ASEAN a prevalence to the Principle

¹²⁵ Jeremy Bellamy, *The Other Asian Miracle?*; Jennifer M. Welsh, "Norm Contestation and the Responsibility to Protect," *Global Responsibility to Protect* 5, no. 4 (2013)

¹²⁶ Sriprapha Petcharamesree, "ASEAN Human Rights Regime and Mainstreaming the Responsibility to Protect: Challenges and Prospects," *Global Responsibility to Protect* 8 (2016)

¹²⁷ Rizal Buendia (2020), "ASEAN 'Cohesiveness and Responsiveness' and Peace and Stability in Southeast Asia"

of Non-interference is given why would they create a Human Rights system? Creating a system with the aim of protecting and promoting human rights, but then limiting it to the principle of non-interference seems paradoxical. On one side it creates an apparent engagement with human rights standards, but on the other hand all instruments and mechanisms are not allowed to take any action when human rights atrocities are being committed by states against their peoples. In this regard authors argue that it is only an attempt from ASEAN to protect its external regional legitimacy. Whether to confront the West or to show the international audience that something is being done¹²⁸.

Moreover, it becomes evident that the AICHR's lack of an enforcement mechanism and the AHRD's various provisions which allow states to opt-out of certain human rights obligations are due to a lack of political will to address issues related to human rights. And this is clearly a result of the strong adherence to the principle of non-interference¹²⁹.

Taking an even more close look into the impact of the adherence to this principle it is possible to reach the conclusion that it consubstantiates the reason why the drafting process of both the AICHR's Terms of Reference and the AHRD led to the limited advisory role of the AICHR and its reliance upon consensus-based decision-making and to the fact that the AHRD is merely declaratory rather than a treaty. Furthermore, a legally binding treaty would require an enforcement mechanism that ASEAN currently lacks.

Overall rethinking the norm of non-interference has become imperative. Only that way serious violations of human rights can be effectively addressed, allowing humanitarian intervention or the imposition of sanctions.

3.2.3. The Relationship between ASEAN and Civil Society

¹²⁸ Avery Poole, "The World Is Outraged: Legitimacy in the Making of the ASEAN Human Rights Body" *Contemporary Southeast Asia* (2015)

¹²⁹ Robin Ramcharan, "ASEAN and Non-Interference: A Principle Maintained," *Contemporary Southeast Asia* 22 (2000)

When attention was paid to the role that intergovernmental organizations could have within the field of human rights and, more specifically, its relationship with international norms as “norms diffusers”, it was also referred the crucial role that is played by civil society organizations as “norms entrepreneurs”. In this regard it must now be analysed the particular relationship established between ASEAN and civil society organizations in the region.

In fact, the relationship between these figures has a prominent impact in the field of human rights, reiterating the willingness of both parties to engage with each other. In the ASEAN context this is especially relevant, given the fact that the overall framework is irremediably dependent on the will of member states. And in order to achieve successful results genuine interest of intergovernmental organizations towards the work of CSOs must be witnessed to prove a broader approach towards human rights¹³⁰. Nevertheless, to reach meaningful cooperation benefits for both parties should be met, being that IGOs are likely to only give proper assistance to CSOs if, somehow, that brings gaining in terms of pursuing its policy goals.

At the time of its founding, ASEAN did not conceded a meaningful role to civil society, being that CSO remained behind the curtains the following decades. Notwithstanding, since the 90's, these bodies began to appear throughout the region and over recent years, ASEAN has started proclaiming the rhetoric of becoming “people-oriented” in a number of documents bringing this IGO onto the radar of CSOs¹³¹.

Truth is that ASEAN has recently made numerous commitments to engage CSOs in its governance practices. In the late 90's, as parties of the ASEAN's Vision 2020 initiative, member states agreed to pursue “a community of caring societies” in

¹³⁰ Jens Steffek, “Explaining Cooperation Between IGOs and NGOs – Push Factors, Pull Factors, and the Policy Cycle,” *Review of International Studies* 39 (2013)

¹³¹ Alan Collins. “ A People-Oriented ASEAN: A Door Ajar or Closed for Civil Society Organizations?”, *Contemporary Southeast Asia: A Journal of International and Strategic Affairs* ISEAS–Yusof Ishak Institute (2008)

which “civil society was empowered”¹³². Moreover, other initiatives by ASEAN were established, namely the formation of an accreditation system which allows CSOs to become officially affiliated with ASEAN and the inciting of CSO participation on informal consultations on specific issues.

At the same time that these initiatives may create the idea of a “community caring” ASEAN, they are deeply flawed. Truth is that, concerning to the first one, the accreditation offers limited means for CSOs to contest policy as a result of strict controls over who can participate, and the forms of participation permitted¹³³. In regard to the second ASEAN has the ability to choose which civil society organizations are invited to these forums. ASEAN has the ability to bar civil society organizations which are critical of organizational policies as well as those of member states.

As a result, some may question the legitimacy of the spaces argued to have been created for CSO participation, being that they seem to be structured to prevent CSOs from contesting policy. Furthermore, this limitations are especially applied to the organizations that work on issues related to human rights, being that out of the 53 civil society organizations that are formally affiliated with ASEAN, not one has an explicit focus on human rights and most are business-oriented¹³⁴.

Overall, it can be concluded that this may be just another façade of ASEAN. In, fact, the influence of CSOs focused on human rights is, at the end of the day, severely limited, emphasis being given only to CSOs that focus their attention on a narrow set of civil society issues, such as economic development and social welfare. This exclusion of CSOs regarding human rights issues is also evidenced by the exclusion of such bodies from the drafting process of the AHRD as well as the annual ASEAN-ISIS Colloquium of Human Rights. Thus, ASEAN’s limited official interaction with civil society organizations focused on human rights forces

¹³² Association of Southeast Asian Nations, *ASEAN Vision 2020*, Jakarta (1997) https://asean.org/?static_post=aseanvision-2020

¹³³ Kelly Gerard, “ASEAN and civil society activities in ‘created spaces’: the limits of liberty”, *The Pacific Review journal*, Vol. 27, 265-287 (2014)

¹³⁴ ASEAN, The Association of Southeast Asian Nations, “Register of Accredited Civil Society Organizations (CSOs),” May 11, 2015

such organizations to turn to less effective forms of advocacy, such as alternate methods of engagement in parallel spaces that are highly ineffective.

As “norms-entrepreneurs”, CSOs are faced with an incredible difficulty concerning to the diffusion of norms throughout the region, once ASEAN seems to be unwilling to undertake its task as a “norms-diffuser”. These organizations, in fact, do conduct activities in parallel spaces, but they are not effective at spearheading the norm diffusion process in comparison to official consultations with ASEAN governments. Thus, regional CSOs focused on human rights are left with few meaningful options for diffusing human rights norms in Southeast Asia.

