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The human rights protection system in Southeast Asia and ASEAN

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rights institution – the AICHR, does not have a mandate to receive a claim, to investigate allegations of human rights abuses, or to prosecute human rights violators, which has necessitated CSOs, as actors to help end violations, to reach out to an international institution like the ICC

CHAPTER FIVE

Towards a Southeast Asian Human Rights Court: Mobilizations of Civil Society Organizations and the ASEAN Intergovernmental Commission on Human Rights

Abstract

The Association of Southeast Asian Nations (ASEAN) is an integration of ten Southeast Asian countries which came into being in 1967. Its first human rights institution, the ASEAN Intergovernmental Commission on Human Rights (AICHR), was established in 2009. Since then, the idea of developing a more effective regional human rights institution, namely a regional human rights court, has yet to be set into motion by member states. This article argues that Civil Society Organizations (CSOs) have been significant actors in demanding a strengthened human rights protection system, and their mobilization provides a basis for supporting the establishment of a regional human rights court. In addition to such CSO mobilization, the paper argues further that mobilization on the part of the AICHR can also be observed in parallel to the efforts of the CSOs. These two analyses lead us to conclude that the efforts towards a human rights court is currently being set in motion by CSOs and the AICHR, simultaneously. These two observations have been generated by empirical evidence collected from fieldwork comprised of interviews with the AICHR representatives, CSOs' group discussions, and an analysis of official statements in recent years.

Keywords

Human Rights; Civil Society Organizations (CSOs); the Association of Southeast Asian Nations (ASEAN); Southeast Asia; the ASEAN Intergovernmental Commission on Human Rights (AICHR); a Southeast Asian Human Rights Court.

1. Introduction

The Association of Southeast Asian Nations (ASEAN) was established in 1967—half a century ago (ASEAN, 2016). Human rights have only been officially documented in ASEAN discussions since 1993, whereby the idea of establishing an ASEAN human rights mechanism was mentioned (Phan 2019, p. 2). The idea culminated with the establishment of the ASEAN Intergovernmental Commission on Human Rights (AICHR) – the first human rights institution in the region (Ibid). Nevertheless, Southeast Asia still lacks an effective human rights institution which meets universal standards, because the AICHR seems to be embarking mainly on a human rights promotion-related activities (Ibid, p. 5). Compared to regional human rights institutions elsewhere in the world, Europe, the Inter-Americas and Africa have their own human rights mechanisms which are mandated to protect human rights. In those regions, when rights have been violated, people can lodge their complaints to the system (Phan 2012, p. 161-169). Then, cases will be investigated and considered and states will submit their positions in reaction (Ibid). The final phase involves a mechanism that will take steps to prevent and stop violations, and then provide reparations and determine accountability to make certain such violations are not repeated (Ibid).

Indeed, ASEAN does not have such mechanisms like other regions. Moreover, member states have not shown a keen interest in creating a legally binding institution like a regional human rights court. This absence led to the original idea of this research, to ascertain how other actors in the region are making a contribution towards strengthening human rights protection, and establishing a regional human rights court in ASEAN. This research points out that CSOs are important actors struggling with such issues. Cognizant of CSOs' notable role, the first research question of this paper asks *'how have CSOs been mobilizing to strengthen the regional human rights protection, and establishing a regional human rights court.'*

Nevertheless, establishing regional human rights court in ASEAN seems to be a sensitive step. Member states who can be considered violators of human rights of their citizens are very reluctant to accept this idea because a court might take action which adversely affects the state. When member states seem to be

against the idea of improving a human rights institution, an important actor would then be supranational institutions like the AICHR to put forward this idea. Even though this supranational organization has been criticized as 'a toothless tiger' since it was established due to its lack of protective functions such as receiving complaints and investigation (Kelsall 2009, p. 1-8), this research counters such criticisms by supporting that the AICHR has been moving forward step by step. Here, we point out its significant roles, and interaction with CSOs on how this supranational organization tries to strengthen human rights protection, and push for a more effective regional human rights institution— a court.

This research expresses that there have been some AICHR representatives mobilizing to gain more protective powers. Their performances which to interact with CSOs have been revealed attitudes on that the protection system and the more effective human rights institutions such as a court are needed to deal with urgent human rights violations in Southeast Asian countries. Thus, the second research question is *'what has the AICHR been doing to strength human rights protection in the region, especially its legal mandates, and eventually the establishment of an effective legally binding human rights institution— a court in ASEAN.'*

The methodology of this research is based on collecting contemporary data and information over the period 2017-2019. Contributions have been primarily generated by the existing literature and theoretical contexts of CSO involvement in strengthening human rights protection at the international level, and other regional human rights systems such as Europe and the Inter-American. Secondly, this research is based on analyzing official documents produced by ASEAN, AICHR, and CSOs. Furthermore, empirical evidence has been collected from fieldwork from extensive interviews with former and recent AICHR representatives, group discussions with CSOs, attendance at AICHR conferences, and an analyses of various CSOs platforms.

