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ASEAN'S Human Rights Conundrum: An Analysis Of The Failures Of The ASEAN System For Promoting Human Rights

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Abstract

The ASEAN human rights system consists of a network of formal institutions such as the ASEAN Intergovernmental Commission Human Rights, documents such as the ASEAN Human Rights Declaration, and efforts to interact with regional civil society organizations. This system, which emerged in 2009, has come under intense scrutiny because the region's human rights record has worsened since its inception. This paper examines the complex network of institutions, documents, and interactions between ASEAN member states and civil society organizations to determine the overall effectiveness of the organization's efforts to safeguard human rights throughout the region. The paper begins with an overview of the role that regional intergovernmental organizations play in protecting human rights before examining the shortcomings of ASEAN's human rights architecture. In particular, this examination will focus on the ASEAN Intergovernmental Commission on Human Rights, the ASEAN Human Rights Declaration, and ASEAN's interactions with human rights-focused civil society organizations. Next, the paper evaluates the regional human rights systems in Europe, the Americas, and Africa in order to determine whether the shortcomings of ASEAN's human rights system can be observed in other regional human rights systems. This comparison finds that ASEAN's human rights system is uniquely weak in comparison with its counterparts in other regions. Finally, this paper concludes by providing policy recommendations for strengthening ASEAN's human rights system before subsequently explaining difficulties associated with passing potential reforms.

Keywords

asean, human rights, southeast asia, international relations, political science, intergovernmental organizations

Disciplines

Asian Studies | International Relations

**ASEAN'S HUMAN RIGHTS CONUNDRUM: AN ANALYSIS OF THE FAILURES OF THE ASEAN
SYSTEM FOR PROMOTING HUMAN RIGHTS**

DAKOTA JONES
A Thesis
in
Philosophy, Politics, and Economics

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Dr. James McGann

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Introduction

The Association of Southeast Asian Nations (ASEAN) is a regional intergovernmental organization (IGO) which consists of ten treaty-bound member states: Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam. Collectively, these states are playing an increasingly prominent role on the global stage because they contain approximately 8.59% of the world's population¹ and have a combined GDP which exceeds \$2.6 trillion.² Furthermore, the economies of ASEAN's member states are projected to grow at a torrid pace in the near future due to a rapidly emerging middle class and a sizeable labor force inside the economies of its member states.³ Unsurprisingly, the international community has turned its attention to ASEAN as a result of its emergence as a critical political and economic bloc in the international community.

A side effect of this rapid emergence, however, is increased scrutiny of its member states' questionable human rights records. Many of ASEAN's member states have shown signs of "shown increasing signs of human rights violations or moves away from democracy" within the past decade.⁴ While the Rohingya genocide in Myanmar is responsible for many of the most extreme violations of human rights during this time frame, there are many other violations

¹ United Nations Population Division, *2017 Total Population – Both Sexes V1* (New York, NY, 21 June 2017), distributed by the United Nations Population Division, [https://esa.un.org/unpd/wpp/DVD/Files/1_Indicators%20\(Standard\)/EXCEL_FILES/1_Population/WPP2017_POP_F01_1_TOTAL_POPULATION_BOTH_SEXES.xlsx](https://esa.un.org/unpd/wpp/DVD/Files/1_Indicators%20(Standard)/EXCEL_FILES/1_Population/WPP2017_POP_F01_1_TOTAL_POPULATION_BOTH_SEXES.xlsx).

² "The Association of Southeast Asian Nations (ASEAN): 12 Things to Know," *Asian Development Bank*, last modified November 8, 2017, <https://www.adb.org/features/asean-12-things-know>.

³ David Wijeratne, "How to Keep the ASEAN Economies Growing for Another 50 Years," *World Economic Forum*, September 8, 2018, accessed February 24, 2019, <https://www.weforum.org/agenda/2018/09/to-keep-growing-aseans-economy-must-adapt-heres-how/>.

⁴ Vincent Bevins, "It's not just Burma: Human rights are under attack across Southeast Asia, advocates say," *Washington Post*, September 8, 2017.

occurring in other member states as well. Thailand's rapid backslide from a burgeoning democracy into a military junta, Cambodia's recent moves to dissolve opposing political parties, and the Philippines' initiatives to encourage extrajudicial killings as a part of President Rodrigo Duterte's "drug war" are just a few examples of human rights crises that have emerged in other ASEAN member states over the course of the past decade. In response to increased scrutiny of human rights abuses in the region, ASEAN's member states convened the ASEAN Intergovernmental Commission on Human Rights (AICHR) in 2009 and drafted the ASEAN Human Rights Declaration (AHRD) in 2012.

In this paper, I examine the effectiveness of ASEAN's initiatives to promote and protect human rights within its member states. In Chapter One, I provide a brief overview of the international human rights landscape, examine the role that regional IGOs play in promoting and protecting human rights, and propose an evaluation scheme to determine the effectiveness of a particular regional IGO's ability to ensure that member states uphold human rights. In Chapter Two, I provide an overview of ASEAN's efforts to explicitly protect human rights; in particular, this chapter will focus on the AICHR and the AHRD. Furthermore, this chapter will also present a case study of ASEAN's response to the Rohingya crisis in Myanmar to highlight the flaws of the organization's human rights architecture. In Chapter Three, I evaluate ASEAN's initiatives to promote civil society organizations within its member states, which matters because civil society plays a critical role in the process of persuading states to accept human rights norms. Using the findings from the previous two chapters, I evaluate the overall efficacy of ASEAN's human rights mechanisms before subsequently comparing its efforts to promote

and protect human rights to those of other regional IGOs in Chapter Four. Finally, in the concluding section, I summarize my findings and provide policy recommendations for ASEAN.

Chapter One

Background: How Can the Effectiveness of Regional Intergovernmental Organizations in Protecting Human Rights be Evaluated?

This chapter explores the role that IGOs – organizations containing states that are legally bound together by a treaty – play in the creation of norms related to human rights. First, I will provide background information about the complex relationship between human rights and international law. Next, I will explain the role that IGOs play in promoting and protecting human rights through their roles as watchdogs and norm diffusers. Finally, I will delve into a discussion of the unique role that regional IGOs play in the international human rights architecture before subsequently establishing metrics to evaluate the efficacy of these bodies to encourage their member states to protect human rights.

a. Background on the Codification of Human Rights in International Law and the Role of IGOs

Over time, human rights have grown to become a fundamental pillar of international law. While international human rights law is unique because it reflects a state's obligations to its domestic population rather than to other states, it suffers from many of the same challenges of enforceability and compliance as other branches of international law. While most states claim to respect and protect the human rights of their citizens, 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. Unsurprisingly, this gap between the codification of human rights norms in international law and state compliance is a result of a complicated legal landscape.⁵

International human rights law can primarily be found in two types of documents: binding treaties and non-binding forms of “soft law.” Binding treaties are statements of law which specify enforceable legal obligations for states. Binding human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR), are significant because they can force states to change aspects of their territorial sovereignty. This characteristic of treaties is important because states cite violations of sovereignty as a justification for failing to ratify treaties or choosing to ratify a treaty with significant reservations (which occurs when states ratify a treaty, but opt out of specific provisions).⁶ Non-binding forms of “soft law,” meanwhile, are primarily aspirational documents which codify norms into international law without legally obligating states to adhere to them. While documents such as the Universal Declaration of Human Rights (UDHR) are useful because they codify human rights norms into international law, they do not have the power to compel states to commit to certain courses of action.⁷

As is the case with other areas of international law, the lack of enforceability is one of the most glaring weaknesses of international human rights law. 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 rights.⁸ As a result, these bodies employ “light touch” enforcement mechanisms in which states are shamed for their human rights violations,

⁵ 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), 61.

⁶ *Ibid*, 64.

⁷ *Ibid*,

⁸ Emilie M. Hafner-Burton, “International Regimes for Human Rights,” *Annual Review of Political Science* 15 (2012), 266.

but do not face formal penalties or sanctions. This tactic is adopted because international human rights bodies do not wish to alienate states from the international human rights system altogether; it is more beneficial for the long-term prospects of international human rights for imperfect states to participate in the system than for states to completely opt-out of the system due to concerns about infringement on sovereignty. Furthermore, these bodies are limited to forms of “light touch” enforcement largely because their scope of enforcement is limited to a specific, narrowly defined set of powers by the treaties which establish their existence.⁹

In spite of the problems associated with enforceability, however, the codification of human rights in international law has allowed for a process known by scholars as “norm diffusion” to occur. Norms, defined by Finnemore as “collectively held ideas about behavior”¹⁰ which are “shared and social,”¹¹ are diffused through the international system and are adopted by states as a result of concerted efforts by IGOs to encourage states to adopt certain courses of action.¹² Once the norm is diffused by states, states subsequently internalize the norm and follow its associated rules of behavior.

IGOs are involved in the process of diffusing norms related to human rights in two distinct ways. First, they have the ability to directly act as “norm diffusers” that encourage states to adopt certain rules of behavior. For example, the Organization for Security and Co-operation in Europe (OSCE) has successfully diffused norms related to the treatment of ethnic minorities

⁹ Smith, “Human Rights in International Law,” 71.

¹⁰ Martha Finnemore, *National Interests in International Society*, (Ithaca: Cornell University Press, 1993), 23.

¹¹ Ibid.

¹² Susan Park, “Theorizing Norm Diffusion Within International Organizations,” *International Politics* 43, no. 3 (2006), 343.

within its member states by conducting seminars ran by independent experts in member states.¹³

Second, IGOs can support the creation and diffusion of new norms through efforts to support civil society organizations in their member states. These efforts are important because Finnemore and Sikkink have identified civil society organizations as critical “norm entrepreneurs,” which means that they possess the ability to introduce new norms and persuade states to adopt them. Once these actors convince enough states to adopt a particular norm, the authors assert that a “tipping point” is reached and a “norm cascade” encourages others to gradually adopt the norm.¹⁴ The spread of norms related to women’s suffrage illustrates the important role that civil society plays in the creation and dissemination of norms. The International Women’s Suffrage Association (IWSA), an international non-governmental organization, launched a worldwide campaign to encourage states to grant women the right to vote. This campaign, as well as several other overlapping campaigns, managed to persuade enough states to adopt women’s suffrage that the norm reached a “tipping point” in 1930. After 1930, states began to adopt such measures at an increasingly rapid pace. IWSA, as well as other civil society organizations involved in the international women’s suffrage movement, served as “norm entrepreneurs” because they launched campaigns to convince states to adopt provisions granting women the right to vote.¹⁵ While IGOs are unlikely to serve as “norm entrepreneurs,”¹⁶ they have the ability to spearhead efforts to promote the activities of local

¹³ Steven Ratner, “Does International Law Matter in Preventing Ethnic Conflict,” *NYU Journal of International Law* 32 (2000), 646.

¹⁴ Martha Finnemore and Kathryn Sikkink, “International Norm Dynamics and Political Change,” *International Organization* vol. 52, no. 4 (1998), 895.

¹⁵ *Ibid*, 896.

