

Glass half empty or half full? The AICHR and the ASEAN Perspective on Humanitarian Intervention¹

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I. INTRODUCTION

The post-cold war period ushered a new world order that favored what Friedman (2005) considers “democratic, consensual, free, market-oriented governance.” These, coupled with rapid technological innovations, have made the world, as he coined it, flat. Globalization challenged barriers in various spheres – economic, social, cultural, political, and ideological.

The seemingly borderless state, however, gave rise to its own anti-thesis.³ The rapid diffusion of foreign ideas brought with it an intensified yearning for cultural identity demonstrated by increased regionalization and nationalization. Regional blocs and alliances were formed to ensure economic, political, and socio-cultural security against gargantuan world forces. Meanwhile, states more than ever assert their authority and personality as the primordial actor in the global arena.

This paper situates the discussion of humanitarian intervention amidst the interplay among trends of globalization, regionalization, and nationalization (Kacowicz, 1998). Globalization and nationalization play a tug-of-war. On one end is the growing interconnectedness and interdependence among nations that tend to blur purely domestic from international concerns; hence, the scenario of humanitarian intervention where a foreign government sends its troops to prevent unabated killings resulting from another country’s internal conflict. On the other end is the pressing appeal for nationhood; thus the corollary claim for sovereignty and non-interference in local affairs. Interestingly, regionalization comes in, not as a middle ground, but as a complex yet unique context within which globalization and nationalization operate.

This paper looks at the concept of humanitarian intervention as a demonstration of the globalization-nationalization tension, within a regional backdrop. Regionalization, as exemplified by the establishment of the Association of Southeast Asian Nations (ASEAN), promotes a distinct system. The ASEAN has espoused the “ASEAN Way” of managing its affairs, which includes a homegrown approach to human rights (Drummond, 2010). For purposes of this paper, the recently established ASEAN Intergovernmental Commission on Human Rights (AICHR) serves as the platform for the ASEAN’s stand. The AICHR as a regional human rights body is of particular significance given its mandate to promote and protect human rights within the ASEAN, and the mixed reactions of disappointment and promise that it has elicited from advocates.

Specifically, the paper examines the concept of sovereignty *vis a’ vis* the ASEAN’s evolving construction of human rights through exploring both the prospects and limits of humanitarian intervention within the AICHR framework. I begin by offering a working definition of humanitarian intervention, and identifying its related issues. The paper likewise presents a brief history and mandate of the AICHR in order to draw out the ASEAN’s view of humanitarian intervention. As part of the conclusion, I toss some recommendations on how governments, civil society, and the academe can proactively engage the AICHR towards a deeper and broader discourse on humanitarian intervention, and ultimately towards strengthening human rights protection in the region.

As a caveat, it must be emphasized that this treatise does not attempt to assess the value and effectiveness of the AICHR, which as a new institution must be given a chance to grow and find its place of importance in fulfilling its mandate. Neither does this work intend to present each ASEAN member state’s position as regards humanitarian intervention. Simply put, this work presents a Southeast Asian perspective of humanitarian intervention through the lens of the AICHR.

II. HUMANITARIAN INTERVENTION: KEY CONCEPT AND ISSUES

Humanitarian intervention has been a controversial subject in international debates for the past fifteen years (Welsh, 2006). The discussions give rise to a host of interrelated and oftentimes contradicting issues of sovereignty, non-interference, self-determination, national interests, and non-use of force on one hand, and of human rights, shared humanity, security, and moral obligation on the other. Some scholars thus treat the concept of humanitarian intervention with ambivalence (Lu, 2007), not only because of the nature and complexity of the issues it raises, but also because of the highly politicized context within which it is applied.

But before delving into humanitarian intervention as a problematique, it is imperative to have a leveled off understanding of the concept. This section offers a working definition of humanitarian intervention and devotes special attention to the issue of its legitimacy, in light of the ASEAN's predilection towards non-interference.

A. Key concept

For a more basic appreciation, the component words "humanitarian" and "intervention" deserve independent treatment. Di Prizio (2004) recognizes that there is no universally accepted definition for either term. The word "intervention" generally means to "interfere, usually through force or threat of force, in the affairs of another nation."⁴ Di Prizio funnels this down to the manner in which the action is undertaken. He posits that intervention involves coercion or the use or threatened use of force. Coercion implies lack of consent from the state where the intervention will be undertaken. Forcible action is usually carried out through armed or military intervention.