2. The Theoretical and Literature Context

2.1 *Interactions between CSOs and Supranational Organizations in Strengthening Human Rights Protection*

The meaning of CSOs may sometimes confound readers. Thus, this part briefly explains the meaning of CSOs as defined by major international organizations. Occasionally, ‘NGO’ is used interchangeably with ‘CSO’, but NGOs should be properly understood as a subset of CSOs (Brian Tomlinson & AidWatch Canada, 2013 p. 43, 124). The phrase ‘NGO’ is contested terminology, and for many has been subsumed within a broader category of ‘CSOs’ (Ibid). This study has chosen to use the term ‘CSOs’ instead of ‘NGOs’. CSOs are individuals and groups who voluntarily engage in forms of public participation and action around shared interests, purposes or values that are compatible with the goals of the United Nations (UN 2014).

With respect to human rights, CSOs represent actors which include human rights defenders, organizations and networks devoting vital resources to the promotion and protection of human rights.¹ Basically, CSOs are independent of both states and supranational organizations, and identify their common aims as actors to address governments on behavior regarding human rights violations (Wiseberg 1991, p. 529). They can help establish international human rights norms for state behavior, lobbying officials, media and allies to catalyze states to accept or ratify international treaties, and providing direct assistance to victims of human rights abuses (Welch 2001, p. 3).

Bouget & Prouteau (2002) points that governments have started accepting CSOs as efficient and effective actors for social service delivery. They link the public with the political process, and are key solidarity actors in building a structured civil dialogue between citizens and national governments, and between citizens and supranational entities (Ibid; Smith, Pagnucco, and Lopez, 1998). Supranational bodies in collaboration with CSOs can increasingly influence governments to

¹ For more definitions of CSOs, See the United Nations Human Rights, Office of the High Commissioner for Human Rights (OHCHR), 2008, Working with the United Nations Human Rights Programme, A Handbook for Civil Society, p. vii.

change national policy (Cerny, 1999). CSOs are largely responsible for placing the topic of human rights firmly in the centre of political agenda, creating new legal standards of states, building international enforcement institutions, mobilizing public opinion to oppose violations (Korey, 1998).

However, the tension between CSOs and governments is always seen especially with states who do not accept human rights norms, are violating states, therefore they do not give legitimacy to CSOs (Wiseberg 1991, p. 530; Gear 1995, p. 394). Such governments are not friendly to CSOs, and have used a variety of ways to suppress human rights CSOs such as incarceration of CSOs leaders, disappearance, labelling of CSOs as subversive groups, harassment with legal proceedings, unwarranted arresting, and limit the range of activities that CSOs can conduct (Ibid). These conflicts may result in CSOs seeking regional or international peers to access international institutions, to put pressure back on governments to end their violations, referred to as the ‘Boomerang Model’ (Keck & Sikkink, 1998).

Importantly, based on the empirical evidence gathered by scholars in several disciplines, there is a vast disagreement between states and CSOs in terms of human rights overriding the sanctity of state sovereignty. State actors normally protect themselves against interference from external actors and CSOs by referring to their sovereignty as enshrined in the UN Charter and other international conventions (Hajjar 2004, p. 589-604). Many governments seek to marginalize and limit CSOs’ input which reflect states’ behavior especially when the pressure from regional and international arenas become more hostile towards them (Ishay, 2004; Burke, 2010).

Even though state sovereignty is a main barrier to CSOs, the challenge in lobbying state actors for various international human rights instruments and in overcoming the weak enforcement capacity of many of these international instruments does still happen (Tsutsui, Whitlinger and Lim, 2012 p. 368). CSOs’ mobilization collectively institutes human rights as a guiding principle to a state, most of whom resist the pressure from CSOs to reform (Ibid). As a result of CSOs performance, despite states still holding more power than CSOs, international human rights instruments have enlarged authority over states’ domestic affairs and have become progressively more in effect, and can influence states to accept and change behaviors that adversely affect human rights (Ibid, p. 369).

The relationship between CSOs and regional and international organizations is characterized by visibly more acceptance. Gear's research (1995) on CSOs' confrontation with the government at the UN shows that in the field of human rights, CSO networks are the device for almost every advance made by the UN since its founding. Borgwardt (2012) exemplifies the case which 42 US CSOs persuaded the US Secretary of State to include human rights provisions in the UN Charter, and established a commission on human rights at the United Nations. CSOs issued reports about political killings and massacres, identifiable atrocities such as torture and disappearance, motivated governments to the UN to address specific violations, and requests for new protective mechanisms (Ibid).

'Without [the flow of information, documentation, and data from] NGOs, the entire human rights implementation system at the UN would come to halt' (Welch 2001 p. 5). CSOs 'performed the critical function of the mechanism [UN working groups or special rapporteurs]—acquiring and verifying information on human rights abridgements... the overwhelming bulk of the credible and reliable information has been and is provide by NGOs' (Ibid). CSOs essentially serve as unofficial researchers to the UN committee members, rendering valuable support by providing facts and specific case materials to establish an effective and independent UN human rights instruments to relief violations (Ibid).