¹⁶ Park, “Theorizing Norm Diffusion Within International Organizations,”

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 causes. Through supporting civil society efforts to address issues related to human rights, IGOs can play an indirect role in assisting “norm entrepreneurs.”¹⁷

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 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 force states to alter their behavior. Ultimately IGOs are complex actors with the ability to significantly influence the international human rights landscape.

b. The Role of Regional IGOs in the International Human Rights System

In addition to the UN human rights system, many regional IGOs have established human rights bodies, such as the Organization of American States’ American Commission on Human Rights and the Council of Europe’s European Court of Human Rights. Much like their global counterparts, these regional bodies are responsible for enforcing human rights treaties within their member states. Importantly, rather than ensuring compliance with global treaties, these bodies are primarily responsible for enforcing regional human rights treaties such as the American Convention on Human and Peoples’ Rights and the European Convention of Human Rights and Fundamental Freedoms. In terms of protected rights and freedoms, regional treaties

¹⁷ Thomas Buergenthal, “The Evolving International Human Rights System,” *American Journal of International Law* 100, no. 4 (2006), 804.

bear striking resemblance to those codified in the UDHR, ICCPR, and subsequent global treaties.¹⁸

The UN human rights system has undoubtedly played a significant role in influencing the legal norms which underpin the international human rights system; furthermore, it also plays an important role in making sure that the broader international community is on the same page in terms of human rights norms.¹⁹ At the same time, however, there are a multitude of strategic benefits that can be derived from deferring to regional human rights bodies. First, regional human rights bodies have the ability to adopt language in their respective human rights treaties that accounts for their cultural context. For instance, the African Charter on Human and Peoples' Rights includes provisions to protect "collective peoples'" rights. Since regional human rights bodies are able to adopt language in their foundational documents which reflects cultural context, member states are more likely to view such bodies as legitimate.²⁰ Second, regional bodies are more effective at applying "peer pressure" on member states to comply with human rights law in comparison to their global counterparts. This effectiveness stems from the fact that in comparison to international bodies such as the UN, regional bodies contain a smaller number of member states which share common historical, cultural, and political characteristics.²² As a result, the "peer pressure" from regional human rights bodies tends to be more credible compared to pressure from their global counterparts.

¹⁸ Smith, "Human Rights in International Law," 73.

¹⁹ Buergenthal, "The Evolving International Human Rights System," 791.

²⁰ Ibid, 792.

²¹ Smith, "Human Rights in International Law," 73.

²² Ibid.

In spite of these benefits, however, regional human rights bodies are imperfect, especially in the realm of enforcing human rights treaties. A vast majority of regional human rights bodies, with the exception of the European Court of Human Rights, lack the ability to punish against states which violate human rights. This important omission of power means that regional human rights bodies suffer from an inability to act as a direct enforcer of human rights provisions. In spite of this, however, regional IGOs and their associated human rights bodies are still critical actors in the international human rights architecture because they are more effective as potential norm diffusers in comparison to their global counterparts.

c. How Should the Effectiveness of Regional IGOs be Evaluated?

The previous two sections established the roles of IGOs within the broader international human rights landscape and explored the unique role that regional human rights bodies can play in the protection and promotion of human rights. The previous analysis can also be used to establish a metric for evaluating the effectiveness of regional IGOs in facilitating the protection of human rights. As discussed in the prior two sections of this chapter, IGOs primarily do this through the creation of direct enforcement mechanisms or through promoting the existence of civil society organizations in their member states. Thus, this paper will evaluate the ability of regional IGOs to directly ensure that states comply with key human rights provisions as well as their efforts to support civil society organizations within their member states.

Chapter Two

Evaluating the Effectiveness of ASEAN's Formal Human Rights Institutions

This chapter aims to evaluate the effectiveness of ASEAN's formal institutions designed to protect human rights. First, I will begin by providing historical background on the evolution of ASEAN's formal human rights mechanisms and initiatives. Next, I will provide an overview of the ASEAN Human Rights Declaration and the ASEAN Intergovernmental Commission of Human Rights and discuss their respective structural flaws. Afterward, I will discuss the influence of the norm of non-interference and its influence over how ASEAN addresses human rights violations committed by member states. Finally, I will conclude by providing a case study about ASEAN's response to the Rohingya genocide which is occurring in Myanmar to highlight how the institutional deficiencies of the organization's human rights regime lead to an insufficient response to human rights crises within member states.

a. **Historical Evolution of ASEAN's Human Rights Mechanisms: From Asian Values to Internationalization of Human Rights**

In the years following the conclusion of the Cold War, Western countries began to place considerable pressure on Southeast Asian states to adopt policies in line with liberal values, which included demonstrating a commitment to the protection of human rights. In response, these countries initially resisted adherence to such norms and asserted that there were a set of "Asian values" which conflicted with Western human rights norms. This discourse, which originated in the early 1990s, was both a defensive reaction against increasing pressure for liberalization and an attempt to piece together common strands of thought from different cultures in order to create the appearance of Southeast Asia as a unified bloc capable of

providing an alternative model of governance in contrast to the West.²³ Key principles asserted in Asian values discourse included the importance of community over individual rights, respect for authority, and social cohesion over individual interests. Singapore and Malaysia – the two states viewed as the main proponents of this school of thought – argued that such values played critical roles in their rapid economic growth that occurred over the course of the prior two decades.²⁴

Importantly, the emergence of Asian values ideology drew criticism from academics, activists, and political leaders from both inside and outside the region. Scholars, minority groups, and indigenous peoples in ASEAN member states all spoke out against this line of discourse by arguing that this ideology simply existed for the purpose of justifying domestic repression under the guise of being necessary for development.²⁵ Furthermore, Western political leaders and scholars criticized the notion of Asian values as being a selective interpretation of social and political norms design to legitimize authoritarian regimes. Sen, in particular, argued that “so-called Asian values that are used to justify authoritarianism are not Asian in any particular sense”²⁶ and that the appearance of the notions of individual rights in Western writings does not delegitimize the claims to freedom and liberty that citizens of ASEAN member states may possess.²⁷

This debate, while contentious, faded from the international arena in the late 1990s as a result of the 1997 Asian Financial Crisis. The crisis caused almost all ASEAN member states to

²³ Philip Eldridge, *The Politics of Human Rights in Southeast Asia* (New York: Routledge, 2002), 32.

²⁴ Ibid, 33.

²⁵ Ibid, 35.

²⁶ Amartya Sen, “Human Rights and Asian Values,” *The New Republic*, July 14-21, 1997, <https://www.carnegiecouncil.org/publications/archive/morgenthau/254>.

²⁷ Ibid.

slip into deep recessions, which sparked social unrest and widespread protests amongst workers in most countries. As a result, state leaders were to adapt their policies to the demands of their citizens.²⁸ Furthermore, the crisis showed that adherence to Asian values could not guarantee sustainable economic growth and thus refuted many of this ideology's core tenets.²⁹ As a result, the debate over the existence of separate Asian values was significantly subdued by the end of the decade.

The financial crisis and subsequent collapse of Asian values discourse forced ASEAN member states to alter their stance on human rights and engage with the international human rights regime. In the years leading up to the crisis, however, pressure from the international community had already forced political leaders in Southeast Asia to gradually make concessions on this issue area. In consultation with the UN in 1993, several Asian states signed the Bangkok Declaration, which affirmed the universality of human rights³⁰ and reaffirmed the commitment of signatory parties to "principles contained in the Charter of the United Nations and the Universal Declaration on Human Rights."³¹ While this declaration represented an important step because it was the first major instance in which ASEAN member states formally engaged with the international human rights regime, it served as an imperfect human rights document. The declaration alluded to the idea of regional exceptionalism through its simultaneous affirmation of the principle of non-interference³² and the assertion that human rights "must be

²⁸ Eldridge, *The Politics of Human Rights in Southeast Asia*, 42.

²⁹ Gerd Langguth, "Asian Values Revisited," *Asia Europe Journal* 1, no. 1 (2003), 27.

³⁰ Eldridge, *The Politics of Human Rights in Southeast Asia*, 61.

³¹ United Nations, "Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights," conclusion date: April 2nd, 1993, 1, http://faculty.washington.edu/swhiting/pols469/Bangkok_Declaration.doc.

³² *Ibid.*

considered in the context of a dynamic and evolving process of international norm-setting.”³³ These provisions are inherently contradictory because they affirm that while human rights are universal, implementation is not a priority due to the region’s unique historical, economic, and social backgrounds.³⁴ Despite this document’s imperfections, however, it was still impactful because it served as the first instance in which the regional community explicitly recognized the importance of adhering to human rights norms. Later that year, the ASEAN Inter-Parliamentary Association adopted the Kuala Lumpur Declaration on Human Rights, which reiterated many key themes of both the Bangkok Declaration and the Vienna Declaration adopted at the World Conference on Human Rights.³⁵ In addition to these international agreements, individual ASEAN member states also began to formally engage with the international human rights regime as a result of pressure from the international community. Several ASEAN member states have engaged in formal discussions with the UNHCR about how to improve human rights conditions in their countries; furthermore, multiple member states have also established national human rights institutions in response to international pressure as well.³⁶

Ultimately, a combination of political and economic pressures forced ASEAN member states to address human rights concerns. The initial steps of the Bangkok Declaration, the Kuala Lumpur Declaration on Human Rights, and the measures taken by individual member states to protect human rights all set the stage for increasingly bold and groundbreaking steps to ensure the protection of human rights. In 2007, human rights were codified as an organizational

³³ Ibid, 2.

³⁴ Eldridge, *The Politics of Human Rights in Southeast Asia*, 61.

³⁵ Ibid, 89.

³⁶ Ibid.

priority in Article 14 of the ASEAN Charter, which called on member states to establish a regional human rights body.³⁷ This led to the eventual creation of the AICHR in 2009 and the passage of the AHRD in 2012.

b. Evaluation of ASEAN Intergovernmental Commission on Human Rights

The ASEAN Intergovernmental Commission on Human Rights (AICHR) was established in 2009 as a regional human rights body for the purpose of protecting and promoting human rights within Southeast Asia. The body meets twice a year and consists of a group of ten representatives – one per member state. The body's most notable accomplishment is the successful negotiation of the passage of the ASEAN Human Rights Declaration because it represented the first time that international human rights norms were formally codified into law in an ASEAN document. In particular, the body's proponents argue that the passage of this declaration was a cornerstone moment in the history of human rights in Southeast Asia because it represented the first time that the organization's ten member states with vastly different political structures and cultural norms reached significant agreement on the importance of protecting and codifying rights. Furthermore, these proponents also argue that the passage of the Declaration could serve as an important first step for the further diffusion of human rights norms throughout the region.³⁸

Despite these successes, however, there are five major structural flaws which prevent the body from being an effective regional human rights body. First, the body's Terms of

³⁷ Association of Southeast Asian Nations, *ASEAN Charter*, Singapore: November 2007, 19, <http://asean.org/storage/images/archive/publications/ASEAN-Charter.pdf>.

³⁸ Michelle Staggs Kelsall, "The New ASEAN Intergovernmental Commission on Human Rights: Toothless Tiger or Tentative First Step," *Analysis from the East-West Center* no. 90 (2009), 2.