Nevertheless, these facts will hardly be surprising. Throughout this text numerous were the times that the almost insignificant importance that is given to human rights in the region was criticized, namely while concluding that they are far from been considered an organizational priority. Well, if it has been like this, it would be predictable the lack of will to cooperate with CSOs focused in this particular issue area. Furthermore, the existence of the norm of non-interference serves as a disincentive for cooperation with civil society organizations focused on human rights since they would be likely to criticize the internal affairs of member states in the process.

Taking all of this in consideration also this relationship should be subject of a rethinking process. Only this way it would be possible to ensure a different ASEAN’s approach towards human rights.

4. Case Study: Myanmar – ASEAN responsiveness to the Rohingya Crisis

This chapter intends to demonstrate how both procedural and substantive limitations make ASEAN powerless before human rights atrocities in the horrendous reality lived by thousands within its member states. For that, the case of the Rohingya Crisis is going to be used as a practical example, being described by the UN Secretary-General António Guterres, as "one of, if not the, most discriminated people in the world", the Rohingya are one of Myanmar's many

ethnic minorities. The Rohingya Crisis is, without a doubt, responsible for many of the most extreme violations of Human Rights during the last decade.

Starting with a brief historical approach, the Rohingya people are a Muslim-minority ethnic group which is concentrated along Myanmar's North-western Rakhine State and which shares a border with Bangladesh's Chittagong Division and differing from Myanmar's dominant Buddhist groups ethnically, linguistically, and religiously ¹³⁵. Actually, the tensions between Muslim Rohingyas and the overwhelmingly Buddhist Burmese majority date back to World War II, due to the fact that the two groups supported opposing sides, respectively the British and the Japanese. Nevertheless, the tension between both groups increasingly worsened and discriminatory policies of Myanmar's government since the late 1970s have forced hundreds of thousands of Muslim Rohingya to flee their homes in the predominantly Buddhist country. Most have crossed by land into Bangladesh, while others have taken to the sea to reach Indonesia, Malaysia, and Thailand.

Concerning to the Rohingya legal status, according to Myanmar's Citizenship Law of 1982 they are effectively denied citizenship, being one of the largest stateless populations in the world¹³⁶. This inhuman legal status incites abuses such as restrictions on movement, arbitrary confiscation of property, forced labour, and ineligibility for public office. Moreover, the Rohingya people are also subject to restriction regarding religious freedoms, being that authorities regularly conduct inspections and subsequently "fine or imprison those who conduct organized prayers in their own homes"¹³⁷.

Most recently, in August 2017, a deadly crackdown by Myanmar's army on Rohingya Muslims sent hundreds of thousands fleeing across the border into

¹³⁵ Eleanor Albert and Lindsay Maizland, "The Rohingya Crisis", *Council on Foreign Relations*, Last updated January 23, 2020, online: <https://www.cfr.org/backgrounder/rohingya-crisis>

¹³⁶ Human Rights Watch, "Rohingya", online: <https://www.hrw.org/tag/rohingya>

¹³⁷ Human Rights Watch, "Burma: Events of 2018", online: <https://www.hrw.org/worldreport/2019/country-chapters/burma>

Bangladesh¹³⁸. Myanmar's military launched a large-scale ethnic cleansing campaign against Rakhine State's Rohingya population in response to attacks by local separatist groups, encompassing renewed violence, reported rape, murder, and arson, while Myanmar's security forces claimed they were carrying out a campaign to reinstate stability in the country's western region.

Putting into numbers, and according to the HRW, about 900,000 Rohingya are currently living in overcrowded camps in Bangladesh, most of whom fled Myanmar since August 2017 to escape the military's crimes against humanity and genocide. Furthermore, it is estimated that 600,000 Rohingya remain in Rakhine State, continuing to be subject to government persecution and violence, confined to camps and villages without freedom of movement, and cut off from access to adequate food, health care, education, and livelihoods¹³⁹.

What has been the role of ASEAN towards this inhuman atrocities?

The first responsibility to protect the rights of the Rohingya Muslim population lies with the Government of Myanmar, but as previously referred, when governments are unable or unwilling to undertake this task, the responsibility falls on regional bodies. Furthermore, it is undeniable that the Rohingya refugee crisis has already become a regional crisis, meaning that the members of the ASEAN must enhance regional cooperation in order to improve protection for the region's refugees¹⁴⁰.

While ASEAN has been taken the Rohingya Crisis to occupy prominent place in various forums since August 2017, it has largely ignored Myanmar government threats to the 600,000 Rohingya remaining in Rakhine State and failed to support efforts to investigate the military's atrocity crimes and pursue accountability. Moreover, the executive director of Human Rights Watch's Asia Division, Brad

¹³⁸ BBC News, "Myanmar Rohingya: What you need to know about the crisis" (2020), online: <https://www.bbc.com/news/world-asia-41566561>

¹³⁹ Human Rights Watch, "Rohingya", online: <https://www.hrw.org/tag/rohingya>

¹⁴⁰ Richa Shivakot, "ASEAN's role in the Rohingya refugee crisis", *National University of Singapore* (2017)

Adams, has criticized ASEAN governments for focusing on repatriation over safety and accountability, revealing a callous disregard for Rohingya lives¹⁴¹.

In this regard critics have been severe concerning to the role of the principle of non-interference. In the words of the director of Asia, “ASEAN member states should drop their harmful ‘non-interference’ mantra and express their readiness to respond to Myanmar’s abuses and lack of cooperation with international agencies”¹⁴².

As an example of the impact of this principle, there is the position undertaken by Indonesia, which even recognizing the Rohingya crisis as regional problem, has followed the non-intervention principle, emphasising that it would pursue its policy of ‘constructive engagement’ rather than put pressure on Myanmar. The norm of non-interference strongly discourages policy measures which would require ASEAN to intervene in a member state’s domestic affairs.

Turning attention, more specifically, to ASEAN instruments and mechanisms, it can be firstly referred that the situation of the Rohingya crisis explicitly violates core provisions of the AHRD, namely:

- Article 12 of the AHRD which encompasses the rights to personal security¹⁴³
- Article 15 of the AHRD concerning to the rights to freedom of movement ¹⁴⁴
- Article 18 of the AHRD that states the right to a nationality¹⁴⁵
- Article 22 of the AHRD which stipulates the right to freedom of religion¹⁴⁶
- Article 28 of the AHRD regarding to the right to an adequate standard of living¹⁴⁷

¹⁴¹ Human Rights Watch, “ASEAN: Overhaul Regional Response to Rohingya Crisis”, June 26 2020, online: <https://www.hrw.org/news/2020/06/26/asean-overhaul-regional-response-rohingya-crisis>

¹⁴² Ibid.