2.2 Prominent Roles of CSOs in Building Human Rights Institutions: An Example in Europe, the Inter-Americas, and the International Criminal Court

With respect to building a human rights institution in Europe, the European Commission accepted CSOs to provide information as potential coalitions to the European policymaking arena which can by-pass, and sometime play a role against national governments (Weber & Christophersen, 2002). Duranti (2017) noted the importance of CSOs in shaping the contents of the European Convention on Human Rights ECHR. A CSO independent body called the 'European Movement' provided a 32-page statement which contained a draft ECHR, and a draft Statue for a proposed European Court of Human Rights to the COE, which were collectively called the 'European Movement Convention' (CoE, 1975-1985 vol. 1 p. xxiv; Marston, 1993; Teitgen, 1993).

In the process of establishing the European human rights institutions,

CSOs proposed that a 'European Human Rights Commission' would function to select appropriate cases from individuals or from States, and a 'European Court of Human Rights' would be centrally in charge of the enforcement function (Bates, 2010). Three famous CSOs, namely Amnesty International, the International Commission of Jurists (ICJ) and the International Federation of Human Rights (FIDH), were admitted by the Committee of Ministers as observers to the Steering Committee for Human Rights (CDDH) (Drzemczewski, 1987). This entails that such CSO representatives can attend meetings and submit statements, although consultation between the Committee of Ministers and CSOs are not necessarily required (Haddad, 2012).

In the Inter-American human rights system, when the Court was being formally created during the 1960s and 1970s, CSOs were beginning to have a prominent global role as human rights defenders in Latin America (Haddad 2012, p. 139). They were a key actor in such processes because the Commission and the Court were constantly underfunded, and threatened or neglected by member states, which were ruled by authoritarian regimes that were committing gross human rights abuses (Buergenthal, 2004). Due to this financial issue, during the early steps of the creation of the Commission and the Court, external funding from the U.S. Agency for International Development (USAID) and foundations were requested (Haddad 2012, p. 141).

The Washington Office on Latin America (WOLA) was an important CSO augmenting the Commission's lack of funding (Ibid). Americas Watch and Amnesty International also used their budget to help the Commission by investigating human rights abuses in fields and providing facts and information through reports to the Commission (Ibid, p. 142). Buergenthal (2004) evidenced that CSO like the Inter-American Institute of Human Rights which were created by the court after its establishment was essential because it could provide financial support to the Court by being a court representative to receive money from international donor agencies, and by organizing academic conferences that coincided with the court's special sessions to attract external funders to attend conferences and donate.

Furthermore, the emergence of the International Criminal Court (ICC) presents an outstanding paradigm of CSO mobilization. The NGOs Coalition

for the International Criminal Court (CICC) which included more than 2,000 member organizations worldwide was a major actor to bring forth the Rome Statue (Schiff, p. 144). The CICC produced information materials, lobbied governmental representatives to promote their ideas about the court (Ibid). They attended both formal and informal meetings, and made publications in advance of the Rome Statue conferences (Ibid, p.148). They pushed for states to support the emerging organizations' budget, and continued campaigns in the national level to urge states to sign and ratify the Statue and adopt implementing domestic laws (Ibid, p. 151). CSOs also provided crimes' details, helped victims and witnesses, and played a significant role in shaping the context of trials (Ibid). These CSOs' involvement means that they were truly key actors since the drafting of the Statue until the trial process.

2.3 Background of ASEAN: Member States' Ignorance, and Main Impediments on Strengthening Human Rights Protection, and Building a Regional Human Rights Court

As for ASEAN, it was the member states who agreed to establish the AICHR, and to have the AHRD, which is neither legally-binding nor entails judicial powers to deal with human rights violations, as its regional human rights institutions. However, after that, member states have not proceeded to establish a more effective institution, like a court. This is despite this region having, for over a decade, witnessed widespread and systematic human rights abuses perpetrated by some of its member states. This stands in stark contrast with the situation in other regions. Europe built its own human rights system to protect people rights and avoid atrocities from the Second World War (Moravcsik, 2000). In the inter-Americas, the human rights system is created to address human rights violations suffered under dictatorship regimes around American states, where in Africa the rationale was that the atrocities of slavery and colonialism would never happen again in African states (Bates, 2010; Nmehielle, 2001, p. 1).

The ASEAN Foreign Ministers Meetings (AMM) which are officially held once every year confirm that member states have never considered and put the idea of establishing a regional human rights court. All official statements of the AMM after the year that the AICHR was established—the Joint Communiqués of the 43rd to the 51st AMM from the years 2010 to 2018 have not raised any

concern on this point. Also, there has been neither discussion nor recommendation pertaining to a regional human rights court in the ASEAN summit since the 16th ASEAN Summit of 2010 until the 34th ASEAN Summit of 2019.

