

**HUMAN RIGHTS ENFORCEMENT THROUGH ASEAN HUMAN
RIGHTS MECHANISM**

A BACHELOR DEGREE THESIS



By:

MUHAMMAD IQBAL RACHMAN

Student Number : 14410339

INTERNATIONAL PROGRAM
FACULTY OF LAW
UNIVERSITAS ISLAM INDONESIA
YOGYAKARTA

2018

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Presented as the Partial Fulfillment of the Requirements
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Yogyakarta



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Thesis Content Advisor,



Dodik Setiawan Nur Heriyanto, S.H., M.H.,L.L.M.,Ph.D

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Language Advisor,



Yaries Mahardika Putro S.H.

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الاستاذ المساعد

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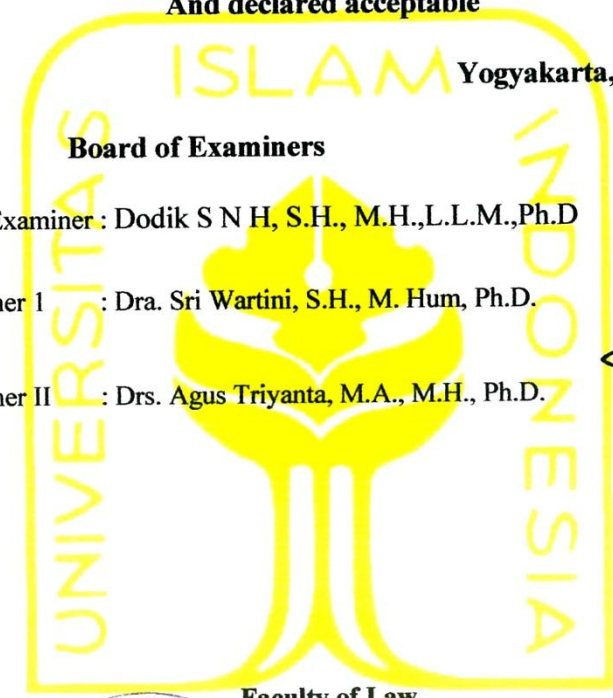
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1. Chief Examiner : Dodik S N H, S.H., M.H.,L.L.M.,Ph.D
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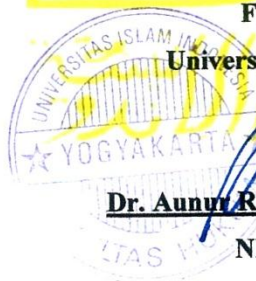
Faculty of Law

Universitas Islam Indonesia

Dean,

Dr. Aunur Rohim Faqih, SH., M.Hum

NIK: 841100101



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MAHASISWA
FAKULTAS HUKUM UNIVERSITAS ISLAM INDONESIA

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Yang bertandatangan di bawah ini, saya:

Nama : **Muhammad Iqbal Rachman**

No. Mahasiswa : **14410339**

Adalah benar-benar mahasiswa Program Internasional Fakultas Hukum Universitas Islam Indonesia Yogyakarta yang telah melakukan penulisan karya tulis ilmiah (tugas akhir) berupa skripsi atau legal memorandum atau studi kasus hukum dengan judul:

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Dibuat di : Yogyakarta

Pada tanggal : 6 Maret 2018

Yang membuat pernyataan,



Muhammad Iqbal Rachman

CURRICULUM VITAE

BASIC INFORMATION

Name : Muhammad Iqbal Rachman
Date of Birth : April, 12th 1996
Place of Birth : Karawang
Gender : Male
Religion : Islam
Marital Status : Single
Phone Number : +628960 749 7401
E-mail Address : iqbal.jwb@gmail.com
Address : Perum Galuh Mas Blok B.2/1 RT/RW 001/015 Sukaharja
Teluk Jambe Timur, Karawang

Parents Identity

- a) Father : Ahmad Jaelani
Occupation : Private Employee
- b) Mother : Ati Maryati
Occupation : Private Employee

BACKGROUND OF EDUCATION

1. International Program Law Department of Universitas Islam Indonesia,
International Law Major, 2014-2018
2. SMA-IT Al-Binaa Islamic Boarding School 2011-2014
3. SMP-IT Al-Binaa Islamic Boarding School 2008-2011
4. SD-IT Al-Irsyad Islamiyyah Karawang 2002-2008
5. SD-IT Al-Irsyad Islamiyyah Karawang 2000-2002

ORGANIZATIONAL EXPERIENCES

1. Juridical Council of International Program (JCI), Fakultas Hukum Universitas Islam Indonesia: Staff of Human Resource Development Division for the period 2014/2015 and Staff of Public Relations Division for the period 2015-2017
2. Student Association of International Law (SAIL), Fakultas Hukum Universitas Islam Indonesia: Staff of Competition Division for the period 2016/2017 and Staff of Discussion Division for the period 2016/2017
3. Takmir Masjid Al-Azhar, Fakultas Hukum Universitas Islam Indonesia: Staff of Syi'ar Division for the Period 2016-2017
4. UII Golden, Universitas Islam Indonesia: Staff of Event Organizer Division for the Period 2015-2016
5. Komunitas Peradilan Semu, Fakultas Hukum Universitas Islam Indonesia: Cadre for the Period 2015-2017.
6. Criminal Law Discussion Community (CLD), Faculty of Law Universitas Islam Indonesia, Head of International Criminal Law Department for the Period 2016-2017.

VOLUNTEERING AND INTERNSHIP EXPERIENCES

1. Coordinator of Equipment Division at International Student Conference International Program Universitas Islam Indonesia, June 2015
2. Coordination of Internal Event Division at Student Exchange of Ahmad Ibrahim Kuliyyah of Laws, Fakultas Hukum Universitas Islam Indonesia, June-July 2015
3. Coordination of Security Divisions at Indiast Interest 2.0 Laboratory Legal Practice, January 2016
4. Liaison officer of National Scientific Paper Centre For Local Law Development Studies, 2016

5. Programme Manager/ Head Committee at Student Exchange of Ahmad Ibrahim Kuliyyah of Laws, Fakultas Hukum Universitas Islam Indonesia, June 2016
6. International Internship in Indonesia Embassy for Romania and Moldova, Agustus-September 2016(40 Days)
7. International Internship as Legal Fellow in Justice Without Borders, January-Juni 2016(6 Months)
8. Committee of INPROVAL 2016
9. Bailiff & Users in Indonesia National Rounds of the Philip C. Jessup International Law Moot Court Competition held by Universitas Indonesia
10. Internship in Pusat Studi Hukum Islam(PSHI), Fakultas Hukum Universitas Islam Indonesia, October 2017-Present
11. Division of Media Communication and Information in INDIES INTEREST 3.0, 2017
12. Chaperone in Intermediate Islamic Leadership Training(IILT), International Program Universitas Islam Indonesia, 2016
13. Internship in Centre of Local Law Development Studies(CLDS), Fakultas Hukum Universitas Islam Indonesia, August 2017-Present
14. Legal Assistance Lecture of Islamic Law(Muallim), Fakultas Hukum Universitas Islam Indonesia, 2015-Present
15. International Volunteer in ASIAN GAMES INVITATION TOURNAMENT 2018

ACHIEVEMENT, AWARDS AND CERTIFICATE

1. Participant on Pesta Peradilan, Fakultas Hukum Universitas Islam Indonesia, 2014
2. Participant on Self Leadership Training(SLT), International Program Universitas Islam Indonesia, 2014
3. Participant on International Student Gateway Seminar, International Program Universitas Islam Indonesia, 2014

4. Student Exchange in Ahmad Ibrahim Kuliyyah of Laws, International Islamic University Malaysia, October 2015
5. Presenter on International Conference of Refugee Law held by International Islamic University Malaysia, June 2015
6. Spokesperson on seminar “Duduk gembira bersama para petualang student exchange” held by Lembaga Eksekutif Mahasiswa(LEM) Fakultas Hukum Universitas Islam Indonesia, 2016
7. Participant on LDK(Latihan Dasar Kader) Takmir Masjid Al-Azhar Fakultas Hukum Universitas Islam Indonesia, 2016
8. Presenter on ASEAN Youth Gathering Conference: “The Role of Students in ASEAN COMMUNITY DEVELOPMENT” held by Fakultas Hubungan Internasional Universitas Islam Indonesia, 2016
9. Presenter on Human Rights Symposium for Youth: “Human Rights in The ASEAN Community Era” held by Fakultas Hukum Universitas Indonesia, 2016
10. Presenter on Bangkok International Student Conference held by Thammasat University, January 2017
11. Participant on Adzan Training Takmir Al-Azhar Fakultas Hukum Universitas Islam Indonesia, 2017
12. Presenter on The ICIMLRR 2017: 19th International Conference on International Migration Law and Rights of Refugees held by WASET, January 2017
13. An Outstanding Presentation on The ICIMLRR 2017: 19th International Conference on International Migration Law and Rights of Refugees. Jeddah, Saudi Arabia
14. Presenter on ICLAS6: International Conference on Law and Society held by Fakultas Hukum Universitas Muhammadiyah Yogyakarta
15. Top 20 Finalist on Paper Competition Andalas Accounting National Events 2017 held by Fakultas Ekonomi Universitas Andalas, 2017
16. Spokesperson on mini seminar “ Tips and Trick to Participate in International Event” held by SAIL FH UII, 2016

17. Honorable awards by Rector Universitas Islam Indonesia as ‘Mahasiswa Berprestasi’, 2017
18. Participation in Islamic Studies Training Volume 2 held by Internasional Program Universitas Islam Indonesia, 2017
19. Participant on PPMI Riyadh 2017 Essay Competition, 2017
20. Participant as CLD’s Delegation in Student Lawyers Club on the topic of “Kajian Hukum Peristiwa Kendeng’ Antara Ekspektasi dan Realita”
21. **Moderator** on Public Discussion “Aku, Kamu & Rohingnya” Calloboration Between Centre Law and Centre of Local Law Development Studies (**CLDS**) FH **UII**, Takmir Masjid Al-Azhar FH **UII**, and Aksi Cepat Tanggap(ACT)
22. Participant on Diponegoro School of Nations 2017
23. Best Essay and Speaker on Diponegoro School of Nations 2017
24. Top Eleven on National Law Sudent Conference Faculty of Law Universitas Airlangga 2017
25. Finalist on Paper Competition HIMIE Economic Research and Olympiad (HERO) 2017, Faculty of Economic and Business Universitas Muhammadiyah Yogyakarta
26. Presenter on International Conference on Forced Migration and Refugee Studies: Issues and Shifting Paradigms 2017, Kuliyyah of Islamic Revealed Knowledge and Human Science International Islamic University Malaysia

INNFORMAL EDUCATION

1. Participant on Seminar “Keislaman Al-Azhar Berdakwah 2015” held by Takmir Masjid Al-Azhar FH **UII**
2. Participant on seminar ‘Briging AEC closer to labour’s future’ held by Universitas Gajah Mada
3. Participant on Seminar “Optimalisasi dan pertanggungjawaban alokasi dana desa” held by Pasca Sarjana Fakultas Hukum Universitas Islam Indonesia

4. Participant on seminar “Melawan amputasi kewenangan lembaga Independen” held by Fakultas Hukum Universitas Islam Indonesia
5. Participant on seminar “Etika Penegakan Hukum di Indonesia” held by Fakultas Hukum Universitas Islam Indonesia
6. Participant in International Seminar “Islamic Discussion with title challenges of secularism in the Globalization Era” held by International Government Programme Universitas Muhammadiyah Yogyakarta
7. Participant on seminar “Menguak Kebijakan Freeport: Adakah Kesejahteraan Untuk Rakyat?” held by Takmir Masjid Al-Azhar FH UII
8. Participant on seminar “Telaah Dampak Pembangunan Infrastruktur Terhadap Keuangan Negara” held by Fakultas Ekonomi Universitas Islam Indonesia
9. Participant on National Seminar Hero 6th “Akuntabilitas Penggunaan Dana Pembangunan Nasional” held by Fakultas Ekonomi Bisnis Universitas Muhammadiyah Yogyakarta
10. Romanian Language Course held by KBRI Romania and Moldova in Bucharest
11. Morning Star Language English Course, Pare Kediri East Java, 2014
12. Mr. Bob Language English Course, Pare Kediri East Java, 2014
13. Al-Azhar Language Arabic Course, Pare Kediri East Java, 2017
14. Lembaga Ilmu Pengetahuan Islam dan Bahasa Arab Language Arabic Course, Jakarta Selatan, 2018-Present

LANGUAGES

Bahasa Indonesia (native), Basa Jawa (native), English (speaking, writing, listening, and reading), Arabic(speaking, writing, and listening)

Yogyakarta, February 26st 2018

(Muhammad Iqbal Rachman)

NIM: 14410339

MOTTO

مَنْ جَدَّ وَجَدَ

Barang siapa bersungguh-sungguh, dapatlah ia.

(Imam Syafi'i)

Bebek Berjalan Berbondong-bondong, Akan Tetapi Elang Berjalan Sendirian

(Ir. Soekarno)

Slow But Sure

(Muhammad Iqbal Rachman)

DEDICATION

This thesis is wholeheartedly dedicated to:

Allah SWT, Prophet Muhammad SAW...

My constant encouragement and amazing place in my whole life, Ahmad Jaelani and Ati Maryati. My inspiration brother and sister, Nuzulul Khairun Nisa and Abiyu Ahmad Habibi

- ✓ *My Nationality Indonesia...*
- ✓ *Almamaterku, Universitas Islam Indonesia...*
- ✓ *Al-Binaa Islamic Boarding School...*
- ✓ *Takmir Masjid Al-Azhar...*
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- ✓ *Student Association of International Law...*

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During the process of making this thesis, the writer realized that this thesis never finished without any contribution, assistance, guidance, and support from various parties. So, the writer would like to extend gratitude to:

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TABLE OF CONTENT

PAGE OF APPROVAL.....	i
PAGE OF APPROVAL.....	ii
PAGE OF APPROVAL.....	iii
SURAT PERNYATAAN	iv
CURRICULUM VITAE.....	vi
MOTTO.....	xii
DEDICATION.....	xiii
ACKNOWLEDGEMENTS.....	xiv
TABLE OF CONTENT.....	xvi
ABSTRACT	xviii
CHAPTER I.....	1
INTRODUCTION.....	1
A. Background of Study	1
B. Problems Formulation.....	7
C. Research Objectives.....	7
D. Definition of Terms.....	8
E. Theoretical Review.....	9
F. Research Methods.....	16
CHAPTER II	21
GENERAL OVERVIEW ON ASEAN HUMAN RIGHTS MECHANISM..	21
A. The History of The Establishment of ASEAN Human Rights Mechanism.....	21
B. Human Rights Bodies Within ASEAN.....	37
C. Legal Sources of ASEAN Human Rights Mechanism.....	38
D. General Principles of ASEAN Human Rights Mechanism.....	46
E. Protection of Human Rights Under Islamic Perspective.....	60
CHAPTER III.....	63

The Effectiveness of ASEAN Human Rights Mechanism and How to Strengthen It.....	63
A. The Weakness of ASEAN Human Rights Mechanism.....	63
I. The Existence of ASEAN Human Rights Mechanism Have No Capability to Stop The Violations of Human Rights.....	64
II. The Non-Interference Principle as an Obstacle to Enforce ASEAN Human Rights Mechanism.....	77
III. The Ineffectiveness of ASEAN Human Rights Mechanism to Uphold Human Rights in Southeast Asia Region.....	85
B. STRENGTHENING HUMAN RIGHTS MECHANISM IN ASEAN	89
I. The Idea in Improving The Performance of ASEAN Human Rights Mechanism.....	89
II. Looking for The Experience and Positive Things That Exist on The Others Regional Human Rights Mechanism.....	92
III. How To Empower ASEAN Human Rights Mechanism.....	107
CHAPTER IV.....	125
CONCLUSION AND RECOMMENDATION.....	125
A. Conclusion.....	125
B. Recommendation.....	126
REFERENCES	128

ABSTRACT

The new spirit of ASEAN Human Right mechanism has indicated how crucial the arrangements regarding human rights in Southeast Asia region are, the establishment of ASEAN human rights enforcement has become the main pillar to accommodate the rights of ASEAN community. ASEAN human rights mechanism became the main instruments to protect and guarantee human rights in Southeast Asia region. However, the existence of ASEAN human rights mechanism has become a knife with double-edge. On one side, the ASEAN human rights mechanism recognized as a great achievement in upholding human rights in Southeast Asia region. On the other side, the ASEAN human rights mechanism has faced weakening issues that influenced by the political consideration among the ASEAN member countries to enforce human rights based on their will. Consequently, there are several human rights violations in Southeast Asia region that cannot be resolved until today and it has drawn the attention of international community. Therefore, the ASEAN human rights mechanism is still far from being perfect. Based on the reality it became a basis to drive the writer to do a research. The methodology that will be used is a normative method with a conceptual approach. It means that to formulate this research, the author will integrate several legal comparisons and principle to get a concrete solution. Consequently, the output in this research is empowerments in establishing a legal framework to protect the strengthen ASEAN human rights mechanism. The results of this study will be submitted to the ASEAN leaders in order to increase the ASEAN's consideration to follow up the problem of human rights enforcement in a serious level.

Keywords: ASEAN, human rights, politic

CHAPTER 1 INTRODUCTION

1.1 Background of Study

Started from the equation of destiny as a colonized country, some countries in Southeast Asia slowly awakened and realize that their need an association to unite and integrate each other in order to achieve common interests. At that time, the idea of establishing an international organization in Southeast Asia intended to build an economic coalition in Southeast Asia region which aimed to pursue the gap of economic disparity which very far behind against western countries. Therefore, the *Association of South East Asia Nations* (ASEAN) on August 8, 1967, through the Bangkok Declaration was established by five pioneer state that agreed to make regional cooperation¹.

The development of ASEAN is increasingly growing up day by day, ASEAN nowadays does not only focus on economic problems. One of the most issues that should be accommodate by ASEAN is the protection of human rights in the occurrence of human rights violations in Southeast Asia region. The new spirit of ASEAN Human Right enforcement has been started from the enactment of ASEAN Charter that has indicated how crucial the arrangements of human rights, ASEAN Charter became a great achievement in ASEAN history to accomodate human rights in Southeast Asia region. The protection of human rights generally related to the

¹ Faisal Keling, Hisamudhin, and others, 2011, The Development of ASEAN from Historical Approach. *Canadian Center of Science and Education: Asian Social Science* Vol. 7 No. 7, p. 171-172.

role of the state in the context of human rights enforcement as the main pillar to accommodate citizen interest. The existence of human rights basically started from the establishment of Universal Declaration of Human Rights that signed on 1948, this declaration had become the first international source of rights and freedom that used as universal code for humankind. The concept of human rights has been debated each other dialectically in responding to the existence of human rights, and it seems as never-ending debate. Since 2007, the establishment of ASEAN Charter became a legal basis to enforce human rights in Southeast Asia region. On the other side, The establishment of ASEAN Charter has functioned as to trigger on the formation of ASEAN Intergovernmental Commission on Human Rights(AICHR) and the signing of ASEAN Human Rights Declaration(AHRD) which have placed human rights at the forefront of ASEAN political discourse. The development of ASEAN human rights became an evidence to the international community that Southeast Asia region does not want to be left behind in upholding human rights. It indicates that the commitment of ASEAN member countries to maintain the rights of everyone to accommodate citizen interest through regional human rights mechanism is very serious².

The establishment of ASEAN Charter become the real evidence that related to the state responsibility in protecting and fulfill human rights in the middle of society³. It has defined that the establishment of ASEAN Charter was intended to

² Hien BUI, 2016, The ASEAN Human Rights System: A Critical Analysis, *Asian Journal of Comparative Law*, Vol 11, p 113-117.

³ Eko Riyadi, 2015, *Bahan Ajar Mata Kuliah Hukum Hak Asasi Manusia*, Fakultas Hukum Universitas Islam Indonesia Press; Yogyakarta, p 109

accommodate the whole regional issues and enhance cooperation between ASEAN countries in the Southeast Asia region through the human rights protection. In line with article 14 ASEAN Charter, it is proved that the ASEAN Charter provides a mandate to ASEAN member to establish a special regional body in the scope of humanity⁴⁵. Article 14 was established AICHR as the ASEAN Regional human rights institution which aims to protect and promote the existence of ASEAN human rights enforcement in Southeast Asia region⁶. On the other side, the formation of regional human rights institutions was established to improve the standardization of human rights enforcement in ASEAN. However, there is a unique contextualization in the formation of regional human rights institutions that made some scholars worried through the ASEAN human rights enforcement in Southeast Asia region, it caused the formation of regional human rights in ASEAN itself has their own provisions to implement human rights in Southeast Asia by promoting the value of ASEAN⁷. The scholars worried that the ASEAN human rights mechanism do not relevance with the standards that listed in the Universal Human Rights Declaration as the universal norm which is applied to all countries⁸.

⁴ AICHR, Prospek Mekanisme HAM ASEAN, available at: http://aichr.or.id/index.php/id/aichr-indonesia/akuntabilitas-publik/rilis/23-prospek-mekanisme-ham-asean?showall=1_&limitstart= accessed on 28 October 2017

⁵ Article 14 asean Charter 2008 which stated: “1. 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. 2. This ASEAN human rights body shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting”. The establishment of ASEAN human rights institution aimed to protect and promote the rights of ASEAN society regarding to the human rights issues in Southeast Asia region.

⁶ Hien BUI, *Op. Cit.*,

⁷ Corthay, 2016, The ASEAN Doctrine of Non-Interference in Light of the Fundamental Principle of Non-Intervention. *Asian-Pacific Law & Policy Journal*, Vol. 17 (2), p. 3-11.

⁸ *Ibid.*,

Politically, ASEAN member states argue that the international human rights concepts are not compatible with ASEAN member countries. ASEAN member countries was felt that the international human rights is a product which made by western countries that have a different culture and value with ASEAN member countries. ASEAN member countries argue that not all international human rights concepts is harmony with the ASEAN values. Nevertheless, it does not mean that ASEAN human rights mechanism dispose the universal human rights values, ASEAN countries must continue to uphold the universal human rights as some of them have become a members by ratifying the declaration⁹.

However, the commitment of ASEAN member countries with establishing ASEAN Charter, AICHR and AHRD were felt not reflected an effective human rights enforcement in Southeast Asia region. On the other hand, the development of human right has become the instruments and navigation on the protection of human rights enforcement in Southeast Asia region was felt weak to accommodate human right issues in Southeast Asia region . The propulsion of political consideration that contained in ASEAN values which have been regulated since the establishment of Treaty of Amity and Cooperation in Southeast Asia in 1976 and the ASEAN Charter has felt do not accommodate human right enforcement in South East Asia region as totally¹⁰. In theoretical review, the existence of non-interference principle was assessed as a barrier to making a better human rights enforcement in

⁹ Lily Husni Putri, 2016, Efektifitas Badan HAM ASEAN dalam Menangani Isu HAM, *Journal Kanun Ilmu Hukum*, No. 61, p. 499-501.

¹⁰ Katsumata, H. 2009, ASEAN and human rights: resisting Western Pressure or emulating the West?. *The Pacific Review* Vol 22 No. 5, p. 622

Southeast Asia region, the emergence of some humanity tragedy which occurred in Southeast Asia region such as ‘Serious Human Rights Violation’ tragedy in Rohingya which have been slaughtered local people during a military attack to Rohingya Moslems in Myanmar, more than 1.000 people were killed, and 88.000 people became an asylum seeker¹¹. Another serious human rights violation which happened in ASEAN was conducted by Rodrigo Duterte as the President of Philippines through the government's controversial anti-drugs campaign which killed more than 400 people without passed fair trial¹². The occurrence of human rights violation which killed many innocent people has proved that the commitment of ASEAN countries through human rights enforcement in South East Asia region has felt did not proportional and did not appropriate to cover and protect human rights violation which conducted by ASEAN states member¹³.

Therefore, it is difficult to quantify the effectiveness of human rights enforcement in South East Asia region, the establishment of ASEAN human rights bodies through AICHR and the commitment of AHRD to uphold human rights has felt no fangs and power to accommodate citizen interest and protect their rights as the ASEAN society. The non-interference principle has felt as a barrier to enforce

¹¹Republika, Korban Tewas Muslim Rohingya Sudah Ratusan Jiwa, available at: <http://www.republika.co.id/berita/koran/halaman-1/16/11/17/ogrcv79-korban-tewas-muslim-rohingyas-udah-ratusan-jiwa>. Accessed on 28 October 2017.