¹⁴³ *ASEAN Human Rights Declaration* (2012), Art. 12

¹⁴⁴ *ASEAN Human Rights Declaration* (2012), Art. 15

¹⁴⁵ *ASEAN Human Rights Declaration* (2012), Art. 18

¹⁴⁶ *ASEAN Human Rights Declaration* (2012), Art. 22

¹⁴⁷ *ASEAN Human Rights Declaration* (2012), Art. 28

- Article 31 of the AHRD referring to the right to an education¹⁴⁸ (being that Rohingya children are denied the access to schools)

Furthermore, also economic, social, and cultural rights listed in this document are unconditionally violated. Notwithstanding the non-binding character of the document, the AHRD is a remarkable roadmap to determine which human rights violations are effectively being committed. Even though, the lack of this enforcement capability could be suppressed by the creation of a Human Rights Court to interpret and enforce the AHRD. This possibility is going to be subject of analysis in the last chapter.

Regarding the role of the AICHR, also its flaws do not go unnoticed. As the body responsible for upholding the protection and promotion of human rights, as well as the main drafter of the AHRD, it should be able take any action against the violations of those provisions by the Myanmar's government. But why atrocities continue to be committed against Rohingya peoples before ASEAN eyes and nothing is done? Why is there a clear absence of action from the AICHR?

Well, the answer to these questions were already given when the procedural flaws of the ASEAN system were analysed. It is mainly due to the fact that the AICHR is a merely consultative body, having the limited power to only provide recommendations to the ASEAN Secretariat.

The truth is that ASEAN has always struggled to settle a coherent policy to address the various events occurring in Myanmar throughout the years¹⁴⁹. Myanmar has been described as been described as "the most serious challenge to ASEAN's national standing". In this regard, policies of "constructive engagement" have been undertaken, meaning that ASEAN's efforts are best understood as an effort to "insert itself" into political and human rights issues in Myanmar" as a means of promoting liberalization and human rights in the country¹⁵⁰.

¹⁴⁸ *ASEAN Human Rights Declaration* (2012), Art. 31

¹⁴⁹ Bilveer Singh, "ASEAN, Myanmar, and the Rohingya Issue," *Himalayan and Central Asian Studies* (2014)

¹⁵⁰ Lee Jones, "ASEAN, Sovereignty and Intervention in Southeast Asia", *Basingstoke and New York: Palgrave Macmillan* (2012)

Myanmar became a party of the ASEAN in 1997, as an intent of ASEAN to make some pressure, having the partnership being offered in exchange of engaging with the international human rights regime. But even if apparently agreed it does not seem that Myanmar had taken it seriously. It is true that there was an intent to implement some several semi-democratic reforms in 2010, but there is no proof of it being linked to the ASEAN's chosen approach. Furthermore, the fact that human rights violations actually worsened in the years after Myanmar joined ASEAN suggests that any attempt at constructive engagement was ineffective in this case¹⁵¹.

The inexistence of any meaningful change led ASEAN to try a different strategy and criticism towards Myanmar's government took place in public forums as a mean to exercise some pressure on the military junta. It was also proven not to be enough. For instance, recently, Malaysia raised its voice in condemning Myanmar's treatment of the Rohingya when its Prime Minister, Najib Razak stated that the "world cannot sit by and watch genocide taking place"¹⁵². This step taken by Malaysia resulted in the Government of Myanmar taking some steps to try to ease concerns, but sadly it is still not enough and forceful methods, such as punishment, seem to be far from being thought by the regional organization. ASEAN has been called to coordinate humanitarian aid and to investigate alleged atrocities committed against them. But who in the human rights system under analysis has effective power to investigate? The AICHR lacks mandate to protect and investigate, so there is no mechanism that could be used to undertake such indispensable task. This shows how urgent it is to take some action in order to strengthen the AICHR.

The idea of a "constructive engagement", even being proven ineffective, continues to be present in the AICHR approach. Most of the efforts related to the crisis have been towards facilitating discussion between Myanmar's representatives and

¹⁵¹ International Bar Association's Human Rights Institute, "The Rule of Law in Myanmar: Challenges and Prospects" (2012)

¹⁵² 'Malaysia PM urges world to act against "genocide" of Myanmar's Rohingya', The Guardian, 4 December 2016 <http://bit.ly/MalaysiaPM-Rohingya-Dec14>

leaders within ASEAN. An example of this was the 2013 Summit in Myanmar, where time was dedicated by AICHR to discuss the Rohingya crisis and potential solutions¹⁵³. Also, in the 2018 ASEAN Summit chaired by Singapore, the Chairman's Statement offered weak criticism of Myanmar's handling of the crisis but refrained from directly accusing Myanmar of committing human rights violations¹⁵⁴. The fact that the AICHR relies exclusively on discussion is equally a result of the strict adherence to the norm of non-interference, being a form of public shaming to promote human rights without directly intervening in the internal affairs of its member states.

Of tremendous importance is also the fact that the AICHR's reliance on consensus-based decision-making, as mandated by the TOR, further weakens its ability to respond to the Rohingya crisis because Myanmar would essentially have to agree to punitive measures and consent to the internationalization of its domestic affairs¹⁵⁵. It would be beyond naïve to think that this would ever happen.

To conclude, it has become clear that the continuing Rohingya crisis has shown how ill-prepared the region is to deal with human rights violations and the imperious need to proceed to some reforms and sift of mentalities. It has to be recognized that even if there had been the political will to combat the infringement of rights in Myanmar, there were no instruments and mechanisms in place to process it.

¹⁵³ Yuyun Wahyuningrum, "Fourth Anniversary of the AICHR," *University of New South Wales Diplomacy Training Program* (2018)

¹⁵⁴ Association of Southeast Asian Nations, "Chairman's Statement of the 33rd ASEAN Summit," Singapore, November 13, 2018

¹⁵⁵ William Jones, "Myanmar's Rohingya: Human Rights Abuses and Systemic Violence," *Journal of Urban Culture Research* 14 (2017)

5. The other Regional Human Rights Systems – Are there lessons to be learned?

When a comparison of contexts and human rights issues takes place, it should not be forgotten that there is no-size-fits-all formula. In the specific case under analysis, the heterogeneity of regional human rights protection systems cannot be unnoticed. They differ in nature and in effectiveness which, consequently, means that the appropriate action to be taken for the advancement of regional human rights protection systems will also be heterogeneous and asymmetric¹⁵⁶, which does not mean that lessons cannot be learned from one another. Also, it can be questioned if the problems faced by ASEAN are unique or if, on the contrary, some can be considered transversal to all regional human rights systems.

