

# Asean and European Human Rights Mechanisms, What Shout be improved

*By Febrian Febrian*

## ASEAN and European Human Rights Mechanisms, What Should be Improved?

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### Abstract

The human rights mentioned in the Universal Declaration on Human Rights (UDHR) are universal values agreed upon countries in the world. This is reflected by the fact that no state rejects the United Nations General Assembly Resolution in 1948. It is even strengthened by the ratification of two major international human rights covenants, which have binding legal powers. They are the International Covenant on Civil and Political Rights and the Covenant on Economic, Social, and Cultural Rights in 1966. European states are legally bound to human rights through the European Human Rights Convention that is signed in 1950 and come into force in 1953. On the other hand, ASEAN states are bound to human rights as parties of ICCPR, ICESCR, and their commitment to the regional level ASEAN Declaration of Human Rights. Both in European Union and ASEAN have their own human rights mechanisms: the European Court of Human Rights (ECtHR) and ASEAN Intergovernmental Commission on Human Rights (AICHR). This study employed a comparison method with a normative legal research approach to compare the human rights mechanisms in Europe and in ASEAN. It also deals with the implementation of human rights protection by the states in the two regional organizations. As a result, although the two regional organizations have human rights mechanisms applied in their areas, with experiences through cases appealing to European Human Rights Courts, Europe provides more assurance and legal certainty towards individuals when a state commit human rights violations against individuals. On the other hand, the AICHR, as the equal commission in ASEAN region, tends not to have sufficient legal power in handling human rights cases occurred in its territory.

**Keywords:** AICHR, ASEAN, human rights mechanism.

### ***Mekanisme HAM ASEAN dan Eropa, Apa yang Seharusnya Dibenahi?***

#### **Abstrak**

*Hak asasi manusia yang terdapat dalam DUHAM merupakan nilai-nilai universal yang telah disepakati oleh negara-negara di dunia. Hal ini tercermin dengan tidak adanya satupun*

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*negara yang menolak Resolusi Majelis Umum PBB tersebut tahun 1948 dan diperkuat dengan disahkannya dua kovenan internasional utama HAM yang mengikat yakni Kovenan tentang Hak Sipil dan Politik (ICCPR) dan Kovenan tentang Hak Ekonomi, Sosial dan Budaya (ICESCR) tahun 1966. Negara-negara di Eropa memiliki keterikatan secara hukum terhadap HAM melalui Konvensi HAM Eropa yang disahkan tahun 1950 dan berlaku 1953. Di sisi lain, negara-negara di ASEAN memiliki keterikatan terhadap HAM sebagai pihak ICCPR, ICESCR dan komitmen mereka terhadap Deklarasi HAM ASEAN pada tingkat regional. Baik di organisasi regional Eropa maupun ASEAN memiliki mekanisme HAM masing-masing, Eropa memiliki Pengadilan HAM Eropa dan ASEAN memiliki Komisi HAM ASEAN. Artikel ini menggunakan metode perbandingan dengan pendekatan penelitian hukum normatif yakni dengan membandingkan mekanisme HAM yang ada di Eropa dan di ASEAN dan implikasinya terhadap praktik perlindungan HAM oleh negara di dua organisasi regional tersebut. Hasil penelitian ini adalah meskipun kedua organisasi regional tersebut sama-sama memiliki mekanisme HAM yang berlaku di wilayah mereka, dengan pengalaman yang dimiliki Eropa melalui Pengadilan HAM, Eropa lebih memberikan jaminan dan kepastian hukum terhadap individu ketika negara melakukan pelanggaran HAM terhadap individu. Di sisi lain, AICHR sebagai komisi yang berwenang untuk menyelesaikan persoalan HAM di wilayah ASEAN cenderung tidak memiliki kekuasaan dan kekuatan hukum yang memadai dalam menangani kasus-kasus HAM yang terjadi di wilayahnya.*

**Kata kunci:** AICHR, ASEAN, mekanisme hak asasi manusia.

### A. Introduction

The issue on human rights violation directly confronts two interrelated parties: individuals and state. These two parties face each other to defend their respective interests. The interests and rights of individuals and state, as the party who fulfil protect and respect people's rights, require serious attention.<sup>1</sup> The substance of universal human rights has been regulated in the Universal Declaration of Human Rights (UDHR), the major international human rights covenants –the International Covenant on Civil and Political Rights (ICCPR) and the Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>2</sup> European Convention on Human Rights (ECHR), and ASEAN Human Rights Declaration (AHRD).