¹² Kompas, Takut Ditembak Mati, 500.000 Pongedar dan Pongguna Narkoba di Filipina Menyerah, available at: http://internasional.kompas.com/read/2016/08/05/21304401/takut_ditebak_mati.500.000.pongedar.dan.pongguna.narkoba.di.filipina.menyerah accessed on 8 November 2017

¹³Novie Lucky Andriyani and Muhadi Sugiono, Pelanggaran Hak Asasi Manusia di ASEAN Studi Kasus: Etnis Rohingnya, *Katalog Tesis FISIPOL Universitas Gadjah Mada*, 2015, Available at: <http://hi.fisipol.ugm.ac.id/katalogtesis/pelanggaran-hak-asasi-manusia-di-asean-studi-kasus-etnis-rohingnya/>. Accessed on 9 November 2017.

human rights as totally. Although it has been enacted to cover human rights problem more than 8 years before, law enforcement against human rights abuses is far from the perfect words. As a result, some opinions are debated each other dialectically in responding to the existence of ASEAN human rights enforcement, start from the concept, substance, and even the implementation¹⁴.

In fact, the establishment of AICHR and AHRD do not resolve human rights violations which became a big question in Southeast Asia region. Human rights issues are still being sensitive issues in Southeast Asia, it is proved by the existence of human rights violations which conducted by ASEAN member countries. That condition indicates a lack of commitment which has constructed by ASEAN member countries to promote and protect human rights as enshrined in the ASEAN Charter. Myanmar and Philipines cases created a negative assessment towards international community to ASEAN countries in the terms of upholding human rights enforcement in Southeast Asia region. The emergence of genocide people in Myanmar and drug's war in Philipine that happened in ASEAN territory became the evidence that the commitment of ASEAN countries related to the human rights not directly proportional to enforce human rights in Southeast Asia area.

Therefore, the author was felt that need to study and discuss more about the formulation of ASEAN human rights enforcement, based on the description above, the author is interested in elevating these problems into a thesis research which

¹⁴Sindo News, Penegeakan HAM di ASEAN Masih Lemah, Available at: <https://nasional.sindonews.com/read/696019/12/penegakan-ham-di-asean-dan-indonesia-masih-lemah-1355123444>. Accessed on 18 November 2017

titled: “Human Rights Enforcement Through ASEAN Human Rights Mechanism”. First of all, this thesis will review the weakness and problem that exists in the ASEAN human rights enforcement. Second of all, this thesis will analyze the effective way to enforce human rights in Southeast Asia region. Furthermore, the results of the research will be analyzed through the concept of Universal human rights and special model which has been regulated in the context of ASEAN human rights enforcement. The thesis results can be concluded that ASEAN human rights is difficult to enforce because each country has different interests, therefore the ASEAN member countries should amend the existence of legal basis that accommodate ASEAN human rights mechanism and considering to establish ASEAN human rights court which could be as the one of solution to uphold human rights in Southeast Asia region.

1.2 Problem Statement

Based on the description above, the author will formulate a problem that will be discussed in this thesis as follows:

1. What are the weaknesses of the ASEAN human rights mechanism?
2. How to establish the effective enforcement of human rights through ASEAN human rights mechanism?

1.3. Research Objectives

The purpose or objective of the writer to do the research regarding the pertinent topic in this research can be summarized in the two purposes;

1. To find the solutions and to give recommendation for the ASEAN human rights enforcement.
2. To analyze the effectiveness of ASEAN human rights enforcement in Southeast Asia.

1.4 Definition of Term

The terms used in this thesis will be explained in order to make the analysis to be easier.;

1. ASEAN is the regional organization which established through the formulation of Bangkok Declaration on 8 August 1967 in Bangkok, Thailand. Bangkok Declaration was establish by the agreement between five pioneer countries in Southeast Asia region namely Indonesia, Malaysia, Philippines, Singapore and Thailand¹⁵.

2. AICHR is ASEAN human rights institution that poured in the ASEAN Charter Chapter IV article 14 which aimed to protect and promote the rights of ASEAN society regarding to the human rights issues in Southeast Asia region. AICHR also formulated to provide human rights standarization which purposed to increase a better quality of life for the ASEAN community¹⁶.

3. AHRD is the declaration that strengthen the promotion and protection of human rights cooperation in the Southeast Asia region. AHRD was establish

¹⁵ Kementrian Luar Negeri Republik Indonesia, Sejarah dan Latar Pembentukan ASEAN, available at: <http://www.kemlu.go.id/id/kebijakan/asean/Pages/Sejarah-dan-Latar-Pembentukan-ASEAN.aspx> accessed on 2 November 2017.

¹⁶ Lily Husni Putri, *Op. Cit*, p. 500.

on 19 November 2012. On the other side, AHRD also has function to completely the mandate of AICHR which has obligation to promote and protect human rights in Southeast Asia region¹⁷.

1.5 Theoretical Review

1.The Ideal concept of Human Rights

The concept of human rights became a great achievement in the history of human being. The existence of human rights has been conceived to accommodate humanity and the all aspects of life. The idea of human rights has existed to fulfill the dignity and noble value of human being¹⁸. The concept of human rights is automatically owned by everyone since in the womb, it exist naturally which does not any admission by the state, but the state is obliged to guarantee and protect human rights in positive law to strengthen the existence of human rights effectively under the legal certainty¹⁹. The concept human rights law formulated that the state should not be either intentionally or unintentionally ignores the fundamental rights and freedoms of the society²⁰. On the opposite, the State assumed had a huge

¹⁷ Catherine Shanahan, 2013, The ASEAN Human Rights Declaration 2012, *Human Rights Law Review*, Volume 13, Issue 3, p 557–579, Available on <https://doi.org/10.1093/hrlr/ngt016> Accessed at 2 November 2017.

¹⁸ Eko Riyadi, *Op. Cit*, page 1.

¹⁹ Muhammad Iqbal Rachman and Sahid hadi, The Dynamics Of Human Rights Enforcement In Indonesia: a Misconception and Political Consideration in the Formulation of Law Number 26 Year 2000 on Human Rights Court. Presented on “International Conference on Law and Society (ICLAS) VI: Legal Challenges in Social Justice and Economic Progress” was held by Faculty of Law Universitas Muhammadiyah Yogyakarta collaborated with International Islamic University Malaysia, Istanbul Medeniyet University Turkey, University Islam Sultan Zainal Abidin Malaysia, Fatoni University Thailand on 4-7 april 2007 at Universitas Muhammadiyah Yogyakarta, Indonesia.

²⁰ Ni'matul Huda, *Ilmu Negara*, 2014, Jakarta: RajaGrafindo Persada, p.17

positive obligation for actively protecting and ensuring the fulfillment of the fundamental rights and freedoms of it. However, according to Hegel which has described on his dialectic, Hegel substantially stated that the existence of human rights concept basically as the result of social contract theory, where the people give their right to the ruler to maintain peace and security condition around them, the implication that the state has obligation to accommodate their interest specially in the term of human rights²¹.

Therefore, the existence of the State is very important to protect any citizens as an absolute obligation. In the context of human rights enforcement, the state as stakeholder had rights and obligations as subjects of law. The rights and obligation of state generally had been declared in the Universal Declaration of Human Right 1948. In the Declaration stated that the state categorized as the main responsible entity to promote, fulfill, and protect human rights²².

2. The Scope of International Human Rights Law

The scope of human rights have been classified the individual or person as the *right-holders* which has rights to protected and guaranteed by the state as the stakeholder under international law²³. On the opposite, the state as stakeholder has been classified as the *duty-holders* who take the

²¹ Thomas Buergenthal, 2013, Dinah Shelton & David P. Stewart, International Human Rights in a Nutshell, *GWU Law School Public Law Research Paper*, No.34. Available at: <https://ssrn.com/abstract=2226064> accessed on 10 November 2017

²² Eko Prasetyo, 2001, HAM: Kejahatan Negara dan Imperialisme Modal, Yogyakarta: INSIST Press, p. 4-5.

²³ Eko Riyadi, Op.Cit, p. 14

responsibility to accommodate the citizen interest in order to protect and guarantee human rights²⁴. Thus the relation between *right-holders and duty-holders* in the scope of international human rights became the main object to determine the rights and obligations between both of them. The determination of rights and obligations was resulted three basic human rights instruments and optional protocols which designed by the United Nations²⁵;

a) Universal Declaration of Human Rights (UDHR)

UDHR was established as a common standard to enforce human rights which became the historical achievements for all peoples and all nations. The declaration was describe that the duty to protect and enforce human rights is the state to all human rights and fundamental freedoms, regardless of their political rights, education rights, health rights, economic and cultural rights²⁶. The principle of universal human rights become the higher principle where the human rights is valid and owned by everyone and everywhere²⁷. The universal of human rights described that the differences of ethnic, religion, skin, and others is not validate in this

²⁴ *Ibid.*,

²⁵ *Ibid.*,

²⁶ Office of the United Nations High Commissioner for Human Rights (OHCHR), What are human rights?, available at: <http://www.ohchr.org/EN/Issues/Pages/WhatAreHumanRights.aspx>. Accessed on 27 May 2017

²⁷ Soetandyo Wingjosoebroto, 2003, 'Hak-hak Asasi Manusia: Konsep Dasar dan Pengertiannya yang Klasik pada Masa-Masa Awal Perkembangannya' dalam Toleransi dan Keragaman: Visi untuk abad ke-21 tulisan tentang hak asasi manusia, Surabaya; Pusat Studi Hak Asasi Manusia Universitas Surabaya and The Asia Foundation, p. 4

world because human being is equal in the scope of human rights. The existence of human rights has owned by everyone since the womb of his mother²⁸. People has rights because their are human beings. The universal of human rights also has describe to everyone respect each others, the universal of human rights implemented as the law of nature. The rights is general that could implemented in everywhere without any limitation²⁹.

b) International Covenant on Civil and Political Rights (ICCPR)

The existence of ICPPR aimed to strengthen the article 3-21 in UDHR, ICCPR has classified as negative rights which mean the state do not required to provide those rights because it came naturally that has been owned by everyone in the whole of world. The state basically has functioned to respect and facilitate in order to accomodate those rights in the middle of society. The state should liberate the society to believe in any single religions and choose political parties without force³⁰. The ICCPR exist to hold the rights of everyone in the scope of life, freedom to express, and religion.

²⁸ *Ibid.*,

²⁹ *Ibid.*,

³⁰ Eko Riyadi, Op.Cit, p. 63-72.

c) International Covenant on Economic, Social and Cultural Rights (ICESCR)

The ICESCR establish as the hard law which strengthen the existence of UDHR as the soft law who have no legally binding to the international community³¹. In the context of ICESCR, the state classified as *duty-bearer* or the parties who responsible to fulfill the basic needs of society. On the other hand, we could conclude that the state has obligation based on the positive rights to actively fulfill the public interest of society³². The ICESCR exist to hold the rights of everyone in the scope of education, work, health, and so on³³.

3. Human Rights as Jus Cogens

The existence of human rights could be categorize as jus cogens in international law, it means that human rights has been accepted and recognized by the international community as international customary law which came from treaty or resolution that do not need ratification or justification to enforce human rights in the whole of world. According to Schwarzenberger, jus cogens was admitted in international law because the main characteristics of jus cogens contained universal and fundamental values that could be applied in international society. In international law, jus cogens is often interpreted as a norm who force the state and jus cogens

³¹ Eko Riyadi, Op.Cit, p. 73-100

³² *Ibid.*,

³³ *Ibid.*,

considered have the highest position of the norms which governing international relations³⁴.

Therefore, the norm of jus cogens is very important in international law that cannot be violated, excluded or exempted under any circumstances. Generally the definition of jus cogens has been describing in the Vienna Convention 1986 on the law of treaties³⁵. However, the jus cogens should not be violated by another norm and jus cogens only could be modified by some basic norm of international law which having the same character with jus cogens. Jus cogens has formulated human rights as one of the fundamental values in the international law, where the value which contained in the human rights cannot be ignored and should be prioritized in international relations³⁶.

4. Basic Human Rights Principle

There are some principle in human rights concept which generally almost of all implemented in some international human rights agreement and applied in the middle of society as follows³⁷;

³⁴ Virgayani Fattah, 2017, Hak Asasi Manusia Berkategori Jus Cogens dan Kaitannya dengan Hak Atas Pendidikan, *Tadulako Law Review*, Volume 2 Issue 1, p. 69-71, available at: <http://jurnal.untad.ac.id/index.php/TLR> accessed on 24 November 2017.

³⁵ Article 53 Vienna Convention on the Laws of Treaties, 1986 which stated: "A peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"

³⁶ Nanda Saraswati, 2017, Kriteria untuk Menentukan Hak Asasi Manusia sebagai "Jus Cogens" dalam Hukum Internasional, *Arena Hukum Journal*, Volume 10 Nomor 2, p 163-1176, available at: <http://dx.doi.org/10.21776/ub.arenahukum.2017.01002.1> accessed on 25 November 2017

³⁷ Eko Riyadi, Op.Cit, p 21-34.

- a. Universality: Human rights must be afforded to everyone, without exception. The entire premise of the framework is that people are entitled to these rights simply by virtue of being human.
- b. Indivisibility: Human rights are indivisible and interdependent, which means that in order to guarantee civil and political rights, a government must also ensure economic, social and cultural rights (and *vice versa*). The indivisibility principle recognizes that if the government violates rights such as health, it necessarily affects people's ability to exercise other rights such as the right to life.
- c. Participation: People have a right to participate in how decisions are made regarding protection of their rights. To ensure human rights, governments must engage and support the participation of civil society on these issues.
- d. Accountability: Governments must create mechanisms of accountability for the enforcement of human rights.
- e. Transparency: Transparency means that the governments must be open about all information and decision-making processes related to human rights. People must be able to know and understand how major decisions affecting the right.
- f. Non-Discrimination: Human rights must be guaranteed without discrimination of any kind. This usually happened on the protection from policies and practices which may have a discriminatory effect.

1.6 Research Method

The type and characteristic research on this thesis use normative legal research. The method will be conducted based on research library or study document, the author will use representative principle which is appropriate to contextualize with the topic in this thesis. The research generally examines the topic based on written rules and journals as secondary data. Normative legal research is a legal research using secondary data sources or data obtained through library materials³⁸. Normative legal research is a process to find a legal norm, the principles of law, and legal doctrines in order to answer the issue of law which is examined. In this thesis the author will use the method of normative legal research because the author will use data obtained from the materials which came from the library to answer the main problem in this thesis³⁹.

1. Research Object

The research object of this research will examine and analyze the theoretical review of ASEAN human rights enforcement through ASEAN human rights mechanism.

2. Research Approach

This thesis will use two approaches:

³⁸ Abdulkadir Muhammad, *Hukum Dan Penelitian Hukum*, 2004, Bandung: Citra Aditya Bakti, p. 155.

³⁹ Mukti Fajar ND dan Yulianto Achmad, *Dualisme Penelitian Hukum*, 2004 *Normatif & Empiris*, Yogyakarta: Pustaka Pelajar, p. 154.

- a. Statutory approach, the research approach will reviewing the agreement and declaration among ASEAN countries that relevant into legal issue which examined;
- b. Conceptual Approach, the research approach will use the doctrines and legal opinions which developed in the science of law, the author also will refer to the legal norms and the principles of law which can be found generally in international law⁴⁰.

3. Research Legal Materials

The source of the data in this thesis use secondary data with the following explanation⁴¹:

Secondary Data is data that obtained through the research library which consists of:

- a. The primary legal materials is a material that has judicial power among the parties;
 - 1). The Universal Declaration of Human Rights (UDHR) 1948
 - 2). Uniter Nation Charter
 - 3). ASEAN Charter

⁴⁰ Peter Mahmud Marzuki, Penelitian Hukum, 2010, Jakarta; Kencana, p. 35.

⁴¹ Idtesis, Metode Penelitian Hukum Empiris dan Normatif, available at: <https://idtesis.com/metode-penelitian-hukum-empiris-dan-normatif/> accessed on 28 Mei 2017

4). ASEAN Inter-governmental Commissioner on Human Rights(AICHR)

5). ASEAN Human Rights Declaration

b. The secondary legal material is a material that does not have judicial power and legally binding to the parties such as books, magazines, newspapers, literature, and research relating to the existence human rights.

c. The tertiary legal material is a material law that serves as a complementary data sources for writers such as dictionaries, encyclopedias and internet.

4. Research Analysis

In doing the process and analysis of the thesis, the authors firstly conducted identification in legal materials which are obtained from the results of this study, then processed in some way, therefore it can be read and interpreted. Such activities include to grouping the materials that appropriate with the qualifications needed. Data analysis was done qualitatively, and referred from the legislation as a positive legal norms.

The collected data are matched with existing regulations and analyzed which used to provide answers in the problems of research, the data collected in order to get an overview of material to support the research

and describe more in how the position of the state among ASEAN countries to enforce human rights effectively⁴².

5. Systematics research Proposal

The systematical and structure of this scientific thesis will determine into five part of thesis which related each other systematically and will integrated to examine ASEAN human rights as follows;

Chapter I: Introduction

This chapter will consist of preliminary section, which is constructed the background, problem formulation, research objectives, the benefits of research, literature review, research methods and systematic writing.

Chapter II: General Overview of ASEAN Human Rights Mechanism

Literature section review about the overview of ASEAN human rights institution and mechanism, the analysis of political and theoretical review through the existence of ASEAN human rights mechanism, the overview of Non-interference to enforce human rights in ASEAN, and the overview of serious humanity which occurs in ASEAN.

Chapter III: The effectiveness of ASEAN human rights mechanism in Southeast Asia region and how to strengthen it

This chapter will examine the overview of ASEAN human rights mechanism based on international human rights law, including the authority

⁴² Abdulkadir Muhammad, Op.Cit., p. 81

and position of ASEAN human rights to enforce human rights law in South East Asia.

Chapter IV: Conclusion and Recommendation

The author on this chapter will conclude the conclusion about the scientific thesis and add some recommendation as advice to complete the human rights enforcement in South East Asia region.

II. LITERATURE REVIEW

GENERAL OVERVIEW ON ASEAN HUMAN RIGHTS MECHANISM

2.1 The History of The Establishment of ASEAN Human Rights Mechanism

The history of ASEAN through Bangkok Declaration 1967 basically was not mentioned the element of human rights specifically in the document of Bangkok Declaration because at that time the issue of human rights protection was not the main concern for Southeast Asian countries. Basically the ASEAN human rights mechanism at the first time indirectly stated in the Bangkok Declaration 1967, ASEAN human rights mechanism indirectly has been mentioned in the second point of the aims and purposes of Bangkok Declaration to maintain the stability in Southeast Asia region, the second point of ASEAN Charter indirectly leads to the protection of human rights in Southeast Asia region⁴³.

After the formation of Bangkok Declaration, human rights issues in Southeast Asia are becoming a sensitive discourse due to the cultural differences among ASEAN member countries. It influenced by the condition of ASEAN

⁴³ Bangkok Declaration 1967; The aims and purposes of the Association shall be: 1. To accelerate the economic growth, social progress and cultural development in the region through joint endeavours in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of South-East Asian Nations; 2. To promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries of the region and adherence to the principles of the United Nations Charter; 3. To promote active collaboration and mutual assistance on matters of common interest in the economic, social, cultural, technical, scientific and administrative fields; 4. To provide assistance to each other in the form of training and research facilities in the educational, professional, technical and administrative spheres; 5. To collaborate more effectively for the greater utilization of their agriculture and industries, the expansion of their trade, including the study of the problems of international commodity trade, the improvement of their transportation and communications facilities and the raising of the living standards of their peoples; 6. To promote South-East Asian studies; 7. To maintain close and beneficial cooperation with existing international and regional organizations with similar aims and purposes, and explore all avenues for even closer cooperation among themselves

member countries that newly independent from colonization, the priority of ASEAN member countries at that time is national development including general security in Southeast Asia region that supports for the economic progress and political stability. Therefore, the issues of human rights violations in Southeast Asia region at that time did not seem to get much attention from the ASEAN member countries⁴⁴. Consequently, the history of ASEAN was recorded that there are several cases of human rights violations occurred in Southeast Asia region which became a serious concern to the international world⁴⁵:

1. Indonesia : The Mysterious Shooter “Petrus” in Soeharto era and Military offenses in East Timor⁴⁶.
2. Cambodia : The case of genocide in Pol Pot era and the Cambodian-Thai border conflict over Preah Vihear temple claims that caused some residents to become victims of a firefight attack between both of parties⁴⁷.
3. Thailand : Human rights violations, extrajudicial killing, and forced disappearance that conducted by Thailand’s central government to the

⁴⁴ Ahmat Reza Fahlefi Pattihua, Efektivitas Asean Intergovernmental Commission on Human Rights (AICHR) dalam Mengatasi HAM di Asia Tenggara, p. 514, Presented on “The 6th University Research Colloquium 2017 Universitas Muhammadiyah Magelang” was held by Universitas Muhammadiyah Magelang on 9 September 2017 at Universitas Muhammadiyah Magelang, Indonesia.

⁴⁵ *Ibid.*,

⁴⁶ Muhammad Iqbal Rachman and Sahid Hadi, *Op.Cit*, p. 1-8.

⁴⁷The History Place, Genocide in the 20th Century, available at: <http://www.historyplace.com/world-history/genocide/pol-pot.htm> accessed on 20 February 2018.

separatist movement in Pattani which resulted hundreds of Pattani people who were predominantly Muslim were deaths⁴⁸.

4. Philippines: Human rights violations and civil war because of military opposition to the Marcos government against the Moro-Mindanao were the Islamic liberation front⁴⁹.
5. Malaysia : Human rights abuses in the form of racial discrimination and the enforcement of the Internal Security Act⁵⁰.

Therefore, the ASEAN human rights mechanism is urgently needed to implemented in Southeast Asia region. However, the human rights were began to exist in Southeast Asia region when ASEAN adopted Vientiane Action Program(VAP) in 2004.VAP is a master plan which formulated by ASEAN member countries that have the main focuses to empower the development of ASEAN in front of the international community including human rights protection.⁵¹ However, the formulation of VAP is not enough to stop the activity of human rights violations in Southeast Asia region, it indicated that more than 40 years since the establishment of ASEAN, ASEAN was powerless to guarantee and protect human rights in Southeast Asia region. Consequently, ASEAN has been

⁴⁸ Lembaga Bantuan Hukum(LBH) Jakarta, Sejarah Kelam Thailand dan Perjuangan Masyarakat Pattani, available at: <https://www.bantuanhukum.or.id/web/sejarah-kelam-thailand-dan-perjuangan-masyarakat-patani/> accessed on 20 February 2018.

⁴⁹ Conciliation Resources, History: Mindanao conflict and the Moro Islamic Liberation Front, available at: <http://www.c-r.org/where-we-work/southeast-asia/history-mindanao-conflict-and-moro-islamic-liberation-front> accessed on 20 February 2018

⁵⁰ Nicole Fritz and Martin Flaherty, 2002, Unjust Order: Malaysia's Internal Security Act, *Fordham International Law Journal*, Volume 26 Issue 5, p. 1345-1346.

⁵¹ Hadi Rahmat Purnama, 2012, Masyarakat Sipil dan Mekanisme ASEAN Inter-Governmental Commission on Human Rights: Studi Kasus Internasional Human Rights Treaty Bodies, *Hukum dan Pembangunan Journal*, No.4, p. 476-480.

received many criticized and highlighted internationally by the failure regional organization in maintaining the human rights violations⁵².

On the other hand, ASEAN also becomes a major concern of the international community where the ASEAN member countries have a very low commitment to uphold human rights protection which resulted many cases of human rights violations that cannot be resolved in Southeast Asia region. Consequently, ASEAN member countries realize that ASEAN needs to formulate regional mechanisms which functioning to cover and accommodate the rights of citizens⁵³. The encouragement to having a regional human rights mechanism in Southeast Asia region then gave birth to a standardization of human rights enforcement in Southeast Asia.⁵⁴ The existence of regional human rights mechanism historically was established after the end of World War II, the development of human rights mechanisms basically has been debated to implemented at the regional level by various argumentation around the world. In the end, The UN General Assembly has discussed to establish effective mechanism if it compared to the international human rights institution, the decision decided that the UN General Assembly allowed regional human rights mechanism which aimed to easier the UN to uphold human rights mechanism. The primary reasons UN to allowed the establishing a regional human rights mechanism also interfere based on

⁵² *Ibid.*,

⁵³ Li-ann Thio, 2014, Implementing Human Rights in ASEAN Countries: Promises to keep and miles to go before I sleep, *Yale Human Rights and Development Journal*, Volume 2 Article 1, p 2-8.