In this chapter an analysis for the European, Inter-American and African Regional Human Rights Systems is going to be made in an attempt to seek for lessons from which ASEAN could learn and evolve. The above mentioned regional human rights systems have been setting their own standards since the first establishing of the European Human Rights System in 1950 and, even though not perfect, are considered to be in the right path, aiming to provide access to individuals to a decision and remedy based on the violation of human rights in the founding treaties¹⁵⁷. On the other hand, ASEAN is considered to be significantly weaker, failing completely in establishing a proper regional system, since, as it was already concluded, its weak formal human rights mechanisms and instruments are incapable of effectively mount responses to humanitarian crises and punish states which consistently abuse human rights.

5.1. The European Regional Human Rights System

The European system is unarguably different from the ASEAN, mostly due to the contexts in which they are inserted, but despite the distinct realities a comparison

¹⁵⁶ Directorate-General for External Policies of the Union, Policy Department, “The Role of Regional Human Rights Mechanisms” (2010)

¹⁵⁷ Claudia Martin, “Inaccessible apexes: Comparing access to regional human rights courts and commissions in Europe, the Americas, and Africa”, *American University Washington D.C* (2018)

between them may be pertinent to provide an idea of how human rights can be more effectively enforced in ASEAN if it takes some lessons from the European experience.

The European Regional Human Rights System is globally considered the most effective and well-equipped mechanism in the world to guarantee the rights of European citizens and individuals with regard to human rights violations committed by states. Concerning to the mechanisms responsible for the protection and promotion of human rights in this region it is possible to refer to the Council of Europe, and the Organization for Security and Cooperation in Europe¹⁵⁸.

The COE is an IGO, created on May 5 of 1949, being the continent's leading human rights organization, whose membership consists in 47 countries, 27 of which are members of the EU¹⁵⁹. According to the Statute of the organization, the purpose of the COE is to “achieve a greater unity between its members for the purpose of...common heritage and facilitating...economic and social progress”¹⁶⁰.

In 1950, just after the end of the World War II, the COE member states took the initiative to draft the European Convention on Human Rights, which is considered the main human rights instrument in Europe, protecting a wide range of civil and political rights and being the first human rights convention to have binding legal powers for its member states. The reason behind this decision has to do with the fact that it was thought that the UN's efforts to create an effective binding international treaty along the lines of the non-binding UDHR could take too many years¹⁶¹. As a result, the ECHR entered into force on September 3 of 1953, serving the region's most prominent body for addressing various issues in the field of human rights.

¹⁵⁸ Haaland Matlary, Janne, “The Formation of the European Human Rights Regime”, “Intervention for Human Rights in Europe” (2002)

¹⁵⁹ Council of Europe, online: <https://www.coe.int/en/web/about-us/who-we-are>

¹⁶⁰ “Statute of the Council of Europe” of May 5, 1949, *Council of Europe Treaty Series* no. 1

¹⁶¹ Thomas Buergenthal, “The Evolving International Human Rights System”, *The American Journal of International Law*, Vol. 100, No. 4 (2006), pp. 783-807

The ECHR, of which all 47 members of the COE are parties, is a treaty designed to protect human rights, democracy, and the rule of law and it has had a longer history when compared to the other international human rights bodies and considerably more success. Notwithstanding, many are the ones who have been justifying this regional human rights system's faster achievements on grounds that the community of nations that it serves has been significantly homogeneous with shared cultural, social, and political affinities¹⁶², unlike ASEAN, for instance.

In addition to articulating a list of key civil and political rights, the Convention also mandated the creation of the ECtHR in 1959, a supranational body responsible for hearing cases of alleged human rights violations committed by member states.

Initially the European Commission of Human Rights, established in 1954, and the ECtHR were two separated bodies. Before the merger of the two institutions, it was composed by one full-time member from each state and the ECtHR was formed by part-time judges. After, in 1998, the Commission was discontinued and the ECtHR became a fulltime institution and its judges became also fulltime member of the court, being one from each state, being totally independent and not having the possibility to engage in any activity that would be incompatible with their duty of independence and impartiality¹⁶³. One major feature of the system that truly contributes to the European system's effectiveness is the fact that individuals can apply to the ECtHR directly, being that individuals, groups, and other member states all possess the ability to file complaints and apply for hearings in front of a judge. If a hearing is effectively granted, the Court reviews the case and assesses whether the defendant member states violated one of the Convention's protocols.

Since its creation, the Court has examined hundreds of thousands of applications, being its judgments binding on the countries concerned and it also has played a role that incited governments to alter their legislation and administrative practice

¹⁶² Douglas L. Donoho, "Human Rights Enforcement in the Twenty-First Century", *Nova Southeastern University-Shepard Broad Law Center* (2006)

¹⁶³ ECtHR, online: <https://echr.coe.int/Pages/home.aspx?p=court/judges&c=>

in a wide range of areas. The Court's case-law makes the Convention a modern and powerful living instrument for meeting new challenges and consolidating the rule of law and democracy in Europe¹⁶⁴.

One of the most prominent differences between human rights mechanisms in ASEAN and Europe is precisely the binding nature of a decision. As it is known, the AICHR does not have the capacity to issue a binding decision or to take the lead on investigations. On the other side, there is the European system, where not only the COE has the main task of effectively protect human rights, democracy and the rule of law, but also a judicial institution, the ECtHR, with the authority to handle human rights disputes with the power to issue binding and final decisions, which are not possible to be subject to appeal by the defendants.

Furthermore, in the European human rights system, there is also an authority responsible for carrying out the decision delivered by the Court, the Committee of Ministers, which is the Council of Europe's decision-making body. It is both a governmental body where national approaches to European problems are discussed on an equal footing and a forum to find collective responses to these challenges. With the Parliamentary Assembly, it is the guardian of the Council's fundamental values, and monitors member states' compliance with their undertakings¹⁶⁵. After the ECtHR issues a decision, the Committee must ensure that the compensation provided is in accordance with the court's decision and that actions against these individuals are in accordance with the principle of "*restitution in integrum*"¹⁶⁶, as well as considering comprehensive actions to avoid the similar violations in the future.

While enjoying widespread respect, the Council of Europe's human rights system has faced many difficulties. The Court's many problems have led one observer to

¹⁶⁴ ECtHR, online: https://echr.coe.int/Documents/Court_in_brief_ENG.pdf

¹⁶⁵ COE, "About the Committee of Ministers", online: <https://www.coe.int/en/web/cm/about-cm>

¹⁶⁶ Alice Donald and Anne Katrin Speck, "The European Court of Human Rights' Remedial Practice and its Impact on the Execution of Judgements", *Human Rights Law Review*, Vol.19, Issue 1, 2019, pp.83-117

conclude that its future “looks bleak but all is not yet lost”¹⁶⁷. Truth is that the number of cases submitted to the court has been exponentially increasing, being that the number of applications filed each year has ballooned. Repeat cases comprise many of the cases before the ECtHR and more than half of these cases are fair trial rights related. A solution to resolve the ever-increasing caseload and deal with the root causes must, indeed, be found¹⁶⁸.