All international and regional Human rights instruments have established basic rights, which cannot be avoided by anyone, especially states in the context of the modern world today. Although some scholars argue that western states mainly dominate the basic idea of human rights, it is found in moments where there was a

<sup>1</sup> Nurhidayatulloh, "Dilema Pengujian Undang-Undang Ratifikasi oleh Mahkamah Konstitusi dalam Konteks Ketatanegaraan RI," *Jurnal Konstitusi*, Vol. 9, No. 1, 2012, p. 118

<sup>2</sup> It can also be grouped to "first-generation human rights" and "second-generation human rights. See Irawati Handayani, "Justiciability of Economic, Social and Cultural Rights in International Law and Its Future Implementation in Indonesia," *Yustisia*, Vol. 7 No. 3, 2018, p. 451.

rough collective emotional consensus,<sup>3</sup> yet the basic principles born within the international human rights instruments are no longer considered as Western products. They belong to all states and all human beings. Thus, the role of state must not be eliminated in the discussion of human rights because state is the main actor of this concept.

The concept of state involvement in human rights will subsequently become a complicated problem because it will intersect with the issue of state sovereignty versus universal human rights. This idea basically starts from two big views about universalism and cultural relativism. The universalism view considers that contained values in human rights are universal and have been accepted by all countries. On the other hand, cultural relativism states that it is impossible to homogenize universally existing values because of the peculiarities of the values of each country or region. This is corroborated by Weston's opinion which states that even though there is acceptance of human rights principles at the national and international level, this does not mean that there is also agreement in terms of the nature, scope and definition. He also questioned whether human rights must be seen as divine, legal or moral rights.<sup>4</sup>

Furthermore, so far, a lot of human rights experts and constitutional law experts still have no agreement on this issue. It is because for constitutional law experts, sovereignty is absolute and cannot be negotiated. On the other hand, international human rights law experts argue that because human rights are based on international law and state has been ratified international human rights conventions, state sovereignty are no longer absolute. In this case, when a state is a part of international community, cooperation with other states are unavoidable. Then, the international relations require the state to be actively involved to overcome human rights problems. In this context, for the sake of humanity, state cannot remain silent when there are human rights violations committed by neighboring state against individuals.<sup>5</sup> Hence, the United Nations (UN) establish the Commission on Human Rights (1946-2006), which is then replaced by the Human Rights Council (2007-present)<sup>6</sup> as a body dealing with human rights problems. The responsibility cover mechanisms of annual human rights development reporting for the state parties of the ICCPR and the ICESCR.

<sup>3</sup> Roland Burke, "Emotional Diplomacy and Human Rights at the United Nations," *Human Rights Quarterly*, Vol. 39, No. 2, 2017, pp. 273-295.

<sup>4</sup> Declan O'Sullivan, "The history of human rights across the regions: Universalism vs cultural relativism," *The International Journal of Human Rights*, Vol. 2, No. 3, 1998, pp. 22-48.

<sup>5</sup> Privacy rights is one of the important individual rights since it is related to the human rights protection stipulated in Universal Declaration of Human Rights (UDHR). See Kukuh Tejomurti, (et.al.), "Legal Protection for Urban Online-Transportation-User's Personal Data Disclosure in the Age of Digital Technology", *Padjadjaran Journal of Law*, Vol. 5, No. 3, 2018, p. 489.

<sup>6</sup> Laura K. Landolt and Byungwon Woo, "NGOs Invite Attention: From the United Nations Commission on Human Rights to the Human Rights Council," *Journal of Human Rights*, Vol. 16, Issue 4, 2017, pp. 407-427.

The importance of why a human rights mechanism is needed in the fulfillment, protection and respect of human rights is to ensure that through independent institutions the principles of human rights can still be well implemented even in a country led by an authoritarian regime. This mechanism is also carried out when the process of establishing international human rights standards reaches its peak with the adoption of a number of international instruments, the United Nations begins to move to the next stage of implementation through reporting, monitoring, and enforcing the norms stated in these instruments. This is done openly by the appointment of Special Rapporteurs team filled by independent experts appointed by the United Nations whose main task is to look for facts that occur in the country relating to human rights violations and report them back to the UN.<sup>7</sup>

Several papers discussing ASEAN human rights mechanism have been published, for instance, the one written by Munro.<sup>8</sup> Munro elaborates the major features of the AICHR. This exposes the background of the AICHR creation by the member states of ASEAN. He argues that ASEAN member states did not just create this body to respond to their own needs. they created the body because a regional human rights institution is nowadays considered a 'standard' of a regional community.<sup>9</sup>