Although the last few years have seen increasing severity of human rights violations, particularly with regard to the persecution of the Rohingya in Myanmar, and the extrajudicial killing of illegal drug users in the Philippines, there has yet to be a trace of solution, of equipping the AICHR with practical protective powers, or of ideas on building a new effective human rights institution to proportionately respond to the severity of such violations mentioned anywhere in the official documents. Further, governments have different levels of eagerness in effectuating a more effective regional human rights institution, because such institution in execution of its tasks would definitely affect the governments adversely (Phan, 2009; Victor, 2018). This is testimony to ASEAN's ignorance in strengthening human rights protection further, because if we take into comparison the period of time during the establishment of the AICHR, it can be found that the Joint Communiqués of each year documented the continuous progress of establishing the AICHR. Indeed, there has not been any discussion in such official documents after 2009 about the establishing a regional human rights court.

Scholars have remarked on the reason why ASEAN member states look over this issue. The main argument is that ASEAN still stands on the principle of respect for independence, sovereignty, and non-interference which are enshrined in article 2 (a) and (e) of the ASEAN Charter (Ramcharan, 2000). The non-interference principle, state sovereignty, and consensus-based decision-making have usually been raised by member states in imposing a veto on the issue of improving a legally binding instrument (Phan, 2012, p. 108-113). Member states would be afraid that such improvement might affect state relations because they directly affect the states who violate their civilians' human rights. Further, the ASEAN Way and different political wills of member states have always been cited as the main impediments underpinning the inability to come to an agreement in dealing with human rights violations (Ibid).

To date, the abovementioned obstacles presented by governments have affected enhancing the AICHR's mandate. A recent evidence can be found when

some current and former AICHR representatives proposed to equip the AICHR with the ability to receive complaints and an accompanying procedure to respond to those complaints. Edmund Bon Tai Soon, the Malaysian AICHR representative (2016-2018) suggested to member states that a communication procedure need to be established first (Hanara, 2019, p. 43). He also offered services in drafting a proposal of such procedure, but member states exercise their veto power against AICHR's ability to consider a complaint (Ibid). Thus, it seems that this procedure which potentially affects member states with poor human rights records would never come into effect, whereby the advocacies from other representatives proposing otherwise were too weak to fight for this issue.

3. Analysis: Towards Establishing a Regional Human Rights Court through Mobilizations of CSO and the AICHR

As mentioned in the previous part, member states are not moving forward to create a more effective regional human rights institution. CSOs on the other hand have demonstrated successful mobilizations on human rights issue in international regime, and other regional levels, whereas interaction from supranational organizations have also been conducive towards that improvement. Recognizing the importance of these two actors in bringing about an effective regional human rights protection system, this Part of the paper now turns to ascertaining the manner by which CSOs and the AICHR have mobilized towards strengthen human rights protection, and establishing a regional human rights court in ASEAN.

3.1 CSOs' Mobilization in Strengthening Human Rights Protection, and Push for a Regional Human Rights Court in ASEAN

The role of CSOs in ASEAN emerged in the process of establishing the AICHR. CSOs constituted the Working Group for an ASEAN Human Rights Mechanism tasked with the duty to draft the Terms of Reference (ToR) and were involved in all processes up until the eventual creation of the AICHR in 2009 (Muntarbhorn 2013, p. 108-110). It is to be noted that in 2015, the AICHR initiated a process for accreditation of CSOs as AICHR consultants whereby accredited CSOs can submit policy recommendations relevant to the AICHR, provide written statements, and

work with the AICHR on specific studies or papers thereby increasing opportunities for CSO-AICHR partnership (Phan, 2019). With respect to mobilization towards a regional human rights protection system, CSO action can be categorized into the following three courses of actions: call for a strengthened AICHR; call for a regional human rights court; and provide financial assistance for fact finding, and aiding victims.

3.1.1 Call for a Strengthened AICHR

The most common and public form of mobilization from CSOs is their call for a strengthened AICHR. In 2017, FORUM-ASIA urged the AICHR to respond to the persecution of the Rohingya in Myanmar's Rakhine state pursuant to the AICHR's mandate under its ToR (Hanung et al., 2018). The most striking of the demands of FORUM-ASIA in this particular instance are that they urged the AICHR to carry out its own investigations into Rohingya crisis, as part of a thematic study pursuant to article 4.12 of the ToR and request information from other Member States pursuant to article 4.10 of the ToR.

The reason these two demands are notable is because the AICHR does not have an investigative mandate as such. Article 4.12 of the ToR merely mandates the AICHR to prepare studies on thematic issues of human rights in ASEAN. By urging the AICHR to conduct an investigation as part of a thematic study, FORUM-ASIA has suggested a creative way for AICHR to be able to carry out investigations by the mechanisms of thematic study and of information requesting which the AICHR is already authorized to do under the ToR.