In addition to the existence of an enforcement mechanism, the COE and ASEAN also radically differ in their ability to diffuse human rights norms, which largely due to two factors. Firstly, the COE possesses a greater amount of power to disseminate norms amongst member states due to its strong sense of regional legitimacy. In fact, the COE, not being able to force individual member states to sign or ratify these protocols, has on its favour, the ability of introducing amendments to the Convention, allowing for the organization to act as a “norm entrepreneur” that possesses the ability to introduce norms and persuade states to adopt them through tactics of persuasion¹⁶⁹. Secondly, unlike ASEAN, the COE truly seeks for cooperation with regional civil society organizations which aim to protect and promote human rights¹⁷⁰.

In conclusion, it can be affirmed that the European Regional Human Rights system’s efforts to protect and promote human rights are considerably more serious than ASEAN’s. Both the EU and ASEAN have their own Human Rights mechanisms, being the ECtHR and the AICHR. Nevertheless, there is a significant disparity on the results both achieved, being almost unnecessary to refer that Europe provides more assurance and legal certainty towards individuals when a

¹⁶⁷ Steven Greer “What’s Wrong with the European Convention on Human Rights?” *Human Rights Quarterly* 30 (2008) 680–702

¹⁶⁸ Jeremy Sarkin, “The African Commission on Human and People’s Rights and the future African Court of Justice and Human Rights: Comparative lessons from the European Court of Human Rights” (2012)

¹⁶⁹ C.A. Gearty, “The European Court of Human Rights and the Protection of Civil Liberties: An Overview,” *Cambridge Law Journal* 52 (1993)

¹⁷⁰ Andre Härtel, “The Council of Europe and Cooperation with Civil Society,” *The Palgrave Handbook of Interorganizational Relations in World Politics*, pp. 547-552 (2016)

state commit human rights violations against individuals, while the AICHR tends to lack sufficient legal power in handling Human Rights atrocities in the region.

5.2. The Inter-American Regional Human Rights System

The Inter-American Regional Human Rights System relies almost entirely on the Organization of the American States, which is the world's oldest regional organization, dating back to the First International Conference of American States, held in Washington, D.C., from October 1889 to April 1890¹⁷¹. The OAS came into being in 1948 with the signing in Bogotá, Colombia, of the Charter of the OAS, which entered into force in December 1951, having been established in order to achieve "an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence"¹⁷² among its member states.

Later, in 1959, it took place the establishment of the Inter-American Commission on Human Rights, with the purpose of enforcing the protection of human rights in the region, namely the ones encompassed on the existing three documents, being the OAS Charter, the American Declaration of the Rights and Duties of Man, and the American Convention on Human Rights¹⁷³. The IACHR is given the effective power of enforcing the provisions contained on these documents, also having the ability to play the role of a dispute mediator, while also handling human rights cases¹⁷⁴. In fact, a significant part of the Commission's work was addressing systematic human rights violations that occurred within its member states, namely the ones that lacked an effective national mechanism for the protection of human

¹⁷¹ OAS, online: http://www.oas.org/en/about/who_we_are.asp

¹⁷² Charter of the Organization of the American States, Article 1, online: http://www.oas.org/en/sla/dil/inter_american_treaties_A-41_charter_OAS.asp

¹⁷³ OAS, IACHR, online: <https://www.oas.org/en/iachr/mandate/what.asp>

¹⁷⁴ Schreiber, "The Inter-American Commission on Human Rights in the Dominican Crisis, XXII International Organization (1968)

rights and where there was a lack of cooperation on the part of the respective governments¹⁷⁵.

Much like the European regional human rights system, the OAS system of human rights also detains a judicial branch, which can be found pretty indispensable. Inter-American Court of Human Rights is an autonomous legal institution whose objective is to interpret and apply the American Convention, exercising a contentious function, in which it resolves contentious cases and supervises judgments, an advisory function, and a function wherein it can order provisional measures¹⁷⁶.

However, unlike the European system, individuals cannot refer cases to the Court¹⁷⁷. Instead, individuals may file a complaint with the IACHR, which possesses the power to determine whether a case should be referred to the Court. In the case of being referred to the court, a panel of judges will review the case and determine whether is guilty of violating human rights. Another particularity in common with the European system is the power conceded to the court to issue judgements, ordering states guilty of human rights violation to provide due reparations to its victims.

Notwithstanding, unlike Europe that has the Committee, the Inter-American system lacks a body capable of ensuring that the Court's decisions are correctly undertaken by the defendants¹⁷⁸, which makes the good functioning of the system rely on the willingness of states to accept the court's settlement and respect human rights. Being so, while the Court possesses the ability to enforce human rights in the region, it cannot force OAS member states to comply with human rights treaties.

175 Cecilia Medina, "The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture", *Human Rights Quarterly* Vol. 12, No. 4 (Nov. 1990), pp. 439-464

176 The Inter-American Court of Human Rights, online: https://www.corteidh.or.cr/que_es_la_corte.cfm?lang=en

177 Jo M. Pasqualucci, "The Practice and Procedure of the Inter-American Court of Human Rights", *Cambridge University Press* (2013)

178 Filipe González, "The experience of the Inter-American Human Rights System" (2009)

Concerning to the relationship between the OAS and Civil Society Organizations, attention seems to have been paid to the ones who aim to protect and promote human rights. The engagement process between both entities occurs in an ad-hoc basis¹⁷⁹. In fact, CSO participation in OAS activities and meetings has a long history. They have been sharing information in meetings and collaborating on projects for a long time. OAS agencies dealing with human rights have both formal and informal relations with CSOs and, as a return, CSOs are allowed to attend most OAS meetings as observers or special guests¹⁸⁰.

Notwithstanding, concerning to the forms in which this relationship may, in fact, function there has been some confusion which affect its efficiency. It can be referred the risk if contradictory standards as a result of multiple mechanisms for facilitating the interaction between the two bodies, and the fact that since consultations between these two parties are spread out across different participatory mechanisms, information gained from such interactions may not be shared effectively across all these bodies.

As a result of what was said it can be concluded that the OAS human rights system is weaker than the European, but despite that can be considered to be stronger than the ASEAN, both in terms of its ability to punish states for human rights violations and its willingness to interact with civil society organizations.

5.3. The African Regional Human Rights System

The African Human Rights System was once already considered being the least developed of all regional systems, while at the same time, being seen as the most distinctive and the most controversial by some authors¹⁸¹. Nevertheless, this is not accurate anymore.