The term "humanitarian," on the other hand, opens a multitude of "motivations, intentions, constituencies, funding lines, mandates, operational principles, expectations" from among a wide range of actors including "academics, practitioners, policymakers, targeted populations" (Di Prizio, 2004: 5). But these proponents agree on humanitarianism's chief objective, i.e. to

prevent the death and misery of innocent people. In other words, at the crux of what is humanitarian is the existence of no less than the human being. Di Prizio interestingly observes that while the object of humanitarianism has remained the same, humanitarian intervention has evolved to adjust to changes in the socio-political landscape. What started out as emergency aid assistance in times of war or natural disasters and calamities, now incorporates assistance to people to promote general “security, peace, development, and justice” (Di Prizio, 2004: 5).

In line with the foregoing and in the context of an international relations discourse, this paper subscribes to Lu’s (2007: 137) definition of “humanitarian intervention” as “the use of military force by states against a sovereign authority for the purpose of human protection.” The definition combines the elements of manner of intervention (i.e. coerced military action) and purpose (i.e. to protect people), with the latter as justification for the former.⁵

B. Issues

“Humanitarian intervention” is a term laden with complexities. Some scholars question the existence of such oxymoron: can a coerced military action ever be humanitarian? (Holzgrefe and Keohane, 2003) The concern stems from the basic concept of intervention as an external influence, which at the outset contradicts the United Nations (UN)-recognized principle of state sovereignty.⁶

While discussing sovereignty can lead to convolutions as to its extent and limitations, its real-world application by heads of state focuses on the right of each state to do “entirely as its government pleases” (Shue, 2004: 13). Asserting and protecting this right leads to its corollary concept of non-interference, which bars states from meddling with the internal affairs of its equally sovereign counterparts.⁷

History reveals that since the days of the chieftains, monarchs and the Cold War, state sovereignty has never enjoyed complete deference. The international community, through the UN, however condemned assaults to sovereignty carried out in the name of territorial expansion, largely as a bitter lesson from Second World War. Yet sovereignty and non-intervention operate within a

larger grey area of international politics that through the decades continually create nuances in the application of such norms.

As mentioned in the paper's introduction, globalization blurred the public-private divide among nations, resulting to a more complex web of international relations. Welsh (2004: 2) traces the more tolerant view of sovereignty and non-intervention to the following global developments: "the weakness and (or complete failure) of state structures in many conflict-ridden societies, which provides opportunity for criminal activity, arms proliferation, and terrorism; the increased vulnerability of civilians in the context of civil conflict, and the intensification of refugee flows; the 'CNN effect', in which global and instantaneous access to information heightens popular awareness of human suffering; the strengthening of human rights norms and proliferation of human rights organizations; the strengthening of international institutions, regional and global, which increases the possibility of states acting on a multi-lateral basis; and the search by Western governments for new forms of political legitimacy and 'moral authority' to replace the ideologically driven agenda of the cold war."

The battle cry for democracy, and the consequent spread of human rights after the fall of communism provided greater impetus for challenging the bounds of sovereignty. Recognizing sovereignty as a right of a state, Shue (2004: 15) draws a convincing argument regarding restrictions to sovereign powers:

"Thus, if sovereignty is a right, sovereignty is limited. Sovereignty is limited because the duties that are constitutive of the right, and without which there can be no right, constrain the activity of every sovereign belonging to international society. The deeper reason why the principle of non-intervention protects the principle of sovereignty, as Vincent said, is that non-intervention imposes duties that also constrain the sovereignty of the states that bear the duty. It protects mine by constraining everyone else's and protects everyone else's by constraining mine. This is what rights do, where there are rights, there are duty-imposing rules."⁸

Just like any right, sovereignty carries with it inherent responsibilities, including the duty to protect people. When a state reneges on that duty, the underlying existence of the sovereign is put to question. Lu (2007: 3) eloquently explained this justification for intervention:

“Walzer relaxes the legalist paradigm of non-intervention, asserting that states can in certain circumstances justifiably intervene in the internal affairs of other states. The moral basis for such intervention, in cases of secession and counter-intervention, and in response to acts that shock the conscience of humankind, however, lies in the ideal of the self-determining community itself. Even interventions to halt gross human rights violations are justified because such interventions do not threaten communal integrity or autonomy since ‘when a government turns savagely upon its own people, we must doubt the very existence of a political community to which the idea of self-determination might apply.’”⁹

Indeed, there has been a growing acceptance among scholars and practitioners that sovereignty is not absolute, and that non-interference and non-intervention are subject to exceptions. As earlier discussed, while intervention initially came in the form of relief assistance to address human strife brought about by natural disasters, the concept has evolved to allow for external armed action to protect people suffering as a result of man-made disasters of civil conflict and later, of human rights violations.

Now that the limits to sovereignty and non-interference have been a growing consensus among states, the more important question lies: when then is intervention justified? Advocates of humanitarian intervention would answer that the intervention to be acceptable must be humanitarian. Humanitarianism is the legitimizing force for intervention. Welsh (2004) initially explains that intervention becomes humanitarian only when both the motives and outcome are humanitarian; the purpose and end result must be for the protection of people. Such standard remains relative and difficult to grasp so Welsh (2004: 35), following the Just War tradition, proposes four requirements that must be satisfied before an intervention is considered humanitarian:

First, there must be a just cause, or a supreme humanitarian emergency. This criterion attempts to address the criticism against selectivity in intervention. Welsh notes that the basis is not simply figures or the number of people affected, although this may be an indication of the magnitude of human rights violations. “A supreme humanitarian emergency exists when the only hope of saving lives depends on outsiders coming to the rescue.” Welsh however qualifies that a nation can intervene as a preventive measure and need not wait for the extreme situation if there is clear evidence of an “impending massacre.”

Second, use of force must be done as a last resort. This puts the burden on states to exhaust existing non-violent remedies to address the situation before employing military action. Welsh agrees with Bazylar (1987) that non-exhaustion may only be justified if delay would result in “irreparable harm”.¹⁰

Third, intervention must be proportional. This means that the “level of force employed [should] not exceed the harm that it is designed to prevent or stop”. The criterion calibrates the extent of military action with the nature and enormity of the situation.

Fourth, the use of force must achieve positive humanitarian outcome. The last standard refers to the “twin requirements of rescue and protection”. Rescue ensures that the humanitarian objective to save lives is met, while the protection aspect gives a long-term assurance that human rights abuses will no longer continue because their underlying causes have been properly addressed.

Welsh’s standards may provide a handle for understanding and evaluating the validity of a humanitarian intervention. But a realistic view shows that even with such standards, there can be no purely objective assessment of whether an intervention is indeed humanitarian or not.

In 2001, amidst continuing debates about humanitarian intervention, the International Commission on Intervention and State Sovereignty published the report “The Responsibility to Protect”.¹¹ This report was instrumental in the adoption of Heads of State and Governments in 2005 of the “Responsibility to Protect” (R2P), “an internationally agreed upon concept for jointly dealing with four egregious crimes: genocide, war crimes, ethnic cleansing, and crimes against humanity” – expressed in paragraphs 138 and 139 of Outcome Document of the World Summit in 2005.¹² As the latest UN issuance on humanitarian intervention, R2P attempts to lay down the basic principles on intervention in the name of protecting citizen’s right. While this was a welcome development for it provides a more up-to-date UN-issued statement on humanitarian intervention, many find the statements to be insufficient guidance for operationalizing foreign military action.

Ultimately, humanitarian intervention finds basis in the Chapter VII of the UN Charter which authorizes the Security Council to be responsible for collective measures, including allowing the use of force, in situations where there is a threat to international peace, breach of peace, or an act of aggression. But experience reveals that “similar atrocities have not always received equal attention even when occurring in the same part of the world.”¹³ Bartlett cites as an example that the UN allowed humanitarian relief missions in Somalia but not in Rwanda.¹⁴

Realpolitik is at play. Humanitarianism as a hegemonic tool may be a mere mask for selective self-interests of states and power blocs to enhance security and economic positioning, among others. Indeed, to intervene or not to intervene transcends the question of saving lives, but intricately involves the intervening state’s economic and political goals.¹⁵

Accordingly, humanitarian intervention has never been a welcome concept among all nations. The afore-discussed issues regarding sovereignty and the politics behind external military actions make state leaders and scholars circumspect about humanitarian intervention.