Another work on human rights mechanism comes from Quane.<sup>10</sup> She discusses the changing of nature and level of engagement between the ASEAN States and global human rights mechanisms, especially the Universal Periodic Review mechanism. She also admits that the AHRD and the AICHR are significant milestones in the development of a regional human rights system. However, there are many critics that AHRD falls below international human rights standards and a limited mandate to operate as a genuine enforcement mechanism. She concludes several reasons of the changes of nature and level of engagement between ASEAN States and the global human rights mechanisms. The mechanisms concern the interpretation and the implementation of global human rights norms, the validity of a uniform approach to human rights in regions, and the contextualization of recent human rights developments within ASEAN countries.<sup>11</sup>

<sup>7</sup> Surya P Subedi, "Protection of Human Rights through the Mechanism of UN Special Rapporteurs," *Human Rights Quarterly*, Vol. 33, No. 1, 2011, pp. 201–228.

<sup>8</sup> The article entitled "the relationship between the origins and regime design of the ASEAN intergovernmental commission on human rights (AICHR)"

<sup>9</sup> James Munro, "The Relationship Between the Origins and Regime Design of The ASEAN Intergovernmental Commission on Human Rights (AICHR)," *The International Journal of Human Rights*, Vol. 15, No. 8, 2011, pp. 1185–1214.

<sup>10</sup> The article entitled "the significance of an evolving relationship: ASEAN states and the global human rights mechanisms"

<sup>11</sup> Helen Quane, "The Significance of an Evolving Relationship: ASEAN States and The Global Human Rights Mechanisms," *Human Rights Law Review*, Vol. 15, Issue 1, 2015, pp. 283–311.

The previous studies provide foundation for this study that the issue of the human rights mechanism is very crucial. In order to ensure human rights enforcement, good and effective mechanisms at regional levels need to be upheld. However, among the previous studies, no one has compared European and ASEAN human rights bodies. Therefore, the focus of this study is relatively new. The comparison of the two regional human rights mechanisms will show the weaknesses and the strengths of each mechanism. To understand deeply on how access to justice for individuals towards the enforcement of human rights in ASEAN and in the Europe, this article elaborates human rights mechanisms of both regional organizations the implications of these regional human rights provisions for their respective regions, and lessons learned that can be used to improve the mechanism.

### B. The Importance of Human Rights Mechanism

The question of acquiring human rights mechanism often arises along with the implementation of human rights enforcement issue, especially after ICCPR and ICESCR were entry into force as two main international human rights instruments. In general, every international human rights instrument at the UN has a treaty body or committee to monitor the implementation of human rights in state parties, such as the Human Rights Committee to monitor the development of human rights provisions relating to the ICCPR, and Committees on Economic, Social and Cultural Rights which have the authority to monitor human rights developments on ICESCR.<sup>12</sup>

In each of the treaty bodies, it consists of independent experts from 10 to 23 members of the various competencies in the field of human rights. The Member Committee is nominated and elected for a period of four years and can be re-elected by States Parties. However, in the latest provisions, the Committee members can only be elected once, while the Committee members are determined based on their expertise, geography, representation of various legal systems, and gender.<sup>13</sup>

In regards to the human rights mechanism, each treaty body has the main task to monitor the implementation of human rights values of state party. Each treaty body has mandate to receive and consider reports that provided by state party on regular basis. In addition, the committee has the duty to make guidelines to help state party for preparing the report, explaining general comments of the

<sup>12</sup> See United Nations Human Rights Office of the High Commissioner (OHCHR), "Human Rights Bodies", <https://www.ohchr.org/en/hrbodies/Pages/HumanRightsBodies.aspx>, accessed on April 2019.

<sup>13</sup> OHCHR Uganda, "Uganda and the United Nations Human Rights Mechanisms A Compilation on the Occasion of the 60th Anniversary of the Universal Declaration of Human Rights", <https://www.ohchr.org/Documents/Countries/PublicationUgandaUNHRMechanisms.pdf>, accessed on April 2019.

international instrument as valid interpretations of an international agreement, and hold discussions regarding existing international agreements. Even in some cases the treaty body can consider complaints and communications from individuals suspected of being victims of human rights violations by the state party.<sup>14</sup>