⁵⁴ *Ibid.*,

historical, cultural and geographical similarities, it is also purposed to easier the implementation of human rights in the whole of the world⁵⁵.

The milestone of ASEAN human rights mechanism generally established on November 2007, it became an important event when the ASEAN leaders agreed and signed the ASEAN Charter as a constitutive instrument in Southeast Asia region including human rights protection. This Charter becomes a positive step for ASEAN where the mechanism of human rights protection is a collective obligation from each country to complement each other in upholding the human rights⁵⁶. The Charter does not only provide the legal basis for ASEAN's legal status but also provides the other new legal norms for its Member States. One of the new legal norms is the mandate of the establishment of an ASEAN Human Rights Commission to enforce ASEAN human rights more comprehensive in Southeast Asia region. The establishment of ASEAN human rights commission basically has been enshrined in the Article 14 of the Charter where the article emphasizes the commitment of ASEAN Member States in its effort to protect and promote the human rights in Southeast Asia region.

However, the establishment of ASEAN Charter also influenced by the demand of international community that forces the ASEAN member countries to

⁵⁵ Ahmat Reza Fahlefi Pattihua, *Op.Cit*, p. 513-517.

⁵⁶ Muhammad Iqbal Rachman and Mohamad Faishol Soleh, The Analysis of Political and Theoretical Consideration about The Existence of Non-Interference Principle in ASEAN Human Rights Declaration (AHRD). Presented on "Human Rights Symposium for Youth: "Human Rights in The ASEAN Community Era" was held by Faculty of Law Universitas Indonesia Depok Calloborated with Human Rights Resource Centre on 28-30 November 2016.

guarantee and protect the rights of ASEAN community at that time⁵⁷. Consequently, the ASEAN member countries were felt difficult to conduct cooperative relationships with other countries outside ASEAN, including the agreements with other countries to other international organizations, it happened because the ASEAN member countries were felt unable to protect human rights against their citizens. Even though, one of the state responsibility is the duties in protecting their citizens⁵⁸ that clearly defined in the International Covenant on Civil and Political Rights (ICCPR)⁵⁹. Therefore, The establishment of ASEAN Charter to formulate the ASEAN human rights mechanism is recognize as the proper decision to uphold human rights in Southeast Asia when the state has no capability to enforce human rights.

In the end, the newest ASEAN human rights development enhanced by the mechanism in 2012 through the establishment of AHRD to revitalize the existence of ASEAN human rights mechanism in Southeast Asia region. It also aims to

⁵⁷ The Aceh Institute, Tawaran Konsep Perkuat Komisi Hak Asasi Manusia ASEAN, <http://acehinstitute.org/pojok-publik/hukum/tawaran-konsep-perkuat-komisi-hak-asasimanusiaasean.html#.WooHa0Bubi> accessed on 20 February 2018

⁵⁸ Thomas Buergenthal, 2002, International Law Human Rights in Nutshell, *A Thomson Company United State of America*, p. 2.

⁵⁹ Preamble of the International Covenant on Civil and Political Rights (ICCPR); “Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,. Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms.

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant”

completely the old mechanism which enshrined in ASEAN Charter. The long story of ASEAN human rights mechanism is becoming a long struggle of ASEAN leaders in order to protect and guarantee the rights of ASEAN community that possibly violated by the state.

2.2. Human Rights Bodies within ASEAN

The empowerment of human rights mechanism in ASEAN Charter also strengthen with the establishment of ASEAN human rights body that generally has been enshrined in Aarticle 14 of the ASEAN Charter. However, the process of establishing ASEAN human rights body is not easy, the ASEAN human rights body have been exist through long debates among the leaders of ASEAN member countries. Absolutely it happened because each of ASEAN member country has their own interests that do not want to be disturbed by any country, especially if the country has their national interests that during the negotiation of ASEAN human rights body has a case of human rights violation. Majority of ASEAN member countries still having some human rights issues on it. Therefore, the establishment of ASEAN human rights bodies are very difficult to establish due to the political interests among ASEAN member countries⁶⁰. Therefore, the mandate of ASEAN Charter to establish human rights bodies is became a positive step to empower the ASEAN human rights mechanism in Southeast Asia region. Based on the

⁶⁰ Wahyudi Djafar, 2014, Ardimanto Putra, and Hilman Handoni, Laporan Penelitian: Memperkuat Perlindungan Hak Asasi Manusia di ASEAN, International NGO Forum on Indonesian Development(INFID)&ICCO; Jakarta. p. 17-25.

argumentation above, there are two human rights bodies in Southeast Asia region as follows:

1. The ASEAN Inter-Governmental Commission on Human Rights(AICHR)

The formulation of AICHR as the mandate of ASEAN Charter in Article 14 was officially established on 23 October 2009 at the 15th ASEAN Summit in Hua Hin, Thailand. The framework of AICHR basically has been enshrined in the *Terms of Reference*(ToR) that has been formulated by the *ASEAN Foreign Ministers Meeting* on July 2009 at the 14th ASEAN summit in Phuket, Thailand. The ToR of AICHR is becoming a guideline to describe the legal authority of AICHR in Southeast Asia region, The ToR also comprehensively has been regulated several matters of AICHR such as the objectives, mandate and functions. However, the main purpose of AICHR was established to be an instrument in ASEAN human rights mechanism in order to enforce the promotion and protection function of ASEAN human rights mechanism in the middle of ASEAN community⁶¹.

The establishment of ASEAN human rights commission through the Article 14 of ASEAN Charter is becoming a solution to the human rights violations that exist in Southeast Asia region by conducted regional

⁶¹ AICHR, A Brief History of the ASEAN Intergovernmental Commission on Human Rights (AICHR), available at: <http://aichr.org/about/> accessed on 20 February 2018

legitimation when national legitimation were felt unable to respect and protect the human rights. The existence of AICHR as the human rights instrument was functioned to protect and promote human rights in Southeast Asia region, generally it has an important role for every individual, because when we discuss about human rights it will directly relate to the respect and recognition of everyone for free and independent life⁶². On the other side, the establishment of ASEAN human rights mechanism through AICHR in Southeast Asia region aims to re-emphasize that the ASEAN member countries have responsibility to protect, fulfill, and respect to the rights of their citizens⁶³. The establishment of ASEAN human rights mechanism also aims to legitimize the protection of human rights in Southeast Asia region which considered ineffective because there are still exist many human rights violations that conducted by ASEAN member countries in Southeast Asia region which especially occurred in some cases such as the violation of freedom, ethnic, racial, and belief⁶⁴. Basically the establishment of ASEAN human rights mechanism has been appropriate

⁶² Fero Sondakh Luntungan, 2014, Mekanisme Penyelesaian Sengketa Hak Asasi Manusia(HAM) di ASEAN, *Lex et Societatis Journal*, Vol. II No. 1, p. 85.

⁶³There are three state obligations to human rights, namely the obligation to respect, fulfill, and protect; a) Responsibility to respect: The obligation to respect is a duty which imposes to the state that state have to respect their citizen by not taking action on human rights limitation, b) Responsibility to fulfill: The obligation to fulfill is the obligation of the state to fulfill the citizen interest, and c) responsibility to protect: The obligation to protect is an obligation that requires active action and positive contribution of the State to ensure that no human rights violation that violated to their citizen. Muhammad Iqbal Rachman and Sahid Hadi, Reformulasi Kebijakan Hukum Terhadap Kewenangan Bertindak Datasemen Khusus 88(DENSUS 88) Dalam Memberantas Tindak Pidana Terorisme. Presented on “National Law Student Conference 2017” was held by Faculty of Law Universitas Airlangga Surabaya on 17-19 November 2017.

⁶⁴ Fero Sondakh Luntungan, *Op. Cit*, p. 86.

with the UN Charter which stated that the maintenance of international peace and security is becoming the primary organization's purpose which means that indirectly leading to the protection of human rights because peace and human rights are the things that could not be separated⁶⁵, it also appropriate with the main purpose of ASEAN Charter which stated that the ASEAN member should uphold peace and security in order to maintain stable region in Southeast Asia⁶⁶.

On the other side, the framework of AICHR has been described clearly in the Article 4 of ToR who serves as the working guidance of the AICHR as follows⁶⁷:

- i. To develop strategies for the promotion and protection of human rights and fundamental freedoms to complement the building of the ASEAN Community;
- ii. To develop an ASEAN Human Rights Declaration with a view to establishing a framework for human rights cooperation through various ASEAN conventions and other instruments dealing with human rights;

⁶⁵ *Ibid.*

⁶⁶ ASEAN Charter 2008; Asean Charter stated that the ASEAN Charter was created which purpose to maintain and enhance peace, security and stability and further strengthen peace-oriented values in the region.

⁶⁷ The article 4 of INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS (Terms of Reference) 2009.

- iii. To enhance public awareness of human rights among the peoples of ASEAN through education, research and dissemination of information;
- iv. To promote capacity building for the effective implementation of international human rights treaty obligations undertaken by ASEAN Member States;
- v. To encourage ASEAN Member States to consider acceding and ratifying international human rights instruments;
- vi. To promote the full implementation of ASEAN instruments related to human rights; To provide advisory services and technical assistance on human rights matters to ASEAN sectoral bodies upon request;
- vii. To engage in dialogue and consultation with other ASEAN bodies and entities associated with ASEAN, including civil society organisations and other stakeholders, as provided for in Chapter V of the ASEAN Charter;
- viii. To consult, as may be appropriate, with other national, regional and international institutions and entities concerned with the promotion and protection of human rights;
- ix. To obtain information from ASEAN Member States on the promotion and protection of human rights;
- x. To develop common approaches and positions on human rights matters of interest to ASEAN;

- xi. To prepare studies on thematic issues of human rights in ASEAN;
- xii. To submit an annual report on its activities, or other reports if deemed necessary, to the ASEAN Foreign Ministers Meeting; and
- xiii. To perform any other tasks as may be assigned to it by the ASEAN Foreign Ministers Meeting.

AICHR also has a working mechanism as an advisory body, the performance of AICHR was influenced by the consultation and consensus on the decision making with a review of its performance twice a years. The problem-solving mechanism within the AICHR also resolves by making decisions based on the consultation and consensus⁶⁸. It was enshrined in Chapter VII Article 20 of the ASEAN Charter about Decision Making Process. The consensus dispute resolution was inspired by the ASEAN values that ensuring the equality between ASEAN member countries and preventing the marginalization or discrimination in the decision making process. The consensus means that the principle allowance to all ASEAN member countries describe their opinion to be a consideration for the dispute resolution to produce

⁶⁸ Anak agung, wiwik dharmiasih, and Bagus Surya, 2017, Penyebab Kegagalan ASEAN dalam Penyusunan Code of Conduct Sengketa Laut Cina Selatan Selama Periode 2002-2012, *Hubungan Internasional Journal*, Volume 1 Number 1, p. 8-9.

a decision. If consensus is not reached, ASEAN must renegotiate until the consensus is reached⁶⁹.

The position of AICHR in Southeast Asia region is part of the ASEAN organizational structure that acts as a consultative and advisory body in ASEAN. In addition, AICHR is also operating as a human rights institution in ASEAN with general responsibility for the promotion and protection of human rights in the Southeast Asia region⁷⁰. In terms of composition, AICHR comprises of representative from each ASEAN member countries. The composition of AICHR generally is regulated under Article 5⁷¹ of the ToR. Although the ToR does not specifically stated the exact number of members of this Commission, it can be concluded that the number of members are adjusted to the number of member countries. The representative of AICHR has limitation period of works up to 3 years and might be re-appointed in the second time. The AICHR meetings are held regularly 2 times a year and it is required to report the condition of human rights situation in Southeast Asia region to the Minister for Foreign Affairs of each country⁷².

⁶⁹ *Ibid.*,

⁷⁰ DetikNews, Lembaga HAM ASEAN Dinilai Overacting dan Tertutup, available at: <https://news.detik.com/berita/d-1911540/lembaga-ham-asean-dinilai-overacting-dan-tertutup> accessed on 19 February 2018.

⁷¹ ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS (Terms of Reference) 2009. Article 5: 5.1 The AICHR shall consist of the Member States of ASEAN. 5.2 Each ASEAN Member State shall appoint a Representative to the AICHR who shall be accountable to the appointing Government.

⁷² Kementrian Pemberdayaan Perempuan dan Perlindungan Anak(KEMENPPPA), Pointers ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS (AICHR),

2. **The ASEAN Commission on The Promotion and Protection of the Rights of Women and Children (ACWC)**

Besides AICHR, The ASEAN also have human rights special body to protect and guarantee the rights of women and children through the establishment of ACWC that was released on 7 April 2010 in Ha Noi, Viet Nam, at the 16th ASEAN Summit. The structure of ACWC contained twenty representatives of each ASEAN member countries, similarly with the AICHR, ACWC representative limitation period of works up to three years and might be re-appointed for a second term⁷³. However, the structure could be change any time, the government has authority to replace its representative based on his consideration without notice or explanation. The position of ACWC is becoming a sectoral body who has special task to uphold human rights neforcement in the scope of woman and children⁷⁴.

The existence of ACWC is becoming a collaboration instrument for women and children as a platform that integrate the all of ASEAN member countries who have been ratified *the International Convention on the Elimination of All Forms of Discrimination against Women*

available at: <https://www.kemenpppa.go.id/lib/uploads/list/6e178-pointers-asean-intergovernmental-commission-on-hhumas-right.pdf> accessed on 20 February 2018

⁷³ ASEAN COMMISSION ON THE PROMOTION AND PROTECTION OF THE RIGHTS OF WOMEN AND CHILDREN(ACWC) Term of Reference 2010. Article 6(Composition): The ACWC shall consist of the Member States of ASEAN. 6.2. Each ASEAN Member State shall appoint two representatives, one representative on women's rights and one representative on children's rights to the ACWC

⁷⁴ ASEAN Commission on the Promotion and Protection of the Rights of Women and Children, About ACWC, available at: <https://acwc.asean.org/about/> accessed on 21 February 2018.

(CEDAW), and the Convention on the Rights of the Child (CRC). Hence the similarity of ratification in the international scope have been integrate the leaders of ASEAN to give more concern about the rights of children and women in Southeast Asia region⁷⁵. It is also supporting from the population data in Southeast Asia region which has been shown us that a half of population in Southeast Asia region are woman and children, therefore the decision of ASEAN's leaders to establish special body who has special concern about woman and children are very important. The ASEAN could faces various challenges in this field of cooperation such as domestic and sexual violence in women and children, exploitation of women in the form of human trafficking, abuse and discrimination in migration⁷⁶.

In the developemnt of ASEAN to empower the concern on the issue of the protection of women and children of ASEAN, the ASEAN's leaders also develop the guideline that can be used by ASEAN member countries in handling trafficking cases, especially women and children trafficking victims⁷⁷. In the 10th ACWC meeting in Jakarta on 25-27 February 2015 the ASEAN agreed to strengthen the legal basis of

⁷⁵ Klarise Estorninos, 2017, A Legal Analysis of Selected ASEAN Declarations and Conventions from a Child Rights Perspective, Unpublished Thesis Faculty of Law Leiden University, p. 9-13. Available at: <https://www.universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/instituut-voor-privaat-recht/jr-estorninos-thesis-2017.pdf> 9-16 accessed on 21 February 2018

⁷⁶ *Ibid.*,

⁷⁷ Sekretariat Nasional ASEAN-Indonesia, Isu-Isu yang Dibahas dalam Kerja Sama Pilar Sosial Budaya ASEAN: Perlindungan Perempuan dan Anak, available at: <http://setnas-asean.id/pilar-sosial-budaya> accessed on 21 February 2018

ACWC to protect the woman and children by adopted *The Gender Sensitive Guideline for Handling Women Victims of Trafficking in Persons*. These guidelines was functioned to be a platform for law enforcement, social workers, health workers, service providers, NGOs and other concerned parties dealing with trafficking cases⁷⁸. The legal basis also has purposed in improving access to justice for trafficking victims. On the other side, to optimize the function of ACWC, the authority of ACWC has been comprehensively regulated in the ACWC work plan (2016-2020), there are 16 special thematic area as follows⁷⁹:

- (i) strengthening institutional capacity of ACWC;
- (ii) elimination of violence against women and children;
- (iii) the right of children to participate in all affairs that affect them;
- (iv) trafficking in women and children;
- (v) promotion and protection of the rights of women and children with disabilities;
- (vi) Child Protection System: Comprehensive / Integrative Approach for Children in Need for Special Protection (e.g. victims of abuse and neglect, trafficking, child labour, children affected by statelessness, undocumented migrant

⁷⁸ *Ibid.*,

⁷⁹ The ACWC Work Plan (2012-2016)

- children, HIV/AIDS, natural disaster, conflicts, and children in juvenile justice system / children in conflict with the law);
- (vii) the right to early childhood and quality education; (viii) promoting implementation of international, ASEAN and other instruments related to the rights of women and children;
 - (viii) gender equality in education (textbook, curriculum, equal access);
 - (ix) social impact of climate change on women and children;
 - (x) strengthening economic rights of women with regards to feminization of poverty, women's rights to land and property;
 - (xi) adolescent physical and mental health;
 - (xii) gender perspective in policies, strategies and programs for migrant workers;
 - (xiii) gender mainstreaming;
 - (xiv) women participation in politics and decision making, governance and democracy, and
 - (xv) early marriage.

The framework of ACWC generally does not much different, ACWC also used decision making process based on consultation and consensus in accordance with Article 20 of the ASEAN Charter. The

decision making mechanism of ACWC also has been described comprehensively in the ToR of ACWC⁸⁰.

Both of ASEAN human rights bodies also has cooperation within the others sectoral human rights bodies, for the example, the result study of ACWC have to report to the *ASEAN Ministerial Meeting on Women* (AMMW). On the other side, ACWC also has cooperation between ASEAN Committee on Women (ACW) which concern about gender issues, Senior Official Meeting on Transnational Crime (SOMTC) which concern about the violation of human trafficking, and Senior Official Meeting on Social Welfare and Development (SOMSWD). The ACWC also has close relationship with AICHR that cover the ASEAN human rights mechanism more general than ACWC. Therefore, The framework of ASEAN human rights bodies also including the coordination with sectoral bodies in ASEAN⁸².

2.3 Legal Source of ASEAN Human Rights Mechanism

The existence of human rights in southeast asia could be categorize as a new things in Southeast Asia region if we compare to another regional mechanism, it is because the age of ASEAN human rights mechanism are not more than 10 years

⁸⁰ ACWC Term of Reference 2010. Article 7: Decision making in the ACWC shall be based on consultation and consensus in accordance with the ASEAN Charter.

⁸¹ Alvian Rizky H, 2017, Dilema Hak Asasi Manusia Di Asia Tenggara: Ketiadaan Peran Asean dalam Kasus Perekrutan Tentara Anak di Myanmar dalam Perspektif English School, *Journal of International Relations*, Volume 3, Nomor 1, p. 92-93. Available at: <http://ejournal-s1.undip.ac.id/index.php/jihi> accessed on 21 February 2018

⁸² Sekretariat Nasional ASEAN-Indonesia, Isu-Isu yang Dibahas dalam Kerja Sama Pilar Sosial Budaya ASEAN: Perlindungan Perempuan dan Anak, available at: <http://setnas-asean.id/pilar-sosial-budaya> accessed on 21 February 2018

since the ASEAN Charter was formed in 2008⁸³. Therefore, the ASEAN Charter is becoming a milestone of human rights enforcement in Southeast Asia region, the establishment of ASEAN charter also became the legal standing of ASEAN human rights mechanism that clearly enshrined in the Article 1(1) of ASEAN Charter⁸⁴. On the other side, the platform of ASEAN human rights mechanism to enforce human rights more comprehensively also enshrined in the Article 14 of ASEAN Charter related to the establishment of ASEAN human rights commission. AICHR was established with the aim of promoting and protecting human rights in accordance with the ASEAN framework⁸⁵.

The establishment of ASEAN human rights mechanism generally must become a commitment and legal basis for human rights protection in the Southeast Asia region. ASEAN human rights mechanism become the one of most important aspects that should be owned by ASEAN which implicitly contained in the Bangkok Declaration as an instrument that serves to regulate and maintain the harmony, peace, and security in Southeast Asia region⁸⁶.

However, the legal basis of ASEAN human rights mechanism is becoming the primary needs that should be own by ASEAN, it is proved that the ASEAN

⁸³ Chrisbiantoro, 2014, *Kewajiban Negara dalam Penanganan Kasus-Kasus Pelanggaran HAM dan Pelanggaran HAM yang Berat di Indonesia*(Buku Panduan Mengukur Kewajiban Negara), *Komisi Untuk Orang Hilang dan Korban Tindak Kekerasan*(KONTRAS); Jakarta p 18-20.

⁸⁴ The ASEAN Charter 2008. Chapter I Purposes and principles in article 1(1): To maintain and enhance peace, security and stability and further strengthen peace-oriented values in the region

⁸⁵ The ASEAN Charter 2008; Article 14 ASEAN Charter was stated to establish ASEAN human rights institution; (1) 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. (2) This ASEAN human rights body shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting.

⁸⁶ Fero Sondakh Luntungan, *Op. Cit.*, p.85-90.

member countries during this time was enforce the human rights only based on his will because there is no legal certainty that control the ASEAN human rights comprehensively in Southeast Asia region. The real evidence that could be seen in the track record of ASEAN human rights enforcement where the ASEAN member countries has various interest especially in the international human rights law that ASEAN member countries only ratified the international human rights convention that appropriate with the needs of each ASEAN member countries. Politically, the only one convention that has been ratified by all ASEAN member countries is the *International Convention on the Rights of the Child*. On the other convention, the ASEAN member countries was felt that they only want to ratified if the context of the human rights convention appropriate with the state interest. This kind of situation which has been differentiate between the ASEAN than another regional organization in the scope of human rights enforcement. The ASEAN member countries has freely based on his will to ratify or not ratify the human rights convention based on the state interest, for the example, Brunei was decide to do not ratify CAT and Malaysia politically do not want to sign the ICCPR⁸⁷.

However, The commitments of ASEAN member countries by ratifying international conventions of human rights law can be interpreted as a respect for tribute against human rights. The states who ratified the human rights convention claim that they are fully committed and compliant to protect human rights in accordance with the provisions in the convention. Ratification is often related to the

⁸⁷ Wahyudi Djafar, 2014, Ardimanto Putra, and Hilman Handoni, Laporan Penelitian: Memperkuat Perlindungan Hak Asasi Manusia di ASEAN, International NGO Forum on Indonesian Development(INFID)&ICCO; Jakarta. p. 20-22.

behavior and commitment of the state to the international human rights legal regime, it also serves to stop the human rights violations that conducted by several countries⁸⁸. On the other side, ASEAN member countries was felt that the international human rights convention do not directly proper if the convention implemented in ASEAN member countries because the ASEAN member countries have their own culture which different with the internation convention of human rights⁸⁹. Because of that, ASEAN members have different point of view regarding to ratify the international convention of human rights, the ASEAN member countries has their interest to ratify the convention based on his need. It is become the differentiation legal basis in Southeast Asia region be not the same, and difference with the others regional human rights mechanism who have similarity in ratifying the international convention of human rights⁹⁰. Based on the argumentation above, there are the tables of ratification status of international human rights convention by ASEAN member countries⁹¹:

The Table of Ratification Status of International Human Rights Convention⁹²

Table 2.1 Ratification Status of International Human Rights Convention

⁸⁸ Debora Aprilany Grace Rompis, 2017, Praktik Ratifikasi Terhadap Perjanjian Internasional Di Bidang Hak Asasi Manusia, *Lex Crimen Journal*, Volume VI number 4, p. 135-139.

⁸⁹ Heribertus Jaka Triyana, *Op.Cit*, p. 623-624.