In addition to creatively use existing mandates to pursue investigation into human rights violations, other CSOs have urged for the AICHR to be equipped with the authority to receive complaints, investigate, and address them. In 2018, the Asia Indigenous Peoples Pact – AIPP, Asian Forum for Human Rights and Development (FORUM-ASIA), Asylum Access Malaysia, Child Rights Coalition Asia, DAWN- Development Action for Women Network, Global Alliance Against Traffic in Women, Islamic Renaissance Front, Malaysian Confederation of the Disabled, MARUAH, Persatuan Promosi Hak Asasi Manusia – PROHAM, PMRW- Philippines Migrants Rights Watch, PUSAT KOMAS, and SUARAM-Suara Inisiatif launched a joint statement for the AICHR Training/Symposium

which took place in Chiang Rai, Thailand, on 13 – 15 October 2018 (FORUM-ASIA, 2018a).

The statement addressed several recent human rights issues, including strengthening protection systems such as investigative and judicial functions to deal with human rights violations. This time, CSOs expressed concern over the Rohingya crisis by recommending the AICHR to take action to implement the AICHR's protective mandate by establishing a mechanism to receive complaints on human rights violations from individuals and groups, investigate and address them in accordance with international human rights law and standards (Ibid).

Evidence from Thai CSOs corroborate the abovementioned mobilization. Chalida Tajaroensuk, Director of the Thailand's People's Empowerment Foundation, remarked that CSOs really hope to have a regional human rights court in ASEAN.² CSOs have been struggling to pressure the AICHR to put this idea to ASEAN governments, also engage the AICHR to expand its protective mandates such as receive complaints and investigate cases (Ibid). At the ASEAN Summit and AICHR Meeting, CSO assembly sometime pressure governments, or the AICHR to address issues appropriately (Ibid). So, this means that CSOs insightful works seems more presented, and their attempts would have gone to fruition whereby governments and the AICHR at least takes some awareness from CSOs.

3.1.2 Call for a Regional Human Rights Court

A more recent form of mobilization pertains to CSOs expressly calling for not only a strengthened AICHR, but an outright call for a regional human rights court. A regional CSO network across the region called the ASEAN Civil Society Conference/ASEAN Peoples' Forum (ACSC/APF) organized a parallel meeting with the 30th ASEAN Summit. Both events were held in Manila, the Philippines from 26 – 29 April 2017. In the ACSC/APF meeting, the CSO network, citing disturbingly high incidences of extra-judicial killings (EJKs), called on the government representatives attending the ASEAN Summit to adhere to international standards of human rights and to assemble ideas for the establishment of an independent regional human rights court to deal with such cases (ICNL,

² Chalida Tajaroensuk, interview by author, Bangkok, Thailand, August 15, 2019.

2018). They proposed that such a court would be modeled on the European Court of Human Rights and Inter-American Court of Human Rights. This will be a good way to protect human rights and prosecute abuses by member states (Ibid).

CSOs have also reached out to international organizations. On 15 March 2018, Rosanna Ocampo from FORUM-ASIA attended the 37th Regular Session of the UN Human Rights Council, and called on the UN Human Rights Council to engage ASEAN member states and urge them to create a regional human rights court to remedy the inability of AICHR which has caused them to be rather irresponsible to gross violations on Rohingyas in Myanmar, extrajudicial killings in the Philippines and shrinking of democratic space in Cambodia (FORUM-ASIA, 2018b).

Another group of CSOs went beyond calling for ASEAN governments to establish an ASEAN human rights court. Rather, they hoped to draw upon the capacity of Asia Pacific countries to effectuate an Asia Pacific human rights court. Leong Sze Hian, President of MARUAH was confident that *'The involvement of more developed countries such as Japan, Australia and New Zealand, would accelerate the process of creating a court.'*³ This opinion is consistent with the 1st Joint Statement of the ASEAN-Australia Special Summit 2018 which provides new prominent cooperation between ASEAN and Australia. Article 23 confirms that this both of them will enhance dialogue and cooperation on the protection of human rights as embodied in the UDHR and other applicable international human rights instruments.⁴ Thus, more progress can be made based on this agreement which might include an achievement on establishing a regional human rights court in the future.

Interestingly, some CSOs remarked that thinking about building a regional human rights court, the adoption of human rights legally binding convention should be taken in to action first. Evidenced by fieldwork, as joining group discussions, and interviewing with a number of CSOs—MARUAH (Singapore), SUARAM (Malaysia), Pusat KOMAS (Malaysia), HRRC (Indonesia), Human Rights and Development Foundation (Thailand) and FORUM-ASIA, have shown

³ Interview by author, Bugis, Singapore, April 5, 2018.

⁴ See the statement at <https://aseanaustralia.pmc.gov.au/Declaration.html>.

their supporting opinion on this issue. It is necessary for ASEAN and the AICHR to accelerate the process to implement a human rights convention because it can be a legally binding document, as opposed to the non-binding declaration ASEAN currently has.⁵ Other regions such as Europe and Inter-Americas can be significant examples which ASEAN should learn from. Those regional human rights systems were established by adopting regional human rights conventions which accordingly gave birth to the regional human rights court in such regions (Ibid).