III. THE ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS (AICHR)

A. A brief history

The signing of the Universal Declaration of Human Rights in 1948 signaled the beginning of the call for a common understanding of guarantees and protections for peoples among nations. Southeast Asian countries have not been spared from this call.

But the response from the ASEAN was not immediate. For one, the ASEAN as the regional body of today was not yet organized then. Its predecessor was the 1961 Association of Southeast Asia (ASA) composed of only of Malaysia, Thailand and Philippines. A new group, MAPHILPINDO, composed of Malaysia, Philippines and Indonesia overtook ASA in 1963 (Solidum, 2003). In 1967, the MAPHILINDO trio included Singapore and Thailand to constitute the ASEAN as a regional association for cooperation. The membership expanded in 1984 when Brunei joined, followed by Vietnam in 1995, and by Laos and Myanmar in 1997. In 1999, Cambodia became the ASEAN's newest Member State. The ten-member organization was formally organized in 2007 under the ASEAN Charter.

Simultaneous with the development of the ASEAN was the unfolding of a human rights understanding among Southeast Asian Nations. Ryu and Ortuoste (2011) categorize the evolution of the human rights discourse in Southeast Asia to three periods. The *first* period covers the years 1967 to 1989, which Ryu and Ortuoste (2011: 13) call the “period of rejection and neglect of human rights.” This apathetic stance is traced to the Southeast Asians’ preoccupation with “domestic agenda such as economic development and regime stability.” Authoritarian rulers prevailed in the region at that time. Hence, the 1967 Bangkok Declaration, the first official document in ASEAN history, made no mention of human rights.

The *second* period from 1989 to 1997 was marked by an initial recognition of human rights qualified by the Southeast Asian context – “a regional stance on human rights” (Ryu and Ortuoste, 2011: 13). This time, human rights haunted

Southeast Asia with the 1991 Dili Massacre and through international concern expressed in the 1993 Vienna Convention. Significant during this period was the ASEAN's assertion of its own notion of human rights --one that is based on Asian values, culture and history as opposed to the concept imposed by the West.

In 1993, the idea of a regional human rights mechanism was first articulated in an official ASEAN document. The Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights expressed “the need to explore the possibility of establishing regional arrangements for the promotion and protection of human rights in Asia.”¹⁶ The evidently tempered language of the declaration referred to a mere recognition of a need, and not directly to the creation of a human rights body.

The Vienna Declaration and Programme of Action adopted in June 1993 at the World Conference was a half step ahead of the Bangkok Declaration. In Vienna, the sentiment was “to consider the possibility of establishing regional and sub-regional arrangements for the promotion of human rights where they do not already exist.” Foreign Ministers made a follow through in the ASEAN Ministerial Meeting held a month later. Member States “consider[ed] the establishment of an appropriate regional mechanism on human rights.” The language here was no longer to consider a mere *possibility* but to consider the *creation* of the body. The Asian Inter-Parliamentary Organisation (AIPO) expressed a more promising commitment in its Kuala Lumpur Declaration on Human Rights in September 1993. The AIPO acknowledged the mandate: “it is the task and responsibility of Member States to establish an appropriate regional mechanism on human rights” (Drummond, 2010).

Chalermphanupap (2008), Special Assistant to the ASEAN Secretary General, remarked that the establishment of the AICHR in part slowed down in 1995 as a result of political diversity brought about by the inclusion of four new member states in the ASEAN: Vietnam, Laos, Myanmar, and Cambodia. These countries have appalling records of human rights violations, and have been reluctant to support the creation of a regional human rights body.