⁹⁰ *Ibid.*,

⁹¹ Lembaga Bantuan Hukum(LBH) Jakarta and American Bar Association Rule of Law Initiative, Pelatihan Advokasi Hukum Asia Tenggara: Memperkuat Sistem Hak Asasi Manusia ASEAN melalui Advokasi Hukum, *Manual Pelatihan LBH Jakarta*, Pp. 21. Available at: https://www.americanbar.org/content/dam/aba/directories/roli/asean/aba_rolia_asean_strengthening_human_rights_system_through_legal_advocacy_indonesian_1013.authcheckdam.pdf accessed on 22 February 2018.

⁹² Data 2013

CONVENTION/ STATE	ICCPR	ICESCR	CAT	CEDAW	CRC
INDONESIA	✓	✓	✓	✓	✓
MYANMAR				✓	✓
MALAYSIA				✓	✓
SINGAPORE				✓	✓
PHILIPPINES	✓	✓	✓	✓	✓
CAMBODIA	✓	✓	✓	✓	✓
THAILAND	✓	✓	✓	✓	✓
LAO PDR	✓	✓		✓	✓
VIETNAM	✓			✓	✓
BRUNEI				✓	✓

To integrate the common interest in order to uphold regional human rights in Southeast Asia region which proper with the ASEAN values, the ASEAN member countries was agreed to establish the new legal basis in 2012 namely ASEAN Human Rights Declaration(AHRD), ASEAN leaders was intended to make a new conception and open the opportunity for the ASEAN human rights mechanism to guarantee and protect human rights more comprehensively⁹³.

⁹³ Rachminawati, 2014, ASEAN Human Rights Declaration: A New Form of Universalism, *Hukum Internasional Journal*, Volume 11 Number 3, p. 396-399.

However, the existence of ASEAN human rights mechanism is very unique when the ASEAN human rights mechanism was formulated by ASEAN values which clearly described in ASEAN Human Rights Declaration 2012 in the Chapter of general principle, AHRD stipulates the values of international human rights law to interpreted in the ASEAN human rights mechanism⁹⁴. The AHRD also ensures the ASEAN human rights mechanism has fullfil the objectives of international human rights convention based on ASEAN way, it is also aims to implemented the common values in UDHR, as follows:

1. International Covenant on Civil and Political Rights (ICCPR)

The AHRD generally interpreted the values of ICCPR in Southeast Asia region through the Article 1 of general principles⁹⁵:

“All persons are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of humanity”

Those article basically purposed to re-emphasize the rights of ASEAN community in the scope of civil and political fields. The interpretation of AHRD in the scope of civil and political rights in human rights law generally defined as the rights of people who came from the dignity that owned by anyone, on the other side, the civil and political rights also have to be guaranted and respected by the stakeholder that resulted to the people who has freedom to enjoy their rights such as the rights of religion and life

⁹⁴ *Ibid*, p. 399-341.

⁹⁵ The article 1 of ASEAN Human Rights Declaration 2012

who cannot be interfered by the state. The state also have responsibility to facilitate the society in order to fullfil their needs in Southeast Asia region⁹⁶.

2. International Covenant on Economic, Social and Cultural Rights(ICESCR)

Besides the ICCPR, the AHRD also known as the legal basis who accomodate the values that interpreted from ICESCR to be implemented in Southeast Asia region through the Article 2 of the general principles⁹⁷:

“Every person is entitled to the rights and freedoms set forth herein, without distinction of any kind, such as race, gender, age, language, religion, political or other opinion, national or social origin, economic status, birth, disability or other status”

The AHRD on this article illustrates that ASEAN member countries indirectly must respect and implement the ICESCR, ASEAN member countries also recognize that the state has an obligation to the individuals and communities in fullfil the rights that guaranteed in ICESCR. In this article, AHRD interpreted the values of human rights about economic, social and cultural aspects proper with the UDHR in legal terms around the Southeast Asia region. The ASEAN shall guarantee the fulfillment of the economic, social and cultural rights through the ASEAN community⁹⁸.

3. Convention Againts Torture(CAT)

⁹⁶ Institute For Criminal Justice Reform(ICJR), Mengenal Kovenan Internasional Hak Sipil dan Politik, avaible at: <http://icjr.or.id/mengenal-kovenan-internasional-hak-sipil-dan-politik/> accessed on 21 February 2018.

⁹⁷ The article 2 of ASEAN Human Rights Declaration 2012

⁹⁸ AICHR, Deklarasi HAM ASEAN & Pernyataan Phnom Penh Mengenai Pengesahan Deklarasi HAM ASEAN, avaible at: <http://aichr.or.id/index.php/id/aichr-indonesia/mekanisme-ham/dokumen/14pernyataan-phnom-penh?showall=1&limitstart=> accessed on 21 February 2018

The legal basis of AHRD also accommodate the protection against torture in Southeast Asia region through the Article 3 of AHRD⁹⁹:

“Every person has the right of recognition everywhere as a person before the law. Every person is equal before the law. Every person is entitled without discrimination to equal protection of the law”

AHRD through this article want to emphasize that the treatment of ASEAN member countries shall not exercise a cruel treatment, and inhuman or degrading treatment or punishment to the ASEAN community. AHRD prohibits the ASEAN member countries through this article to commit acts which undermine human dignity that might include pain or suffering that will decrease the dignity of people¹⁰⁰.

4. Convention on the Elimination of Discrimination Against Women (CEDAW)

The protection against woman generally has been comprehensively protected through the establishment of ACWC, however the protection of woman also has been enshrined in Article 4 of AHRD¹⁰¹:

“The rights of women, children, the elderly, persons with disabilities, migrant workers, and vulnerable and marginalised groups are an inalienable, integral and indivisible part of human rights and fundamental freedoms”

This article comprehensively functioned as an instrument that implements CEDAW values as an international human rights convention to protect and

⁹⁹ The article 3 of ASEAN Human Rights Declaration 2012

¹⁰⁰ Institute For Criminal Justice Reform (ICJR), Kovensi Anti Penyiksaan, available at: <http://icjr.or.id/konvensi-anti-penyiksaan/> accessed on 22 February 2018.

¹⁰¹ The article 4 of ASEAN Human Rights Declaration 2012

regulate women's rights in the Southeast Asia region. In addition, ASEAN leaders through AHRD also want to eliminate all kinds of gender discrimination against women in Southeast Asia region¹⁰².

5. Convention on the Rights of the Child(CRC)

The establishment of AHRD specifically has special concern to the issues of children in Southeast Asia region inspired from the Article 4 of AHRD: “The rights of women, children, the elderly, persons with disabilities, migrant workers, and vulnerable and marginalised groups are an inalienable, integral and indivisible part of human rights and fundamental freedoms”

The issues of children also become a main concern of ASEAN member countries to be protected specially, the protection of children also influenced from many cases of human rights violations that involving children as a main object of human rights violation. Therefore, the establishment of AHRD also want to re-emphasize the commitment of ASEAN member countries in order to protect children in the Southeast Asia region.¹⁰³

2.4 General Principles of ASEAN Human Rights Mechanism

Generally, if we put a huge attention to the ASEAN human rights mechanism in Southeast Asia region, there are special treatments because the ASEAN human rights mechanism implemented the ASEAN values in all kind

¹⁰² Lembaga Studi dan Advokasi Masyarakat(ELSAM), Hak Asasi Perempuan dan Konvensi CEDAW, available at: <http://referensi.elsam.or.id/2014/09/hak-asasi-perempuan-dan-konvensi-cedaw/> accessed on 22 February 2018.

¹⁰³ Alvian Rizky H, 2017, Dilema Hak Asasi Manusia di Asia Tenggara: Ketiadaan Peran Asean dalam Kasus Perekrutan Tentara Anak di Myanmar dalam Perspektif English School, *Journal of International Relations*, Volume 3 Nomor 1, p. 87-92.

activities of ASEAN. The ASEAN human rights mechanism generally containing several norms or values that enshrined as ASEAN's identity that become a manual guideline to conducting relationship among ASEAN member countries, the ASEAN values also become the unique one that distinguished it from the others regional human rights mechanism¹⁰⁴.

The ASEAN human rights mechanism is recognised different from the others regional human rights mechanism because basically ASEAN want to control regional stability through it values that designed to adjust with the ASEAN member countries that come from the same history as a colonized countries. The ASEAN member countries reasoned that the ASEAN values were established to control Southeast Asia region that prevented to turn up the conflict if the ASEAN member countries have relationship without guidance, the ASEAN leader at that time such as Mahathir Mohammad and Lee Yuan Yew believe that the different culture and colonized history becomes a unique challenge for ASEAN member countries that should be careful in order to having relationship between ASEAN member countries to avoid conflict¹⁰⁵.

In establishing relations between ASEAN member countries, ASEAN initiated to establish general principles in the ASEAN Charter that become as one of the key points of the ASEAN to maintaining all ASEAN activities which directly enhance the peace, security and stability in the Southeast Asia region. The position

¹⁰⁴ Tommaso Visone, 2017, The "ASEAN Way". A decolonial path beyond "Asian values"?, *Perspectives on Federalism journal*, Vol. 9 issue 1, p 1-5.

¹⁰⁵ *Ibid*, p. 1-8.

of ASEAN general principles is very vital for ASEAN member countries¹⁰⁶. Therefore, the position of general principles of ASEAN have been clearly enshrined in the Article 2(1) of ASEAN Charter¹⁰⁷:

- i. respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States;
- ii. shared commitment and collective responsibility in enhancing regional peace, security and prosperity
- iii. renunciation of aggression and of the threat or use of force or other actions in any manner inconsistent with international law;
- iv. reliance on peaceful settlement of disputes;
- v. non-interference in the internal affairs of ASEAN Member States;
- vi. respect for the right of every Member State to lead its national existence free from external interference, subversion and coercion;
- vii. enhanced consultations on matters seriously affecting the common interest of ASEAN;
- viii. adherence to the rule of law, good governance, the principles of democracy and constitutional government;
- ix. respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice;

¹⁰⁶ Dewa Gede Sudika Mangku, 2014, Meneropong Prinsip Intervensi Yang Masih Melingkar Dalam ASEAN, *PERSPEKTIF Journal*, Volume XIX Number 3, p.180-181.

¹⁰⁷ The article 2(1) of ASEAN Charter 2008

- x. upholding the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN Member States;
- xi. abstention from participation in any policy or activity, including the use of its territory, pursued by any ASEAN Member State or non-ASEAN State or any non-State actor, which threatens the sovereignty, territorial integrity or political and economic stability of ASEAN Member States;
- xii. Respect for the different cultures, languages and religions of the peoples of ASEAN, while emphasising their common values in the spirit of unity in diversity;
- xiii. The centrality of ASEAN in external political, economic, social and cultural relations while remaining actively engaged, outward-looking, inclusive and non-discriminatory; and
- xiv. Adherence to multilateral trade rules and ASEAN's rules-based regimes for effective implementation of economic commitments and progressive reduction towards elimination of all barriers to regional economic integration, in a market-driven economy.

The ASEAN Charter also emphasize that the ASEAN member countries have to obey absolutely to the general principles of ASEAN, the obidient of ASEAN member countries in order to implemented in all kind of ASEAN activities not except in human rights enforcement. The legal basis of ASEAN member

countries have to hold the implementation of ASEAN general principles generally has been enshrined in Article 2(1) of ASEAN Charter¹⁰⁸:

“In pursuit of the Purposes stated in Article 1, ASEAN and its Member States reaffirm and adhere to the fundamental principles contained in the declarations, agreements, conventions, concords, treaties and other instruments of ASEAN”

Therefore, the implementation of general principles of ASEAN especially in human rights enforcement is becoming a challenge to the ASEAN member countries in interpreted the ASEAN general principles simultaneously to enforce human rights in Southeast Asia region. Since the establishment, the ASEAN has developed with their own culture of diplomacy namely ASEAN Way, the ASEAN culture values generally prioritize the harmony and avoid conflict. Those values has been enshrined since the establishment of Bangkok Declaration 1967. Hence the implementation have strong connection with the existence of ASEAN general principles, the ASEAN member countries has absolute obligation to implement the ASEAN general principle in all of condition to achieve the common interest that has been formulated since the establishment of ASEAN as regional organization¹⁰⁹.

On the main point, it can be concluded that the ASEAN values which becomes the basic norm through the ASEAN member countries was resulted some

¹⁰⁸ The Article 2(1) of ASEAN Charter 2008

¹⁰⁹ Kementerian Luar Negeri Republik Indonesia (KEMLU RI), 2011, Ayo Kenali ASEAN, Jakarta: Sekretariat of ASEAN, p. 12-13. Available at: <https://www.kemlu.go.id/Documents/Tentang%20ASEAN/Buku%20Ayo%20Kita%20Kenal%20ASEAN.pdf> accessed on 22 February 2018.

principles in Southeast Asia region such as state sovereignty which should be respected by ASEAN member countries, non-interference, and peaceful settlement on every dispute among ASEAN member countries. This general principle basically has been commented by some researcher which stated that the general principle of ASEAN human rights has been contrary with the international human rights standard and norms, the ASEAN member countries reasoned that the ASEAN has their own culture to interpret their own regional mechanism because ASEAN member countries was felt that the human rights came from the western which contained western values that do not appropriate with the condition in Southeast Asia region. On the other side, ASEAN human rights mechanism through the general principle does not rejected the existence of international human rights norms that has been ratified by ASEAN member countries. The ASEAN member countries tried to interpret their own human rights mechanism which appropriate with the nature norm which living in Southeast Asia region¹¹⁰. Therefore, there are three ASEAN's general principles that has important role to enforce ASEAN human rights mechanism as follows¹¹¹:

¹¹⁰ Tommaso Visone, *Op. Cit*, p. 5-9.

¹¹¹ The Treaty of Amity and Cooperation in Southeast Asia region 1967, The purpose of this treaty are to promote perpetual peace, everlasting amity and cooperation among their peoples which would contribute to their strength, solidarity and closer relationship. In their relations with one another, the High Contracting Parties shall be guided by the following fundamental principles: a. Mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations; b. The right of every State to lead its national existence free from external interference, subversion or coercion; c. Non-interference in the internal affairs of one another; d. Settlement of differences or disputes by peaceful means; e. Renunciation of the threat or use of force; f. Effective cooperation among themselves.

a. Respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States

At the first level, this principle becomes an instrument which aimed to respect for the sovereignty and independence of each ASEAN member countries. This principle has play an important role in Southeast Asia region, the principle becomes an instrument which functioned to prevent the conflict among ASEAN member countries who have different colonial background histories and cultures. According to Jean Bodin which has been stated that the sovereignty is a state authority which has absolute power that could not be shared and separated from the state. Jean Bodin also stated that the sovereignty of state has unlimited power that could not be limited or interfere by another state. On the other side, the possession of supreme authority which owned by state could be contrary to the international law which governing the relation between states. If this case the international law has the lower position than the sovereignty of state because the state has the highest authority and does not want to recognize the existence of a higher power than the state power. As the result, international law will be underestimated because the states do not want to sacrifice their sovereignty if there is any contradiction with the international law¹¹².

¹¹² Erika and Dewa Gede, 2014, Meneropong Prinsip Non-Intervensi Yang Masih Melingkar Dalam ASEAN, *Perspektif Journal*, Volume XIX No. 3, p. 181.

Therefore, why the ASEAN member countries was made the sovereignty become the key principle in the ASEAN cooperation because the ASEAN member countries wanted to make an equal position between each member in the organization, they have the same position without any discrimination of social degree that aimed to respect every ASEAN member countries through their sovereignty and independence. ASEAN wants to be an organization that treats its members as equal to one another, this is very different from the existing system in the UN member because the UN has *Veto Rights*¹¹³ which only owned by some super power state which is often used as a political tool to achieve the state interests¹¹⁴.

However, the sovereignty of state in international law generally has been legitimate in UN Charter 1945 article 2 (4) which stated that the sovereignty of state basically is allowed, as long as the limitation aimed as preventive action if an interference or intervention which conducted by some state could be scared to violates the territorial integrity of

¹¹³ The veto rights generally has been stated that Vote and Majority Required in Article 27 of the UN Charter 1945 which has been regulated as follow: “1. Each member of the Security Council shall have one vote, 2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members, 3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting”. Basically the veto rights is still unidentify because there is no clear definition about it in the UN Charter 1945. But the veto rights is the rights which owned by permanent security council that has super power authority in the world that won in the world war II, therefore the veto rights of each super power vote has strong power in the UN because if the decision of UN has been *veto* by one of the state who owned *veto rights*, it could be cancel the decision because one *veto rights*. This term that basically scared by ASEAN if the ASEAN member countries used their political interest among the relationship in ASEAN. Available at: <http://www.un.org/en/sc/meetings/voting.shtml>, accessed on 4 January 2018.

¹¹⁴ Erika and Dewa Gede, *Op. Cit.*, p. 181-182.

another state, political independence and the limitation do not separated with the purposes of the United Nations¹¹⁵.

b. Non- Interference Principle

The existence of Non-interference which become a basic guideline through ASEAN member countries in every instrument which produced by ASEAN member countries has been existed start from the enactment of TAC in 1967. The non-interference principle was born in the middle of ASEAN member countries as the instrument which functioning to prevent conflict and maintaining peace and security in Southeast Asia region. It also emphasize in ASEAN Charter 2008 that the state should have to respect and adhere of every principle which has been poured in TAC 1967¹¹⁶.

The non-interference principle basically emphasize the values of respect territorial integrity and sovereignty which owned by each ASEAN member countries, the settlement of any political issues through discussion, and take priority to make cooperation in the aspects of regional defense and security based on the basic norms which should be obey and adhere by ASEAN member countries. Therefore, the

¹¹⁵ Article 2 (4) the United Charter 1945, The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles; “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”

¹¹⁶ The ASEAN Charter 2008. ASEAN member countries through the ASEAN Charter has revitalize that the ASEAN member countries should be obey to the principle which has been poured in TAC 1976: “Respecting the fundamental importance of amity and cooperation, and the principles of sovereignty, equality, territorial integrity, non-interference, consensus and unity in diversity. Adhering to the principles of democracy, the rule of law and good governance, respect for and protection of human rights and fundamental freedoms”

ASEAN member countries prohibited intervention in their international relationship because they are very respectful to the ASEAN Values in Southeast Asia region especially the non-interference principle to respect the differences of culture and colonize experience. On the other side, we should realize that the non-interference principle becomes one of the most important principle which guide cooperation among ASEAN member countries to conducting their international relationship in order to accomodate peace and stability among ASEAN member countries. The ASEAN member countries have commitment to respect another state affairs through the non-interference principle. Another reason was related to the domestic security concerns around Southeast Asia region, diversity among the Southeast Asian nations such as race, religion, culture combined with the weak of state structures and unstable regime become the primary reason that why ASEAN member countries is very dependent to the non-interference principle¹¹⁷.

Perhaps, the non-interference principle has significantly contributed to the Southeast Asia region in order to keep the peace and stability because the ASEAN member countries has different colonize background which impacted to the diversity of culture that applied in each ASEAN member countries. The political background related to the private interest of each country which become the reason of ASEAN member countries agree to implemented the non-interference principle

¹¹⁷Muhammad Iqbal Rachman and Mohammad Faishol Soleh, *Op. Cit*, p. 2-3.

as a peace solution that feared going to turn up conflict if every country can interfere the sovereignty and domestic affairs another countries, the sensitive characteristic that owned by each ASEAN member which has various domestic problem due to the diversity historical colonize also become the main reason that why does the ASEAN need the non-interference principle as the main instrument that serves to maintain peace. The non-interference principle also has been supported the sovereignty principle which guarantee the independence and sovereignty of every ASEAN member countries¹¹⁸.

The history of the existence of non-interference principle started from the past of World War II which winning by five countries such as US, UK, France, China, and Russia. The state basically was prohibited to interfere another state in all aspects including political and military intervention when the state is facing some problem which related to their domestic affairs in the country. However, in the history was noted that the super power state was broke the principle with various excuses that impacted the UN was force to regulate it into the positive law which has been poured in Article 2 UN Charter that described about sovereignty and non-interference¹¹⁹, generally the provisions of the UN Charter was

¹¹⁸ Erika and Dewa Gede, *Op.Cit*, p. 179-182.

¹¹⁹ UN Charter 1945; Article 2 verse 7 which has close relationship with the non-interference principle as globally;” Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII”

clearly explain that the state has prohibit to interfere the another state affairs.

Generally, the existence of non-interference principle impacted that the ASEAN member countries should be tolerate in the diversity or differences through their culture or political approachment which operated by ASEAN member countries. As the result, ASEAN member countries refrain to make open criticism through another ASEAN member countries.

c. Settling the dispute by peacefully manner

ASEAN as a regional organization generally has their own way which become a guideline since the establishment of the organization, the guideline which has function to guide the operation of ASEAN member countries called as “The ASEAN Way”¹²⁰. The ASEAN Way basically has an important role in order to maintained the peace and security among ASEAN member countries, ASEAN Way until today has a role to maintain regional stability and keep the harmonization in the international relationship between ASEAN member countries. On

¹²⁰ The ASEAN Way has role which becomes a platform for ASEAN member countries related to how the ASEAN member countries should conduct their international relations in the Southeast Asia region. ASEAN Way according to some observers of international relations in the Southeast Asia region stated that the ASEAN Way becomes a knife with double-edge. One side, ASEAN Way until today has played an important role because the ASEAN Way was felt very effective in maintaining harmony among ASEAN member countries. But on the other side, the ASEAN Way has become a primary factor through the ASEAN as a regional organization that unable to perform its roles and functions properly. ASEAN Way is the main cause of unintegration of ASEAN member countries especially in human rights mechanism in Southeast Asia region. I Made, Sukma, and Putu, 2017, ASEAN Way Sebagai Sebuah Paradoks: Kasus Terorisme Terhadap Kelompok Abu Sayyaf, *Hubungan International Journal*, Volume 1 No. 1, p. 3-4. Available at: <https://ojs.unud.ac.id/index.php/hi/issue/view/2229>, accessed on 4 January 2018.

the other side, ASEAN Way also has important role to organizing and resolving disputes through legal or diplomatic approachment without violence which known as the principle of Settling the dispute by peacefully manner that become the one of ASEAN principle in Southeast Asia region¹²¹. Historically, the requirement to settle disputes peacefully was initially confirmed in Article 2 paragraph (3) of the UN Charter which basically explained that all member states of the United Nations have obligation to resolve the international disputes by peacefully manner¹²².

The obligation to settle the disputes peacefully has been described clearly in Article 33 of the UN Charter which stated as follows¹²³;

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

¹²¹ Elfia Farida, Penyelesaian Sengketa Perbatasan Antara Thailand Dan Kamboja Melalui Mekanisme Asean, Masalah-Masalah Hukum Journal, Volume 43 No. 1, 2014, Pp. 57-60.

¹²² Article 2 paragraph (3) the UN Charter 1945, the establishment of United Nation as global organization which accomodate the whole of state around the world basically has purposed to maintain the peace and security in the whole of world, one of the instrument which aimed to kept the harmonization among states in the whole of world with enacted article 2 paragraph (3) the UN Charter which obliged to all of member states around the world to kept peace and security at least in the dispute mechanism. Article 2 paragraph (3) basically has clearly stated that “To be a center for harmonizing the actions of nations in the attainment of these common ends. international peace and security, and justice, are not endangered”

¹²³ Article 33 of The UN Charter about Pasific Settlement of Disputes.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

The UN Charter through this article has been clearly without a doubt has a high consistency in maintaining the world peace, it is appropriate with the purpose of the establishment of the UN as a global organization which has function to maintain the peace and security from the disputes that could be arise between the UN member countries. This article has proved that the UN has explicitly set up a mechanism if there are any disputes among the UN member countries. The UN is strictly regulated that the parties parties who has a dispute which would be distrubing the international peace and security should seek settlement by some way which has been provided by the UN through Article 33 of the UN Charter. On the other side, ASEAN especially also have their own dispute resolution mechanisms, the ASEAN dispute resolution has been clearly mentioned in TAC 1976¹²⁴.