Reference stipulate that ought to focus on the promotion of human rights rather than on their protection in the ASEAN region. While the promotion of human rights norms is undoubtedly a noble goal, this provision undermines the ability of the AICHR to serve as an authoritative regional voice that can name and shame specific states or actors which violate human rights. Second, the AICHR's Terms of Reference also stipulate that it only has the power to serve as an advisory body to the ASEAN Secretariat, which means that it does not possess any meaningful ability to enforce decisions or punish consistent violators of human rights.³⁹ Third, unlike other regional human rights bodies, the AICHR does not currently have a formal mechanism for receiving complaints of human rights abuses. The absence of a formal complaints mechanism means that there is currently no way for individuals or civil society organizations to report human rights abuses to the body. This oversight significantly contributes to the ineffectiveness of the AICHR because the body cannot adequately respond to allegations of human rights abuses if it does not have a mechanism to collect information about them in the first place.⁴⁰ Fourth, the representatives appointed to the body by each member state are not independent; they "remain accountable to their appointing governments" and can thus be withdrawn at any time.⁴¹ Fifth, the AICHR's Terms of Reference mandate a reliance upon consensus-based decision-making. Given the wide range of political systems and cultural norms encompassed by ASEAN's ten member states, this form of decision-making is particularly problematic because they will either fail to reach a consensus or reach a consensus which represents a weak

³⁹ Ibid.

⁴⁰ Vitit Muntarbhorn, *Development of the ASEAN Human Rights Mechanism* (Brussels: European Parliament, 2012), 10.

⁴¹ Association of Southeast Asian Nations, *ASEAN Intergovernmental Commission on Human Rights Terms of Reference*, July 2009, Article 5(2).

response to serious human rights violations.⁴² Furthermore, consensus-based decision-making is harmful because it essentially gives member states veto power, which means that consistent human rights violators possess the ability to block any proposed forms of punitive action.⁴³

In sum, while the AICHR has had some successes in promoting discourse related to human rights norms, it still has work to do in order to become a body that can serve as a catalyst for protecting human rights in the region. In particular, the structure of the body ties the hands of its member states and prevents it from taking action against human rights violations in the region.

c. Evaluation of the ASEAN Human Rights Declaration

In 2012, the AICHR and its representatives appointed by ASEAN member states worked to draft the ASEAN Human Rights Declaration (AHRD). This document represented the first instance in which member states with vastly different histories and commitments in regard to human rights had agreed to a specific, shared set of principles on this issue area.⁴⁴ Even though the passage of this document served as an important milestone in the history of human rights in Southeast Asia, its drafting process was fraught with controversy. Since the document was drafted by the AICHR, outside observers were concerned that its representatives, which were 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

⁴² 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), 28.

⁴³ Kelsall, "The New ASEAN Intergovernmental Commission on Human Rights," 2.

⁴⁴ 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, 108-109.

can be withdrawn by their appointing government at any time.⁴⁵ Furthermore, the drafting process was conducted almost entirely in secret; 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. Furthermore, regional civil society organizations were largely excluded from the drafting process until the document was complete, which meant that the process of drafting the document was largely insular.⁴⁶ The UN High Commissioner for Human Rights even went so far as to criticize the drafting process on the grounds that it was anti-democratic, noting it was “not the hallmark of the democratic global governance to which ASEAN aspires”⁴⁷ and that it would “undermine the respect and ownership that such an important declaration deserves.”⁴⁸

The document itself, according to drafters, was created with the goal of upholding standards of the UDHR while also acknowledging the regional context in which the document was drafted. In some respects, the drafters were successful in achieving this goal. Articles 10 and 26 of the AHRD affirm civil and political rights as well as economic, cultural, and social rights codified in the UDHR.⁴⁹⁵⁰ In some instances, the AHRD actually expands upon the scope of these rights. Article 4 of the AHRD, for example, affirms that the rights of women, children, the elderly, and persons with disabilities as an “inalienable, integral, and indivisible part of

⁴⁵ Association of Southeast Asian Nations, *ASEAN Intergovernmental Commission on Human Rights Terms of Reference*, July 2009, Article 5(2).

⁴⁶ Catherine Shanahan Renshaw, “The ASEAN Human Rights Declaration 2012,” *Human Rights Law Review* 13, no. 3 (2013), 558.

⁴⁷ 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, <https://reliefweb.int/report/world/un-rights-chief-welcomes-focus-human-rights-and-democracy-calls-review-asean-draft>.

⁴⁸ *Ibid.*

⁴⁹ Association of Southeast Asian Nations, *ASEAN Human Rights Declaration*, November 2012, Article 10.

⁵⁰ *Ibid.*, Article 26.

human rights and fundamental freedoms.”⁵¹ In other parts of the document, rights codified in the UDHR are clarified for specific regional contexts. Article 13 of the AHRD, for instance, expands upon the UDHR’s provisions which prohibit slavery by adding a reference the “smuggling and trafficking in persons, including for the purpose of trafficking in human organs.”⁵² The drafters of the AHRD were able to successfully achieve some of their goals through the inclusion of provisions which reaffirm, expand, or clarify rights initially found in the UDHR.

At the same time, however, the document itself is deeply flawed due to provisions which undermine the universality of human rights. Article 6 of the AHRD stipulates that “the enjoyment of human rights and fundamental freedoms must be balanced with the performance of corresponding duties as every person has responsibilities to all other individuals, the community and the society where one lives.”⁵³ While the recognition of duties itself in the document is not a cause for concern since nearly all human rights instruments contain references to them, the idea that human rights duties must be “balanced” against other duties was a cause for alarm amongst human rights advocates and regional civil society organizations. International human rights advocates found this language to be troubling because it harkens back to Asian values discourse which emphasizes that individual rights are less important than obligations to the family, community, or broader society.⁵⁴

⁵¹ Ibid, Article 4.

⁵² Renshaw, “The ASEAN Human Rights Declaration 2012,” 560.

⁵³ Association of Southeast Asian Nations, *ASEAN Human Rights Declaration*, Article 6.

⁵⁴ Renshaw, “The ASEAN Human Rights Declaration 2012,” 566-567.

In addition to concerns over the language related to balancing duties, the document also contains language which places conditions on the universality of human rights. Article 7 of the AHRD stipulates that “all human rights are universal, indivisible, interdependent, and interrelated,” while also noting that “at the same time, 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.”⁵⁵ Critics of the AHRD denounced this provision on the grounds that it could potentially be invoked to justify the violation of human rights on the grounds of cultural relativism. While this provision contains references to the unique regional context of Southeast Asia, it does not seem to explicitly allow states to use this justification to violate human rights. Importantly, Article 6 of the AHRD improves on the language of universality present in the Bangkok Declaration, which qualifies that “while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process.”⁵⁶ The removal of the word “while,” which was seen as a qualifying word by international human rights advocates, from the AHRD’s version of this provision signifies progress on the question of regional exceptionalism. Article 7 of the AHRD is still imperfect because the language which implies the acceptance of cultural relativism as a justification for failing to uphold human rights is present; however, it is clear that progress has been made on this issue.⁵⁷

Finally, critics of that the AHRD’s limitations clause argue that it undermines the overall effectiveness of the document. Article 8, which contains the clauses, states that:

⁵⁵ Association of Southeast Asian Nations, *ASEAN Human Rights Declaration*, Article 7.

⁵⁶ “Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights,” 1.

⁵⁷ Renshaw, “The ASEAN Human Rights Declaration 2012,” 568.

“The human rights and fundamental freedoms of every person shall be exercised with due regard to the rights and duties of others. The exercise of human rights and fundamental freedoms shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition for the human rights and fundamental freedoms of others and to meet the just requirements of national security, public order, public health, and public morality and the general welfare of the peoples in a democratic society.”⁵⁸

This article contains several provisions which limit the universality of human rights; in particular, it stipulates that human rights can be subject to limitations on the grounds of national security, public order, public health, and public morality. While the UDHR has a similar limitations clause,⁵⁹ international human rights advocates and regional civil society organizations objected to the placement of this clause in the “General Principles” section in the document because it could potentially allow these limitations to apply to all rights, including those deemed as non-derogable under international law. Furthermore, several regional civil society organizations (most prominently, the Asia Pacific Forum on Women, Law, and Development) opposed the inclusion of “public morality” as a limitation because it could be used as a justification for states to undermine women’s rights. These critics argued that the “morality” implied by this clause refers to the dominant patriarchal culture of many countries in the region, which reinforces norms which favored men in power at the expense of women.⁶⁰ The inclusion of “national security” in Article 8 also caused alarm amongst regional civil society organizations for similar reasons; in particular, they feared that national security could be used as a vague justification for continued human rights abuses. Importantly, regional civil society

⁵⁸ Association of Southeast Asian Nations, *ASEAN Human Rights Declaration*, Article 7.

⁵⁹ *Ibid*, Article 8.

⁶⁰ Renshaw, “The ASEAN Human Rights Declaration 2012,” 569.

organizations were not alarmed over the language in Article 8 in isolation because many other human rights documents allow for limitations in extreme emergencies. Rather, these organizations were alarmed over the language in the context of previous human rights abuses and cultural norms in Southeast Asia that could be interpreted as a justification for allowing abuses of human rights to continue.

The passage of the AHRD represented an important step in the development of human rights in Southeast Asia; however, this document has not played a significant role in improving human rights in the region. First, as pointed out previously, there are several provisions throughout the document which allow states to derogate on rights in the UDHR that are viewed as non-derogable under any circumstances. Second, since the document is a declaration rather than a treaty, it is non-binding by nature. This important characteristic means that while states can sign the document and appear to commit to upholding human rights, there is no legal obligation for them to actually follow through on those commitments. Furthermore, since the AICHR does not have the ability to punish states that consistently violate human rights, there would be no institutional mechanism available to punish states which consistently violate provisions of the treaty. Therefore, the passage of the AHRD should not be viewed as a document which played a significant role in advancing human rights in the region because it is not an ironclad document which fails to force states to commit to the protection of human rights. This skepticism is especially justified given the extensive tradition of states with

extensive histories of human rights violations signing declarations and treaties in response to international pressure.⁶¹

d. The Role of the Norm of Non-Interference

It is clear 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. This phenomenon can be explained by ASEAN's rigid adherence to the norm of non-interference, which stipulates that ASEAN should not intervene in the domestic affairs of its member states in accordance with the basic tenets of sovereignty.⁶² ASEAN upholds this norm by refusing to explicitly intervene in the internal affairs of member states. Rather, if the organization believes the internal affairs of one of its member states is problematic, it will publicly criticize the member states or engage in backdoor negotiations in an attempt to address the problem. Such practices were used to spur political reforms in Cambodia and Myanmar in the 1990s before they officially joined ASEAN.⁶³ The one notable exception to this norm is when security issues threaten to undermine regional stability; for instance, ASEAN member states (Thailand, Philippines, and Singapore) intervened in 1999 to stabilize East Timor after it erupted in violence following a referendum for independence from Indonesia.⁶⁴ While the norm of non-interference is seemingly simple, the actual behavior of ASEAN member states reflects a more complex reality. ASEAN member states will apply

⁶¹ Matthew Davies, "The ASEAN Synthesis: Human Rights, Non-Intervention, and the ASEAN Human Rights Declaration," *Georgetown Journal of International Affairs* 14, no. 2 (2013), 56.

⁶² Robin Ramcharan, "ASEAN and Non-Interference: A Principle Maintained," *Contemporary Southeast Asia* 22, no. 1 (2000), 60.

⁶³ Ramcharan, "ASEAN and Non-Interference," 82-83.

⁶⁴ Lee Jones, "ASEAN's Unchanged Melody? The Theory and Practice of 'Non-Interference' in Southeast Asia," *The Pacific Review* 23, no.4 (2010), 497.

pressure to problematic member states and only pursue intervention in cases where it is necessary for regional stability. In the realm of human rights, this means that ASEAN is likely to directly intervene or punish member states for violations unless they directly affect regional stability.