¹⁷⁹ Robin L. Rosenberg, "Implementing the Summits of the Americas: Invigorating Civil Society Participation", *The North-South Center, University of Miami* (1996)

¹⁸⁰Yasmine Shamsie, "Mutual Misgivings: Civil Society Inclusion in the Americas" (2003)

¹⁸¹ Henry J. Steiner and Phillip Alston, "International Human Rights in Context, Law, Politics, Morals" (2000)

In 1963 Africa assisted to the creation of the Organization of African States, which was conceived to safeguard independence in the wake of colonialism and promoting regional unity.

Initially, just like the case of ASEAN, human rights were equally not seen as a priority by the African countries. In spite of the Organisation's endorsement of the principles of the UDHR of 1948 in the preamble of the OAU Charter, the main concern relied on political and economic independence, non-discrimination and the liberation of Africa, the eradication of colonialism on the continent and apartheid in Southern Africa, at the expense of individual liberty¹⁸².

Only in 1979 the work on the African Charter on Human and People's Rights began, being the document adopted in 1981 in the meeting of the OAU Heads of States and Government in Nairobi Kenya. This Charter was the first legally binding human rights treaty of the region and aimed to provide for a Human Rights Commission to ensure implementation of the rights enshrined therein.

Well, by being a legally binding treaty is already more effective than the AHRD, having the capability of obligate member states to comply with stipulated human rights. Nevertheless, the Charter contains several flaws which prevent it from being completely effective as a human rights instrument. One pertinent example is the article 6 that states that "... No one may be deprived of his freedom except for reasons and conditions previously laid down by law..."¹⁸³. This provision allows restrictions on human rights on grounds that some violations can be justified by national law, which has a severe impact on the effectiveness of the treaty as a legally binding document.

Regarding the ACHPR, this quasi-judicial body was officially inaugurated six years after the drafting of the Charter, more precisely on November 2 of 1987¹⁸⁴

¹⁸²African Commission on Human and People's Rights, online: <https://www.achpr.org/history>

¹⁸³ *Organization of African Unity, "African Charter on Human and Peoples' Rights" (1981), Article 6*

¹⁸⁴ Jeremy Sarkin, "The African Commission on Human and People's Rights and the Future African Court of Justice and Human Rights: Comparative Lessons from the European Court of Human Rights" (2012)

in Ethiopia and consists of eleven members “chosen from among African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples’ rights; particular consideration being given to persons having legal experience”¹⁸⁵.

In accordance with the Charter, the ACHPR should aim to “to promote human and peoples’ rights and ensure their protection in Africa”¹⁸⁶. In here it is clear that the African system has a common feature with ASEAN since both focus on the promotion of human rights and not as much as on its protection, taking the promotional work various forms, namely, the organization of seminars and conferences on human rights. Moreover, the ACHPR was not given the authority to punish consistent violators of human rights, being only responsible for investigations and advisory tasks.

Another serious problem that should be pointed out is the lack of resources that the mechanism suffers from. For the African Commission to be more effective, a means to grow its budget substantially ought to be found and also the Commission should be granted greater independence, budgetary and otherwise.

Furthermore, states systematically fail to meet requirements to report on human rights situations in their countries¹⁸⁷ and until 2008, the ACHPR had dealt with only about 12 cases a year. “For most of its first thirty years, the Convention was largely ignored by just about everybody, including victims of human rights abuse, lawyers, jurists, politicians, and social scientists”¹⁸⁸. Finally, attention must also be paid to the lack of systematic publication of the findings of the Commission processes.

¹⁸⁵ *Organization of African Unity, “African Charter on Human and Peoples’ Rights” (1981), Art 31*

¹⁸⁶ *Organization of African Unity, “African Charter on Human and Peoples’ Rights” (1981), Part II*

¹⁸⁷ Claude Welch Jr., “The African Commission on Human and Peoples’ Rights: A Five-Year Report and Assessment,” *Human Rights Quarterly* 43 (1992)

¹⁸⁸ Steven Greer, “What’s Wrong with the European Convention on Human Rights?” *Human Rights Quarterly* 30 (2008) 680–702

Taking all these facts in consideration it can be said that the African Commission has developed into a particularly useful human rights institution, but much more can be done by the AU and the institution to make it more effective¹⁸⁹.

Later, in 2004, it was created the African Court on Human and People's Rights as the judicial branch of the African Human Rights System. This body undertakes the same task as the courts that were established in Europe and the Americans for these purpose, meaning that it is responsible for hearing cases of alleged human rights abuses committed by states that have accepted its jurisdiction. This Court equally has the power to issue legally binding decisions and to compel defendants to compensate the victims or provide restitution.

Notwithstanding also this court is flawed, namely because, just like the other judicial branches of regional human rights organizations, it has not the ability to overrule domestic law and it has the aggravation of states possessing the faculty to withdraw from the body at any time, as it recently happened with Tanzania, which became the second country, after Rwanda, to withdraw the right of individuals and NGOs to directly access the African Court¹⁹⁰. Furthermore, there is also a gap as a result of the ability that individuals and CSOs lack to bring cases before the court unless a state passes a declaration accepting the right of individual jurisdiction. This makes the life of victims considerably more difficult if they are seeking for justice, because states will hardly accept this right. Truth is that, traditionally, African leaders have always favoured the use of quasi-judicial commissions, rather than a court with full judicial powers¹⁹¹, being that the African system "is one of forgiveness, conciliation and open truth, not legal friction or technicality"¹⁹². This issue arises as a proof that, even though the existence of a judicial branch is crucial

¹⁸⁹ Sarkin, Jeremy, "The African Commission on Human and People's Rights and the future African Court of Justice and Human Rights: Comparative lessons from the European Court of Human Rights"

¹⁹⁰ Amnesty International, "Tanzania: Withdrawal of individual rights to African Court will deepen repression", 2 December 2019 online: <https://www.amnesty.org/en/latest/news/2019/12/tanzania-withdrawal-of-individual-rights-to-african-court-will-deepen-repression/>

¹⁹¹ Nsongurua J. Udombana, An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication?, 28 Brook. J. Int'l L. (2003)

¹⁹² A. L. Ciroma, "Time for Soul-Searching", Daily Times (1979)

to grant regional human rights system effectiveness, it will not achieve the results as expected if it is not well positioned without these kind of limitations and empowered.