Based on that argumentation, the existence of ASEAN's general principle which become the main concern of ASEAN human rights mechanism basically has exist becuase of some factors such as colonial experiences, cold war experiences, and the ideology of communism that have interfere the peace and security in some ASEAN member countries. The general principles that should be obey by each ASEAN member countries become a key element in ensuring regional stability

¹²⁴ Elfia Farida, *Op. Cit*, p. 89-90.

from turning up the conflict in Southeast Asia region. The Southeast Asia region stability considered as the fundamental issue that influenced to the establishment of ASEAN general principles which become an instrument that has function to maintain the region stability¹²⁵. The general principles has categorize as a unique diplomatic engagement that adhere by ASEAN member countries was considered as the most effective principle to integrate ASEAN member countries and successfully uphold regionall organization to control the Southeast Asia region stay safe and secure from the conflict¹²⁶.

2.5 Protection of Human Rights under Islamic Perspective

Islam is concerned not only about religious, but also islam becomes a guideline to everyone which already regulated every single matters in the world even the small things as the manners how to urinate. Generally islamic human rights in islam has been explained in the Al-qur'an and hadith as a basic of islamic sources about the dignity and right of people comprehensively. In the other side, the highest appreciation to the dignity of human mankind in modern era has been declared by islamic community on the whole of world through the Cairo Declaration on Human Rights in Islam 1990 that signed by 45 states. The Cairo Declaration on Human Rights in Islam provides the new knowledge regarding human rights enforcement related to the islamic perspective on human rights, the source of islamic human rights belong to the islamic sharia. Islamic human rights also has been clearly

¹²⁵ Muhammad Iqbal Rachman and Mohammad Faishol Soleh, *Op. Cit*, p. 5-6.

¹²⁶ *Ibid.*,

explained that islam absolutely care and respect to protect people no matters he is moslem or not¹²⁷.

Therefore it could be conclude that human rights in islam is not something weird, because the discourse about human rights in islam earlier exist when we compared with other concepts. In the other words, Islam came inherently carrying the concept of human rights indeed. Islam has exist before the doctrine of human rights which contained in the Magna Charta Charter that appeared 600 years after the appearance of islam. Moreover, it is also proved that islamic thought has been exist on the social, economic and cultural rights before the western thought¹²⁸. On the other side, Allah SWT has revealed directly which has been poured in some verses of Qur'an that related to the dignity which owned by human beings¹²⁹;

وَلَقَدْ كَرَّمْنَا بَنِي آدَمَ وَحَمَلْنَاهُمْ فِي الْبَرِّ وَالْبَحْرِ
وَرَزَقْنَاهُمْ مِّنَ الطَّيِّبَاتِ وَفَضَّلْنَاهُمْ عَلَى كَثِيرٍ مِّمَّنْ خَلَقْنَا
تَفْضِيلًا

¹²⁷ Mashood A. Baderin, *International Human Rights And Islamic Law*, 2003, London:Oxford University Press, p. 12-42.

¹²⁸ *Ibid.*

¹²⁹ Ahmad Mukri Aji, 2015, Hak dan Kewajiban Asasi Manusia dalam Perspektif Islam, *Salam Journal*, Vol. 2 No. 2, p. 2-10, available at: <http://journal.uinjkt.ac.id/index.php/salam/article/view/2386> accessed on 25 November 2017.

“Indeed We have honoured the children of Adam, and carried them over land and sea, provided them with good things for their sustenance, and exalted them over many of Our creatures¹³⁰” {QS. Al-Isra(17)-70}

لَقَدْ خَلَقْنَا الْإِنْسَانَ فِي أَحْسَنِ تَقْوِيمٍ

“We have certainly created man in the best of stature¹³¹” {QS. At-Tin(95)-4}

Based on the explanation above, generally human rights in islam perspective is highly respect the status of human beings. Islam also respects the diversity and convert diversity be the instrument to cooperate among humans, therefore humans could be complete each other in order to through the life¹³².

¹³⁰ The Noble Qur’an in English, Al-Isra-17, Surah The Journey by Night Verse-70, translated by Ahmed Ali, available at: <http://en.noblequran.org/quran/surah-al-isra/ayat-70/> accessed on 25 November 2017.

¹³¹ The Noble Qur’an in English, At-Tin 95, Surah The FRUITS OF Tin Verse-4, translated by Ahmed Ali, available at: <http://en.noblequran.org/quran/surah-al-isra/ayat-70/> accessed on 25 November 2017.

¹³² Ahmad Mukri Aji, *Op. Cit*, p. 14.

III. RESEARCH OUTCOME

THE EFFECTIVENESS OF ASEAN HUMAN RIGHTS MECHANISM AND HOW TO STRENGTHEN IT

3.1 The Weakness of ASEAN Human Rights Mechanism

In order to respect the existence of human dignity which enshrined on the human rights mechanism, global organization and regional organization especially ASEAN generally has been agree and willing to protect and guarantee the rights of every citizen. Although the existence of human rights enforcement especially ASEAN human rights mechanism is far from the perfect words, it considered when the ASEAN human rights mechanism is very general and there is no clear mechanism to ensure the effective human rights enforcement. Consequently, there are some human rights violation which resulted from the abuse of power by ASEAN member countries because there are no strict regulation which regulated about ASEAN human rights mechanism. Therefore, the state only enforce the human rights mechanism which appropriate with their national interest¹³³.

On the other hand, it is important to bear in our mind that the ASEAN human rights mechanism in Southeast Asia region still retarded in the development, the history explain that the existence of ASEAN human rights mechanism was established officially and recognized by international society after more than 40 years the establishment of ASEAN declaration. The ASEAN human rights mechanism was established in 2008 through the formulation of ASEAN Charter

¹³³ Lily Husni Putri, *Op. Cit*, p. 491-498.

when the ASEAN member countries have been suspected in the issue of ASEAN human rights mechanism that conducted by few ASEAN member countries which attracted international attention, the implication was made the ASEAN is rated as a weak organization because the ASEAN have no capability to maintain the dignity of their citizens¹³⁴.

3.1.1 The Existence of ASEAN Human Rights Mechanism Have No Capability to Stop the Violation of Human Rights.

ASEAN human rights mechanism is difficult to enforce human rights in Southeast Asia region. The human rights violations that even categorized as a serious human rights violation which happened in Southeast Asia region often ignored by ASEAN member countries instead they focus on their own affairs. If we compare with the human rights mechanism in other regions such as European Union human rights mechanism, ASEAN member countries seem to have no obligation to guarantee and protect human rights in Southeast Asia region, the lack of human rights enforcement in Southeast Asia region become an evidence that ASEAN human rights enforcement did not grow to be more comprehensive in order to protect and guarantee the rights of ASEAN community¹³⁵. More than 50 years, ASEAN were established, but there is no any significant progress in enforcing

¹³⁴ *Ibid.*,

¹³⁵ The European Convention on Human Rights. European Human Rights Mechanism basically has been comprehensively enshired on The European Convention on Human Rights which also known as The Convention for the Protection of Human Rights and Fundamental Freedoms, the convention was signed in Rome on 4 November 1950 and came into force in 1953. The European Convention on Human Rights become the first human rights instrument in Europe that confirmed to enforce the human rights mechanism that poured in the Universal Declaration of Human rights, this convention basically has legally binding to each European member countries.

human rights in the Southeast Asia region, the ASEAN human rights violations have never found a solution to be resolved. The ASEAN member countries are more often conducting their rhetoric to answer the human rights issues without any concrete action to solve the problem. The data shows us that more than 600 opportunity of ASEAN Meetings¹³⁶, the ASEAN member countries only produce the agreement to solve the case up to 50 percent that actually can be implemented, the data described that the ASEAN member countries are not serious in enforcing human rights. On the other hand, ASEAN member countries also repeatedly postpone the ASEAN summit or ASEAN meeting in critical circumstances. This is why ASEAN member countries are often retard in reponding to the human rights violation because the majority of ASEAN member countries as putting aside the common interests of ASEAN, the common reason which stated by the majority of ASEAN member countries are the ASEAN member countries does not want to interfere on the domestic affairs of another members, the classic reason which always be the reason to avoid them in order to solve the problem¹³⁷.

The effectiveness of ASEAN human rights mechanism arises because the tradition of Southeast Asia governments which come from colonize history that has force ASEAN member countries to agree and adhere the non-interference principle and sovereignty principle which assessed as an obstacle to the ASEAN member countries in order to enforce human rights mechanism totally without any political

¹³⁶ ASEAN Meeting is an opportunity to the ambassador or state's representative of each ASEAN member countries to meeting in order solve the problem or initiate a common step for ASEAN in the future. Available at: www.ASEAN.org accessed on 10 January 2018.

¹³⁷ A. Jafar M. Sidik, Saatnya ASEAN Menjadi Mekanisme Regional yang Efektif, 2009, available at: <https://www.antaraneews.com/berita/133761/saatnya-asean-menjadi-mekanisme-regional-yang-efektif> accessed on 10 January 2018..

consideration that should fit to the national interest of each ASEAN member countries¹³⁸. If we look in the European Union Constitution explicitly declares that the European Union member countries have to uphold human rights maximumly without any exception, it is different with the condition of ASEAN which very hesitant to affirm and uphold the issue of human rights protection that becomes an important issue in maintaining the stability of the world. The ASEAN member countries are considered to be barren in order to resolve the human rights violations because they provide greater space for bilateral approachment that resulted that the ASEAN member countries was felt abandonment the function of ASEAN human rights mechanism. In addition, The ASEAN is also considered not serious in enforcing human rights in the Southeast Asia region because it does not consider the existence of ASEAN human rights bodies that do not have the power to perform their duties in case of human rights violations in Southeast Asia region¹³⁹.

Ideally, ASEAN human rights mechanism have to learn from the failure experience of human rights enforcement in some region. Consequently, some ASEAN member countries are comfortable to conducting human rights violations that resulted political crisis that threatens peace and security in the Southeast Asia region. There are some example which pull the international attentionn about human rights violation that cannot be solved by ASEAN until today, as follows;

¹³⁸ *Ibid.*,

¹³⁹ *Ibid.*,

A. The Crime of Genocide Against the Minority Groups in Myanmar

Human rights violation in Rohingya proves that the ASEAN human rights enforcement is still weak because the ASEAN human rights enforcement until today have no capacity to resolve the existing problem that conducted by Myanmar government. The ASEAN human rights enforcement unable to protect the mandate that exist on the ASEAN Charter in order to maintain regional stability from human rights violations. Even though it has been happened in for several years that caused a humanitarian crisis and political chaotic in the international society¹⁴⁰. The situation is getting worse when the ASEAN never issued a statement or clarification related to the human rights violation that occurred in Rohingya, Myanmar. It has been shown to us that how difficult the ASEAN human rights enforcement to engage in resolving the Rohingya crisis¹⁴¹.

Basically, the history was noted that the disputes which exist in Myanmar came from several years ago. Some historians even argued until nowadays about the origin of Rohingya and how they appeared in Myanmar. Some historians claim that Rohingya ethnicity is actually has settled in Myanmar from hundreds years ago and other historians said that

¹⁴⁰ Penny Green, Thomas MacManus, and Alicia de la Cour Venning, 2015, *Countdown to Annihilation: Genocide in Myanmar*, London: International State Crime Initiative, p. 16-28.

¹⁴¹ Heyder Affan, *Krisis Rohingya, mengapa ASEAN tidak mampu berperan?*, 2017, available at: <http://www.bbc.com/indonesia/indonesia-41160293> accessed on 14 January 2018.

Rohingya ethnicity appeared in the last century¹⁴². In this case, the government of Myanmar unilaterally declares that the ethnic of Rohingya is a newcomer who came from India, it also strengthen in the constitution of Myanmar which has been stated that the ethnic of Rohingya is not registered as citizens¹⁴³. Therefore, the Rohingya ethnicity have been denied to become a citizens although they are having lived in Myanmar for some decades. On the other hand, Rohingya peoples feel that they are part of Myanmar and violated by state persecution. The discrimination against Rohingya ethnicity is very inhumanity, all access and activities are very limited by the government which contrary with the ICCPR¹⁴⁴. The resentment of Myanmar's government through Rohingya ethnicity which predominantly citizen are embracing Buddhism also interfere by religions

¹⁴² The word of Rohingya generally comes from the majority of Muslims in Rakhine state that called themselves as Rohingya. The language of Rohingya basically different with local language in Myanmar, Rohingya language historically came from Bengali language in Bangladesh. Rohingya consider themselves to be indigenous people who have lived for a long time in Myanmar. On the other side, the government and Buddhist nationalist considered them as a immigrant from the British colonial administration. World Directory of Minorities and Indigenous Peoples, Myanmar/Burma - Muslims and Rohingya, 2017, available at: <http://minorityrights.org /minorities /muslims-and-rohingya/> accessed on 14 January 2018.

¹⁴³ Myanmar 1974 Constitution. Generally Rohingya ethnicity have been considered as Myanmar's citizens which regulated in the Constitution and civilian administration 1948. The status of citizen which belong to the Rohingya ethnicity allowed until the military coup d'état in 1962. In 1974 the government erase their status in the constitution which impacted the government do not recognize Rohingya ethnicity under the act of 1982. The regulation has been stated that the citizens could be recognize officially by the government if the group as a part of 135 national races that enshrined under the constitution. World Directory of Minorities and Indigenous Peoples, Myanmar/Burma - Muslims and Rohingya, 2017, available at: <http://minorityrights.org /minorities /muslims-and-rohingya/> accessed on 14 January 2018

¹⁴⁴ International Covenant on Civil and Political Rights (ICCPR) 1966. ICCPR clearly define about the prohibition to discriminate any person through the non-discrimination principle which has been poured in article 26 "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

matter, some researchers also mentioned that the Myanmar's government do not like Rohingya ethnicity because one of the disputed factors is about religions matter, Rohingya ethnicity was considered as terrorist which threaten the stability of country¹⁴⁵.

Currently the circumstances in Rohingya are very frightening, some news are reported that thousands of Rohingya's children, women, and civilian have been slaughtered during a military campaign againsts Rohingya ethnicity¹⁴⁶. On the other side, the military and buddhism nationalist Myanmar reportedly conducted the act of cruelty such as gang rapes to woman, killings, disappearances and other acts of inhumanity that could be categorize as serious human rights violation as genocide¹⁴⁷, genocide basically has been regulate comprehensively in the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) in 1948¹⁴⁸ dan The Rome Statute of the International Criminal

¹⁴⁵ British Broadcasting Corporation(BBC), Siapa sebenarnya etnis Rohingya dan enam hal lain yang harus Anda ketahui, 2017, available at: <http://www.bbc.com/indonesia/dunia-41149698> accessed on 14 January 2018.

¹⁴⁶ *Ibid.*,

¹⁴⁷ Lisa Schlein, Report: Thousands of Rohingya Are Victims of Unbearable Acts of Cruelty, 2017, <https://www.voanews.com/a/un-report-myanmar-rohingya-human-right-violations/3704838.html> accessed on 14 January 2017

¹⁴⁸ Genocide Convention 1948. This convention comprehensively was described the element of genocide which regulated in article 2 Genocide Convention 1948 which stated that Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such; (a). Killing members of the group; (b). Causing serious bodily or mental harm to members of the group; (c). Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d). Imposing measures intended to prevent births within the group; (e). Forcibly transferring children of the group to another group. It strengthen in line with article 1 Genocide Convention which stated that The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Court (Rome Statute) in 1998¹⁴⁹¹⁵⁰. On the other side, the Guardian news stated that the victim of military campaign to the Rohingya ethnicity has been reported more than 1,000 people indicated have been killed, the act of cruelty which conducted by Myanmar government also impacted more than 70,000 Rohingya people have fled in recent months to become a refugees¹⁵¹. Almost all ASEAN member countries have been affected by the humanitarian crisis which occurred in Rohingya. Neighboring countries especially Bangladesh which is the closest country to Rohingya has received more than 420,000 people of refugees from Myanmar¹⁵².

¹⁴⁹ The Rome Statute of the International Criminal Court (Rome Statue) 1998. Article 6 of Rome Statue also has been regulated about genocide which stated that For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

¹⁵⁰ Eka Ari Pramuditya, Kejahatan Genosida dalam Konteks Hukum Internasional, available at: <http://www.hukumonline.com/klinik/detail/lt50fc2162e60e3/kejahatan-genosida-dalam-konteks-hukum-internasional> accessed on 14 January 2018.

¹⁵¹ Refugee Convention 1951. The existence of refugees historically is an international concern of humanity for the victims of World War II who were forced to leave their place of origin because they felt threatened his life. Refugee convention 1951 basically has been classified the status of refugees in Article 1 (2) which stated that the refugees is a result of events that occurring before 1 January 1951 and owing to wellfounded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

¹⁵² The Guardian News, More than 1,000 Rohingya feared killed in Myanmar crackdown, say UN officials, 2017, available at: <https://www.theguardian.com/world/2017/feb/09/more-than-1000-rohingya-feared-killed-in-myanmar-crackdown-say-un-officials> accessed 14 January 2018

The latest condition in Myanmar when the conflict resumed between the government and Rohingya peoples is occurs in the middle of 2017, Indonesia as the only one country from the ASEAN member countries who have take the initiative step to conducting diplomatic approachment to resolve the current conflict which repeatedly happening. This step is seen as a soft approachment to resolve the conflict as the most effective solution to avoid a larger conflict in Southeast Asia region because the government of Myanmar is still controlled by the military regime. However, Indonesia is the only one country who believed by the government of Myanmar to solve the conflict in their national affairs. Lately, Indonesia's Foreign Minister Retno Marsudi was accepted by Aung San Suu Kyi as the state advisor in Myanmar¹⁵³. Therefore, the diplomatic approachment that conducted by Indonesian government in order to solving the Rohingya crisis is an important act owned by Indonesia as ASEAN's representative to resolve the conflict which unresolved since a decade ago. On the other side, the concrete steps which has been taken by Indonesian government to solve the problems in Myanmar by a sense of humanity that accordance with the Preamble of Indonesian constitution 1945(UUD 1945)¹⁵⁴.Afterwards, the ASEAN member countries also contributed in the middle of Rohingya crisis

¹⁵³ Faiq Hidayat, Menlu Jadi yang Pertama Temui Otoritas Myanmar Soal Rohingnya, available at: <https://news.detik.com/berita/3626444/menlu-ri-jadi-yang-pertama-temui-otoritas-myanmar-soal-rohingya> accessed on 17 January 2018.

¹⁵⁴ Ronggo Astungkoro, Selesaikan Konflik Rohingya Lewat Jalur Diplomatik Proaktif, 2017, available at: <http://www.republika.co.id/berita/dpd-ri/berita-dpd/17/09/06/ovv0s0-selesaikan-konflik-rohingya-lewat-jalur-diplomatik-proaktif> accessed on 14 January 2018

through the logistics assistance and humanitarian aid such as medical assistance¹⁵⁵.

Nevertheless, the condition about the humanitarian cases in Myanmar reportedly has been filed to the Permanent People's Tribunal, the public prosecutor of Permanent People's Tribunal accused that Myanmar's government including military leaders, senior political figures, president Htin Kyaw and state advisor Aung San Suu Kyi intentionally committing genocide against the Rohingya ethnic community¹⁵⁶. However, the judge's verdict in this case stated that the government of Myanmar was found guilty which clearly committed serious human rights violations which categorize as genocide against ethnic minorities such as Rohingya and Kachin, the decision by Permanent Peoples' Tribunal has been declared in Kuala Lumpur¹⁵⁷. Another parameter that convinces the judges to decided that the government convincingly conducted serious human rights violation against ethnic minorities in Myanmar because it conducted systematically. The judges of tribunal also decided to announced their verdict after considering and review the documentary, expert evidence, and more than 200 victims testimony from Rohingya, Kachin and another groups in Myanmar. Through the strong evidence which presented at the trial, the judges have

¹⁵⁵ Mariam Bensaoud, 2015, Between R2P and the ASEAN Way: The case of Myanmar's Cyclone Nargis, *Institute of Asian Studies* working paper series No. 13, p. 10-12.

¹⁵⁶ Rinaldy Sofwan, Jaksa Pengadilan Rakyat Dakwa Myanmar Lakukan Genosida, 2017, available at: <https://www.cnnindonesia.com/internasional/20170920130627-106-242930/jaksa-pengadilan-rakyat-dakwa-myanmar-lakukan-genosida> accessed on 14 January 2017.

¹⁵⁷ *Ibid.*,

reached a consensus that the government of Myanmar has proven to be intentionally committed to genocide to the minorities groups¹⁵⁸.

On the other side, the Permanent People's Tribunal has become an alternative way to solving the humanitarian cases in Myanmar that almost a decade cannot be solved by ASEAN member countries, in spite of the outcome of this trial is not legally binding and it is only a recommendation to proceed the case to the higher court as the international human rights court. The tribunal was provided 17 recommendation to be submitted to the international human rights court. One of the most important recommendation that provided by the Permanent People's Tribunal stated that the government have to amend their constitution and abolish some article which contain discriminatory clause that limited the rights of minorities ethnicity and the prohibition of citizenship to the minorities¹⁵⁹.

B. The Extra Judicial Killing In Philippines Anti-Drugs Campaign

The second human rights violation which existed in the Southeast Asia region that lately become the major concern of international attention is about the murder againts drugs campaign in Philippines. The international attention is directed to Philippine's president Rodrigo Duterte, the disruption of the peace and security in Southeast Asia region occurs when Duterte issuing a policy on the war of drugs, the decision to war on drugs

¹⁵⁸ *Ibid.*,

¹⁵⁹ Yayasan Bantuan Lembaga Bantuan Hukum Indonesia(YLBHI), People's tribunal finds Myanmar guilty of Rohingya genocide, 2017, <http://www.ylbhi.or.id/2017/09/peoples-tribunal-finds-myanmar-guilty-rohingya-genocide/> accessed on 14 January 2018

generally becomes a major problem because it increasing the data of violence in the Philippines¹⁶⁰. In Duterte's anti-drugs campaign, international society recognize that Duterte has been taken extreme policy about the war on drugs in Philippines. The controversy of law enforcement against drugs in Philippine is related about the regulation which allowed the law enforcers as police to shoot the drug dealers, drug distributors, courier when they are disobedient to the law and procedures which ordered by the police or state apparatus. For those the law enfocers who shoot the drugs dealers, distributor, and courier, they will get an honor from the government and will be guaranteed the legal protection on it. Despite of it could be classify as an international offense which committed by the Philippine's government to their citizens¹⁶¹.

The mechanism of dead shooting to any suspects of drugs offender without a fair trial is categorize as an extra judicial killing. Based on the standard operation which carried out in the policy of war against drugs generally it resulted several violations of human rights such as extra judicial

¹⁶⁰ Anne-Sophie Windel, 2010, Demanding an end to human rights violations in the Philippines, *OBSERVER: A Journal on threatened Human Rights Defenders in the Philippines* Volume 2 Number 2, p. 24-25.

¹⁶¹ Glori K. Wadrianto, Kekerasan dan Pelanggaran HAM Marak di Filipina, Duterte Disoroti Lagi, 2017, available at: <http://internasional.kompas.com/read/2017/08/01/06145131/kekerasan-dan-pelanggaran-ham-marak-di-filipina-duterte-disoroti-lagi> accessed on 14 January 2018.

killings¹⁶², enforced disappearances¹⁶³, and torture¹⁶⁴. This violation generally should become the main attention of ASEAN human rights enforcement to take several preventive measures when human rights violations are committed by one of the ASEAN member countries. By this far, there are some parties such as United States(US), United Nations(UN) and the European Union(EU) that have vocal voice to criticize the policies which undertaken by Duterte, especially in combating drugs. According to the three parties, Duterte's policy clearly has violated human rights and may disrupt security and peace which impacted to the global stability. On the other side, Philippine Foreign Minister Perfecto Yasay has been asked to the international community that not to interfere in the Philippine internal

¹⁶² Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions. The prevention clause in article 1 has been clearly stated about the meaning of extra judicial killing which stated that the governments shall prohibit by law all extra-legal, arbitrary and summary executions and shall ensure that any such executions are recognized as offences under their criminal laws, and are punishable by appropriate penalties which take into account the seriousness of such offences.

¹⁶³ International Convention for the Protection of All Persons from Enforced Disappearance. In article 2 on this convention was defined the term of disappearances which stated that enforced disappearance is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

¹⁶⁴ *Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment*. Any torture and cruel could be categorized as the violation of human rights. In article 1 convention against torture also defined the definition of torture which stated that the term torture means any act by which severe pain or suffering, whether physical or mental is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

affairs, especially in order to fight against drugs¹⁶⁵. The Philippines reasoned that the step in fighting drugs is become a solution when the current regeneration of the Philippines has been destroyed by the drug contamination, therefore this measure is considered the most effective in establishing a clean drugs resolution¹⁶⁶.