The existence of the norm of non-interference affects ASEAN's efforts to promote and protect human rights in two ways. First, the existence of this norm likely impacted the drafting process of both the AICHR's Terms of Reference and the AHRD. In particular, the limited advisory role of the AICHR and its reliance upon consensus-based decision-making reflect the core tenets of this norm. The AHRD's status as a declaration rather than a treaty is likely a result of this norm as well; a legally binding treaty would require an enforcement mechanism that ASEAN currently lacks. Second, the existence of this norm prevents ASEAN from taking drastic steps, such as humanitarian intervention or the imposition of sanctions, to address serious violations of human rights. Essentially, the norm of non-interference serves as another institutional obstacle to meaningful responses to allegations of human rights abuses in ASEAN member states.

e. Case Study: ASEAN Response to Rohingya Crisis in Myanmar

This section of the chapter will employ a case study of ASEAN's response to the Rohingya crisis in Myanmar to highlight the ineffectiveness of its internal processes and practices for addressing major human rights violations. First, this section begins with a brief overview of the Rohingya crisis and the key provisions of the UDHR and the AHRD that Myanmar has allegedly violated. Next, this section will provide background about how ASEAN has historically addressed human rights violations in Myanmar before then delving into how

ASEAN has specifically responded to the Rohingya crisis. Finally, this section will conclude by analyzing the institutional factors that prevent ASEAN from mounting a robust response to the crisis and its associated human rights violations.

The Rohingya people are a Muslim-majority ethnic group concentrated along Myanmar's northwestern Rakhine State, which shares a border with Bangladesh's Chittagong Division.⁶⁵ The Rohingya, who make up just 1.5% of the overall Myanmar population, are ethnic and religious minorities whose overall population is dwarfed by the country's overwhelmingly Buddhist majority.⁶⁶ Tensions between Muslim Rohingyas and Buddhist Burmese date back to World War II because the two groups supported opposing sides; the former supported the British, while the latter supported the Japanese.⁶⁷ These tensions worsened when Myanmar was on the cusp of independence in 1967 as a result of Rohingya leaders campaigning for the creation of an independent state Muslim-majority state in Arakan, which is a region within the current Rakhine State. This violent separatist campaign further enflamed tensions between the two groups and provided the state, which is primarily governed by its Buddhist Burmese majority, a justification for taking retaliatory measures against the Rohingya.⁶⁸

Since Myanmar has gained independence, it has persistently engaged in campaigns of repression targeting the Rohingya. The passage of a "Citizenship Law" in 1982, according to Human Rights Watch, "effectively . . . [denied] the Rohingya the possibility of acquiring a

⁶⁵ Bilveer Singh, "ASEAN, Myanmar, and the Rohingya Issue," *Himalayan and Central Asian Studies* 18, no. 1/2 (2014), 7.

⁶⁶ *Ibid.*, 6.

⁶⁷ *Ibid.*, 8.

⁶⁸ *Ibid.*, 9.

nationality”⁶⁹ and classified them as “resident foreigners.”⁷⁰ This legal status means that Rohingya are subject to abuses such as restrictions on movement, arbitrary confiscation of property, forced labor, and ineligibility for public office. Furthermore, the government of Myanmar has also placed restrictions on the religious freedoms of Rohingya Muslims; authorities regularly conduct inspections and subsequently “fine or imprison those who conduct organized prayers in their own homes.”⁷¹

In addition to these abuses, the government of Myanmar has also begun to engage in active campaigns of violence against the Rohingya people. In August 2017, Myanmar’s military launched a large-scale ethnic cleansing campaign against Rakhine State’s Rohingya population in response to attacks by local separatist groups. Military units and local militias attacked Rohingya villages, carried out systematic campaigns of mass sexual assault, and committed widespread massacres. More than 100,000 Rohingya individuals were internally displaced as a result of the actions of Myanmar’s military.⁷² Additionally, these campaigns also generated a massive refugee crisis; more than 730,000 Rohingya have fled to refugee camps in neighboring Bangladesh in order to escape persecution. Conditions within these Bangladeshi camps are notoriously poor as well; a lack of funds dedicated towards refugee camps has led to shortages of food, water, and medical supplies.⁷³ Furthermore, poor sanitary conditions and a lack of

⁶⁹ “Burmese Refugees in Bangladesh: Still No Durable Solution,” *Human Rights Watch*, May 1, 2000, <https://www.hrw.org/report/2000/05/01/burmese-refugees-bangladesh/still-no-durable-solution>.

⁷⁰ Ibid.

⁷¹ “Burma: Events of 2018,” *Human Rights Watch*, accessed March 25, 2019, <https://www.hrw.org/world-report/2019/country-chapters/burma>.

⁷² “Burma: Events of 2017,” *Human Rights Watch*, accessed March 25, 2019, <https://www.hrw.org/world-report/2018/country-chapters/burma>.

⁷³ Mohammed Mainul Islam and Tasmiah Nuzhath, “Health Risks of Rohingya Refugee Population in Bangladesh: A Call for Global Attention,” *Journal of Global Health* 8, no. 2 (2018), 2.

medical resources in these Bangladeshi camps have led to outbreaks of deadly and highly-communicable diseases such as measles, cholera, and diphtheria.⁷⁴

Myanmar's mistreatment of the Rohingya people, perhaps unsurprisingly, violates a slew of AHRD provisions. Most violations are classified as infringements upon the civil and political rights covered by the AHRD. In particular, the abuses documented earlier in this section constitute violations of the Rohingya's right to personal security (Article 12 of the AHRD),⁷⁵ their "right to freedom of movement" (Article 15 of the AHRD),⁷⁶ their right to a nationality (Article 18 of the AHRD),⁷⁷ and their right to freedom of religion (Article 22 of the AHRD).⁷⁸

Furthermore, the refugee crisis generated by Myanmar's actions towards the Rohingya has led to violations of economic, social, and cultural rights that are protected in the document. In particular, the fact that Rohingya refugees have been forced to migrate to refugee camps characterized by poor conditions constitutes a violation of their "right to an adequate standard of living" (Article 28).⁷⁹ Furthermore, since Rohingya children cannot attend public school, their right to an education is being violated as well (Article 31).⁸⁰ Importantly, while the AHRD is not a binding document, it serves as a useful roadmap for determining specific human rights violations that Myanmar commits. Furthermore, since the AICHR is ASEAN's primary human rights body and was heavily involved in the process of drafting this document, it would be logical for the body to use it as a basis for pursuing action against Myanmar.

⁷⁴ Ibid, 1.

⁷⁵ Association of Southeast Asian Nations, *ASEAN Human Rights Declaration*, Article 12.

⁷⁶ Ibid, Article 12.

⁷⁷ Ibid, Article 15.

⁷⁸ Ibid, Article 22.

⁷⁹ Ibid, Article 28.

⁸⁰ Ibid, Article 31.

Historically, ASEAN has struggled to pursue a coherent policy to address Myanmar, which it has viewed as “an embarrassment to the values and ideology”⁸¹ of the organization. Initially, ASEAN adopted a policy of “constructive” engagement towards Myanmar and its ruling military junta’s questionable human rights record. In 1997, the organization offered membership to Myanmar in exchange for an agreement to engage with the international human rights regime.⁸² This policy was pursued in hopes that ASEAN could discreetly encourage Myanmar to adopt democratic reforms and improve its human rights record through backdoor negotiations. When this policy failed to lead to meaningful change, ASEAN began to criticize Myanmar in public forums in hopes of pressuring its ruling military junta to enact reforms. More forceful methods of engaging with the military junta, such as punishment, never gained serious traction within the organization.⁸³

Myanmar eventually implemented several semi-democratic reforms in 2010, but there is no evidence to suggest that “constructive engagement” played a significant role in spurring this change. While the literature suggests a multitude of causes for Myanmar’s pursuit of reforms, none of them point to ASEAN’s policy of “constructive engagement” as the main reason that the military junta pursued democratic reforms. Some scholars argue that reform was a result of Myanmar’s military junta pursuing power-sharing strategies to overcome the dangers of internal factionalism.⁸⁴⁸⁵ Others contend that the transition was spurred by

⁸¹ Singh, “ASEAN, Myanmar, and the Rohingya Issue,” 10.

⁸² Ibid.

⁸³ Ibid, 11.

⁸⁴ Adam McDonald, “From Military Rule to Electoral Authoritarianism: The Reconfiguration of Powers in Myanmar and Its Future,” *Asian Affairs: An American Review* 40, no. 1, 20-36.

⁸⁵ Aurel Croissant and Jil Kamerling, “Why Do Military Regimes Institutionalize? Constitution-Making and Elections as Political Survival Strategy in Myanmar,” *Asian Journal of Political Science* 21, no. 5 (2013), 105-125.

Myanmar's sputtering economy⁸⁶ or a desire to entrench the ruling military junta's power while simultaneously establishing international legitimacy.⁸⁷ Regardless of the main cause of transition cited by scholars, it is clear that ASEAN played at most a minimal role in spurring Myanmar's semi-democratic transition. This case shows that internal pressure, which is ASEAN's preferred method of convincing problematic member states to change their behavior given the existence of the norm of non-interference, is not extremely effective. This is especially true considering that the current regime in Myanmar is still guilty of many human rights violations that are unrelated to the Rohingya crisis, such as the imprisonment of journalists.⁸⁸

ASEAN's strategies to address the Rohingya crisis follow precedents set by its previous engagement in Myanmar. The AICHR's response to human rights violations associated with the crisis so far has largely been consistent with the core ideas of "constructive engagement" because most of its efforts related to the crisis have been related to facilitating discussion between Burmese representatives and leadership figures within ASEAN. In 2013, for instance, the AICHR dedicated time during a summit in Myanmar to discuss the Rohingya crisis and potential solutions.⁸⁹ More recently, in 2018, the AICHR representatives of ASEAN's two largest Muslim-majority member states (Indonesia and Malaysia) released a joint statement which called on the body to take an increasingly proactive approach to address the crisis. In particular,

⁸⁶ Robert Taylor, "Myanmar: From Army Rule to Constitutional Rule," *Asian Affairs* 43, no. 2 (2012), 221-236.

⁸⁷ Marco Bunte and Jöm Dosch, "Myanmar: Political Reforms and the Calibration of External Relations," *Journal of Current Southeast Asian Affairs* 34, no. 2 (2015), 3.

⁸⁸ *Ibid.*, 8.

⁸⁹ Yuyun Wahyuningrum, "Fourth Anniversary of the AICHR," *University of New South Wales Diplomacy Training Program*, accessed April 24, 2018, <http://www.dtp.unsw.edu.au/sites/default/files/FOURTH%20ANNIVERSARY%20OF%20THE%20AICHR.docx>.

the two representatives called on the body to review measures that could be implemented to bring peace and “promote harmony and reconciliation between the various ethnic communities of Myanmar.”⁹⁰ This initial pressure eventually snowballed and caused more ASEAN member states to criticize how Myanmar has treated the Rohingya. During 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 violations.⁹¹ These recent events highlight that the creation of a new human rights body has not substantially altered ASEAN’s strategy for addressing human rights violations in Myanmar. In accordance with the norm of non-interference, the body still relies on discussion and a mild degree of public shaming to promote human rights without directly intervening in the internal affairs of its member states.