When there are complaints submitted by individuals who are suspected become the victim of human rights violations by state party, the Committee may investigate in which the mechanism is quasi-judicial. It should be understood that the complaint mechanism is optional for a country where the committee cannot continue the complaint mechanism unless the state party has recognized the competency of the treaty body either through declaration or through acceptance of the existing optional protocols. Examples of recommendations by the committee to the suspected state party that conduct human rights violations can be done in form of compensation, release of prisoners, or order a re-trial, etc. Unfortunately, decisions made by the committee are not binding. However, in many cases when the committee has released decision, the state party always follow the committee's recommendations and gave remedies to the complainant. For instance, in *Devon Simpson v. Jamaica* case, the Committee decides that Mr. Simpson has the right to receive compensation including improvements in the present conditions of detention and consideration of early release under article 2(3) of ICCPR. The verdict occurred due to the evidence that Mr. Simpson has experienced human rights violations in the form of a solitary confinement, deplorable prison conditions and health medical conditions by the Jamaican authority. The Committee agreed that Jamaica, as the state party has violated article 7 and 10(1) of ICCPR.<sup>15</sup>

Through these explanations, human rights mechanism at international level has important functions to monitor the implementation of human rights values by states who are bound into international agreements. Such actions will be very influential when a country is still controlled by an authoritarian government where individual complaints about the fulfillment of human rights by the state are taboo. However, there are shortcomings where this mechanism cannot be fully implemented since it requires the approval of the parties, especially the state, with regard to the competence of the Committee itself. Then the recommendations made by the treaty bodies have non-binding nature which implies that the implementation depends on the goodwill of the state to meet the recommendations of the committee.

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<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

### **Human Rights Mechanism: From Universal to Regional**

In the context of international law in the 20<sup>th</sup> century, Human rights has experienced a rapid development began with the occurrence of the Second World War. Schabas says that the 20<sup>th</sup> century is a very long century because a number of historical events trigger international awareness of the importance of law enforcement and human rights.<sup>16</sup> Because the legal problem remains from the First World War has not been resolved, in 1939, the world was shocked again with the outbreak of the Second World War, which brings its own consequences for the perpetrators of war crimes. International attention began to realize afterwards that the war had resulted in the loss of millions of lives, which seemed to have no value at all. Therefore, in 1948, the first foundation of human rights was instilled with the birth of the UDHR on December 10, 1948.

The presence of the UDHR was a milestone in modern human rights history, which assign state responsibility to protect the human rights of every individual within its jurisdiction. However, many parties consider that the UDHR is still not perfect. One of the shortcomings of the UDHR is its binding nature. Because the UDHR is a product of the UN General Assembly Resolution, many states consider at that time that the UDHR cannot bind for the United Nations member states so that they require follow-up to ground the principles contained in the UDHR.

There is international mechanism produced by the office of the UN High Commissioner for Human Rights. It is considered as the most directly accessible mechanism of the international human rights machinery, namely the institution of UN special rapporteurs. This institution is described as the "crown jewel" of the UN human rights system. This body, indeed, had attempted to pierce the veil of the national sovereignty of states to handle serious cases of violations of human rights worldwide.<sup>17</sup> However, this institution was under pressure by states with a poor record of human rights.<sup>18</sup> then it lost its impartiality. From 2007, this institution has been changed to the Human Rights Council and all of their function has been shifted to the council.

In 1950, Europe followed up the principles of UDHR to make a regional convention that could bind European countries in the implementation of human rights in European region. The European Convention of Human Rights (ECHR) is the main human rights instrument established in European Union, which comprises of 59 articles and divided into three parts, namely: 1) arrangements for rights and freedoms; 2) the European Court of Human Rights (ECtHR); and 3) miscellaneous provisions. In its first sentence, the ECHR reads, "The Governments signatory

<sup>16</sup> William A. Schabas, *The Trial of the Kaiser*, Oxford: Oxford University Press, 2018, pp. 3-10.

<sup>17</sup> Nurhidayatulloh, (et.al.), "Forsaking Equality: Examine Indonesia's State Responsibility on Polygamy to The Marriage Rights in CEDAW," *Jurnal Dinamika Hukum*, Vol. 18, Issue 2, 2018, pp. 182-193.