When the ASEAN human rights enforcement does not have the power to stop any violations which occurring in the Southeast Asia region, consequently the ASEAN member countries are very comfortable and free to commit human rights violations. For instance, since in the middle of 2016 when Duterte decided to declare an anti-drugs campaign, at least up to 3.000 people were reportedly killed by Filipino police in an anti-drugs operation¹⁶⁷.

On the other side, up to 5.500 suspected drug criminals in investigation were killed without passing a fair trial process¹⁶⁸. The unique one, Duterte was declared that his campaign would not be end until the last drug's company in the Philippines was closed and the last drug dealer in the Philippines was killed. Under the same policy, Duterte insisted that he did not encourage lawlessness because the perpetrator was clearly detrimental

¹⁶⁵ Nele Asche, Sarah Potthoff, Johannes Richte, and others, 2009, Criminalizations of Human Rights Activist, *OBSERVER: A Journal on threatened Human Rights Defenders in the Philippines* Volume 1 Number 1, p. 12-15.

¹⁶⁶ Jakarta Greater News, Kebijakan Duterte Berantas Narkoba Melanggar HAM ?, 2016, available at: <https://jakartagreater.com/kebijakan-duterte-berantas-narkoba-melanggar-ham/> accessed on 14 January 2018

¹⁶⁷ *Ibid.*,

¹⁶⁸ *Ibid.*,

to the state and deserved to be eradicated. Duterte clarified that the Philippines government did not commit any violations especially the human rights violation, anti-drugs campaign implied in the middle of society because it is clear that the drug criminals are clearly give economic disadvantage to the state and worth to be eradicated¹⁶⁹.

Finally, Both of human rights violations in Southeast Asia region show us that ASEAN has unable to conduct some action when the humanitarian problems coming, ASEAN member countries also very passive when the humanity crisis is happening in Southeast Asia region. Therefore, the United States and several European Union countries threaten and boycott to not attend annually meetings which held by ASEAN every year when there is no significant progress in the process of settling this humanitarian violation. As the result, ASEAN keep following their regional basic norms and continues to adhere their basic principles of sovereignty and non-interference principle. In spite of the cases have clearly violated human rights, but politically, ASEAN member countries have never interfere or undertaken an act which aimed to resolving internal conflicts that could disrupt regional stability and violate human rights¹⁷⁰.

On the other side, the ASEAN recognize is very weak in order to protect and guarantee human rights in Southeast Asia region, the case of human rights

¹⁶⁹ Riva Dessthania Suastha, Filipina Diserang Isu Pelanggaran HAM dalam Sidang PBB, 2017, available at: <https://www.cnnindonesia.com/internasional/20170508183629-106-213251/filipina-diserang-isu-pelanggaran-ham-dalam-sidang-pbb> accessed on 14 January 2018.

¹⁷⁰ Kumparan News, Tragedi Rohingya dan ASEAN yang “Diam”, 2017, available at: <https://kumparan.com/@kumparannews/rohingya-dan-asean-yang-diam> accessed on 14 January 2017.

violation also shows to us that the ASEAN human rights enforcement is only a political mechanism to protect ASEAN member countries from international human rights mechanisms because almost each of ASEAN member countries has their own problems regarding the human rights violation in their own territory. This is become a fact and parameter that the ASEAN human rights mechanism was considered failure and ineffective to protect and guarantee human rights in Southeast Asia region. Regardless of there are many other ways that could be taken by ASEAN member countries to make some action such as consensus, boycott their exports of goods and services, and suspend temporarily diplomatic relations. In addition, ASEAN also has some principles that make it unable to take any prevention measure to enforce human rights.

3.1.2 The Non-Interference Principle as an Obstacle to enforce ASEAN human rights mechanism.

The existence of non-interference principle which becomes one of the ASEAN's working platforms basically is a principle that come from the international law. According to Sefriani, she stated that the non-interference principle is a norm which limited the rights of ASEAN member countries to interfere in internal affairs in a dictatorial way. In spite of the non-interference principle is the most effective element in maintaining regional peace and stability in the Southeast Asia region¹⁷¹. Nonetheless, the application of the non-interference principle should be reviewed when it implemented in the ASEAN human rights

¹⁷¹ Sefriani, 2014, ASEAN dalam Perspektif Hukum Internasional, *Yustisia Journal* Volume 3 No. 1, p. 90-94.

enforcement, consequently when the domestic problems in one member countries cannot be solved, it will become a regional problem. However, the non-interference principle is considered do not appropriate to use in the human rights enforcement, especially if there is serious human rights violation. This principle becomes a dilemma for ASEAN which has an obligation to protect and guarantee the rights of ASEAN society. On the other side, the ASEAN member countries also should obey and adhere to the non-interference principle to respect and prohibit to interfere the internal affairs of another ASEAN member countries¹⁷².

Appropriate with the development of global political constellation, some observers told that the non-interference principle was entered the time to be abandoned by ASEAN member countries, on the other side, the ideal implementation of non-interference principle should be amendments to adjust the function with the current situation. But, the situation seems like the ASEAN member countries will not abandon the non-interference principle as their basic principle.

Consequently, the ASEAN member countries have no power and “fangs” to interfere in every human rights violation which happened in Southeast Asia region, for the example that the existence of human rights violations which committed by ASEAN member countries in Myanmar and Philippines¹⁷³. The existence of ASEAN human rights mechanism was felt very weak in enforcing human right, the

¹⁷² Rahman Asmardika, Prinsip *Non Interference* Hambat Penyelesaian Masalah Rohingya, 2015, available at: <https://news.okezone.com/read/2015/06/16/18/1166519/prinsip-non-interference-hambat-penyelesaian-masal-ah-rohingya> accessed on 14 January 2018.

¹⁷³ Erika and Dewa Gede, *Op. Cit.*, p. 181-184.

adherence of non-interference principle as the ASEAN Values among the ASEAN member countries also criticize has no power to protect and uphold human rights in Southeast Asia region. On the other side, But in generally the ASEAN member countries does not defined the non-interference principle clearly were made it difficult for ASEAN member countries to implement the non-interference principle in the ASEAN human rights enforcement. Therefore, the unclear definition about non-interference principle in the context of ASEAN human rights enforcement was led some observers to wonder about the existence of non-interference principle within the ASEAN human rights mechanism that limited the ASEAN member countries to conducted human rights prevention and protection¹⁷⁴.

The non-interference principle also considered as a barrier in order to enforce human rights mechanism in Southeast Asia region, therefore it is impossible to engage ASEAN member countries to uphold human rights mechanism due to their political interests such as sovereignty for every countries that cannot be interfere by another country. On the other side, the development of human rights enforcement in Southeast Asia region was felt not proportionate between the commitment of human rights enforcement and the fact of human rights violations in Southeast Asia region. ASEAN member countries was felt loss their credibility toward the commitment to uphold human rights in the Southeast Asia region, the non-interference principle assessed to be one factor of human rights

¹⁷⁴ Padjadjaran Law Research and Debate Society (PLEADS FH UNPAD), Lahirnya Deklarasi HAM ASEAN dalam pemajuan HAM di ASEAN, available at: <http://pleads.fh.unpad.ac.id/?p=68>. Accessed on 5 January 2018.

violations that the ASEAN member countries has no power or fangs to take the action through the violation of human rights in Southeast Asia region¹⁷⁵.

Genocide, torture, extra juducial killing and abduction are evidence that human rights violations are committed by several ASEAN member countries because some of them cannot take an action to solve the problem through the humanitarian intervention or diplomatic interference because it is limited by the non-interference principle. The non-interference principle also should be responsible for the increasing human rights violations in the Southeast Asia region, the data shown us that the victims are increasing year by year because the ASEAN member countries are blocked to uphold human rights¹⁷⁶. In the human rights violation, especially in serious human rights violations, the non-interference principle should be ignored, because there are exceptions in the huminity situation, especially in humanitarian interventions. According to Dodik Setiawan, he stated that humanitarian intervention may be justified to be exercised as long as the implementation is appropriate with the international law. He also stated that humanitarian intervention could be apply to interfere the sovereignty of state as long as the parameters fulfilled as follows¹⁷⁷;

¹⁷⁵ Muhammad Iqbal Rachman and Mohammad Faisol Soleh, *Op.Cit*, p. 1-5.

¹⁷⁶ Lidya Christin Sinaga, 2013, Implementation of Democracy and Human Rights Principle in ASEAN: Case Study in Cambodia, Laos, Myanmar, and Vietnam, *Penelitian Politik Journal* Volume 10 No. 1, p. 129-138.

¹⁷⁷ Dodik Setiawan Nur Heriyanto, 2013, Solusi Intervensi Kemanusiaan Sebagai Penyelesaian Konflik Yang Terjadi Pasca Kudeta Presiden Mursi Di Mesir, *UNISIA Journal* Volume XXXIV No. 78, p. 72-76.

A. International Responsibility to Protect

International law generally provides the obligation of every country to guarantee the protection of human rights for every people although it outside of his territory, it also could be applied when the state is unwilling or unable to prevent or take actions that cause masive violation which categorize as serious human rights violation, then the principle of non-intervention could be applied as international responsibility to protect. On the other side, the parameter to implemented the international responsibility to protect are serious human rights violation¹⁷⁸, conducted by reasonable way, and do not conducted for particular interest of state¹⁷⁹.

B. Security Council Resolution

Basically the security council was established to maintain global peace and stability which becomes their primary responsibility. Therefore, in Chapter VII of the UN Charter, United Nation was legitimate humanitarian intervention that must be authorized by the Security Council¹⁸⁰.

¹⁷⁸ Rome Statute of the International Criminal Court 1998. The Rome Statute was classified the kind of serious human rights violation in article such as (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.

¹⁷⁹ Dodik Setiawan Nur Heriyanto, *Op. Cit*, p. 75.

¹⁸⁰ The United Nation Charter. The UN Charter generally has been enacted the regulation related to the humanitarian intervention which aimed to protect peace and global stability around the world in Chapter VII: Action with Respect to Threats to The Peace, Breaches of The Peace, and Acts of Agression. The UN charter has been clearly defined the process of humanitarian intervention in article 39 which stated that "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security". In article 45 the UN Charter also described about the procedures to conduct military intervention which stated that "In order to enable the United Nations to take urgent military measures, Members shall hold immediately available national air-force contingents for combined international enforcement action. The strength and degree of readiness of these contingents and plans for their combined action shall be determined within the limits laid down in the special agreement

C. Just War Doctrine

Just war doctrine is become a justification mechanism when the doctrine provides justification to reduce the sovereignty of a state to conducting military intervention when it is done by a fair way. This doctrine comprehensively provides a guideline as the limitation in interventions which is permissible and not permissible¹⁸¹.

On these condition, we could realize that the humanity intervention to enforce human rights in Southeast Asia region was felt difficult things, because the non-interference principle in ASEAN has an absolute character. Therefore, it is become the difference between the non-interference which adopted in the legal instruments of ASAN with the instrumen that enshrined on the UN Charter. The legal instruments in ASEAN do not apply the legal instruments which contained in the Chapter VII of the UN Charter by ignoring the non-interference principle if there is a serious human rights violation and and threats against international peace and security, this matters also make the ASEAN member countries need to revise about the absolute character in the implementation of non-interference principle because it is considered ineffective if an absolute character of the non-interference principle implemented in ASEAN human rights enforcement¹⁸².

The implementation of non-interference principle ideally should be fullfil the human rights mechanism without the consideration of state necessary.

or agreements referred to in Article 43, by the Security Council with the assistance of the Military Staff Committee”

¹⁸¹ Dodik Setiawan Nur Heriyanto, *Op. Cit*, p. 75-76.

¹⁸² Sefriani, *Op. Cit*, p. 89-93.

Therefore, the existence of non-interference principle should be discuss more deeply especially in the ASEAN human rights enforcement because the non-interference principle could be an obstacle to integrate the commitment of ASEAN member countries in order to uphold human rights together. On the other side, the ASEAN member countries should emphasize the new definition of the non-interference principle that could develop the development of ASEAN human rights enforcement¹⁸³.

The obscurity of standard definition about the non-interference principle comprehensively in ASEAN human rights enforcement has potentially misused by some ASEAN member countries to fix the ASEAN human rights enforcement based on their needs, consequently some country in Southeast Asia region could eliminate the ASEAN human rights enforcement that used the non-interference principle which absolute could not be interfere by another ASEAN member countries. As the result, human rights enforcement in Southeast Asia region was felt weak and ineffective to guarantee the rights of everyone in Southeast Asia region¹⁸⁴.

In the end, the existence of non-interference principle which absolutely related to the ASEAN human rights enforcement was become a knife with double-edge. One side, the non-interference principle has function to accommodate the peace and security in the Southeast Asia region, the principle also become an

¹⁸³ Muhammad Iqbal Rachman and Mohammad Faisal Soleh, *Op. Cit*, p. 7-8.

¹⁸⁴ Tram-Anh Nguyen, 2016, Norm or Necessity? The Non-Interference Principle in ASEAN, *Cornell International Affairs Review* Volume 9 No. 1, p.1-2.

instrument in order to maintain the differences culture between the ASEAN member countries. On the other side, the non-interference principle was assessed as a barrier that was felt ineffective to enforce simultaneously in ASEAN human rights mechanism¹⁸⁵.

3.1.3 The Ineffectiveness of ASEAN Human Rights Commission to Uphold Human Rights in Southeast Asia Region

Based on the fact, the establishment of AICHR do not resolved the human rights violations in Southeast Asia region, it is proved that the human rights violations are still become a sensitive issues in Southeast Asia region after the establishment of AICHR which expected to be the solution in order to solve the human rights violation in Southeast Asia region. On the other side, the process of establishing ASEAN human rights institution is not easy, the ASEAN human rights body have been exist through long debates among the leaders of ASEAN member countries. Absolutely it occurred because each of ASEAN member country has its own interests which do not want to be disturbed by any country if there is any human rights institution establish in Southeast Asia region, the individual interest has been seen during the negotiation process to establish human rights institution because several ASEAN member countries have some problem related to the human rights violation issues. Therefore, the establishment of AICHR is very difficult to establish due to the political interests of ASEAN member countries¹⁸⁶.

¹⁸⁵ Padjadjaran Law Reserach and Debate Society(PLEADS FH UNPAD), Lahirnya Deklarasi HAM ASEAN dalam pemajuan HAM di ASEAN, available at: <http://pleads.fh.unpad.ac.id/?p=68>. Accessed on 15 January 2018.

¹⁸⁶ Wahyudi Djafar, Ardianto Putra, and Hilman Handoni, *Op.Cit*, p. 17-25.

Generally, at the first time almost all ASEAN member countries except Indonesia has decide to ignore the establishment of ASEAN human rights institution that have responsibility to promote and protect human rights for the ASEAN community. The main reason is the majority of ASEAN member countries do not want to interfere by ASEAN human rights institution, consequently in the article 14 paragraph 2 ASEAN Charter, the ASEAN Charter was defined that ASEAN human rights institution has limited function which has been determined in the term of reference¹⁸⁷. The authority of AICHR was limited to the promotion of human rights, not including human rights enforcement to conducting protection and investigation. Therefore, the ASEAN human rights institution was felt so weak and far from the standart of human rights enforcement¹⁸⁸. On the other side, the inneffective role of AICHR through the human rights protection also regulated in the article 20 of ASEAN Charter that stated AICHR only have an authority to make consultation and consensus mechanism in order to uphold human rights enforcement¹⁸⁹.

¹⁸⁷ ASEAN Charter 2008. Article 14 section 2 ASEAN Charter was determine the limitation of AICHR thourgh the term of reference which stated that This ASEAN human rights body shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting

¹⁸⁸ The ASEAN Charter 2008; Article 14 ASEAN Charter was defined about the authority of AICHR as follows; “This ASEAN human rights body shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting.”

¹⁸⁹ The ASEAN Charter 2008; Article 20 ASEAN Charter was defined that the AICHR has role to enforce human rights in Southeast Asia region: 1. As a basic principle, decision-making in ASEAN shall be based on consultation and consensus, 2. Where consensus cannot be achieved, the ASEAN Summit may decide how a specific decision can be made, 3. Nothing in paragraphs 1 and 2 of this Article shall affect the modes of decision-making as contained in the relevant ASEAN legal instruments, 4. In the case of a serious breach of the Charter or non- compliance, the matter shall be referred to the ASEAN Summit for decision.

However, the history was noted that the establishment of ASEAN human rights institution firstly named as ASEAN Commission on Human Rights, at that time the ASEAN human rights institution does not use Inter-governmental term because it would be more independent that cannot be interfere by each ASEAN member countries. Politically, due to political negotiations between ASEAN member countries, the ASEAN member countries finally agreed by naming the ASEAN human rights institution with the ASEAN Inter-governmental Commission on Human Rights. The only one country who wants the naming of ASEAN human rights institution with the ASEAN Commission on Human Rights is only Indonesia, but the proposal is rejected by other ASEAN member countries. This is the reason that how AICHR as a human rights institution in Southeast Asia region contains a lot of political content, it is proved that political interests of ASEAN member countries starting from the naming of ASEAN human rights body which mirroring how ineffective this human rights institution¹⁹⁰.

There are some obstacle which occurs in the implementation of human rights enforcement through AICHR, some obstacle came from the implementation of AICHR's TOR which not running well through three matters. According to Rafendi Djamin, he stated that the three function which possibly to implemented in Southeast Asia region as human rights enforcement has interfere by political intervention which limited the authority of AICHR that cannot receive any report

¹⁹⁰ Wahyudi Djafar, Ardimanto Putra, and Hilman Handoni, *Op. Cit*, p. 23-30.

of human rights violation which came from ASEAN member countries¹⁹¹. This element was made the AICHR has powerless to enforce human rights in Southeast Asia region which has been proved that AICHR cannot receive individual complain, the only one country who has this instrument to receive individual complain is only Indonesia through KOMNAS HAM. In regional mechanism, individual complain has been rejected by all ASEAN member countries except Indonesia as the only one country who agreed individual complain in regional mechanism. Second, AICHR has no authority to review human rights violation in Southeast Asia region, ASEAN member countries agreed that AICHR has no rights and obligations to review any human rights violation in Southeast Asia region, politically the ASEAN member countries stated that it has been review and supervise by global institution as their main reason that resulted the majority of ASEAN member countries agreed to ignore regional review mechanism.

The lattermost, there are no authority belong to AICHR to conduct investigation. It was very important that AICHR should own investigation mechanism to looking a fact in human rights violation. Those factor has become several factor which made the AICHR is powerless to enforce human rights in South East Asia region¹⁹².

¹⁹¹ Rafendi Djamin, Pelanggaran HAM di ASEAN AICHR Tidak Diperbolehkan Melakukan Review, <http://www.tabloiddiplomasi.org/index.php/2010/05/22/pelanggaran-ham-di-asean-aicHR-tidak-diperbolehkan-melakukan-review/>, Accessed on 15 January 2018

¹⁹² Padjadjaran Law Reserach and Debate Society (PLEADS FH UNPAD), Lahirnya Deklarasi HAM ASEAN dalam pemajuan HAM di ASEAN, available at: <http://pleads.fh.unpad.ac.id/?p=68>. Accessed on 15 January 2018.

Therefore, the AICHR has no authority to crack down on those reports because it depends on the sovereignty of state and the non-interference principle. The AICHR only have the effective mechanism to reports human rights violation into the ASEAN Foreign Ministers Meeting (AMM). The mandate for investigation and individual complaint has been blocked by the majority of ASEAN member countries in the process of making the terms of reference¹⁹³.

3.2 Strengthening Human Rights Mechanism in ASEAN

3.2.1 The Idea in Improving the Performance of ASEAN Human Rights Commission

To find the equal parameters between the ASEAN member countries in order to improve the AICHR's function of ASEAN human rights is not an easy thing, besides that, AICHR as a human rights commission is responsible for the promotion and protection of human rights in ASEAN, on the other hand, if we look at the reality during this time the implementation of AICHR is more dominant in promotional functions, because the protection function was felt powerless until this time¹⁹⁴.

The possibly things to strengthen the AICHR as the ASEAN human rights commission in Southeast Asia region is sacrificing to ignore several values that

¹⁹³ Guntur Manasyeh Sumule, 2016, Peran ASEAN *INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS* (AICHR) Dalam Penegakan HAM ASEAN (TAHUN 2009-2015), Unpublished Thesis on Faculty of Law Universitas Hasanuddin Makasar, p. 60-69 Available on <http://repository.unhas.ac.id/bitstream/handle/123456789/19406/SKRIPSI%20LENGKAP-HI-GUNTUR%20MANASYEH%20SUMULE.pdf;sequence=1> accessed on 15 January 2018.

¹⁹⁴ ANTARA NEWS, AICHR dan Penguatan Perlindungan HAM di ASEAN, 2009, available at: <https://www.antaranews.com/berita/159071/aicHR-dan-penguatan-perlindungan-ham-di-asean> accessed on 16 January 2018

becomes an absolute thing in human rights enforcement that enshrined in ASEAN Charter as manual guideline of ASEAN member countries, it purposed in order to cover a greater interests in ASEAN human rights mechanism. Therefore, the ASEAN needs to develop the AICHR's framework and function to make this institution more responsive to faced the issues of human rights in Southeast Asia region. The role of ASEAN human rights body is urgently needed to uphold human rights enforcement. The AICHR must have a strong protection mechanism in Southeast Asia region¹⁹⁵.

The data shown to us that several cases of human rights violation in Southeast Asia region has been increased in several years before. Therefore, looking from the reality above, the ASEAN member countries is urgently to change the authority of ASEAN human rights institution which not only operated in the scope of human rights promotion, but AICHR also immediately have to actively enforce the protection function in Southeast Asia region. The ASEAN is urgently to improve the protection function of AICHR in order to fulfill human rights protection at regional level because the protection of human rights in national level is questionable to enforce. The limitative authority which owned by AICHR should be revise as soon as possible by mirroring on the other human rights institutions such as human rights institution in Europe, America and Africa¹⁹⁶. The objectives of the improvement of ASEAN human rights commission is becomes an effort to solve and prevent violations of Human Rights. On the other side, the main objective

¹⁹⁵ Heribertus Jaka Triayana, 2011 Tinjauan Yuridis Tentang Badan HAM ASEAN Dalam Sistem Hukum Nasional Indonesia, *Mimbar Hukum Journal* Volume 23 Number 3, p. 612-616.

¹⁹⁶ *Ibid.*, p. 616-621.

to improve the function of AICHR is to uphold justice for the victims of human rights violations that have not been taken seriously until today. The improvement of ASEAN human rights commission is urgently needed when the domestic institutions of several ASEAN member countries are failed and powerless to enforce the law¹⁹⁷.

The urgency in improving the performance of ASEAN human rights commission also aims to to maintain the stability and harmony in Southeast Asia region that has been enshrined in the ASEAN purposed. The legal basis which existed in ASEAN nowadays would be only effectively implemented at strategic level in the context of making or formulating human rights protection policy. The implementation of human rights protection will never be applied at the operational level to protect the ASEAN Community actively from the human rights violations when there is no improvement to change the basic performance that owned by AICHR including the frameworks and authorities to uphold human rights that still be limited by the Article 2 ASEAN Charter. Therefore, the inadequate authority and mandate of AICHR should be changed immediately to suit the needs of human rights enforcement in the Southeast Asia region¹⁹⁸.

¹⁹⁷ Priscilla Manurung, 2012, ASEAN Inter-Governmental Commission on Human Rights(AICHR) Sebagai Lembaga Hak Asasi Manusia Regional di ASIA Tenggara, *Unpublished Thesis Faculty of Law Universitas Indonesia*, p. 57-63. Available at: <http://lib.ui.ac.id/file?file=digital/20313089-S43680-Asean%20intergovernmental.pdf> accessed on 6 February 2018.

¹⁹⁸ Ludiro Madu, 2016, Pelembagaan Regional mengenai Hak Asasi Manusia di ASEAN, *Hubungan Internasional Journal* Volume 5 Number 1, p. 42-47.