Regarding the relationship between the ACHPR and CSOs, from article 45 (1/3) of the Charter it results an obligation for the ACHPR to “cooperate with other African and international institutions concerned with the promotion and protection of human and peoples’ rights”. The interactions between both organizations can happen in informal and formal settings, being that concerning to the last CSOs are invited to participate in its meetings and provide consultations. Furthermore, unlike ASEAN, there is no space for a selection based on the matters that are undertaken by the CSOs, being that human rights-based civil society are also heard. These efforts to meaningfully include regional civil society organizations in its proceedings as well as the existence of a complaints mechanism for both state and non-state actors show that it is possible to catch a glimpse of good-faith and will from Africans to promote and protect human rights in the region, which does not happen concerning to the ASEAN human rights system.

Despite having a long way to go before becoming a perfect regional human rights body and the fact that it is weaker than the other two systems above mentioned, largely due to its limited scope of powers and lack of an enforcement mechanism, there is no doubt that the African system is still considerably more effective than ASEAN.

6. The creation of an independent court – Would it be the key to transform ASEAN in a system more capable of properly enforcing Human Rights in the region?

This chapter intends to focus on one of what I consider to be the most important tools to grant effectivity in a regional human rights system: a regional human rights court.

In this regard many are the perspectives that arise concerning the desirability of the existence of a human rights court. While some scholars argue that such mechanism is both legally and ethically desirable and practically useful in preventing future human rights violations¹⁹³, others differ on their opinions stating that will not deter future violations and that in some circumstance they will actually lead to an increase in repression, being seen as a threat of prosecution and cause powerful dictators or insurgents to entrench themselves in power¹⁹⁴. Nevertheless, it was possible to see from the analysis of the different regional human rights systems that, without a court, regional Human Rights Bodies are unable to act as direct enforcers of Human rights provisions.

As it was already mentioned one of the major flaws of the ASEAN system is the fact that its human rights mechanisms and instruments focus almost exclusively on encouraging states to voluntarily change their behaviour through dialogue and, at some rare situations, exposure by publicly shaming them for the violations committed. Notwithstanding the benefits of this approach, regional human rights systems cannot rely entirely on that if there is a true intention to effectively protect human rights. Thus, a body that could guarantee some enforcement is of extreme relevance, namely for the various individual petitioning processes created by the regional systems and four of the major multilateral treaties¹⁹⁵. Furthermore, it was possible to conclude on the previous chapter that all the other regional human rights systems are far more effective than ASEAN and that it is largely due to the existence of a judicial or quasi-judicial bodies. For instance, the existence of a European judicial institution, as it is the ECtHR, has been pointed out as the most prominent feature to ensure effectiveness of human rights mechanisms since it has the ability to try parties, including the states, who committed human rights

¹⁹³ Juan E. Méndez, “In Defense of Transitional Justice. In Transitional Justice and the Rule of Law in New Democracies”, University of Notre Dame Press (1997)

¹⁹⁴ Jack Snyder and Leslie Vinjamuri, “Advocacy and Scholarship in Study of International War Crime Tribunals and Transitional Justice”, Annual Review of Political Science (2004)

¹⁹⁵ Donoho, Douglas, “Human Rights Enforcement in the Twenty-First Century”, Vol.5, *Georgia Journal of International and Comparative Law* (2006)

violations. By issuing legally binding decisions that all states must comply with, the ECtHR is capable of assuring that legal certainty is provided.

ASEAN human rights system is weakly supported by two pillars, being the AICHR and the AHRD, and it became clear that a third one in the form of a judicial organ is needed to transform the human rights protection system more effective.

But is it likely to ever see Southeast Asian countries agreeing to the creation of such powerful mechanism? Truth is that there is no record of official discussions or actions regarding this theme. The possible existence of an ASEAN human rights court has been limited to scholarly discussions and civil society advocacy groups. This is largely due to the fact that such an institution would severely limit the so extensively respected *ASEAN Way* and the principle of non-interference¹⁹⁶ in a region where state sovereignty has such an outstanding weight and whose countries are immensely unlikely to agree to the existence of an independent judicial body capable of interfering in their policies and conducts.

Notwithstanding, this position of the ASEAN countries appears to me as another considerable reason for the urgent implementation of such a mechanism, since there is no doubt that this exacerbated power of Asian governments, much of which are constantly committing human rights violations, needs to be limited.

But to what extent would the creation of a court help to suppress the ineffectiveness of the current system?

The ASEAN human rights system seems to be built upon rhetoric, being its instruments and mechanisms completely flawed and ineffective, incapable of ensuring a meaningful protection of human rights in the region. The lack of an institution capable of enforcement has been seen as one of the major gaps and the existence of a court would, somehow, help to suppress it by offering an "effective

¹⁹⁶ Dimitri Vanoverbeke and Michael Reiterer, "ASEAN's Regional Approach to Human Rights: The Limits of the European Model?" (2014) 14 *European Yearbook on Human Rights* 183

enforcement of human rights in line with regional needs, experiences and legal traditions", especially in the regional setting¹⁹⁷.

In fact, despite an elaborate institutional framework for protecting human right, horrendous atrocities continue to occur and most of all often seem to discredit the proliferation of procedures, committees, and commissions on human rights¹⁹⁸.

The framework of the ASEAN regional human rights system, as it is established today, concedes the states the prerogative to take final decisions on whether or not to follow international and regional human rights norms. Well, but the rights to adequate remedies by competent judicial authorities is granted to human rights violations' victims by international treaties, namely the UDHR¹⁹⁹. In the ASEAN region there is no regional mechanism capable of ensuring that this right is realized, being the creation of a judicial body to complete ASEAN's human rights system an urgent need²⁰⁰.

One can argue that it would be sufficient to strengthen the AICHR mandate, but would it be the same thing? Not in my perspective. Only a court would be able to provide appropriate remedies, since only such mechanism has the power to issue legally binding decisions. And as it can also be concluded, without a legally binding decision states which violate human rights will always have means of escape. Africa is one example that shows that no matter how strong the protection mandates of the Commission might be, the reality is that they do not render binding decisions which states are obligated to follow.

Furthermore, it has been more that proved that the AICHR, with its lack of independence and weak protection mandates, has been consistently failing in providing remedies to redress human rights violations in the region, as it is clearly

¹⁹⁷ Manisuli Ssenyonjo and Gerd Oberleitner, "Towards an International Court of Human Rights?", Chapter 19 of the book "International Human Rights Law, Six Decades After the IDHR and Beyond" (2016)

¹⁹⁸ Gerd Oberleitner, "Global Human Rights Institutions. Between Remedy and Ritual", Cambridge (2007)

¹⁹⁹ *Universal Declaration of Human Rights, Article 5*

²⁰⁰ Hien, B. U. I. "The ASEAN human rights system: a critical analysis." *Asian Journal of Comparative Law* 11, no. 1 (2016)

shown by the examples given throughout this work. On the other hand, a court would be able to help to overcome these challenges, being independent and with tools to work against human rights violators. Thus, while commissions might offer remedies, the establishment of a court is needed to provide effective and enforceable remedies. In the concrete case of Southeast Asia there is an urgent need of a regional human rights court, with jurisdiction to assess whether member states apply the so-called Asian values enshrined in the ADHR proportionately in pursuit of international human rights²⁰¹.