3.1.3 Provide Financial Support for Fact Finding, and Aiding Victims

We have seen that CSOs were key monetary supporters in the Inter-American human rights system in helping to create the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. Without financing from CSOs, these institutions would not have sufficient budget to cover judges' remuneration, staff salaries and operational expenditures (Buergethal, 2004). In ASEAN, CSOs' financial contribution towards the AICHR have not been required. It is member states who support the entire budget for all works to the people who are involved, such as in meetings and roundtable discussions during the establishment of the AICHR (Muntarbhorn, 2013).

ASEAN member states finance the AICHR for all of its work and its representatives' salary. Articles 8.2 and 8.8 of the AICHR's ToR provides that *'The annual budget shall be funded on equal sharing basis by ASEAN Member States..., and Secretarial support for the AICHR shall be funded by the ASEAN Secretariat's annual operational budget.'*⁶ The yearly budget for the AICHR from ASEAN is US\$200,000 (\$20,000 per Member State in accordance with the equal funding basis) (Muntarbhorn, 2013, p. 142). This amount seems sufficient for the AICHR because since it was established, there have been no financial problems and the AICHR is still working well in accordance with its mandate.

However, Rachel Arinii Judhistari remarked that the AICHR does not

⁵ Rachel Arinii Judhistari, the East Asia and ASEAN Programme Manager of FORUM-ASIA, interview by author, Medan, Indonesia, April 12, 2018.

⁶ See the Terms of Reference of the AICHR at <http://www.asean.org/storage/images/archive/publications/TOR-of-AICHR.pdf>.

require external budget because its activities mostly pertain to organizing meetings.⁷ There is also no headquarters, permanent staff, and obligation to investigate and deal with human rights cases. Thus, money is not needed to pay for those purposes, but with respect to a future regional human rights court, external financial support would be important in accelerating and completing such process (Ibid). At present, the AICHR's ToR provides room for receiving external budget. Article 8.6 provides that the AICHR is able to receive funding and other resources from non-ASEAN member states for the following three purposes: human rights promotion, capacity building and education.⁸ This means CSOs can be eligible to financially support the AICHR to set up working groups to adopt a convention to provide a basis for creating a court.

An indication that CSOs will be able to step up to such potential role well is that to date, CSOs have already been making monetary contributions towards the protection of human rights. Some well-known CSOs in the region such as FORUM-ASIA has spent money on providing facilities for victims and witnesses of some human rights violation cases such as the Rohingya crisis.⁹ FORUM-ASIA partnered with international CSOs such as Amnesty International and Human Rights Watch to conduct field work in collecting information, donate money to help victims, build camps for Rohingya orphans, and provide accommodation to witnesses (Ibid). In the Philippines, FORUM-ASIA set a team to work together with local activists and CSOs to collect the data of victims who have been violated during the 'War on Drugs' campaign of President Duterte (Ibid).

CSOs are also capable of acquiring external budget from international organizations, peer CSOs from other regions as well as international CSOs. If ASEAN really intends to establish a regional human rights court, there are many supporters from outside, such as the CoE, countries in the Asia Pacific. Famous international organizations such as Human Rights Watch and Amnesty International are ready to financially contribute to ASEAN. Cess Principe, Executive Director

⁷ Supra note 5.

⁸ See the Terms of Reference of the AICHR at <http://www.asean.org/storage/images/archive/publications/TOR-of-AICHR.pdf>.

⁹ Supra note 5.

of Human Rights Resource Centre (HRRC Indonesia) remarked.¹⁰ CSOs are one of the choices that can also link with international and other regional organization to earn budget. It would be fruitful to consider receiving external monetary aid to independently create a regional court, and try to work without government budget control (Ibid).

3.2 Mobilization within the AICHR in Strengthening Human Rights Protection and Establishing a Regional Human Rights Court in ASEAN

The AICHR was created in 2009 and is empowered by article 14 of the ASEAN Charter, and articles 1 to 4 of the ToR to promote and protect human rights. Article 3 of the ToR stipulates clearly that the AICHR was established as a consultative body, and article 5 (2) provides that each member state shall appoint a representative to the AICHR. These articles testify that the AICHR was born not to be a legally binding institution with full independence from the governments. Even after the AICHR was established, the selection processes for representatives is still considered as the issue of government power.

Moreover, pursuant to article 5(4) of the ToR, no consultation of each state on the selection process of a representative is required. This means when member states select their representatives, it is possible to select representatives who comply with their respective governments rather than act in an independent capacity. Also, compared to other regional human rights systems, the AICHR as a regional human rights commission is often criticized as a toothless tiger because its activities have not yet addressed human rights violations on the ground and have failed to protect people from violating states. However, here we demonstrate otherwise, that the AICHR has been incrementally strengthening human rights protection. Even though obstacles briefly mentioned in the literature review such as the non-interference principle and lack of political will of member states has hindered AICHR's development, some AICHR representatives have been really active in advocating for an improved human rights protection system, and building a regional human rights court.