Nevertheless, the ASEAN's formal commitments fueled a stronger demand for a regional human rights body from civil society. Region-based organizations such as the working Group for an ASEAN Human Rights Mechanism, the Asian Forum for Human Rights and Development (FORUM Asia), Solidarity for Asian People's Advocacy Task Force on ASEAN and Human Rights, among others, were joined by national human rights institutions of ASEAN Member States,¹⁷ and members of the academe to organize consultations and fora to consolidate inputs as to the form, mandate, and other details regarding the establishment of the regional human rights body. (Drummond, 2010)

This led to the *third* stage (1997 to present) in the ASEAN's evolutionary process. Human rights finally found its way into the ASEAN official agenda. The ASEAN Charter of 2007 did not only formalize the overall regional partnership among Southeast Asian nations. It also sealed the commitment to create a human rights body. The Charter confirmed the ASEAN's pledge to promote and protect human rights in its preamble, statement of purpose and principles. Importantly, the Charter's Article 14 mandated the establishment of a regional human rights body:

“14.1. 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.

14.2. This ASEAN human rights body shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting.”

Participants in and observers of the drafting process admit that Article 14 was among the most contentious provision in the making of the Charter (Koh, et al., 2009). Article 14, though considered still very conservative and deficient by human rights groups, was a form of victory for advocates who witnessed the negotiation process. Article 14 marked the incorporation of human rights in the ASEAN's official agenda (Ryu and Ortuoste, 2011). But the Charter was only the first hurdle. The greater challenge was the drafting of the Terms of

Reference (TOR) that will spell out the specific powers and functions of the new body.

A High Level Panel (HLP) composed of academics and diplomats appointed as representatives of ASEAN Member States was tasked to formulate the TOR. The HLP's work began in July 2008. A critical subject matter of discussion was the form and mandate of the body. It must be noted that the Charter chose to call the regional mechanism a body, without specifying whether it is a forum, a commission or a court. In the end, the HLP adopted the term "commission" as a compromise. It is not as loose and disempowered as a forum, which only serves as a venue for discussion. But neither is it a powerful tribunal like a court that can take cognizance of cases and pronounce verdicts, which Member States were not yet ready to deal with. The name of the commission also carried the adjective "Intergovernmental", emphasizing the consensual nature of decision-making within the body.

As to the mandate, the consensus was for more human rights promotion and a toned-down human rights protection function, as will be shown in the discussion of the TOR's main provisions below.

B. Feature provisions

This section will center on the TOR provisions that have considerable implications on the way the ASEAN understands humanitarian intervention. For focus, the paper leaves out provisions of the TOR pertaining to the composition, modalities and administration of the AICHR.

The TOR begins by going back to the ASEAN Charter as the source of the AICHR's authority. This opening statement clearly lays down the confines of the AICHR's role. The TOR's guiding principles affirm that the AICHR must maintain the ASEAN's traditional posture as regards human rights:

“2. PRINCIPLES

The AICHR shall be guided by the following principles:

2.1 Respect for principles of ASEAN as embodied in Article 2 of the ASEAN Charter, in particular:

- a) respect for the **independence, sovereignty**, equality, territorial integrity and national identity of ASEAN Member States;
- b) **non-interference in the internal affairs of ASEAN Member States**;
- c) respect for the right of every Member State to lead its national existence **free from external interference**, subversion and coercion;
- d) adherence to the rule of law, good governance, the principles of democracy and constitutional government;
- e) respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice;
- f) upholding the Charter of the United Nations and international law, including international humanitarian law subscribed to by ASEAN Member States; and
- g) respect for different cultures, languages and religions of the peoples of ASEAN, while emphasizing their common values in the spirit of unity in diversity.

2.2 Respect for international human rights principles, including universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms, as well as impartiality, objectivity, non-selectivity, non-discrimination, and avoidance of double standards and politicization;

2.3 Recognition that the primary responsibility to promote and protect human rights and fundamental freedoms rests with each Member State;

2.4 Pursuance of a **constructive and non-confrontational approach** and cooperation to enhance promotion and protection of human rights: and

2.5 Adoption of an **evolutionary approach** that would contribute to the development of human rights norms and standards in ASEAN.” (Emphasis supplied)

To preserve the non-confrontational attitude among Member States, the AICHR emphasized the consultative nature of the intergovernmental body (Art. 3) and adopted the consensual decision-making process prescribed by the Charter (Art. 6.1). Markedly ASEAN, these principles have been translated into the AICHR’s functions which tilted the balance between human rights enforcement and non-interference in favor of the latter. The following functions outlined in the TOR have been criticized as limited to human rights promotion:

- 1) Formulate strategies, including an ASEAN Human Rights Declaration for human rights promotion and protection (Arts. 4.1, 4.2);
- 2) Increase public awareness, capacity-building support and the general promotion of human rights instruments among Member States (Arts. 4.3, 4.4, 4.5, 4.6);
- 3) Consult with stakeholders (Arts. 4.8, 4.9);
- 4) Provide advisory services or technical assistance on human rights concerns to ASEAN sectoral bodies but only upon request (Art. 4.7);
and
- 5) Conduct studies and develop common approaches and positions on human rights matters (Arts. 4.11, 4.12).