<sup>18</sup> Surya P. Subedi, "Protection of Human Rights through the Mechanism of UN Special Rapporteurs," *Human Rights Quarterly*, Volume 33, No. 1, 2011, pp. 201-228.



hereto, being members of the Council of Europe, Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948; Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared".<sup>19</sup>

This ECHR, later in the history of modern human rights, became the first human rights convention that has binding legal powers for its participating countries.<sup>20</sup> This convention was signed on November 4, 1950 and binding on the parties on September 3, 1953.<sup>21</sup> Until now, the human rights mechanism in Europe by most legal scholars has been recognized as the most advanced and the best human rights mechanism in the world to guarantee the rights of individuals and citizens of Europe with regard to human rights violations committed by states.<sup>22</sup>

Three regional human rights systems in the world have been setting their own standards since the first establishing of the European human rights system in 1950. The other two regional systems are Africa and the Americas. They also create their own regional systems.<sup>23</sup> Only Asia has failed to establish the regional system even though recently ASEAN creates its own standard by the establishing of AICHR in 2009. Mutua argues "The three regional human rights systems in Africa, Europe, and the Americas are to expand, elaborate, translate, or adapt universal human rights to particularized historical, political, and cultural settings. In other words, regional systems bring universal norms closer to the ground, so their implementation is more legitimate and less remote. Regional systems can break new ground and introduce novel ideas and norms in the language of the human rights movement."<sup>24</sup>

The failed of Asia to establish its human rights mechanism makes a difficulty for Asian states to adapt universal human rights to particular historical, political, and cultural settings. In addition, Ramcharan is aware of the role of regional institution to be a supplementary for the international-standard mechanisms. It will be more complicated if human rights mechanism only become a domain of the United Nations because the function of regional mechanism is to secure greater respect for the UDHR and to serve as agents to deal with local issues. If regional

<sup>19</sup> See European Convention on Human Rights, 1950 (ECHR).

<sup>20</sup> Council of Europe, "The Convention In 1950", <https://www.coe.int/en/web/human-rights-convention/the-convention-in-1950>, accessed on March 2019.

<sup>21</sup> European Court of Human Rights, "European Convention", <https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c>, accessed on January 2019.

<sup>22</sup> Irawati Handayani, "Responsibility to Protect: A New Form of Humanitarian Intervention?," *Padjadjaran Journal of International Law*, Vol. 1, No. 1, 2017, p. 53.

<sup>23</sup> Makau Mutua, "Standard Setting in Human Rights: Critique and Prognosis", *Human Rights Quarterly*, Vol. 29, No. 3, 2007, pp. 547-630.

<sup>24</sup> *Ibid.*

bodies produce their own standards, they must be consistent with the Purpose and Principles of the United Nations.<sup>25</sup>

#### D. Human Rights Mechanism in Europe and ASEAN

How do the mechanisms of human rights in Europe and ASEAN work? When this question arises, basically this paper is comparing something which is very far the difference, especially in terms of effectiveness. As the most effective and well-equipped mechanism in the world, the ECtHR and European Commission of Human Rights are beyond comparison than the mechanism in ASEAN with ASEAN Human Rights Declaration (AHRD). However, this probe needs to be done to provide a comprehensive picture of how human rights can be enforced in the two regions and how important the mechanism is to be immediately implemented to create individual equality before the law and guarantee the absence of state human rights violations.

Indeed, ASEAN's response in conceptualizing human rights is not as fast as Europe that made the ECHR in two years after the UDHR and three years later was legally binding their states. On the other hand, ASEAN Countries declared their AHRD on November 18, 2012, more than a half century following the UDHR. This is reasonable because when the UDHR was adopted by the United Nations, several countries in ASEAN were still preoccupied with their respective domestic political affairs. In that period of time, there are some countries who were still fighting colonialism like Indonesia and there were also countries that still had not declared independence, such as Malaysia. Hence, ASEAN as an inter-government organization in Southeast Asia region was not yet formed.

Some ASEAN states actually have national institutions of human rights, such as in Indonesia. Indonesia has the National Commission on Human Rights (Komnas HAM), which is established in 1993. The founding of the National Commission on Human Rights began with Paris Principles where the Paris Principles were defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights held in Paris on October, 7-9 1991. The principle lay down the fundamental criteria for a National Human Rights Institution (NHRI), namely, the establishment by law, independence, broad human rights mandate, composed of a collegiate body reflecting the composition of society, adequate resources, accessibility, and working cooperatively with civil society. The UN Human Rights Commission by Resolution 1992/54 of 3 March 1992 and the UN General Assembly by Resolution 48/134 of 20 December 1993 subsequently adopted the Paris Principles.<sup>26</sup>

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<sup>25</sup> *Ibid.*

<sup>26</sup> Sara Marsan Raventós (et.al.), *The Role of Regional Human Rights Mechanisms*, Brussel: Directorate-General for External Policies of the Union Policy Department European Parliament, 2010, p. 89.