¹⁰ Telephone conversation with author, June 18, 2018.

3.2.1 Various Manners of Advocacy from Active AICHR Representatives

Rafendi Djamin, Indonesian AICHR Representative from 2013-2015, remarked that the Court should be the next step to be accomplished within the next ten years in order to remedy the lack of ability and authority to investigate human rights violations and prosecute those responsible.¹¹ He states that because once legal avenues are exhausted at the state level, cases could be submitted to the regional court (Ibid). He believes that through the AICHR Representatives' active work, the expectation of having a court would probably come true in the future (Ibid). Also, *'the future standard setting under article 4(2) of the ToR should rather be focused on the development of a general legally-binding human rights instrument which duly upholds universal standards'*, Rafendi further added (Hanara, 2019, p. 7).

The Malaysian AICHR Representative (2016-2018), Edmund Bon supported that ASEAN should learn lesson from other regions. He stated that

*ASEAN is not different from the European, Inter-American or African mechanisms which all began as inter-governmental commissions first. It took 20 years for the Inter-American Court to come about. The European Court was slightly faster – it took about six years. ASEAN is taking baby steps ... I'm very sure we'll be looking at a court in the near future.*¹²

He also shares a similar view with CSOs that there needs to be a legally-binding instrument to uphold universal standards of human rights (Ibid). A regional human rights court will normally come after a regional human rights convention, added by Phoukhong Sisoulath, the AICHR Representative from LAO PDR 2016-2018.¹³ Thus, we should think about drafting a convention first, then a court will follow.

Thus, the mobilization for strengthening human rights institutions and pushing for a court that we see from within AICHR is not mobilization as an organization, but rather on a personal capacity. Some representatives called

¹¹ Interview by author, Groningen, the Netherlands, March 22, 2017. At the SEA/ASEAN Dialogue on Human Rights and ASEAN: Advancing Regional Mechanisms and the Civil Society-Institutional Dialogue.

¹² Interview by author, Medan, Indonesia, April 12, 2018. At the AICHR High Level Dialogue on Managing Freedom of Expression in the Information Age.

¹³ Ibid.

directly upon violating member states to address alleged human rights violations. Bon and Wisnu made a Joint Media Statement urging the Myanmar government to open up and provide real information and establish effective protection for victims which should also be long-lasting solutions (Hanara, 2019, p.49). They raised concern on protection practices with other representatives, and conducted mini-UPRs to discuss the Rohingya crisis (Ibid). The possibility of setting up complaints and correspondence procedures for the AICHR was mentioned, but, unfortunately, a consensus within the AICHR representatives to deal with this case was not reached (Ibid).

Noticeably, it is noted that since the current set of AICHR representatives (2019-2021) have assumed their roles, the issue of strengthening a regional human rights institution, building a forceful regional human rights instrument, have been raised more vocally than in the past. The prospects of improving a non-legally binding institution—the AICHR to become part of a judicial institution in dealing with human rights violations in this region seems more promising. For example, Eric Paulsen, the current Malaysian representative for AICHR (2019-2021) at the ‘High-Level Dialogue on ASEAN Human Rights’ in Jakarta, on May 10, 2019, laid emphasis on the fact that ASEAN nations should together advance and uphold the protection of human rights (Kurmala, 2019).

In the ASEAN, we are upbeat that through our efforts, we would be able to boost the mandate of promotion and protection of human rights. Ten years of silence is enough. If the AICHR would like to be relevant to the struggle of the peoples of Southeast Asia and merit to be called a human right commission, it needs to make major institutional changes, and take genuine steps towards the promise behind its creation. He stated (Ibid).

Additionally, new AICHR representatives—Yuyun directly communicates and provides a direct channel to receive complaints from the public. She has been a well-known leader of CSOs, participated many dialogues which organized by CSOs, and recently promoted the slogan ‘AICHR Indonesia works to uphold rights to protect us’ which raise awareness of people and CSOs on the role of the

AICHR which can help protect human rights.¹⁴ She also supports that CSOs are very important in the process of building a regional human rights institution.¹⁵

She is also one of the AICHR representatives who normally uses social media such as Facebook to disseminate information on campaigns and communicate with CSOs and the people. For example, through the official AICHR Indonesia Facebook page, she urged people to send complaints related to human rights to her dedicated e-mail.¹⁶ This can be one of an outstanding task of the AICHR which might reflect the violating states in this region to realize that even the AICHR does not have an exact mandate to receive human rights complains, but representatives started to work beyond their task to play a role on protection term, and against human rights violations.

3.2.2 The AICHR has widened the Opportunity to Work with CSOs

With respect to the cooperation between the AICHR and CSOs, we found evidence that the AICHR sometime uses external actors like CSOs to gain their powers and help to put pressure on member state governments. The AICHR has given accreditation, and they work together with CSOs, which demonstrates collaboration between them which lead to new recent contribution on the issue of protection. Since the Guidelines on the AICHR’s Relations with CSOs was adopted in 11 February 2015, the AICHR has started strengthening engagement with CSOs whereby at present 30 CSOs hold AICHR-accredited status (AICHR, 2018). Also, the increasing number of applications from CSOs for Consultative Relationships with the AICHR has shown the CSO interest in working with the AICHR.