As part of human rights promotion, the AICHR can *attempt* to influence Member States regarding their accession to international human rights instruments (Art. 4.5). But a close reading of the provision reveals that the influence must be in the form of a restricted “encouragement”, i.e. “encouragement to *consider* acceding to” and not even to directly ratify the instrument.

The closest task towards human rights protection is embodied in Art. 4.10, which states that the AICHR can “obtain information from ASEAN Member States on the protection on human rights.” This was the concession point in response to the proposal to empower the AICHR to investigate and assess a country’s human rights situation. Indonesia pushed for a broader protection mandate by authorizing the AICHR to “observe situations and give recommendations to Member States and conduct periodic review of Member States’ human rights practices,” as practiced by the UN. However, the proposals failed to muster support even from Thailand and the Philippines, which were known to be active human rights advocates within the ASEAN. These countries feared that an emboldened AICHR will investigate the mounting human rights violations within their jurisdictions. (Drummond, 2010: 19)

IV. IS THERE ROOM FOR HUMANITARIAN INTERVENTION?

In answering the subject question, this section draws from the discussion on humanitarian intervention and its related issues as presented in the preceding portions of the paper. Specifically, this section examines if humanitarian intervention can be justified within the AICHR framework, using the four standards proposed by Welsh (2004).

A. The glass half empty: Limitations to humanitarian intervention

The ASEAN has been known and proud to espouse the “ASEAN Way,” a distinctive approach to adhere to principles of consultation and consensus in decision-making, as well as to non-interference and non-use of force in dealing with ASEAN neighbors (Weber, 2010). As early as the 1955 Bandung Conference from which most of the ASEAN principles originated, “mutual respect for sovereignty and territorial integrity, mutual non-interference in each other’s internal affairs, peaceful coexistence, disarmament and prohibition of nuclear weapons and respect for human rights” have been the underlying understanding among Southeast Asian countries. It is this set of shared values that binds Member States to act as one (Solidum, 2003). Good neighborliness, cooperation, and high regard for group rights are common themes running in most ASEAN engagements and transactions. The ASEAN Way is now embodied in the ASEAN Charter. Inevitably, the paper will regularly refer to its provisions since

the AICHR draws its existence from the ASEAN Charter.

The language of engagement reiterated in ASEAN documents throughout the years until the 2007 ASEAN Charter, and in the AICHR TOR in particular, are opposed to what humanitarian intervention principally allows, i.e. use of force and lack of consent on the part of the subject state. Moreover, the consensus approach to decision-making makes a situation of coercion or disregarding a Member State's right to consent close to impossible. Unfortunately, ASEAN principles are not just lip service or expressions of sentiments on paper. Member States practice them in dealing with real-life scenarios. As Solidum (2003) notes, ASEAN countries eschew military action.

With these principles entrenched in the AICHR, it is but expected that the regional mechanism's role is limited to human rights protection. The implication then is: if the AICHR cannot even provide for a venue to entertain individual human rights complaints or conduct country investigations of violations, then all the more can it not sanction a coerced armed action to uphold people's rights.

The attitudinal barrier to humanitarian intervention becomes more difficult to confront with when understood within the context of the East-West dichotomy. The ASEAN Way has been repeatedly invoked in debates to justify the ASEAN's stand in critical issues relating to democracy and human rights, largely in response to universalist notions based on western assumptions (Eldridge, 2002). The AICHR, as Ryu and Ortuoste (2011: 8) argue, is a regional mechanism organized precisely as a "shield against external intervention." This does not come as a surprise since the establishment of the ASEAN is likewise a response to the inescapable impact of the forces that make the influence of the West and other regional blocs faster and more real than ever.