One of the founders of ASEAN, Indonesia is quite responsive to international developments where NHRIs are independent institutions that must be within the scope of a state's territory. This is also evident in its capacity as a founding country, Indonesia promotes to revise the Bangkok Declaration into ASEAN Charter. The human rights development in ASEAN constitutionally begun after the 2007 ASEAN Charter replacing the Bangkok Declaration. However, the seriousness of regulating the human rights mechanism in ASEAN began in 1993, at the World Conference on Human Rights in Vienna, Austria. The conference has given birth to the Declaration of Action and Program of Action (VDPA). Then, at the ASEAN Foreign Minister's Meeting in July 1993, it was agreed to form a regional mechanism on human rights.<sup>27</sup>

Upon the interpretation of Article 14 of the ASEAN Charter,<sup>28</sup> the High-Level Panel was set up the draft of the Terms of Reference (TOR) of the ASEAN Human Rights Body. The TOR of AICHR was adopted by the ASEAN Foreign Minister Meeting in July 2009 and on October 23, 2009 the ten AICHR Representatives of the Member States, were appointed. The ASEAN Leaders inaugurated the AICHR at the 15th ASEAN Summit in Cha-am Hua Hin, Thailand.<sup>29</sup>

Regional human rights protection mechanisms constitute the main pillars of the international system for the promotion and the protection of human rights.<sup>30</sup> In the Asia Pacific region, there are several collaborations involving sub-regional organizations dealing with human rights especially the protection of children and other vulnerable groups, such as the South Asian Association for Regional Cooperation (SAARC) and the Pacific Island Forum (PIF) 3, which includes the defense and the promotion of human rights.<sup>31</sup>

However, the most prominent and advanced sub-regional organization of the Asia-Pacific region in terms of recent human rights developments is the one in the ASEAN. In the last decade, several non-legally binding declarations on human rights have been adopted, such as the Declaration on the Elimination of Violence against Women in the ASEAN Region, the Declaration Against Trafficking in Persons Particularly Women and Children, and the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers.<sup>32</sup>

<sup>27</sup> The ASEAN Secretariat, *AICHR ASEAN Intergovernmental Commission on Human Rights What You Need to Know*, Jakarta: The ASEAN Secretariat, 2012, pp. 6-7.

<sup>28</sup> "In conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN human rights body." See Article 14 on ASEAN Charter.

<sup>29</sup> ASEAN Intergovernmental Commission on Human Rights (AICHR), "A Brief History of the ASEAN Intergovernmental Commission on Human Rights", <http://aichr.org/about/>, accessed on January 2019.

<sup>30</sup> Clara Marsan Raventós (et.al.), *The Role of Regional Human Rights Mechanisms*, Brussel: Directorate-General for External *op.cit.*, p. 5.

<sup>31</sup> *Ibid.*, p. 83.

<sup>32</sup> *Ibid.*

From the many principles contained in these declarations in ASEAN, the establishing of AICHR is predicted to have the potential to uphold human rights principles in the future. The mandate of the Foreign Ministers Meeting on 20 July 2009 encompasses (1) the development of strategies of the promotion and protection of human rights; (2) the drafting of papers and studies; the creation of a human rights declaration; (3) capacity building, the promotion of the full implementation of international human rights standards; and (4) the submission of annual reports on its activities to the ASEAN Foreign Ministers Meeting.<sup>33</sup> Nevertheless, one of the shortcomings of the AICHR is that it has no authority to issue binding decisions, consider cases, or conduct investigative visits. These missing functions and the lack of binding requirements for independence and expertise of the AICHR members lead to criticism. The most criticized provision is about the terms of reference for decision by consensus only, implying that each state might reject any criticism of its human rights records by veto.<sup>34</sup>

One of the most prominent differences between the human rights mechanisms in ASEAN and Europe is the binding nature of a decision. On the one hand, the AICHR does not have the capacity to issue binding decisions and to investigate a case. On the other hand, the human rights mechanism in Europe does not only have a Council of Europe (CoE). The CoE has the main tasks to protect human rights, pluralist democracy, the rule of law,<sup>35</sup> and European Commission of Human Rights.<sup>36</sup> It also has a judicial institution called ECtHR with the authority to handle human rights disputes and its decisions are binding.