Despite considering of great importance the establishment of an independent regional court of human rights in the region, I also recognise that such cannot occur without paying attention to the existent framework and to the reform that should have to exist for the court to play a significant role.

In this regard, there are several factors to have in consideration in order to realize an ASEAN human rights court, namely an eventual drafting of a founding treaty, decisions about finances and, and the recruitment of judges and other professional staff²⁰², as well as the means to ensure no corruption within the court.

Where would the court fit within the current framework? Should it replace the AICHR or be seen as complementary? In this regard many are the positions taken by scholars, but the most appropriate approach, in my belief, would be the not to replace the AICHR and rather, as it happens in the African and Inter-American systems, exist side-by-side with this intergovernmental commission. The court should exist independently as a new member of the ASEAN human rights architecture²⁰³. Moreover, it is also of crucial importance the existence of a body to supervise and enforce the court's decisions, as it exists in other regional human rights systems. In Europe, for instance and as it was already mentioned, the ECtHR is under the supervision of the Council of Europe, and the enforcement of ECtHR's

²⁰¹ Rachminawati, R. (2014). ASEAN Human Rights Declaration: A New Form of Universalism. *Jurnal Hukum Internasional*

²⁰² Hao Duy Phan, "A Selective Approach to Establishing a Human Rights Mechanism in Southeast Asia: The Case for a Southeast Asian Court of Human Rights", 185-224 (2012)

²⁰³ Daniel Collige, "Background Paper on ASEAN and Human Rights" (2010)

judgments is undertaken by the Committee of Ministers, which is also an organ of the Council of Europe. In Africa, the same format was adopted, being that the Executive Council monitors the execution of court judgments on behalf of the AU. Only this way it is possible to ensure effective compliance.

As it has been referred the ASEAN human rights system is deeply flawed and structured upon empty promises and lack of political will to enforce human rights. This factors can jeopardize the role that would be played by the eventually created court. Thus, it is some changes are indispensable in the current system before the implementation of such mechanism because they will decide whether the court can make the best out of what is available to protect human rights under ASEAN's system²⁰⁴. That said, one of the first steps that should be taken in order to establish an effective ASEAN human rights court would be the recognition by ASEAN's instruments of the universality of fundamental rights and freedoms, meaning that the AHRD should be revised and an end should be set to the current restrictive interpretations. For example, if states were to use article 7 of the AHRD to justify their wrongdoings, the victims would not have very few chances to succeed before the court. Furthermore, the AICHR's protection mandates would have to be inevitably strengthen and the body would have to be truly independent. Only that way it would be possible to obtain information from state parties and develop Strategies for protecting rights without being manipulated by governments in their behalf.

This only proves that before the creation of the court there is still a long and windy way to go to eliminate the current impediments to justice present in ASEAN's mechanisms and instruments. But I reinforce that gradual progress is also a progress and even if it takes longer and solutions are not given to current atrocities, we have to think that it is also a great improvement for future generations. The efforts made today and the small steps are also of great importance to ensure that

²⁰⁴ Hien, B. U. I. "The ASEAN human rights system: a critical analysis." *Asian Journal of Comparative Law* 11, no. 1 (2016)

in the future people of Southeast Asia and around the globe will not have to live the same horrendous episodes ever again.

CONCLUSION

In the words of Muntarbhorn, improving human rights within ASEAN “has been a long and winding road”²⁰⁵. Notwithstanding, it must be taken under consideration the fact that it has gradually been including human rights in region’s dialogues and that, even being few, there have been some efforts to overcome the rhetoric behind the framework upon which the system for human rights was established. ASEAN must be seen as a work in progress and not has a work completed, otherwise it would be recognized as a complete failure. If it is true that the journey is challenging it is also true that it is not impossible.

Nevertheless, if hopes are to be high and step are not wanted to be taken back instead, major changes must take place within the ASEAN Human Rights System. As it was possible to conclude, the system is deeply flawed, encompassing several procedural and substantive limitations, being uniquely unable to give proper answers to the human rights atrocities in the region.

Firstly, an expansion on the AICHR’s mandate is indispensable. As it became clear the TOR severely limit the way in which the AICHR could take action to adequately respond to the several human rights violations.

Secondly, there is no doubt that the establishment of a formal complaints mechanism is of extreme importance to guarantee the effectiveness of the system. Only this way individuals and civil society will be able to make human rights violations known and allow information to be properly collected before giving responses.

Furthermore, the *ASEAN Way* urges to be rethanked. The use of consensus-based decision-making is proven not to bring many benefits to the resolution of intra-state conflicts. In fact, it has been seen as problematic, as it stops the system in time, being slower and inciting consensus at the lowest common dominator, which

²⁰⁵ Vitit Muntarbhorn, "A Roadmap for an ASEAN Human Rights Mechanism", Third Workshop for an ASEAN Regional Mechanism on Human Rights, Bangkok, Thailand, 28-29 (2003)

gives states veto power and, consequently, a way to escape from responsibility for their wrongdoings. If this form of decision-making were to be changed, the AICHR would be far more effective, since one or two states would not be able to jeopardize its decisions and measures to protect human rights in the region.

Another feature to be taken in consideration is the relationship between ASEAN and CSOs. These last should be given access to participate in dialogues and forums without any restriction imposed. CSOs focused on human rights should have the opportunity to fully cooperate with ASEAN, giving considerable contribution to the effectiveness of the system.

Finally, but equally important, is the creation of a judicial branch capable of making legally binding decision, enforcing states to comply with international and regional human rights norms and to undertake responsibility for the violations committed. If a judicial body is properly established within the ASEAN system, due compensations to human rights violations victims will be ensured.

To sum up, even though these reforms would be crucial to give ASEAN human rights system a meaning, truth is that we cannot be naïve by thinking that member states, the main perpetrators of human rights violations, will easily agree to measures that would imply limitations on their sovereignty and punishment to their actions. Authors like Poole fear that the ASEAN system is even more likely to go backwards than towards any improvement²⁰⁶. Truth is that current human rights atrocities in the region can easily lead to think that reforms to strengthen the overall human rights system will never be more than a simple mirage, especially because all the flaws that were mentioned will be irreversibly linked to the principle of non-interference and the lack of political will to address human rights issues. But even acknowledging all of this, it is my belief that giving up does not seem to be a better path to choose.

²⁰⁶ DW Made for Minds, "ASEAN 50 years on: Success or failure?" (2017) online: <https://www.dw.com/en/asean-50-years-on-success-or-failure/a-38043777>

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