The ASEAN thus views most cases of humanitarian intervention with suspicion. Koji (2003: 6) notes that the ASEAN found the NATO (North American Treaty Organization) involvement in Kosovo "disquieting." The ASEAN knew that it was more about "power politics than moral question." Further, the ASEAN takes a more cynical stance when the target state is its own member. Even the UN had to contend with the ASEAN Way of dealing

with Myanmar. All UN actions as regards the human rights situation in the said country are being closely coordinated with the ASEAN (Ryu and Ortuoste, 2011).

From the foregoing, an attempt to satisfy Welsh's first criterion as to when human intervention may be justified - that there must be a just cause, or a supreme humanitarian emergency - becomes fraught with difficulties. Prior to evaluating the "cause" is the issue of who shall evaluate whether there is indeed a supreme humanitarian emergency? Is it the United States, Australia, the European Union? What are their true interests in becoming involved?

Assuming for argument's sake that the ASEAN, and not an external super power, will decide on the existence of an emergency, the ASEAN's desire to get everyone's agreement, including the subject state's go-ahead, will rule out humanitarian intervention as an option. This is based on the premise that humanitarian intervention entails coercion. As Amnesty International observed, the consensus approach to human rights protection "weakens, compliance, allows obstruction by minority of governments to bring pressures of acceptance to the lowest common denominator standards" (Eldridge, 2002: 63).

Applying Welsh's second and third requirements of use of force as a last resort, and the proportionality of intervention, the AICHR will again fail to facilitate the application of humanitarian intervention. The AICHR, consistent with the principles of the ASEAN, has not been clothed with authority to use military coercion even as a last option. Bound by the ASEAN Charter, the AICHR must employ dispute resolution mechanisms for the peaceful settlement of disputes, renounce aggression, use of force or threat thereof (cf. Article 2, Principles, ASEAN Charter). Solidum (2003: 114-115) finds this practice impressive: "the ASEAN has so far resolved issues without military intervention, using innovative Asian solutions."¹⁸ It thus appears that the ASEAN Way does not envision a situation where grave abuses will warrant forced military action.

As to the fourth criterion of achieving humanitarian outcomes, a primary consideration is: what are humanitarian outcomes for the ASEAN? Following

the ASEAN Way, human rights enforcement must be contextualized within a specific set of culture, values and political beliefs. In this light, the ASEAN has been careful not to impose a particular form of democracy to its members. Further, the ASEAN can argue that good neighborliness and mutual restraint, in full recognition of a co-member state's sovereignty, are themselves humanitarian outcomes that can only be achieved without employing coercion.

These told, the conclusion leads us to the AICHR as a weak, if not powerless, institution for enforcing human rights through the strategy of humanitarian intervention. Drummond (2010) agrees further by saying that reliance cannot be made on the evolutionary approach to human rights enunciated in Article 2.5 of the TOR. She finds the approach vague and elusive as it lacks substantive benchmarks for evaluating the AICHR's development. Drummond is thus far from being optimistic in looking at the AICHR's potential to protect rights, noting that the body was never designed to have teeth.

B. The glass half full: Capitalizing on the ASEAN Way

Seeing the glass as half empty presents only one side of the coin. The ASEAN Way, which the AICHR is mandated to espouse, indeed restricts the manner in which Member States can engage with each other. But a closer look at the AICHR reveals that the new institution offers some leeway for humanitarian intervention.

A striking feature of the ASEAN Way articulated in the TOR (Art. 2.5) is the "(a) doption of an evolutionary approach that would contribute to the development of human rights and standards in ASEAN." This principle and the ASEAN's experience indicate that change is possible. Its extent and pace may not be fully known but there is always some possibility that the ASEAN will find exceptions to the norms of consensus and non-interference, especially when people's rights are involved.

Ambassador Tan Sri Dato Ahmad Fuzi bin Abdul Razak, Malaysia's representative to the HLP, recalls that human rights used to be a "taboo" in the ASEAN (Koh, et al., 2009: 21). Hence, its incorporation in the Charter and the consequent establishment of the AICHR are considered big leaps in ASEAN

history. Philippine representative to the HLP, Ambassador Rosario Manalo commends that the establishment of AICHR placed human rights at the center of the ASEAN agenda.