In Europe, the mechanism of human rights takes place when there are petitions submitted by individuals. In the first place, process will be handled by the European Human Rights Commission. This commission will then investigate the facts and determine whether the complaint is acceptable or not. The nature of the decision is final, i.e. there is no appeal mechanism that can be carried out. In other hand, if the commission's decision states that the complaint is accepted, the commission will then ask the parties regarding the possibility of a friendly settlement. If there is no agreement between them, the commission will report the facts and give an opinion in the case where this opinion will be reported to the Ministerial Committee. It should be understood that the commission does not have the authority to give a "decision" because the facts and opinions submitted

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> William G. O'Neill and Annette Lyth, "The International Human Rights System", <https://www.jus.uio.no/smr/english/about/programmes/nordem/publications/manual/current/kap2.pdf>, accessed on January 2019.

<sup>36</sup> The Commission was discontinued and its functions given to the court in 1998 by Protocol 11 of ECHR. For a transitional period of one year (until 31 October 1999) the Commission continued to deal with the cases which it had previously declared admissible. See Rick Lawson, "The European Convention on Human Rights", <http://www.corteidh.or.cr/tablas/r33362.pdf>, accessed on January 2019, pp. 455-456.

to the ministerial committee are only "report" and not binding. However, in its implementation, usually the report made by the commission often become a consideration by the Committee.<sup>37</sup>

When a dispute is rejected by the commission, ECtHR does not have the authority to make a hearing of the case. History shows that most of 90% of complaints have been rejected by the Commission. On the other hand, when the commission stated that the case could be accepted, there were two paths that could be taken. First scenario, submit the case to the ECtHR on the condition that the state would accept the jurisdiction of the ECtHR. On the contrary, in this case the individual does not have right to file their case into the court.<sup>38</sup>

The second scenario is that if the case is not submitted to the Court, the Committee of Ministers will give a decision whether there is a violation of ECHR articles based on the Commission's report or not. Since the Committee of Minister is a political body, suspected state representatives can take part in the process and vote when a decision is made.<sup>39</sup>

Because the development of human rights violations in Europe has increased significantly, Strasbourg mechanism must be completely overhauled and undergo with significant changes. On the basis of protocol 11 of ECHR and with the aim to strengthen the judicial function of the ECtHR, the role of the Minister of Committee is eliminated in this process.<sup>40</sup> The European Human Rights Commission later was dissolved in 1998.

After the commission has been discontinued, an application to the ECtHR could be post to the ECtHR Registry as soon as possible by lawyers, and in any event before the time limit expires.<sup>41</sup> It means that a Registry assists the Court. By early 2012, it comprises over 270 lawyers. The lawyers are international civil servants. The Council of Europe recruits and employs the lawyers. Judges have no individual *cabinets* with their own clerks. They cooperate with lawyers that belong to the Registry.<sup>42</sup>

As explained previously, the ECHR regulates human rights and fundamental freedoms; and the ECHR also creates a fairly good mechanism by the establishment of the European Court of Human Rights (ECtHR). The Human Rights Court, which is the product of ECtHR, is a permanent Court. The European regional organizations use it to handle cases of human rights violations occurred in Europe.

<sup>37</sup> Rick Lawson, "The European Convention on Human Rights", <http://www.corteidh.or.cr/tablas/r33362.pdf>, accessed on January 2019, pp. 455-456.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> See Council of Bars and Law Societies, *The European Court of Human Rights Questions & Answers for Lawyers*, Brussels: Council of Bars and Law Societies, 2014.

<sup>42</sup> Rick Lawson, "The European Convention on Human Rights", *op.cit.*, p. 456.

*"To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as "the Court". It shall function on a permanent basis."<sup>43</sup>*

According to Article 32 of the Covenant, the ECtHR determines party who can submit case to the European Court of Human Rights. The ECtHR have jurisdiction to provide interpretations of the Convention and its Protocol, and decide disputes.<sup>44</sup> In other words, those who can litigate at the European Court of Human Rights are disputes between states or state against individuals, Non-Governmental Organizations, and/or groups of individuals whose human rights have been violated by the state.

*"Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party."<sup>45</sup>*

*"The Court may receive applications from any person, nongovernmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."<sup>46</sup>*

However, there is a condition that a case can be brought to the European Court of Human Rights is the fulfillment of the "exhausted of domestic remedies." This means that ECtHR is a complimentary court where a case must go through the domestic mechanism of each state and has obtained permanent legal force (*inkracht van gewijsde*)<sup>47</sup> and has not exceeded the six-month limit from the date the decision in that country was taken.<sup>48</sup>

At present, the ECtHR is located in Strasbourg, France with a growing number of cases. At the beginning of its founding, in 1955, ECtHR only received 138 cases (up to 596 cases in 1985). However, after that year, the increase in the number of cases in the court was out of control. Until 2003, there were 27,189 cases. This is due to the increasing number of parties to this Convention from Central Europe

<sup>43</sup> See Article 19 of ECHR.