Institutional efforts to address the Rohingya crisis have been limited to discussion and mild criticism of Myanmar for two reasons. First, the AICHR’s institutional design severely limits the scope of action that can be taken in response to the crisis. The AICHR has been unable to fully address this crisis because it is essentially relegated to an advisory role which only has the power to provide recommendations to the ASEAN Secretariat; it does not possess the ability to significantly punish Myanmar or provide support to the Rohingya. In addition, the body’s reliance on consensus-based decision-making, as mandated by the AICHR Terms of Reference, further weakens its ability to respond to the Rohingya crisis because Myanmar would

⁹⁰ Dian Septiari, “AICHR reps call for regional approach to Rohingya crisis,” *Jakarta Post* (Jakarta, Indonesia), April 23, 2018.

⁹¹ Association of Southeast Asian Nations, “Chairman’s Statement of the 33rd ASEAN Summit,” Singapore, November 13, 2018, accessed March 29, 2019, https://asean.org/storage/2018/11/33rd_ASEAN_Summit_Chairman_s_Statement_Final.pdf.

essentially have to agree to punitive measures and consent to the internationalization of its domestic affairs.⁹² Second, the norm of non-interference strongly discourages policy measures which would require ASEAN to intervene in a member state's domestic affairs. In accordance with the norm of non-interference, ASEAN member states would choose to intervene in Myanmar only if the Rohingya crisis began to affect overall regional stability, as demonstrated by the case of intervention in response to unrest in East Timor in 1999. The case of the Rohingya crisis highlights the insufficiency of ASEAN's current institutional mechanisms for protecting human rights and the need for drastic reforms to the organization's formal mechanisms for protecting human rights.

f. Conclusion and Future Outlook

ASEAN's current formal mechanisms for protecting and promoting human rights severely limit the ability of the organization to respond to human rights abuses. Furthermore, as shown by ASEAN's response to the Rohingya crisis, political demand to address major human rights crises is currently insufficient to spark robust responses to human rights crises. This fundamental weakness is evidenced by the fact that the human rights records of multiple ASEAN member states have actually worsened since the creation of the AICHR and the passage of the AHRD. Unfortunately, given the broader context of the politics of human rights in Southeast Asia, significant reform of the organization's formal human rights mechanisms seems unlikely. The structural weaknesses of the AICHR, the weak language in the AHRD, and the prominence of the norm of non-interference all demonstrate an institutional lack of political

⁹² William Jones, "Myanmar's Rohingya: Human Rights Abuses and Systemic Violence," *Journal of Urban Culture Research* 14 (2017), 20.

will to forcefully address human rights violations occurring in ASEAN member states. Cynical scholars, such as Narine, view ASEAN's formal human rights mechanisms as a part of an effort to rehabilitate the organization's credibility and relieve itself from international pressure to conform to human rights norms.⁹³ As a result, significant reform to ASEAN's formal mechanisms for protecting and promoting human rights is unlikely.

⁹³ Shaun Narine, "Human Rights Norms and the Evolution of ASEAN: Moving without Moving in a Changing Regional Environment," *Contemporary Southeast Asia* 34, no. 3 (2012), 365.

Chapter Three

Evaluating the Relationship Between ASEAN and Civil Society: Does ASEAN Suppress Civil Society's Ability to Diffuse Human Rights Norms?

In contrast with the previous chapter, which evaluated formal mechanisms explicitly designed to address human rights issues, this chapter will analyze ASEAN's relationship with civil society organizations – an important actor in the process of diffusing human rights norms. First, this section will begin with a theoretical overview of the incentives that drive collaboration between IGOs and civil society organizations. Next, this section will examine the strained relationship between ASEAN and civil society organizations; in particular, it will focus on how ASEAN systematically excludes civil society organizations focused on human rights issues from its decision-making processes before concluding that ASEAN is unlikely to change its approach to cooperating with civil society organizations due to the lack of incentives for cooperation. Afterward, this section will analyze ASEAN's efforts to cooperate with civil society on the issue of the rights of migrant laborers. Initially, it appears that such cooperation disproves the notion that ASEAN is completely unwilling to cooperate with civil society on human rights issues. This section's analysis of ASEAN's response to this issue, however, concludes that collaboration between these two actors on the issue of migrant laborer rights is largely the result of unique circumstances and incentives that do not exist for other human rights issues. Finally, this section concludes with a brief discussion about how the strained relationship between ASEAN and civil society affects the diffusion of human rights norms throughout the region.

a. Theoretical Background: Why Does the Relationship Between IGOs and Civil Society Matter for the Protection of Human Rights?

While IGOs and civil society organizations are both critical international actors, the importance of their relationship is not necessarily obvious. In part, this stems from the lack of literature on the relationship between these two types of actors. While there is plenty of literature which discusses the role that IGOs and civil society organizations play in international relations and the process of “norm diffusion” discussed in Chapter One, the literature elaborating on the manner in which the two types of actors interact in the international system is significantly less robust. Nonetheless, there are theoretical frameworks which predict circumstances which encourage cooperation between IGOs and civil society. Steffek, in particular, finds that there are many “push factors” which lead civil society organizations to seek assistance from IGOs as well as “pull factors” which lead IGOs to seek cooperative opportunities with civil society organizations. “Push factors” include a desire for a civil society organization to seek funding from an IGO or a desire to cooperate with an IGO for the purpose of advocacy and elevating the importance of a particular issue on the international stage.⁹⁴ “Pull factors” which incentivize IGOs to seek assistance from civil society organizations, meanwhile, are primarily linked to questions of policy. In particular, IGOs reach out to civil society for consultation on policy formulation or implementation.⁹⁵

While Steffek’s theoretical framework is primarily designed to explain the general relationship between IGOs and civil society organizations, it reveals two key points that are

⁹⁴ Jens Steffek, “Explaining Cooperation Between IGOs and NGOs – Push Factors, Pull Factors, and the Policy Cycle,” *Review of International Studies* 39 (2013), 1006.

⁹⁵ *Ibid*, 1003-1004.

important to keep in mind when discussing how this relationship impacts cooperation on human rights issues. First, this framework reiterates the importance of both parties' willingness to engage with each other. If IGOs do not wish to meaningfully engage with civil society organizations or vice versa, then cooperation should not be expected. While this point might initially seem obvious, it means that an IGO must be interested in working with civil society organizations as a part of its broader approach towards human rights. Second, this framework indirectly highlights the role that incentives play in determining whether these two types of actors will cooperate. Civil society organizations may seek the assistance of an IGO, but unless the IGO believes that it can gain tangible benefits in terms of pursuing its policy goals, meaningful cooperation is unlikely.⁹⁶ In sum, the insights from Steffek's framework show that IGOs are willing to empower civil society activities in the domain of human rights if the organization is committed to upholding human rights and believes that engaging with civil society is necessary to achieve its policy goals.

b. The Relationship Between ASEAN and Civil Society: A Lack of Opportunity for Formal Engagement

At the time of ASEAN's founding in 1967, civil society did not have a robust presence in Southeast Asia. This trend continued for the following two decades, as evidenced by the results of a 1986 survey which concluded that the total number of civil society organizations in the region was low given the scope of issues that civil society covers and the substantial population of ASEAN member states.⁹⁷ In the early 1990s, this trend began to change and civil society

⁹⁶ Ibid.

⁹⁷ Johan Saravanmuttu and Datuk Sharom Ahmat, *ASEAN Non-Governmental Organizations: A Study of Their Role, Objectives, and Activities* (Practical Printers: Penang, Malaysia, 1986), 88.

organizations – including those focused on human rights issues – began to appear throughout the region. In response to this trend, ASEAN saw an opportunity to bring these organizations into the fold as a part of an initiative to create a “people-oriented ASEAN.” In the late 1990s, as part of ASEAN’s Vision 2020 initiative, member states agreed to pursue “a community of caring societies”⁹⁸ in which “civil society was empowered.”⁹⁹ This desire to cooperate with civil society organizations was restated in future institutional documents, such as the Bali Concord II and the Vientiane Action Program before being codified in Article 16 of the ASEAN Charter, which stipulated that the organization may “engage with entities which support the ASEAN Charter.”¹⁰⁰ The official language used to describe ASEAN’s efforts to engage with civil society weakened over time; however, the official commitment to cooperation was abundantly clear in foundational documents.

In tandem with this rhetoric, ASEAN has also established initiatives designed to encourage cooperation with civil society organizations. It is important to note, however, that these initiatives are deeply flawed and give ASEAN the power to severely restrict the type of civil society organizations that can officially participate in public spaces. This is especially the case for organizations that work on issues related to human rights, which often involves the use of “naming and shaming” tactics. There are two major initiatives related to empowering that ASEAN has pursued over the course of the past two decades. The first has been the establishment of an accreditation system which allows civil society organizations to become

⁹⁸ Association of Southeast Asian Nations, *ASEAN Vision 2020*, Jakarta: 1997, https://asean.org/?static_post=asean-vision-2020.

⁹⁹ *Ibid.*

¹⁰⁰ Association of Southeast Asian Nations, *ASEAN Charter*, 19.

officially affiliated with ASEAN. While this system seemingly establishes the legitimacy of civil society in Southeast Asia, it is deeply flawed because ASEAN has the ability to choose which organizations receive accreditation.¹⁰¹ As a result, 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-oriented.¹⁰² Second, ASEAN has allowed civil society organizations to participate on informal consultations on specific issues; for instance, civil society organizations are allowed to participate in annual forums on migrant workers as well as general social welfare. Much like the accreditation system, however, ASEAN has the ability to choose which civil society organizations are invited to these forums.¹⁰³ These strict controls over affiliation which only allows civil society organizations deemed to have “the same intentions as ASEAN” to participate in such forums. As a result, ASEAN has the ability to bar civil society organizations which are critical of organizational policies as well as those of member states.¹⁰⁴

In addition to problems with ASEAN’s official mechanisms for engaging with civil society, there are two other institutional factors which either discourage or outright prevent civil society organizations focused on human rights from engaging with ASEAN. First, there are strict restrictions on the nature of participation allowed by accredited civil society organizations. Such organizations are only guaranteed the ability to submit written statements to the ASEAN Committee of Permanent Representatives. All other activities possible through affiliation, such

¹⁰¹ Kelly Gerard, “ASEAN and Civil Society Activities in ‘Created Spaces:’ The Limits of Liberty,” *The Pacific Review* 27, no. 2 (2014), 267.

¹⁰² Association of Southeast Asian Nations, “Register of Accredited Civil Society Organizations (CSOs),” May 11, 2015, accessed April 8, 2018, https://www.asean.org/wp-content/uploads/images/2015/May/list_of_Entities_Associated_with_ASEAN/Accredited%20Civil%20Society%20rganisations%20as%20of%2011%20May%202015.pdf.

¹⁰³ Gerard, “ASEAN and Civil Society Activities in ‘Created Spaces,’” 267.