An interface meeting with CSOs was organized by the AICHR in November 2017 to discuss the possibility of reviewing the AHRD, and as part of the AICHR-CSO Symposium in 2018 (Hanara, 2019, p. 9). One interesting point is that the travel expenses of the CSOs for these meetings were allocated by the AICHR. These costs were not initially in the 2017 and 2018 work plan (Ibid). This budget was added later by the AICHR purpose demanding to participate with

14 AICHR Indonesia’s Facebook page. https://www.facebook.com/pg/IndonesiaAICHR/posts/?ref=page_internal.

15 Telephone conversation with author, July 26, 2019.

16 Supra note 14.

CSOs which means that the AICHR has granted CSOs a more significant status rather than the past (Ibid). Moreover, during these meeting, they agreed that this kind of official brainstorm will be improved in the future, and having sufficient time for discussions (Ibid).

Bon worked close ties to the CSOs of his countries help advance the CSOs agenda. He remarks that Malaysian CSOs often urge him to voice this idea in ASEAN and AICHR meetings, through annual human rights report, and through information dissemination on social media.¹⁷ CSOs are ready to help and provide grassroots information and be consultant to develop a legal instrument, they are well educated, and also have experience from working in the field, met with victims in many cases. So, they are really capable to work together with member states and the AICHR to enhance human rights protection system which will provide a basis for a court in the future.

It can be noted that such close relations have gained the trust of CSOs in the region. They feel that AICHR representatives could better build the protection task of in both national and regional levels. This point is consistent with article 4.8 of the ToR which provides a significant milestone that CSOs can formally exchange and request information from the AICHR (and vice versa). Likewise, the AICHR can use the opportunity to gain insight on the tangible human rights circumstances on the ground especially in their own countries. The fact-finding missions and field visits through in the real violation areas can be taken part which will help the AICHR to use this information from CSOs to express member states.

4. Conclusion and Recommendations

Prominent human rights institutions have been established at the global and regional levels to promote and protect the respect for people's rights among member states. Europe, the Inter-Americas and Africa have their own regional human rights courts which are principally authorized to adjudicate human rights cases, and order states to take measures to protect persons who are in imminent danger. This stands in contrast with the ASEAN region where widespread and systematic human rights

¹⁷ Supra note 12.

abuses perpetrated by states authorities have been witnessed, but a legally-binding human rights institutions especially a regional human rights court is yet to come into existence. This continent has only a human rights commission, the AICHR, which was intended to be a consultative body which no protective power in reality, by member states' agreement.

Since the AICHR was created, the progressive idea to grant protective functions to the AICHR, and establishing a more effective human right institution like a court have never been put on the agenda of the member states. Nevertheless, this paper has shown that there are actors like CSOs who are extremely active in mobilizing in a variety of ways to strengthen the human rights protection system, and furthering the idea of establishing a regional human rights court in this region. In ASEAN, severe human rights abuses such as the Rohingya crisis in Myanmar, and the extrajudicial killing in the Philippines have highlighted the prominent mobilization efforts of CSOs. Thus, they called for a strengthened AICHR, and establishing a regional human rights court by organizing platforms, trying to work closely with the AICHR, reaching out to international organizations such as the UN, and pressuring member states. Further, they sometimes provide financial support by conducting fact finding in the field, investigating human rights abuses, and assisting victims using their own budget.

Not only CSOs have been struggling to strengthen human rights protection, and establishing a regional human rights court, but also the existing human rights commission— AICHR has started interacting and working with CSOs. The AICHR now is one of the core actors pushing forward those progressive issues especially in the last few years. Significantly, some AICHR representatives especially from Indonesia, Malaysia and Thailand often show their attitudes on strengthening human rights protection, request for more protective mandates for the AICHR, and often try to push the idea of building a regional human rights court. Representatives from those countries have raised awareness to others to take responsibility for human rights violations happening in the region, asked for, interfaced, and pressured the violating governments to make solutions and end all violations occurring as a result of their authority. Additionally, the AICHR has given accreditation, and worked together with CSOs, which show closer collaboration between them leading to

a new recent contribution on protective measures. Occasionally, some AICHR representatives also use external actors like CSOs to supplement their powers and help put pressure to member state governments.

From these positive remarks, we further recommend for the more effective step of strengthening human rights protection, and building a regional human rights court in this region as follows. If ASEAN would like to complete its human rights system like other regions, CSOs and the AICHR are the indispensable players to do so by virtue of their efforts, both on their own and in cooperation with one another. Amidst slow progress of member states on human rights issues, CSOs and the AICHR should enhance their communication and involvement. A significant step is to put pressure to member states to accept international human rights norms, and revise the AICHR's ToR and/or adopt a legally binding convention which leads to establishing a regional human rights court in the future.

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