<sup>44</sup> "The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47". See Article 32(1) of ECHR.

<sup>45</sup> See Article 33 of ECHR.

<sup>46</sup> See Article 34 of ECHR.

<sup>47</sup> Bringing the disputes to the court is not the only alternative to be recommended for the judicial decisions. See Achmad Romsan (et.al.), "Climate Change and Community Environmental Conflicts: Are They Correlated?", *Sriwijaya Law Review*, Vol. 1, Issue 1, 2017, pp. 53-63.

<sup>48</sup> Article 35(1) of ECHR.

and Eastern Europe.<sup>49</sup> The latest data, in 2018, recorded that the ECtHR has received 43,100 cases.<sup>50</sup>

The authority to carry out the decision is the Committee of Ministers. Several steps need to be carried out by the Committee to implement the decision. First, the Committee must ensure that the compensation provided is in accordance with the court's decision. Second, the Committee shall ensure that actions against these individuals are in accordance with the principle of *restitution in integrum*,<sup>51</sup> as much as possible to place the victims of their original position before violations. Third, the Committee shall consider comprehensive actions to avoid the similar violations in the future.

In its implementation, there are often problems of interpretation on the court decision. In this case, the Committee of Ministers may ask the Court about the matter and the court will clarify with regard to the actual meaning of the decision. If a dispute party refuses to carry out the decision, then the rejection can also be used as a basis to sue the party to the Court.

Moving forward to the ASEAN human rights mechanism, ASEAN does not have judicial organs to handle cases of human rights violations by member countries as European countries have with ECtHR. However, there are possibilities that ASEAN human rights court will be formed in the future. As expressed by Phan, ASEAN's efforts to protect human rights should be appreciated as it is a part of the continuing process towards a better human rights reign in ASEAN.<sup>52</sup> It is not impossible for ASEAN to have permanent body which include clear and measurable mechanism for protecting human rights.

The first thing that ASEAN can do for transforming their human rights mechanism, is to amend the AICHR TOR as the constitution for AICHR formation. Similar to the human rights mechanism in Europe where binding ECHR decisions are put as reports to the Committee of Ministers, AICHR is also obliged to report all matters relating to the human rights development in ASEAN to the ASEAN Foreign Ministers Meeting (AMM).<sup>53</sup> Although in Committee of the Ministers, the members has the authority to make final decisions on European Human Rights Commissions recommendations, the AMM does not have explicit authority to decide human rights issues reported by AICHR. In this case, the ASEAN summit

<sup>49</sup> Rick Lawson, "The European Convention on Human Rights", *op.cit.*, p. 426.

<sup>50</sup> Council of Europe, European Court on Human Rights, *Annual Report European Court of Human Rights 2018*, *op.cit.*, p. 168.

<sup>51</sup> Alice Donald and Anne-Katrin Speck, "The European Court of Human Rights' Remedial Practice and its Impact on the Execution of Judgments," *Human Rights Law Review*, Vol. 19, Issue 1, 2019, pp. 83–117.

<sup>52</sup> See Hao Duy Phan, "Promotional versus protective design: the case of ASEAN intergovernmental commission on human rights", *International Journal of Human Rights*, Vol. 22, 2018.

<sup>53</sup> See Terms of Reference of ASEAN Intergovernmental Commission on Human Rights, <https://www.asean.org/storage/images/archive/publications/TOR-of-AICHR.pdf>, accessed on April 2019.

which are attended by heads of member states will have the authority to determine the next steps forward.

### E. Conclusion

The enquiry of this study is mechanisms in two regional organizations: the European Court of Human Rights and the AICHR. It reveals that human rights mechanism is inevitable in the two regions. Europe has a more effective human rights mechanism compared to ASEAN. The most prominent thing about the effectiveness of human rights mechanisms in Europe is the existence of European judicial institutions, the ECtHR, to try parties, including the state, when human rights violation happens. The European states with their European Human Rights Court provide more assurance and legal certainty towards individuals when a state commits human rights violations against individual because the ECtHR has binding decisions and all European states must comply to the decision of the court. This is different from ASEAN, which only has a commission body, the AICHR. It has very limited authority. There is no binding decision issued by the AICHR, which is one of the most worrying shortcomings and is highlighted by several elements of society. However, there are still hopes for ASEAN to improve their human rights mechanism, through strengthen the AMM session as decisions-making forum on combating human rights violations.

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