¹⁰⁴ *Ibid*, 271.

as presenting information to ASEAN subcommittees or attending official meetings, require official approval. As a result, ASEAN possesses the ability to limit the influence of civil society organizations with advocacy focused on human rights or social issues. Second, ASEAN only cooperates with civil society on a narrow set of civil society issues, such as economic development and social welfare. Civil society organizations which focus on controversial issues, such as human rights, are not granted opportunities to engage with ASEAN officials. This is evidenced by the exclusion of civil society organizations from the drafting process of the AHRD as well as the annual ASEAN-ISIS Colloquium of Human Rights.¹⁰⁵

These structures, which allow ASEAN to avoid substantially engaging with civil society organizations performing work on issues related to human rights, have forced regional civil society organizations which focus on human rights issues to turn to other activities to support their advocacy efforts. In particular, these types of civil society organizations tend to employ three types of tactics for participation outside formally sanctioned spaces. First, these organizations hold activities parallel to official ASEAN gatherings which mimic a variety of official events, such as workshops and conferences. Importantly, these “created spaces” do not involve any interaction with ASEAN itself, but merely serve as an opportunity for civil society organizations to highlight their perspective on controversial issues and their exclusion from official dialogues.¹⁰⁶ Second, civil society organizations focusing on controversial issues will stage protests as a form of political participation outside formal ASEAN spaces.¹⁰⁷ Finally, these organizations will conduct research, draft documents such as policy memos or promotional

¹⁰⁵ Ibid, 272.

¹⁰⁶ Ibid, 274.

¹⁰⁷ Ibid, 277.

materials, and disseminate them to both citizens and ASEAN officials.¹⁰⁸ In spite of ASEAN's efforts to suppress the effectiveness of civil society organizations focused on human rights issues, they still have a multitude of tactics available to promote their causes and hasten the process of diffusing human rights norms throughout the region. Importantly, none of these activities are as effective as official consultations with ASEAN at spearheading the norm diffusion process. Out of all of these three types of activities in "created spaces" documented by Gerard, just one resulted in significant policy changes.¹⁰⁹ In general, official consultations tend to be more effective at spreading human rights norms because they allow civil society organizations to directly advocate for their causes. Other activities, such as protests and information distribution, are forms of indirect advocacy that are prone to suppression by the governments of host countries. Thus, ASEAN's limited official interaction with civil society organizations focused on human rights forces such organizations to turn to less effective forms of advocacy.

While it is inaccurate to suggest that ASEAN ignores civil society altogether, it is clear that the organization fails to meaningfully engage with civil society organizations that are primarily focused on human rights. Considering the logic of Steffek's framework, outlined in the previous section, helps explain why this is the case. Since human rights as a whole do not seem to be an organizational priority, as evidenced by the general ineffectiveness of ASEAN's formal human rights instruments, it is logical that there is not an incentive for cooperation with civil society organizations focused on this particular issue area. Furthermore, the existence of the

¹⁰⁸ Ibid, 279.

¹⁰⁹ Ibid, 282.

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. Unless there is a significant change in organizational priorities, it is difficult to imagine that ASEAN's approach towards human rights civil society organizations will significantly change.

c. Advocacy for the Rights Migrant of Laborers: A Potential Counterexample?

The movement of low-income, unskilled workers throughout Southeast Asia has become an important domestic political issue in many states throughout Southeast Asia. Within ASEAN member states, it is estimated that approximately 1.5 million people move abroad per year to find work. Furthermore, a vast majority of migrant workers, totaling upwards of 13.5 million people, move between ASEAN member states. In addition to the economic and political impacts of migration, there is also concern that such migrants are at a high risk of exploitation, human trafficking, and working in abusive conditions.¹¹⁰

In light of the abuses that migrant laborers in Southeast Asia face, the protection of migrant laborers is undoubtedly a human rights issue. Given the information presented both earlier in this chapter as well as the prior chapter, it would be logical to expect that ASEAN has not mounted a robust regional response to this issue. Yet, the opposite seems to be true. In 2007, member states agreed to pass the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers. Furthermore, the organization has also hosted multiple conferences on the issue of migrant labor as well as several consultation sessions with regional

¹¹⁰ Susan Kneebone, "The Governance of Labor Migration in Southeast Asia," *Global Governance* 16, no. 32 (2010), 383-384.

civil society organizations.¹¹¹ The protection of migrant laborers seems to receive significantly more attention from ASEAN than other human rights issues. Interestingly, however, this issue did not become an organizational priority until regional civil society organizations implored ASEAN to prioritize this issue. The primary goal of this section is to explain why ASEAN responded to demands from civil society to mount a substantive response to abuses of migrant laborers, but failed to meaningfully engage with regional civil society in response to other allegations of human rights violations. This section will begin with a brief overview of civil society's advocacy efforts in the domain of migrant worker rights before subsequently detailing ASEAN's response. Finally, this section will conclude by analyzing several potential explanations for why ASEAN was responsive to demands from civil society for the protection of migrant laborers, but not for other human rights issues.

Civil society advocacy efforts have played an important role in the establishment of protections for migrant workers in ASEAN. In particular, regional networks of domestic civil society organizations have carried out a majority of the advocacy work for this issue area. The most prominent of these organizations has been Migrant Forum Asia (MFA). This regional network consisting of more than 47 civil society organizations and trade associations was established for the purpose of building alliances between migrant labor advocates and creating a pan-Asian advocacy group for the protection of migrant laborers' rights. As a parent organization within a larger regional network of civil society organizations, MFA primarily serves

¹¹¹ Jenina Joy Chavez, "Transnational Social Movements in ASEAN Policy Advocacy: The Case of Regional Migrants' Rights Policy," (paper presented for the UNRISD Conference on Regional Governance of Migration and Socio-Political Rights: Institutions, Actors, and Processes, Geneva, Switzerland, January 13-14, 2013) 13-14.

as a coordinator for domestic campaigns to cooperate on regional advocacy projects.¹¹² In addition to MFA, other regional civil society networks such as the Task Force on ASEAN Migrant Workers and international human rights organizations such as Amnesty International and Human Rights Watch have become heavily involved in campaigns for the protection of migrant laborers in Southeast Asia as well.¹¹³

While advocacy efforts from local and state-level civil society organizations have largely failed, as evidenced by the suppression of activists protesting the treatment of migrant laborers in Singapore and Malaysia,¹¹⁴ these efforts have spurred change on a regional level. ASEAN has pursued several initiatives related to the protection of migrant workers. In 2007, member states agreed to adopt the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers. While this document is non-binding (thus leaving enforcement to individual member states) and only covers a limited scope of rights, it still serves as a milestone because it codified migrant worker rights into regional law. After this document was signed, the organization established the ASEAN Committee on Migrant Workers in 2008 and convened the first annual ASEAN Forum on Migrant Labor. Both of these initiatives were designed to create avenues to allow for cooperation between ASEAN and civil society organizations by serving as platforms “for discussion and the exchange of views and ideas among stakeholders on labor migration issues.”¹¹⁵ In sum, ASEAN has responded to pressure from regional civil society organizations and has created consultation mechanisms for regional civil society organizations.

¹¹² Ibid, 10-12.

¹¹³ Lenore Lyons, “The Limits of Transnational Activism: Organizing for Migrant Worker Rights in Malaysia and Singapore,” (paper presented for Transnationalisation of Solidarities and Women Movements, Montreal, PQ, April 27-28, 2006) 3.

¹¹⁴ Ibid, 13.

¹¹⁵ Chavez, “Transnational Social Movements in ASEAN Policy Advocacy,” 13-14.

ASEAN's willingness to engage civil society on the issue of migrant worker rights, however, raises questions about why the organization chooses to engage with civil society organizations on this particular issue area, but not other issue areas related to human rights. Examining this issue from the perspective of Steffek's framework, however, provides an explanation to this phenomenon. ASEAN views policy towards migrant laborers as an issue of regional security and social policy rather than as one of humanitarian policy. In other words, ASEAN views this issue as important because it is not framed as a humanitarian issue. This framing can be seen in the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, which stipulates that the protection of migrant workers is necessary to achieve "a common vision of a secure and prosperous ASEAN community."¹¹⁶ Individual member states also view the issue of migrant workers through the lens of regional security as well. Malaysia, for instance, has viewed the issue of foreign migrant workers as a security issue, as evidenced by various statements from government officials and the creation of a volunteer paramilitary force – the People's Volunteer Corps – tasked with the responsibility to identify migrant workers that are illegally present in the country.¹¹⁷ Since both the organization itself and individual countries view this issue as one of security rather than as a humanitarian issue, it should not be surprising that ASEAN is receptive to the idea of collaborating with civil society organizations. While ASEAN's collaboration with civil society organizations on the issue of protecting the rights of migrant laborers seems to disprove the notion that it is completely

¹¹⁶ Association of Southeast Asian Nations, *ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers*, Cebu, Philippines: 2007, accessed April 11, 2019, https://asean.org/?static_post=asean-declaration-on-the-protection-and-promotion-of-the-rights-of-migrant-workers.

¹¹⁷ Sasagu Kudo, "Securitization of Undocumented Migrants and the Politics of Insecurity in Malaysia," *Procedia Environmental Sciences* 13, no. 17 (2013), 948-949.

unwilling to work with civil society on issues related to human rights, the unique circumstances and framing of this issue mean that cooperation between the two parties on other issues is unlikely.

d. Concluding Remarks

The inability of human rights-focused civil society organizations to engage with ASEAN, perhaps unsurprisingly, has severely impacted their ability to diffuse norms throughout the region. While these organizations conduct activities in parallel spaces, these activities are not effective at spearheading the norm diffusion process in comparison to official consultations with ASEAN governments. Until ASEAN feels an incentive to engage with civil society, it is unlikely that there will be meaningful engagement between these two actors.

Importantly, the case of migrant worker rights shows that ASEAN would potentially be willing to engage with civil society on humanitarian issues that are framed as issues of regional security or social policy. As a result, it is possible to extend this logic to argue that if civil society organizations can reshape the debate about a particular humanitarian issue, the odds of ASEAN granting them a formal meeting would increase as a result. One problem with extending this logic to all potential humanitarian issues, however, is that there still is not any evidence which suggests that civil society organizations are capable of changing the framing of debates over such issues. In the case of the rights of migrant workers, governments and ASEAN itself were responsible for how the issue was framed rather than civil society. The ability of civil society organizations, meanwhile, to reframe the debate is limited given limited freedom of the press

in many ASEAN member states¹¹⁸ as well as the existing structural problems with the relationship between these organizations and ASEAN. As a result, interactions between ASEAN and civil society about migrant worker rights should not be seen as a cause for optimism.

Ultimately, regional civil society organizations focused on human rights are left with few meaningful options for diffusing human rights norms in Southeast Asia. Since these organizations do not have the ability to formally consult with ASEAN and their prospects of successfully reframing debates about humanitarian issues are limited at best, these organizations are forced to turn to alternate methods of engagement in parallel spaces that are highly ineffective. Since many of these problems are linked back to structural issues in the relationship between these two actors caused by perverse incentives, it is unlikely that ASEAN will play a significant role in assisting in the diffusion of human rights norms. If anything, ASEAN is slowing the diffusion of human rights norms in the region by forcing civil society organization to turn to less effective methods of advocating for human rights.

¹¹⁸ Reporters Without Borders, "2018 World Press Freedom Index," accessed April 12, 2019, <https://rsf.org/en/ranking>.

Chapter Four

Comparing ASEAN's Human Rights Regime with Other Regional Institutions: Are ASEAN's Problems Unique?