3.2.2 Looking For The Experiences and Positive Things That Exist On The Other Regional Human Rights Mechanism

The existence of ASEAN human rights mechanism is considering very young in upholding human rights mechanism if we compare to the other regional human rights mechanism, consequently the ASEAN member countries should take many lesson from another regional human rights mechanism in order to enforce human rights mechanism more effectively in Southeast Asia region. The experiences of another regional human rights mechanism become a positive things to ASEAN that wants to improve the standarization of regional human rights mechanism, on the other hand, it purposed that ASEAN does not repeat the mistakes that have been made by other regional before. On the other hand, it is important for ASEAN to refer and take the lesson from those three other regional human rights mechanism in Europe, America and Africa. The experiences of another regional human rights mechanism are useful to uphold human rights mechanism effectifely. Therefore it is become an important step and a solutive idea to looking for several regional human rights experience as follows:

A. European Human Rights Mechanism

The protection of human rights in Europe has been fundamentally codified into the European Convention on Human Rights(EHCR) established after world war II which found the atrocities such as superfluous injury and unnecessary suffering to the civilian in european region. The EHCR also usually known as the European Convention for the Protection of Human Rights and Fundamental Freedoms which has been formulated in

1950. The awareness of European societies concerning the importance of human rights enforcement is also much influenced by the bitter experience that was felt by European society in the massacrred tragedy which committed by Nazi in the world war II. Moreover, the basic notion of European human rights mechanism actually similiar with the applicable law which enshrined in the UN human rights declaration. Consequently, the establishment of European human rights mechanism also has a common purpose to strengthening the universal human rights that have been formulated by the UN¹⁹⁹.

The European human rights mechanism generally influenced by two EU bodies which has function to maximizing human rights mechanism namely the European Council and the Committee of Ministers that have responsibility to protect the European community from the human rights violations²⁰⁰. First, the EU has comprehensively given a mandate to the European Council which purposed to ensure the fundamental rights in all fields of EU activity and increased the cooperation in the scope of European human rights mechanism. Besides that, The European Council also has function to enforce human rights which has been enshired in the Treaty of Lisbon 2009 that covered about the fudamental rights which became legally binding to the EU member states when implementing EU law. However, the

¹⁹⁹ Irish Human Rights Commission, 2012, *European Convention on Human Rights Guide for the Civil & Public Service(e-book)*, Dublin: Irish Human Rights Commission, p. 18-19, available at: https://www.ihrec.ie/download/pdf/echr_guide.pdf accessed on 26 January 2018.

²⁰⁰ *Ibid.*,

European Council was not set up specifically to solve human rights issues in Europe, human rights is only one of the most main tasks that owned by the European Council²⁰¹. Secondly, the EU also has a Committee of Ministers which has established to supervise the obligations of EU member states in the scope of democracy, human rights, and law enforcement. Nonetheless, ECHR has comprehensively described the authority that owned by both of the European bodies which cover about human rights issues such as inter-country complaints, individual submissions, advisor opinion under the European Convention on Human Rights in Section II, and Rules of Court and Report Explanation on the Protocol No. 11. In addition, the Secretary-General of European Council also has the authority to request reports from the EU member parties, basically this authority is become a newest authority in the EHCR Mechanism that was reformed through the Protocol No. 11 which came into force on 1 November 1998²⁰². One of the most important changes is the dissolution of the European Commission on Human Rights, a sub-commission under the Court that has authority to accept and reject of every human rights cases²⁰³.

²⁰¹ European Council of the European Union, Protection and promotion of human rights, 2017, available at: <http://www.consilium.europa.eu> accessed on 26 January 2018.

²⁰² James W. Hart, 2010, The European Human Rights System, *Law Library Journal*, Volume 102 Issue 4, p. 538-546. Available at: https://scholarship.law.uc.edu/cgi/viewcontent.cgi?article=1000&context=lib_pub accessed on 5 February 2018.

²⁰³ Edith Koesoemawiria, Sekilas Mengenal Mahkamah HAM Eropa, 2010. Available at: <http://www.dw.com/id/sekilas-mengenal-mahkamah-ham-eropa/a-5263093> accessed on 5 February 2018.

However, the enactment of ECHR generally has contained some element which fully supported to the upholding human rights in European region such as follows:

1. Convention to the protection of human rights and fundamental freedoms 1950, this convention has material on the obligations for all of EU member parties to guarantee and protect human rights through their society, the convention also contained the specific rights that should be protected by each EU member countries²⁰⁴. The second section of this convention also has been regulated the existence of judicial power through the European Court of Human rights²⁰⁵.

2. First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, this convention contained the steps to ensure the collective enforcement of certain rights and freedoms that already enshrined in the section 1 about Rights and Freedoms through the Convention for the Protection of Human Rights and Fundamental

²⁰⁴ Convention for the Protection of Human Rights and Fundamental Freedoms 1950: The ECHR in the section 1 about Rights and Freedoms specially has been classified the list of rights that obliged to implemented by each of EU member parties such as: 1. The right to life, 2. The prohibition of torture or inhuman or degrading treatment or punishment, 3. The prohibition of slavery and forced labor, 4. The right to liberty and security, 5. The right to a fair and public hearing within a reasonable time by an independent and impartial tribunal, 6. The prohibition of ex post facto criminal laws, 7. The right to respect for private and family life, 8. The right to freedom of thought, conscience, and religion, 9. The right to freedom of expression, 10. The right to freedom of assembly and association, 11. The right to marry and found a family, 12. The right to an effective remedy before a national authority for violations of the rights and freedoms enumerated in the Convention, 13. The prohibition of discrimination on grounds such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status, 14. Free elections, property, and education, 15. Freedom from imprisonment for the nonfulfillment of a contractual obligation, 16. Freedom of movement within a state and freedom to leave its territory, 17. Right of a national not to be expelled from and to enter a state's territory, 18. Freedom of aliens from collective expulsion.

²⁰⁵ Convention for the Protection of Human Rights and Fundamental Freedoms 1950

Freedoms. On the other side, The protocol described more deeply through the ratification of the ECHR and explained the basic rights that owned by the European community especially to strengthen the obligation of EU member countries in human rights enforcement²⁰⁶.

3. Fourth Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto, this protocol generally giving some additional term which regulate specifically in European human rights mechanism²⁰⁷.

4. Six Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, the protocol comprehensively prohibits the death penalty exist in the constitution of all EU member parties²⁰⁸.

On the other side, the European human rights mechanism also has been established a regional institution that serves to maintain the regional stability of human rights violation through judicial powers, namely the

²⁰⁶ First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms 1952.

²⁰⁷ Fourth Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto 1963. This protocol generally enacted certain rights such as: 1. Prohibition of imprisonment for debt, Prohibition of expulsion of nationals, and the Prohibition of collective expulsion of aliens.

²⁰⁸ Six Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty 1983. Article 1 of this convention stated that The death penalty shall be abolished. No one shall be condemned to such penalty or executed, the protocol also stated the exception of death penalty in the war time that has been comprehensively enacted in article 2.

establishment of the European Court of Human Rights. In 1959 the European Court of Human Rights established in Straßburg, France. The jurisdiction of this court is higher than the authority of the national courts. Every European community, who feels that his rights are being violated, allowed to file a lawsuit in this court. It is become the one of a great innovations in the human rights histories, European human rights mechanism shown to us that the European member countries is very serious to enforce human rights, the European member countries also alike wanted to sent a message to another region that human rights should be uphold appropriately without any political interest inside the enforcement²⁰⁹. However, the European Court of Human Rights has the authority to decide the sanctions, including compensation payments for victims of human rights abuses. The existence of European Court of Human Rights was felt effective if we sees from the data that shown the applicant day by day increasing significantly in 2008, there have been more than 10,000 verdicts of human rights violation. The data shown that the establishment of European Court of Human Rights is considered very effective because there is a mechanism that can solve a human rights case, consequently the human rights violations could be resolved and have no indication to disturb the regional stability of Europe. The European Courts of Human Rights comprehensively has been enshrined

²⁰⁹ Luzius Wildhaber, 2007The European Court of Human Rights: The Past, The Present, The Future, *American University International Law Review* Volume 22 Issue 4, p. 521-523. Available at: http://digitalcommons.wcl.american.edu/auilr?utm_source=digitalcommons.wcl.american.edu%2Fauilr%2Fvol22%2Fiss4%2F2&utm_medium=PDF&utm_campaign=PDFCoverPages accessed on 2 February 2018.

in the article 19 of the ECHR²¹⁰. The court also functioning to ensure the obedient of EU member countries through the obligations which arising from the convention and its protocols. The court's jurisdiction also encompasses all matters concerning the interpretation and implementation of the convention and its protocols²¹¹.

The powerfull of European human rights mechanism also give an authority to the decision of courts is legally binding for the state involved. The structure of European Court of Human Rights are consists of a number of judges in accordance with the number of States that have become parties to the convention, it is aimed to maintaining the credibility and independence of judges in deciding the cases, it is comprehensively describe under article 20 of the convention. The criteria of judge also very strict, the judge should have a high moral character and shall have the qualifications appropriate with Article 21 of the convention²¹².

This is one of the most influential element to develop human rights progress

²¹⁰ Convention for the Protection of Human Rights and Fundamental Freedoms 1950. The section 2 comprehensively described about the establishment of European Court of Human Rights which stated that 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.

²¹¹ Gráinne de Búrca, 2013, After The EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?, *Maastricht Journal of European and Comparative Law* Volume 20 issue 2, p. 170-178. Available at: <http://journals.sagepub.com/toc/maaa/20/2> accessed on 2 February 2018.

²¹² Convention for the Protection of Human Rights and Fundamental Freedoms 1950. Article 21 described the criteria of judges which required the credibility of judges: Criteria for office 1. The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence. 2. The judges shall sit on the Court in their individual capacity. 3. During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office; all questions arising from the application of this paragraph shall be decided by the Court.

in Europe, the presence of a fair human rights court and the credibility of human rights mechanism make the European human rights mechanism could solve the problem of human rights violation that could be a disruptive region stability²¹³.

B. American Human Rights Mechanism

The existence of human rights is become a classic stories in America, the members of the Organization of American States (OAS) have passed a long deebated in order to codified human rights in their regional legislation that aimed to integrate and develop with the UN human rights mechanism, meaning that both of them has the same purpose to uphold human rights systematically. Inter-American human rights mechanism for the first time established through the American Declaration on the Rights and Duties of Man(ADRDM) in 1948. ADRDM becomes a soft law that shown a formal commitment of American member states to enacted several human rights principle in America, besides that, ADRDM was not an international treaty that consequent has no legally binding to be ratified by the states. On the development of time, the OAS realize that the ADRDM was not enough to enforce human rights effectively. Therefore, the OAS take the initiative to created the Inter-American Commission on Human Rights(IACHR) in 1959, IACHR was established to completed the human rights mechanims by added an investigation authority regarding to the eradicating of human rights violations in America. The duties of the IACHR generally include

²¹³ Rhona K.M and others, *Op. Cit*, p. 219-221.

promoting human rights, requesting human rights information from member states, human rights investigation, responding and advising to the Inter-American members on human rights matters, and preparing and submitting annual reports about the data and condition of human rights in America as generally to the OAS²¹⁴.

However, the IACHR also similiarly with the European and African human rights mechanism that have authority to examine individual complaints, the differences between both of them, the process and procedure to handling human rights cases is less formal than in Europe and Africa. Communication is become a key main success of American human rights enforcement, although the human rights mechanism seems like strict mechanism. Generally the implementation of Inter-American human rights mechanism primarily looking for friendly settlements between parties to solved the cases with the parties involved. It was felt as a new solution to solve the human rights violation in peacefully manner, if the friendly settlement is not reached, the IACHR have an authority to make recommendations in order to remedy the situation. On the other side, IACHR also completely with the authority to publish their opinion to the public if the state parties involved do not pay attention to the recommendation above²¹⁵.

²¹⁴ Carolyn M. Shaw, 2007, The Evolution of Regional Human Rights Mechanisms: A Focus on Africa, *Journal of Human Rights* Volume 6, p. 2010-2011.

²¹⁵ Ariel E. Dulitzky, 2015, Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights, *Texas International Law*

The existence of Inter-American Commission on Human Rights (American human rights commission or IACHR) and the Inter-American Court of Human Rights (American human rights Court) constantly develop to enhance the standardization of human rights in America, on the development, there are some methods that conducted to improve the enforcement of human rights such as reformed their rules and regulations, considering individual complaints of human rights violation, established human rights court independently, and making important changes to amend the procedures for the processing of petitions and contentious cases in the Inter-American human rights mechanism²¹⁶. These modifications were made almost annually in the anniversary event of Inter-American human rights mechanism such the establishment of IACHR, the adoption of the *American Convention on Human Rights* and *American Declaration of the Rights and Duties of Man*, and the establishment of human rights court, and the initiation to create the Organization of American States (OAS). These developments prove that the Inter-American human rights mechanism still continues to grow comprehensively from year by year. On the other side, those procedural reforms and important changes aimed to achieve the goals of Inter-American human rights mechanism that improved the standardization of Inter-American system. Therefore, the Inter-American human rights mechanism has developed to be a complex

Journal, Volume 50 Issue 1, p. 46-62. Available at: <https://law.utexas.edu/faculty/adulitzky/69-inter-amer-constitutional-court.pdf> accessed on 5 February 2018.

²¹⁶ *Ibid.*,

mechanism which designed to guarantee, promote, and protect human rights over the past fifty years. The Inter-American human rights system has made a breakthrough in the scope of human rights to uphold the truth, provided justice and pay attention to victims of human rights violations²¹⁷.

The Inter-American court of human rights generally comprised by seven expert of independent judges that has been selected by OAS. On the other hand, the duties of Inter-American court of human rights was established to operate several function such as supervise the implementation of human rights mechanism, provide the information about how to enforce human rights in America, deciding human rights cases, and compensate for violations of Human Rights among member countries²¹⁸. The jurisdiction of Inter-Amrican court of human rights actually is limited only to the states who has been recognized the jurisdiction of Inter-American human rights court²¹⁹. In spite of the verdicts is binding, the most punishment of human

²¹⁷ Cecilia M Bailliet, 2013, Measuring Compliance with the InterAmerican Court of Human Rights: The Ongoing Challenge of Judicial Independence in Latin America, *Nordic Journal of Human Rights* Volume 31 No. 4, p. 477-484.

²¹⁸ *Ibid.*,

²¹⁹ American Convention on Human Rights “Pact on San Jose, Costa Rica” 1969. Chapter VIII(Inter-Amrican Court of Human Rights) in section II has been described comprehensively about Jurisdiction and Function as follows: Article 61, 1. Only the States Parties and the Commission shall have the right to submit a case to the Court. 2. In order for the Court to hear a case, it is necessary that the procedures set forth in Articles 48 and 50 shall have been completed. Article 62, 1. A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention. 2. Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organization, who shall transmit copies thereof to the other member states of the Organization and to the Secretary of the Court. 3. The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.

rights violation would be mostly as an economic sanction in the form of compensation to the victim of human rights violation. On the other side, the unique solution in order to solve human rights violations in Inter-American human rights mechanism if the state does not want to consider or unwillingness to follow up on the decision of courts, the court has authority to notify the state involve to the general assembly of OAS²²⁰²²¹.

C. African Human Rights Mechanism

Human rights protections in Africa generally is less extensive if we compare to the another regional human rights mechanism such as American human rights mechanism and European human rights mechanism. In spite of the African human rights charter which usually called as the Organization of African Unity(OAU) that established in 1963 also has similiar reference to the UDHR, we can conclude that the establishment of African human rights mechanism were established to strengthen the UN in order to enforce human rights in the whole of world. The OAU basically has several function in order to enforce African human rights effectively, the OAU charter

²²⁰ American Convention on Human Rights “Pact on San Jose, Costa Rica” 1969. The convention determined the verdict is binding to the parties involved which has been enshrined in article 67 and 68 as follows: Article 67 , 1. The judgment of the Court shall be final and not subject to appeal. In case of disagreement as to the meaning or scope of the judgment, the Court shall interpret it at the request of any of the parties, provided the request is made within ninety days from the date of notification of the judgment. Article 68, 1. The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties, 2. That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state.

²²¹ Diana Contreras-Garduño, 2014, The Inter-American System of Human Rights: Chapter 33 of the SAGE Handbook of Human Rights [Anja Mihr, Mark Gibney], p. 596-605(Suggested Citation). Available at: <https://dspace.library.uu.nl/bitstream/handle/1874/320885/ContrerasGardunoDianaTheInterAmericanSystemofHumanRights2014.pdf?sequence=1> accessed on 6 February 2018.

comprehensively ,mentioned some function such as promoting solidarity and development of human rights, ending colonialism, defending sovereignty in all of OAU member countries, and promoting international cooperation to uphold human rights in Africa togetherness. However, one of the main function of African human rights mechanism to promoting international cooperation is never been existed to uphold human rights up to 1986. Therefore, the OUA fulfill the vacuum of power through the establishment of the African Charter on Human and People's Rights that famously known as Banjul Charter in International society²²².

The establishment of Banjul Charter established in 1986, and it was signed with all fifty-three African states that receive a good response to adopting the charter. The establishment of Banjul Charter was fully supported by the most of African states that was felt it becomes a great achievement in African human rights histories which has concerned to the three fundamental rights in human rights: civil and political rights, economic, social, and cultural rights, and rights of the peoples which including the rights include the right of self-determination and the right to freely dispose of their wealth and natural resources²²³. The establishment of Banjul Charter also influence the establishment of human rights commission in Africa

²²² Ingange-Wa-Ingange, 2010, The African Human Rights System: Challenges and Prospects, Unpublished Thesis requirements for the degree of DOCTOR OF LAWS (LLD) In the Department of Constitutional, International and Indegenous Law, Faculty of Law University of South Africa, p. 156-187. Avaible at: <https://www.peacepalacelibrary.nl/ebooks/files/382582535.pdf> accessed on 2 Febuary 2018.

²²³ Thaddeus Metz, 2014, African values and human rights as two sides of the same coin: A reply to Oyowe, *African Human Rights Law Journal* Volume 14 No. 2, p. 306-319.

which established in 1987. African human rights commission comprehensively regulated in Banjul Charter through the articles 30 until 62, the African human rights commission clearly established within the several main functions to uphold human rights in Africa region²²⁴.

The African commission on human rights generally consisted eleven representative which elected by the African Union, have an agenda to meet twice a year. The functions of African human rights commission include the protection and promotion of human rights, have authority to receive the information regarding human rights violations, communication through the state reports regarding human rights conditions which obliged the African member states to submit a report every year, the interpretation and implementation of international human rights law in Africa. Therefore, the African human rights commission was felt effective to solve the case of human rights violation, one of the key success to operate African human rights commission is the authority to conduct communications if there is any human violations, the commission may request all relevant information from the states involved²²⁵. One of the great achievement in the African human rights hisitories is the authority to investigating reports on the case of human rights violations, the authority has an important role to solve the

²²⁴ African (BANJUL) Charter on Human and People's Rights 1986: The existence of African human rights commission generally has been regulated in Part II: Measures of Safeguard(Chapter I: Establishment and Organization of the African Commission on Human and Peoples' Rights, Chapter II: Mandate of the Commission, Chapter III: Procedure of the Commission, and Chapter IV: Applicable Principles)

²²⁵ Anselm Chidi Odinkalu, 2001, Analysis of paralysis or paralysis by analysis? Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights, *Human Rights Quarterly*, 23(2), p. 327–358.

case if there is any human rights violation in Africa because the african human rights commission has the authority to conduct an investigation in order to seek accountability for the offenses committed²²⁶.

However, the African human rights mechanism also has the African Court on Human Rights that enshrined in the Protocol to the African Charter on Human and Peoples' Rights that entered into force on January 25, 2004. The establishment of African Court on Human Rights also mandate to have several authority such as the verdicts of judges able to issue orders to remedy violations, including payment of fair compensation. Another authorities of court is the characteristic decision of courts will be legally binding to all African state parties that have been decide to ratified the Protocol. The establishment of African human rights court created a new spirit in upholding human rights in Africa region, besides that, it also becomes a platform to resolve human rights violation that could be disturb the peace and security²²⁷.

The experienced of European, American, and African human rights mechanism could be a parameter for ASEAN human rights mechanism in the future to adopt several elements that urgently needed to implemented in the Southeast Asia region. The ASEAN member countries could take many advantage from the experience of another regional human rights mechanism

²²⁶ Carolyn Shaw, 2007, The Evolution of Regional Human Rights Mechanisms: A Focus on Africa, *Journal of Human Rights* Volume 6, p. 209-224.

²²⁷ Gino J Naldi, 2014, Observations on the Rules of the African Court on Human and Peoples' Rights, *African Human Rights Law Journal* Volume 14 No. 2, p. 369-383.

such as the establishment of human rights court, individual complaints, and supervision body to supervise the framework of commission and courts in the society.

3.2.3 How To Empower ASEAN Human Rights Mechanism

The ineffectiveness of ASEAN human rights mechanism is becomes a serious warn to the ASEAN member countries that immediately have to empower the ASEAN human rights mechanism by several changes such as follows:

A. Review and Amendment The ASEAN Charter

The establishment of ASEAN Charter as the identity of Southeast Asia regional organization has been established more than fifty years old since the charter entered into force as the constitution for ASEAN member countries to easier the harmonization of international relationship around them. However, the existence of ASEAN Charter as a platform to accommodate the issues that occurred in Southeast Asia region according to several observers was deemed ineffective and was too old to be applied in ASEAN, the ASEAN Charter was felt do not appropriate to handle the modern challenges that existed nowadays. Therefore, the argumentation present an opportunity for ASEAN member countries to make a discussion immediately in order to review the ASEAN Charter especially in the scope of ASEAN human rights mechanism, as the result, the ASEAN member countries have to take an action in order to improve the performance of ASEAN Charter through

the amendment²²⁸. The amendment of ASEAN Charter purposed to strengthen the enforcement of human rights, especially the implementation of ASEAN values that should be adhere by ASEAN member countries that was felt difficult to be implemented simultaneously with the upholding ASEAN human rights mechanism²²⁹. The amendment have to formulate comprehensively the spesification term of ASEAN values such as the non-interference and sovereignty principles in order to apply in the ASEAN human rights mechanism, it also could be strengthen the existence of ASEAN human rights mechanism to uphold human rights effectively in Southeast Asia region²³⁰. On the other hand, the amendment of ASEAN Charter also purposed to help regional organization to move forward that appropriate with the development of time, the amandment has important role to change the frameworks of ASEAN Charter more relevant that related to the ASEAN's progress in human rights mechanism²³¹.

The amandment of ASEAN Charter in the scope of ASEAN human rights mechanism is urgently needed, the amandment has important role

²²⁸ The Singapore Institute of International Affairs (SIIA), 2014, *Reviewing The ASEAN Charter: An Opportunity To Reform ASEAN Processes*, Singapore: Singapore Institute of International Affairs, p. 4-6. Available at: <http://www.siiainline.org/wp-content/uploads/2016/10/2014-10-Policy-Brief-Reviewing-the-ASEAN-Charter-An-Opportunity-to-Reform-ASEAN-Processes.pdf> accessed on 11 February 2014.

²²⁹ HukumOnline, ASEAN Charter Perlu Direvisi: Partisipasi masyarakat harus dibuka lebih lebar, available at: <http://www.hukumonline.com/berita/baca/lt5282089d2130a/asean-charter-perlu-direvisi> accessed on 11 February 2018.

²³⁰ *Ibid.*, p. 7-11.

²³¹ Marguerite Afra Sapiie, CSIS calls for ASEAN Charter reform, available at: <http://www.thejakartapost.com/news/2016/09/02/csis-calls-for-asean-charter-reform.html> accessed on 11 February 2018.

to changes the controversial principles in the ASEAN Charter which assessed as an obstacle to enforce ASEAN human rights effectively. The urgencies of amendment the ASEAN Charter also purposed to strengthen the others soft law such as TOR of AICHR and AHRD as a platform of ASEAN human rights mechanism to uphold human rights in Southeast Asia²³². Therefore, the amendment of ASEAN Charter have to be a main concern that immediately should be reform. However, the amendment of ASEAN Charter believe that the method could be strengthen the enforcement of ASEAN Charter to protect and promote human rights effectively that until today which has been troubled by several factors such as ASEAN values in human rights mechanism. Do these ASEAN constitutional changes through amendment could make ASEAN function in the scope of human rights more better and effectively to maintain regional peace and security and over the last 50 years²³³.