From the previous two chapters, it is abundantly clear that ASEAN's overall human rights regime is ineffective as a catalyst for encouraging the protection and promotion of human rights. ASEAN's weak formal human rights institutions are unable to effectively mount responses to humanitarian crises and punish states which consistently abuse human rights. Meanwhile, ASEAN's treatment of regional civil society organizations forces them to turn to less effective means of advocacy, which means that the body is actively impeding the process of norm diffusion. In sum, ASEAN's organizational commitment to human rights is weak at best and actively harmful at worst. This section aims to examine whether these problems are present in other regional human rights bodies. In particular, this section will evaluate the efforts of the Council of Europe, the Organization of American States, and the African Union to protect and promote human rights. Each of these three comparisons begins with an overview of the organization's structure before subsequently comparing its initiatives to protect and promote human rights with ASEAN's efforts. The ultimate goal of these comparisons is to determine whether the problems that ASEAN faces can be found in other regional human rights organizations.

a. Council of Europe

The Council of Europe (COE) is an intergovernmental organization whose membership consists of 49 European member states. According to the Statute of the Council of Europe, the

purpose of the organization is to “achieve a greater unity between its members for the purpose of . . . common heritage and facilitating . . . economic and social progress.”¹¹⁹ While the COE was not explicitly established as a rights-based organization, many of its most notable accomplishments are in the realm of protecting and promoting human rights. In 1950, the organization was responsible for drafting the European Convention on Human Rights – a prominent regional human rights treaty which explicitly protects a wide range of civil and political rights. As a result, the body serves as the region’s most prominent body for addressing various issues in the realm of human rights.¹²⁰

In addition to articulating a list of key civil and political rights, the Convention also mandated the creation of the European Court of Human Rights (ECHR), which is a supranational judicial body responsible for hearing cases of alleged human rights violations committed by member states. 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 granted, the Court reviews the case and assesses whether the defendant member states violated one of the Convention’s protocols. The Court’s decisions are final and defendants do not possess the ability to appeal its judgments. The implementation of its decisions is overseen by the COE’s Committee of Ministers, which is tasked with the responsibility of working with guilty defendants to ensure that decisions are implemented and enforced. While the Court does not possess the ability to overrule domestic law, it possesses the power to ensure that states compensate victims of

¹¹⁹ “Statute of the Council of Europe,” May 5, 1949, *Council of Europe Treaty Series* no. 1, <http://www.worldlii.org/int/other/COETS/1949/1.html>.

¹²⁰ Andrew Moravcsik, “The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe,” *International Organization* 54, no. 2 (2000), 218.

human rights violations.¹²¹ Thus, unlike the AICHR and other bodies within ASEAN's human rights architecture, the Court possesses an imperfect enforcement mechanism that allows the COE to achieve its mission of promoting and protecting human rights in Europe.

In addition to the existence of an enforcement mechanism, the COE and ASEAN also radically differ in their ability to diffuse human rights norms. This largely stems from two factors. First, the COE possesses a greater amount of power to disseminate norms amongst member states due to its strong sense of regional legitimacy. The organization's rise to prominence as a defender of individual liberties and its ballooning caseload are both indicative of its status; furthermore, newly-democratizing countries in Europe actually view COE membership as a "badge of legitimacy and a bulwark against authoritarianism."¹²² This legitimacy has given it the influence to rally support for several protocols amending the Convention to enumerate new civil and political rights, such as the right to education, the right to property, and the right for citizens to freely move within a country.¹²³ While the COE cannot force individual member states to sign or ratify these protocols, the process of introducing amendments to the Convention allows 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 persuasion.¹²⁴

Second, unlike ASEAN, the COE cooperates with regional civil society organizations focused on human rights to a much greater degree than ASEAN. In 1998, the COE established

¹²¹ C. A. Gearty, "The European Court of Human Rights and the Protection of Civil Liberties: An Overview," *Cambridge Law Journal* 52, no.1 (1993), 90.

¹²² *Ibid*, 89.

¹²³ "Amendments to the Convention," *Council of Europe*, accessed April 18, 2019, <https://www.coe.int/en/web/human-rights-convention/amendments-to-the-convention>.

¹²⁴ Gearty, "The European Court of Human Rights and the Protection of Civil Liberties," 91.

the North-South Centre, which seeks to promote a wide variety of values including human rights to its members. This sub-organization achieves this goal by working with civil society organizations to promote a strong human rights culture within its member states.¹²⁵ Additionally, the COE also holds an annual civil society conference – the Conference of INGOs – in which civil society organizations are invited to testify to the body’s Parliamentary Assembly. Importantly, the existence of this conference means that the COE is the only regional intergovernmental organization which regularly holds forums explicitly designed to provide opportunities for consultative sessions between a regional IGO and civil society organizations. Thus, the COE uniquely stands out in its ability to engage with civil society in comparison to its peers.¹²⁶

The COE’s efforts to promote and protect human rights are clearly more robust in comparison to those of ASEAN. It is important to note, however, that this could partially be explained by the simple fact that the notion of human rights originated in the West. Along with the United States, countries in Western Europe were the main initial advocates for passing the UDHR. Furthermore, the major strands of philosophical thought – natural law and liberalism – which underpin human rights law originate from the West as well.¹²⁷ As a result, it should not be surprising that Europe has a strong regional system for human rights.

b. Organization of American States

¹²⁵ Miguel Angel Martinez and Jean Bonvin, “Preface,” in *Civil Society and International Development* edited by Amanda Bernard, Henny Helmich, and Percy Lehning (OECD: Lisbon, 1998), 7.

¹²⁶ Andre Härtel, “The Council of Europe and Cooperation with Civil Society,” in *The Palgrave Handbook of Interorganizational Relations in World Politics* edited by Joachim Koops and Rafael Biermann (Palgrave MacMillan: London, 2016), 547-552.

¹²⁷ Raimundo Panikkar, “Is the Notion of Human Rights a Western Concept?,” *Diogenes* 30, 120 (1982), 79-83.

The Organization of American States (OAS) is a regional IGO whose memberships consists of the 35 independent states in the Americas, including the United States. Much like ASEAN, this organization was founded for the purpose of facilitating cooperation between member states, ensuring regional security, and promoting representative democracy with respect for the principle of non-intervention. As a result, OAS member states have collaborated on issues ranging from poverty and development to the eradication of corruption. Since the organization's inception, human rights have been one of the most contentious and prominent issues that OAS has attempted to tackle. In 1959, the Inter-American Commission on Human Rights (IACHR) was established for the purpose of enforcing the protection of rights outlined in three documents: the OAS Charter, the American Declaration of the Rights and Duties of Man, and the American Convention on Human Rights (ACHR). Each of these three documents outlines core rights to be protected; importantly, these documents enumerated civil and political rights as well as economic, cultural, and social rights. The IACHR has the power to enforce the provisions of these documents through its ability to serve as a dispute mediator and its role as a body which handles human rights cases.¹²⁸

In addition, much like the European human rights system, the OAS system of human rights contains a judicial branch. The Inter-American Court of Human Rights is responsible for hearing cases and determining whether an OAS member state is responsible for violating human rights. Unlike in the European system, however, individuals cannot refer cases to the Court. Instead, they must file a complaint with the IACHR, which possesses the power to

¹²⁸ 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* 12 (1990), 443.

determine whether a case should be referred to the Court. If a case is referred to the Court, a panel of judges will review the case and determine whether is guilty of violating human rights. Much like the European system, the Court has the power to issue judgments, order guilty states to remedy breaches of human rights, and compel member states to compensate victims when appropriate. Perhaps unsurprisingly, the ability of this system to function depends on the willingness of states to generally respect human rights and accept the Court's decisions.¹²⁹ Member states have the ability to withdraw their acceptance of the Court's jurisdiction at any time; for instance, Trinidad and Tobago withdrew from the Court's jurisdiction in 1998 due to disputes over the death penalty.¹³⁰ In conjunction with the existence of the organization's principle of non-interference, this case shows that 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.

In addition, OAS has intensified its efforts to engage with regional civil society organizations, including those focused on human rights. Cooperation between these two entities is not a new phenomenon; the OAS and civil society organizations have cooperated on a wide variety of issues, including human rights. Currently, the organizational process engaging with civil society organizations is haphazard and occurs on an ad-hoc basis.¹³¹ In general, the OAS tends to consult with civil society organizations on issues of the environment, development, and human rights in exchange for allowing these organizations to attend most

¹²⁹ Ibid, 447.

¹³⁰ Larry Rother, "In Caribbean, Growing Support for Death Penalty," *New York Times*, October 4, 1998, accessed April 21, 2019, <https://archive.nytimes.com/www.nytimes.com/library/world/americas/100498caribbean-deathrow.html>.

¹³¹ Yasmine Shamsie, *Mutual Misgivings: Civil Society Inclusion in the Americas* (North-South Institute: Ottawa, 2003), 8.

OAS meetings as special guests or observers.¹³² Member states have attempted to structure interactions between the OAS and civil society organizations by organizing summits hosted by three separate member states over the span of seven years. These conferences all resulted in the creation of three separate systems for organizing civil society participation. Perhaps unsurprisingly, the creation of multiple systems for civil society participation in OAS caused two inefficiencies in how interactions between these two parties are structured. First, the existence of multiple mechanisms for facilitating interactions between the OAS and civil society organizations means that there is a high risk of contradictory standards for how these bodies may interact with each other. Second, by spreading interactions across multiple systems, both civil society organizations and the OAS itself are not using their resources as effectively as possible. Finally, 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.¹³³ While it is abundantly clear that OAS is inclusive of civil society organizations, efforts to reform these interactions must be pursued in order to ensure that both parties gain as much as possible from these interactions.

While the overall OAS human rights system is weaker than its European counterpart, it is abundantly clear that it is stronger than the ASEAN system both in terms of its ability to punish states for human rights violations and its willingness to interact with civil society organizations. The existence of a judicial branch in the OAS' human rights apparatus and mechanisms for interacting with civil society demonstrate a strong organizational commitment

¹³² Ibid, 13.

¹³³ Ibid, 8.

to protect and promote human rights. While these OAS mechanisms are imperfect, they are still stronger than the equivalent ASEAN mechanisms because they attempt to seriously address regional human rights issues.

c. African Union

In 1963, the Organization of African States (the predecessor to the African Union) was conceived for the purpose of safeguarding independence in the wake of colonialism and promoting regional unity. Initially, human rights were not an organizational priority, as evidenced by the fact that they only received a passing mention in the organization's charter. In 1981, however, member states passed the African Charter on Human and Peoples' Rights, which served as the region's first legally-binding human rights treaty. While this treaty stipulates core human rights that member states are obligated to protect, it contains several flaws which prevent it from being a completely effective human rights instrument. Article 6, for instance, stipulates that no one may be deprived of their freedoms or rights "except for reasons and conditions previously laid down by law."¹³⁴ The document does not properly define conditions that could be used as grounds for denying an individual their rights; as a result, it is theoretically possible for states to invoke this clause in the document as grounds for justifying just about any type of human rights violation. This lack of specificity, which is present throughout the document, severely hampers its ability to serve as an effective legally-binding treaty.

¹³⁴ Organization of African Unity, "African Charter on Human and Peoples' Rights," Nairobi: June 27, 1981, Article 6 <http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf>.

In addition, the Charter also mandated the creation of the African Commission on Human and Peoples Rights (ACHPR), which was created six years after the document's passage in 1987. According to the Charter, the ACHPR is responsible for the promotion rather than the protection of human rights. More specifically, the body has the power to conduct investigations, cooperate with member states and other international actors to encourage the promotion of human rights, and develop rules to solve legal problems related to the protection of human rights. Importantly, this means that the ACHPR does not possess the power to punish consistent violators of human rights since it only possesses investigative and advisory powers.¹³⁵ Furthermore, the ACHPR also suffers from a lack of resources as well as problems related to states failing to meet requirements to report on the human rights situations in their countries.¹³⁶ As a result, the ACHPR can best be characterized as an ineffective body with limited powers and resources.

In 2004, the African Court on Human and Peoples' Rights was established to serve as a judicial branch of the African human rights system. Much like the judicial branches of the European and American systems, the Court is responsible for hearing cases of alleged human rights abuses committed by states that have accepted its jurisdiction (currently, 30 out of 55 African Union member states have accepted the Court's jurisdiction).¹³⁷ Furthermore, much like its counterparts in other regions, the Court possesses the power to issue legally-binding judgments against member states which violate human rights and require them to either

¹³⁵ Claude Welch Jr., "The African Commission on Human and Peoples' Rights: A Five-Year Report and Assessment," *Human Rights Quarterly* 43 (1992), 47.

¹³⁶ *Ibid*, 54.

¹³⁷ African Court on Human and Peoples' Rights, "African Court on Human and Peoples' Rights," accessed April 20, 2019, <http://en.african-court.org/>.

compensate victims or provide restitution. Perhaps unsurprisingly, this means that the Court suffers from many of the same flaws as other judicial branches of regional human rights organizations. The Court does not possess the ability to overrule domestic law; furthermore, states also have the ability to withdraw from the body at any time.¹³⁸ In addition, the African Court is also flawed because individuals or civil society organizations do not have the ability to bring cases before the court unless a state passes a declaration accepting the right of individual jurisdiction. Currently, just nine African Union (AU) member states have accepted this right. As a result, this means that in most states that accept the Court's jurisdiction, the only actors with the power to bring cases to the Court is the ACHPR.¹³⁹ While the Court is an important facet of the African human rights system, it is also deeply flawed.

In terms of interactions with civil society, Article 45 of the African Charter of Human and Peoples' Rights stipulates that the ACHPR is obligated to collaborate with civil society organizations.¹⁴⁰ In practice, this collaboration happens in three ways. First, the interactions can occur in an informal setting outside of officially-sanctioned AU spaces, such as conferences in which both the IGO and civil society community are attendees. Second, the ACHPR works with a number of recognized "observer" civil society organizations that are invited to participate in its meetings and provide consultations. Unlike ASEAN's process for approving civil society organizations, this process is not used to prevent human rights-based civil society from interacting with ACHPR. Rather, the registration process is primarily used to ensure that civil

¹³⁸ "Rwanda Withdraws from African Court Declaration," *The New Times*, March 5, 2016, accessed April 20, 2019, <https://www.newtimes.co.rw/section/read/197697>.

¹³⁹ Gina Bekker, "The African Court on Human and Peoples' Rights: Safeguarding the Interests of African States," *Journal of African Law* 51, no. 1 (2007), 171-172.

¹⁴⁰ Organization of African Unity, "African Charter on Human and Peoples' Rights, Article 45.

society organizations are actually involved in regional human rights activities and are not misusing their finances.¹⁴¹ Currently, there are over 500 civil society organizations that have been granted observer status by the ACHPR.¹⁴² Finally, civil society organizations have the ability to file complaints of alleged human rights violations to the ACHPR.¹⁴³ Ultimately, it is clear that the ACHPR is making a meaningful effort to include civil society organizations in its processes.

While the ACHPR is an imperfect regional human rights body due to its limited scope of powers and lack of an enforcement mechanism, it is clear that the body acts in a good-faith effort to promote and protect human rights in the region. This is demonstrated by its 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. Even though the African human rights system is imperfect, it is reasonable to claim that the African system is more effective at promoting human rights because it allows for input from non-governmental actors.

d. Conclusion

While all regional human rights bodies are imperfect due to their inability to serve as supranational organizations, it is abundantly clear that the ASEAN human rights system is significantly weaker than those of other human rights bodies. All other regional human rights bodies examined in this section have a formal complaints mechanism; furthermore, all regional

¹⁴¹ Martin Olz, "Non-Governmental Organizations in Regional Human Rights Systems," *Columbia Human Rights Law Review* 28 (1997), 364-366.

¹⁴² African Commission on Human and Peoples' Rights, "NGOs With Observer Status," accessed April 20, 2019, <http://www.achpr.org/network/ngo/by-name/>.

¹⁴³ Olz, "Non-Governmental Organizations in Regional Human Rights Systems," 369.

human rights systems contain a judicial branch with the power to levy judgments against member states guilty of human rights violations. Furthermore, ASEAN also falls short in its willingness to engage with human rights-based civil society organizations. The three other regional human rights systems examined in this section have all made some attempt to consult civil society, while ASEAN has actively excluded civil society organizations from its decision-making processes.

Conclusion

Concluding Remarks and Policy Recommendations

The ASEAN human rights system suffers from structural and institutional weaknesses which have limited its effectiveness and rendered it as one of the world's most ineffective regional human rights bodies. While all regional human rights bodies must navigate the constraints of state sovereignty and find creative ways to promote human rights, the ASEAN system is uniquely inadequate for ensuring the protection and promotion of human rights in Southeast Asia. This ineffectiveness is demonstrated by the lack of an enforcement mechanism with the AICHR, the weak terms of the AHRD, and the refusal of ASEAN to meaningfully engage with human rights-focused civil society organizations. This section will draw upon the lessons learned from the previous three chapters to recommend six proposed reforms to the ASEAN human rights system in order to increase its overall efficacy. The proposed changes to the body are as follows: the expansion of the organization's mandate to include the protection of human rights, the removal of consensus-based decision making, the establishment of a formal complaints mechanism, the creation of a judiciary body, and the expansion of the accreditation process for regional civil society organizations.

1. Expansion of the AICHR's Mandate

One factor which explains the ineffectiveness of the AICHR is that its Terms of Reference constrain the actions it can take in response to allegations of human rights violations. In particular, this document stipulates that the body ought to focus on the promotion of human

rights rather than on their protection.¹⁴⁴ Perhaps unsurprisingly, this mandate eliminates punitive policy options and prevents the body from taking steps to enforce human rights. This particular barrier to action could be eliminated if the scope of the Terms of Reference were expanded and the AICHR was explicitly given the power to protect human rights through measures such as conducting investigations into allegations of human rights abuses, establishing operations to monitor civil and political liberties in fragile states, and punishing consistent violators of human rights. Admittedly, this policy recommendation is also critical for many of the other proposed recommendations in this section as well.

2. Ending Reliance on Consensus-Based Decision-Making

In addition, the AICHR's Terms of Reference should be scrubbed of all references to the system of consensus-based decision-making. This form of decision-making is problematic because it paralyzes action, incentivizes consensus at the lowest common denominator, and gives states the power to "reject . . . criticisms of [their] human rights record by veto."¹⁴⁵ The Rohingya case study, in particular, illustrates many of the problems associated with ASEAN's reliance on consensus-based decision-making. Myanmar would essentially have to agree to censure itself in order for the body to mount any kind of substantive response to the crisis. If this form of decision-making was scrapped, then the AICHR would be able to take more swift and decisive action in response to human rights crises because one or two rogue states would not be able to block measures to prevent violations of civil and political rights.

3. Establishment of a Formal Complaints Mechanism

¹⁴⁴ Kelsall, "The New ASEAN Intergovernmental Commission on Human Rights," 2.

¹⁴⁵ Tobia, "Confessing to the Policization of the ASEAN Human Rights Agenda," 28.

The AICHR should also establish a formal complaints mechanism so that individuals and civil society organizations have the ability to efficiently report violations of human rights. As noted in Chapter Two, the AICHR does not currently have such a mechanism in place, which makes it difficult for the body to gather information on developing human rights crises and take appropriate action in response.¹⁴⁶ Thus, the creation of a channel for receiving complaints would undoubtedly increase the overall effectiveness of the AICHR.

4. The Creation of a Judicial Body

In addition, the AICHR should also attempt to create a judicial body similar to those in Europe, the Americas, and Africa that is designed to hear cases and levy judgments against member states that are guilty of human rights violations. While these judicial bodies are imperfect due to their limited scope of action and their inability to trump domestic law, they nonetheless serve as important bodies for promoting a regional culture of respect for human rights. Furthermore, when these judicial bodies are effective, they have the ability to ensure that victims of human rights violations committed by states are properly compensated for their losses. As a result, ASEAN should pursue the creation of a regional human rights court.

5. The Expansion of the Accreditation Process for Civil Society Organizations

ASEAN's current process for registering civil society organizations with is exclusionary because accreditation is only granted to organizations which are deemed to have "the same intentions as ASEAN."¹⁴⁷ As a result, ASEAN has the ability to disallow human rights-based civil society organizations from participating in officially-sanctioned spaces. Reforming the

¹⁴⁶ Muntarbhorn, *Development of the ASEAN Human Rights Mechanism*, 10.

¹⁴⁷ Gerard, "ASEAN and Civil Society Activities in 'Created Spaces,'" 267."

accreditation process would allow for human rights-focused organizations to participate in these types of dialogues, which give them an opportunity to cooperate with ASEAN on issues related to human rights. Furthermore, this reform would give regional civil society organizations focused on human rights an opportunity to move away from the less effective forms of advocacy in “created spaces” detailed in Chapter Three and instead allow them to turn to more effective forms of advocacy which involve direct contact with ASEAN officials.

Concluding Remarks: Are These Proposals Realistic?

These five proposed reforms would undoubtedly improve the efficacy of the overall ASEAN human rights system. It is unlikely, however, that ASEAN will adopt these reforms because they either run counter to the norm of non-interference or directly contradict existing organizational incentives. The first four proposed reforms involved explicitly granting the body some degree of power to intervene in the domestic affairs of member states, which means that they would violate the norm of non-interference. The fifth proposal, meanwhile, runs counter to incentives for ASEAN to avoid engaging with civil society organizations that could potentially be critical of ASEAN and its member states. Finally, it is worth noting that member states which consistently commit human rights violations would be unlikely to agree to measures that would increase the chances that they face consequences for their actions. Thus, while these proposed reforms would undoubtedly strengthen the overall ASEAN human rights system, they are unrealistic and unlikely to be implemented due to existing perverse incentives.

Perhaps unsurprisingly, the factors which explain why these proposed reforms are unlikely to be implemented reflect many of the overarching problems which plague the ASEAN human rights system. The impotence of the AICHR, the weakness of the AHRD, and the lack of

engagement with civil society can all be linked back to the existence of the norm of non-interference as well as a general lack of political will to address human rights issues. The pessimism surrounding the long-term future of the ASEAN human rights system can be explained by the fact that these two factors which prevent meaningful responses to human rights issues are long-term structural issues that cannot easily be addressed. As a result, improvements to ASEAN's human rights system can only be achieved in tandem with long-term reforms to the organization's attitude towards human rights issues. The shortcomings of ASEAN's human rights system, as well as those of other regional human rights systems, illustrate the cortical role that sovereignty plays in restraining the ability of regional IGOs to respond to international crises.

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