B. The New Convention of ASEAN Human Rights Mechanism

One of the most solution in order to strengthening the ASEAN human rights mechanism is create a special human rights convention in Southeast Asia region, new convention about human rights in Southeast Asia region is deemed necessary to maintain ASEAN human rights mechanism more comprehensive than before, the establishment of

²³² Lee Leviter, 2010, The ASEAN Charter: ASEAN Failure or Membe Failure?, *International Law and Politics Journal*, Volume 43 Issue 159, p. 207-208. Available at: <http://nyujilp.org/wp-content/uploads/2013/02/43.1-Leviter.pdf> accessed on 11 February 2018.

²³³ *Ibid.*, p. 208-209.

ASEAN human rights convention are binding on each ASEAN member countries that force them to adhere the mechanism without any political option²³⁴. On the other hand, the establishment of ASEAN human rights convention also purposed to anticipate the political interest of ASEAN member countries that used soft law mechanism during this time to interpret the ASEAN human rights mechanism based on their interest²³⁵. Therefore, the convention that has legally binding mechanism is urgently needed to enforce ASEAN human rights mechanism effectively, the legally binding mechanism could be eradicated abuse of power in ASEAN human rights enforcement that made the mechanism is powerless to protect and guarantee human rights²³⁶.

Progressive enforcement of ASEAN human rights law also influenced by comprehensive human rights regulations. The establishment of ASEAN human rights convention will make the ASEAN human rights mechanism has absolute legal standing in Southeast Asia region, those legal standing could made legal certainty, improve the authority and direction of ASEAN human rights framework, and strengthening the Asean human rights commission²³⁷.

²³⁴ The Aceh Institute, Tawaran Konsep Perkuat Komisi Hak Asasi Manusia ASEAN, available at: <http://acehinstitute.org/pojok-publik/hukum/tawaran-konsep-perkuat-komisi-hak-asasi-manusia-asean.html#.WoORAW9ubIU> 13 February 2018.

²³⁵ Elfia Farida, 2009, Efektivitas Piagam ASEAN (ASEAN Charter) bagi ASEAN sebagai Organisasi Internasional, *Ilmiah Ilmu Hukum Qistie Journal*, Volume 3 Number 3, p. 11-13.

²³⁶ HukumOnline, ASEAN Charter Perlu Direvisi: Partisipasi masyarakat harus dibuka lebih lebar, available at: <http://www.hukumonline.com/berita/baca/lt5282089d2130a/asean-charter-perlu-direvisi> accessed on 14 February 2018.

²³⁷ Mahrus Ali dan Syarif Nurhidayat, 2011, *Penyelesaian Pelanggaran HAM Berat (In Court System dan Out Court System)*, Gramata Publishing: Jakarta, p. 240-241.

Therefore, the establishment of ASEAN human rights convention is expected to be a platform for ASEAN member countries to implement the law in the most effective and fair way to protect common interests in Southeast Asia region²³⁸.

Based on the argument above, the authors intend to formulate several element that have to be enact in the ASEAN human rights convention as follows:

a. **The Improvement Authority of AICHR**

The urgency to strengthen the ASEAN human rights commission could be improved in the ASEAN human rights convention which contains comprehensively the substance or rules that strengthen the ASEAN human rights commission. The improvement of ASEAN human rights commissions has the most important opportunities for changes in personality, authority and management to supports the performance of AICHR²³⁹. The establishment of ASEAN human rights Convention indirectly make the AICHR more stronger to enforce their functions, duties, and authority, it also indicated that the ASEAN human rights mechanism will operate more optimal than before. If the ASEAN take the lesson from the other regional human rights mechanism, the new

²³⁸ *Ibid.*

²³⁹ Arief Afriansyah, ASEAN Human Rights Body: Akankah Efektif? Beberapa Catatan Awal dari Perspektif Indonesia, available at: <https://www.researchgate.net/publication/280002889> accessed on 14 February 2018

convention of ASEAN human rights mechanism properly to enact some authority to strengthen the power of AICHR, such as²⁴⁰:

- i. Investigation in human rights violations
- ii. Receive Individual Reports
- iii. Direct Communication to the victim of human rights violations
- iv. Request reports to the states involved
- v. Independent election of AICHR's member that cannot influenced by state interest.

The new convention of ASEAN human rights mechanism will influenced to enact a new authority for AICHR. Consequently, the existence of AICHR in the future will be more effective to protect and guarantee human rights in Southeast Asia region²⁴¹. On the other side, it could change the international perception through the ASEAN human rights commission that was felt powerless to enforce human rights effectively. Therefore, the strengthening of ASEAN human rights commission is urgently needed to improve their promotion and protection function that important to be realized²⁴².

²⁴⁰ The Aceh Institute, *Op. Cit*, accessed on 14 February 2018.

²⁴¹ Tempo, LSM Desak Aturan Main Komisi HAM ASEAN Direvisi, available at: <https://dunia.tempo.co/read/593566/lsm-desak-aturan-main-komisi-ham-asean-direvisi> accessed on 14 February 2018.

²⁴² HukumOnline, Draf Deklarasi HAM ASEAN Perlu Direvisi: Masih ada ketentuan yang tidak sesuai dengan pemenuhan HAM secara universal, available at: <http://www.hukumonline.com/berita/baca/lt50542007dbb9c/draf-deklarasi-ham-asean-perlu-direvisi> accessed on 14 February 2018.

1) **The Establishment of ASEAN Human Rights Court**

ASEAN has a very weak human rights dispute resolution compared to other regional human rights enforcement. In spite of ASEAN has The High Council to resolve international disputes among its members, but mechanism to resolve the dispute in Southeast Asia region never been used²⁴³. The reality shown us that human rights violations in Myanmar and Piliphines have never been taken seriously and resolved by ASEAN. Therefore, the establishment of ASEAN human rights court is became a break through in the ASEAN human rights mechanism in order to protect and guarantee human rights in Southeast Asia region²⁴⁴.

The urgency of the establishment juman rights court has been greatly answered by the explanation of the facts of human rights violation that have been occurred during the ASEAN human rights mechanism established. It also influenced by the mandate of ASEAN human rights mechanism that has obligation to conducting human rights promotion and protection, but until this time the ASEAN human rights mechanism only capable to conducted promotion function²⁴⁵. Therefore, the establishment of ASEAN human rights court also purposed to strengthen

²⁴³ Ayu Hannah Zaimah, 2015, Urgensi Pembentukan Pengadilan Hak Asasi Manusia(HAM) oleh ASEAN INTER-GOVERNMENTAL COMISSION ON HUMAN RIGHTS (AICHR), *Sarjana ilmu hukum Journal online*, p. 9-11. Available at: <http://hukum.studentjournal.ub.ac.id/index.php/hukum/article/view/1054>

²⁴⁴ *Ibid.*.

²⁴⁵ Sriprapha Petcharamesree, 2013, The ASEAN Human Rights Architecture: Its Development and Challenges, *The Equal Rights Review Journal*, Volume 11, p. 49-53. Available at: http://www.equalrightstrust.org/ertdocumentbank/Sriprapha%20Petchar_amesree%20ERR11.pdf accessed on 14 Febuary 2018.

the protection function of ASEAN human rights mechanism and directly functioned to solve the problematic of human rights cases that never been resolved by ASEAN²⁴⁶.

On the other side, the establishment of ASEAN human rights mechanism also inspired from the other regional human rights mechanism, the other regional human rights mechanism has been successfully to establishing human rights court through the long considerable²⁴⁷. The spirit of upholding human rights through the establishment of regional human rights court absolutely have to imitate by ASEAN, in the process of formulation the ASEAN human rights court also could refer to the existing mechanism that have been provided by the other regional human rights court such as²⁴⁸;

- i. The composition of judges
- ii. The criteria of judges
- iii. The investigation and evaluation reports of human rights violation
- iv. The verdict is legally binding and obliged to follow by state involve
- v. Have an authority to impose sanction

²⁴⁶ *Ibid.*,

²⁴⁷ Hao Duy Phan, 2009, A Blueprint For a Southeast Asian Court Of Human Rights, *Asian-Pacific Law & Policy Journal*, Volume 10 Issue 2, p. 386-387.

²⁴⁸ *Ibid*, p. 388-391.

Based on the argumentation above, the establishment of ASEAN human court is become a platform that beleive has capability to fullfil the rights of ASEAN community with developing ASEAN dispute resolution.

The reason of establishment ASEAN human rights court that have to regulated in the ASEAN human rights convention reasoned because the authority to bind the parties involve cannot be realized by declaration, conference resolution, and political statement. Therefore, the convention become a platform to established the ASEAN human rights court because the convention basically create legal obligations among ASEAN member countries²⁴⁹.

2) **The Sanction of Human Rights Violations**

According to several political observers from Singapore Institute of International Affairs relating to the implementation of sanction in Southeast Asia region is become a good breakthrough in ASEAN to maintain the loyalty of ASEAN member countries through the international agreement that has been regulated, especially if those regulation related to the humanity in Southeast Asia region²⁵⁰. The implementation of santion in human rights violations purposed to maintaining peace and security in the region and strenthening the ASEAN human rights mechanism, besides that, the sanction will emphasize the ASEAN member countries to do not interpret the ASEAN

²⁴⁹ *Ibid.*

²⁵⁰ Singapore Institute of International Affairs, *Op. Cit*, p. 8-10.

human rights mechanism based on his will or state interest that made the ASEAN human rights mechanism was felt powerless. On the other hand, the sanctions also became a media for the ASEAN member countries more serious to enforce human rights in Southeast Asia region and to be a deterrent effect when the states involved committing a violation of human rights²⁵¹. Based on the argumentation above, the authors initiated to formulated several sanctions that appropriate to implemented in Southeast Asia region:

I. Compensation/ Economic Punishment

The responsibilities of States against their citizens are essentially regulated comprehensively in the Basic Principles and Guidelines of the International Humanitarian Law that was Adopted and proclaimed by General Assembly resolution 60/147 in 2005²⁵². The State has an obligation to provide remedy to victims of human rights violations, the reparations is become an absolute right that to be granted to the victims of human rights violation. On the other hand, the state should not only guarantee the compensation or reparations, but generally the state should

²⁵¹ *Ibid.*

²⁵² Basic Principles and Guidelines of the International Humanitarian Law Adopted and proclaimed by General Assembly resolution 60/147 in 2005. Those law generally has been comprehensively regulated the regulation about reparation, article 15 stated that Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim

ensure that the legal process will proceed according to the existing law.

Based on the General Assembly Resolution, there are five classifications of rights on reparations²⁵³:

- i. Restitution²⁵⁴
- ii. Compensation²⁵⁵
- iii. Rehabilitation²⁵⁶
- iv. Satisfaction²⁵⁷

²⁵³ Zulkipli, 2011, *Kompensasi dan Restitusi Bagi Korban Pelanggaran Hak Asasi Manusia Yang Berat*, *Unpublished Thesis Faculty of Law Universitas Indonesia*, p. 41-54.

²⁵⁴ Basic Principles and Guidelines of the International Humanitarian Law Adopted and proclaimed by General Assembly resolution 60/147 in 2005. Article 19: *Restitution* should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.

²⁵⁵ Basic Principles and Guidelines of the International Humanitarian Law Adopted and proclaimed by General Assembly resolution 60/147 in 2005. Article 20: *Compensation* should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as: (a) Physical or mental harm; (b) Lost opportunities, including employment, education and social benefits; (c) Material damages and loss of earnings, including loss of earning potential; (d) Moral damage; (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.

²⁵⁶ Basic Principles and Guidelines of the International Humanitarian Law Adopted and proclaimed by General Assembly resolution 60/147 in 2005. Article 21: *Rehabilitation* should include medical and psychological care as well as legal and social services.

²⁵⁷ Basic Principles and Guidelines of the International Humanitarian Law Adopted and proclaimed by General Assembly resolution 60/147 in 2005. Article 22: *Satisfaction* should include, where applicable, any or all of the following: (a) Effective measures aimed at the cessation of continuing violations; (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations; (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities; (d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim; (e) Public apology, including acknowledgement of the facts and acceptance of responsibility; (f) Judicial and administrative sanctions against persons liable for the violations; (g) Commemorations and tributes to the victims; (h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.

v. Non Recurrence²⁵⁸

Reparation is part of a civil matter where the society asks for reparation to the state, the reparation mechanism occurs because the people was felt violated or harmed by the activity of state in material or immaterial damage²⁵⁹. The urgency to enshrine a reparations mechanism within the ASEAN human rights convention is very important, where the rights of ASEAN community have not been seriously reviewed during this time and no special attention that conducted by ASEAN to the victims of human rights violations. Therefore, the reparations mechanism is one of the most important elements that should be consider by ASEAN²⁶⁰.

II. Economic Embargo

The economic embargo is become an efforts to stop human rights violations in Southeast Asia region, it also aimed to push the ASEAN

²⁵⁸ Basic Principles and Guidelines of the International Humanitarian Law Adopted and proclaimed by General Assembly resolution 60/147 in 2005. Article 23: *Guarantees of non-repetition* should include, where applicable, any or all of the following measures, which will also contribute to prevention: (a) Ensuring effective civilian control of military and security forces; (b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality; (c) Strengthening the independence of the judiciary; (d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders; (e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces; (f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises; (g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution; (h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

²⁵⁹ Zulkipli, *Op. Cit.*, p. 59-61.

²⁶⁰ Adi Tyas Tamtomo, *Kompensasi Sebagai Bentuk Perlindungan Hukum Terhadap Korban Pelanggaran Hak Asasi Manusia Berat Berdasarkan Hukum Positif Di Indonesia*, *Unpublished Thesis Faculty of Law Universitas Sebelas Maret*, p. 40-43.

member countries who do not obedient with a common policy in order to uphold ASEAN human rights mechanism in the future²⁶¹. The economic embargo policies functioned to prohibiting the economic transaction with the violator human rights that purposed to changes their national activity that indicated violate human rights, it will be one of the most solution that could be applied by ASEAN to uphold human rights effectively²⁶². The implementation of economic embargo in Southeast Asia region could be a platform to make the ASEAN human rights succeed and develop proportionally²⁶³.

The idea to create sanction by economic embargo in Southeast Asia region was inspired by an expert on international law from Universitas Indonesia, Hikmahanto Juwana²⁶⁴. According Hikmahanto Jumawa, The suggestion of imposing sanction through the economic embargo also came from the UN Secretary-General that has been force the ASEAN member countries to immediately take the concrete steps in order to solve the human rights cases in Southeast Asia region, one of the most recommendation that suggested to the ASEAN member countries is the

²⁶¹ Devi Apriyanti, 2014, Reformasi Politik Dan Ekonomi Di Myanmar Pada Masa Pemerintahan Presiden U Thein Sein(2011-2013), *Journal Online Mahasiswa(JOM) FISIP Universitas Riau*, Volume 2 Issue 1, p. 8-10.

²⁶² Media Indonesia, Indonesia Didorong Pelopori Asean Beri Sanksi Ekonomi Terhadap Myanmar, available at: <http://mediaindonesia.com/news/read/120522/indonesia-didorong-pelopori-asean-beri-sanksi-ekonomi-terhadap-myanmar/2017-09-02> accessed on 14 February 2018.

²⁶³ *Ibid.*,

²⁶⁴ Media Indonesia, Sudah Saatnya ASEAN Terapkan Sanksi Ekonomi Terhadap Myanmar, available at: <http://mediaindonesia.com/index.php/news/read/132022/sudah-saatnya-asean-terapkan-sanksi-ekonomi-terhadap-myanmar/2017-11-14> accessed on 14 February 2018

implementation of economic embargo for the violator of human rights²⁶⁵.

Hikmahanto also stated that the imposing of economic embargo to the ASEAN member countries who violate human rights could build positive impact in the ASEAN human rights mechanism, the imposing sanction generally could restoring conditions from human rights abuses. Therefore, the economic embargo was considered as a soft method that believed to stop human rights violation because the economic embargo do not used violence to solve the problem²⁶⁶.

The implementation of the economic embargo was felt urgent to implemented, the ASEAN member countries should take an action in order to prevent the occurrence of international crimes that committed by one of the ASEAN member countries. It also became a new instrument to solve the human rights violations whrn the criticizing and political statement to stop violence is seen as meaningless²⁶⁷.

III. Blockade The Transaction of Weaponry

The necessary of weapon nowadays is became something needed in the globalization era, besides it's function which generally used in war condition, the weapon could be a symbol to showed their capability to

²⁶⁵ *Ibid.*,

²⁶⁶ Adirini Pujayanti, 2012, Sanksi Ekonomi terhadap Iran dan Dampak Internasionalnya, *Info Singkat Hubungan Internasional*, Volume IV Number 4, p. 5-6. Available at: http://berkas.dpr.go.id/puslit/files/info_singkat/Info%20Singkat-IV-4-II-P3DI-Februari-2012-16.pdf accessed on 14 February 2018.

²⁶⁷ Yudi Permana, Pengamat: Negara di ASEAN Perlu Berikan Sanksi Ekonomi Terhadap Myanmar, available at: <https://news.akurat.co/id-64259-read-pengamat-negara-di-asean-perlu-berikan-sanksi-ekonomi-terhadap-myanmar> accessed on 14 February 2018.

keep and protect their sovereignty as military requirements to strengthen the defense and security although the situation is not being war. The occurrence of international armed conflict and non-international has shown that the existence of weaponry has become a requirement of daily life as food²⁶⁸.

On the other hand, the utilize of arms weaponry has over the limits. It can be proved by how the Junta Military Myanmar used the weapon to killed the Rohingnya peoples. Therefore, the impact of misuse of weapons, has become the deliberations and consideration by ASEAN in the human rights convention as the sanction to block the supply of weaponry in the conflict state. It also purposed to control weaponry utility and prevented from unnecessary suffer if there is any conflict²⁶⁹.

IV. Humanitarian Intervention

Although the humanitarian intervention has been contradicted from the basic norm of ASEAN, but the humanitarian intervention could be categorize as the last option to solve the human rights violations that have not been resolved in the last few decades, humanitarian intervention can be one of the most effective solution to stop human rights abuses that

²⁶⁸ Azizah Rizki Amalia, 2012, Analisis Kelemahan Regulasi Perdagangan Senjata Konvensional Dalam United Nations Army Trade Treaty(UNATT), E-Journal Ilmu Hubungan International, Volume 4 Issue 2, p. 2477-2488. Available at; ejournal.hi.fisip-unmul.ac.id accessed on 14 Febuary 2018.

²⁶⁹ Budi Hartono, 2013, Analisa Teori Pilihan Rasional Mengenai Sikap Abstain Indonesia Dalam Perjanjian Perdagangan Senjata (Arms Trade Treaty/ATT), Unpublished thesis Faculty of Political and Social Science Universitas Budi Luhur, 2013, p. 12.

occurring in the Southeast Asia region²⁷⁰. The humanitarian intervention is become a last resort when the state have no any option to solve the case, generally it has been describe in the UN Charter article 33²⁷¹ and completely by the article 41²⁷² and 42²⁷³ to determine the urgency of conducting humanitarian intervention²⁷⁴.

However, the parameter of last resort meant that the use of military force is the last alternative choice, the ASEAN also have to prioritizing the diplomatic efforts and other peaceful resolution mechanism to solve the human rights mechanism. On the other hand, the reason and purpose of humanitarian intervention have to be clear to protect human rights. The implementation of humanitarian intervention also should be proportionally to enforce and prevent from unnecessary suffer²⁷⁵.

²⁷⁰ Emi Heliza, 2014, Heryandi, and Ahmad Syofyan, Intervensi Kemanusiaan(Humanitarian Intervention) Menurut Hukum Internasional Dan Implementasinya Dalam Konflik Bersenjata, *Fiat Justisia Ilmu Hukum Journal*, Volume 8 Number 4, p. 632-635.

²⁷¹ Charter of The United Nations and Statue of The International Court of Justice 1945. Article 33: Article 33 1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. 2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means. Article.

²⁷² Charter of The United Nations and Statue of The International Court of Justice 1945. Article 41: The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

²⁷³ Charter of The United Nations and Statue of The International Court of Justice 1945. Article 42: Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

²⁷⁴ Mohamad Rosyidin, 2011, Intervensi Kemanusiaan dalam Studi Hubungan Internasional: Perdebatan Realis Versus Konstruktivis, *Global&Strategis Journal*, Volume 10, p. 58-60.

²⁷⁵ Emi Heliza, Heryandi, and Ahmad Syofyan, *Op. Cit*, Pp. 635-636.

Therefore, the implementation of humanitarian intervention is become the last option when the ASEAN member countries have no power to solve the human rights violation by peacefull manner, the ASEAN also have to eliminate the basic norm in spesific situation to protect the common interest in Southeast Asia region²⁷⁶.

C. The Establishment of Supervision Body

Inspired from the statement which has been stated by Lord Acton, Lord Acton stated that “**Power tends to corrupt, and absolute power corrupts absolutely**” meant that the authority is easiest to misused the power. Therefore, to formulate the ASEAN human rights mechanism more comprehensively, it is not enough that only to established the ASEAN human rights commission and ASEAN human rights court. The ASEAN also have to concern with the supervision body who focussed to supervise the performance of ASEAN human rights commission and ASEAN human rights court²⁷⁷.

The human rights cases that are never been resolved have made a red notes in the history of ASEAN human rights mechanism, on the other hand the establishment of ASEAN human rights commission and UDHR is also considered very powerless to uphold human rights in Southeast Asia region. Therefore, it needs an empowerment in the ASEAN human rights mechanism to strengthen the law enforcement in the scope of human rights.

²⁷⁶ *Ibid.*

²⁷⁷ Muhammad Iqbal Rachman and Sahid Hadi, *Op.Cit*, p. 4-5.

In the end, we also have to support the ASEAN to advance the process of human rights promotion and protection in the region²⁷⁸.

²⁷⁸ Dinna Wisnu, Dinamika HAM di Asia Tenggara, available at: <http://koran-sindo.com/page/news/2016-02-10/0/3> accessed on 15 February 2018

CHAPTER IV

CONCLUSION AND RECOMMENDATION

A. CONCLUSION

1. Basically the ASEAN Charter is a human rights instrument in Southeast Asia region that was mandated to maintain the peace and security among ASEAN member countries. There is a difference in historical-philosophy, juridical, principle, and theoretical of ASEAN human rights mechanism with the Universal Human Rights Declaration in the scope of human rights enforcement. During this time, the law enforcement of ASEAN human rights mechanism proved ineffective because there is no specific regulation to implemented simultaneously between the ASEAN human rights mechanism and the ASEAN values which has been enshrined in ASEAN Charter.
2. The commitment of ASEAN member countries to uphold human rights in Southeast Asia region should be granted with the highest appreciation to established ASEAN human rights mechanism and AHRD to empower the ASEAN human rights mechanism. Unfortunately, the existence of basic norm ASEAN as the identity of ASEAN was considered as an obstacle to enforce human rights effectively, the existence of ASEAN's principles that was made the ASEAN human rights mechanism have no fangs and powers toward humanity tragedy in Southeast Asia region. Consequently, the ASEAN human rights mechanism was interpreted in line with the state interest. The weakening

issues of ASEAN human rights mechanism was influenced by the political background over the elite of state that wanted to take the advantages in the existence of that principle. On the other side, the theoretical review of ASEAN's principles such as the non-interference and sovereignty are potentially to obstruct human right enforcement in ASEAN.

3. The ASEAN human rights mechanism is urgently need to empower their legal certainty and authority to improve the enforcement of ASEAN human rights mechanism.

B. RECOMMENDATION

1. To the representative of ASEAN member countries, it should immediately empower the ASEAN human rights mechanism and review the implementation of ASEAN values in ASEAN human rights mechanism in order to formulate the comprehensive human rights mechanism in Southeast Asia region. On the other hand, the ASEAN member countries also could take many lesson and advantages from other regional human rights mechanism to enforce human rights more effective and achieve common interest.
2. To the activist of human rights, never stop to speak the truth and never stop to crictic the injustice action by the government. The activist have to be a deffender of common interest for the ASEAN community
3. To the ASEAN community, the society have to support the decision of ASEAN in every process of the empowerment ASEAN human rights

mechanism. The ASEAN community also could take an important roles to supervise the law enforcement of human rights in Southeast Asia region, in order to prevent the abuse of power who take the advantages from the ASEAN human rights mechanism for their individual interest.

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