Ryu and Ortuoste (2011) expressed optimism as to the potential of the AICHR to pursue stronger human rights protection within the region. Their view finds support in recent developments that demonstrate a more liberal acceptance of humanitarian intervention. The Philippines and Thailand for instance supported the Australia-led peace-keeping efforts in Timor Leste by sending their own troops (Koji, 2003). While members such as Myanmar, Cambodia, Laos and Vietnam may continue to oppose a more progressive interpretation of non-interference, the establishment of the AICHR shows that consensus can lead to agreements favoring human rights.

More importantly, the official expression of the ASEAN Way, i.e. the ASEAN Charter, as well as the AICHR TOR, both refer to a more immutable rationale for resorting to humanitarian intervention. It is worth emphasizing that the AICHR is mandated:

“1.6 To uphold international human rights standards as prescribed by the **Universal Declaration of Human Rights**, the Vienna Declaration and Programme of Action, and international human rights instruments to which ASEAN Member States are parties.”
(TOR; emphasis supplied)

The ASEAN Charter likewise provides in its preamble, purpose and guiding principles the protection of human rights and fundamental freedoms (Arts. 1.7, 2.2[i]) and includes as a guiding principle, “upholding the United Nations Charter and international law, including international humanitarian law, subscribed to by states. Although admittedly, some ASEAN members have been selective in ratifying international human rights law instruments, the general intent to protect people’s rights plus the commitment to a people-centered ASEAN can creatively be invoked to justify humanitarian intervention.

After having said all these, if we now apply Welsh’s four-fold test, there can

be room for AICHR to consider humanitarian intervention. As to the first and fourth requirements of a just cause and humanitarian outcomes, the same may be satisfied as the AICHR accepts the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms (Art. 2.2, TOR). The TOR mandates the AICHR to apply the UDHR despite the different cultural contexts in which rights operate. Though what constitutes a supreme emergency may not be easily defined, UN instruments can provide clearer guidance as to when there is a violation of rights and on how such rights should be protected. With the AICHR's reference to international human rights standards, blatant violations that warrant intervention cannot be easily brushed aside, and can prevail over wariness about the self-interest of other states. The reaction to Myanmar's suppression of the Saffron Revolution in 2007 reveals that this is possible. Ciorciari (2009) vividly accounts:

“Shortly after the crackdown, Singaporean Foreign Minister George Yeo expressed ‘horror’ and ‘anger’ at the SPDC’s [State Peace and Development Council] actions. He said plainly that ASEAN ‘had stopped trying to defend Myanmar internationally because it became no longer credible’ and that ASEAN had ‘no choice’ but to castigate the junta. On September 27, 2007, Yeo gave a statement at the UN General Assembly in New York that expressed “revulsion” and, pointedly, called for a ‘transition to democracy.’ As scholar Donald Emmerson has argued, Yeo’s remarks—which evidently were not cleared by other ASEAN ministers—broke from ASEAN’s past insistence on the need for ‘reconciliation’ in Myanmar. By advocating a transition to democracy, Yeo implied the need for dramatic political reform. One Singaporean analyst with close ties to the Foreign Ministry raised the possibility of suspending Myanmar’s ASEAN membership. A few other ASEAN officials also expressed revulsion and demanded change. A ‘frustrated’ Philippine President Gloria Macapagal Arroyo demanded the release of Aung San Suu Kyi and insisted that the SPDC move toward democracy ‘without further delay.’ The Buddhist Foreign Minister of Thailand, Nitya Pibulsonggran, allegedly called the killing of monks ‘opprobrious’ or ‘abhorrent’ in

private ASEAN meetings. In Jakarta, Indonesian Foreign Minister Hassan Wirayuda also expressed concern and attributed the unrest to a ‘flawed democratization process’ in Myanmar. These critiques sounded too gentle and diplomatic to some Western audiences, but they were strikingly sharp by ASEAN’s normal non-intrusive standards.”

As regards Welsh’s second and third criteria, it may be argued that the exhaustion of remedies and proportionality of intervention requirements can be addressed by the evolving principles of sovereignty and non-interference. These concepts are never static (Weber, 2010). Like any other socially-constructed norm, they change over time. ASEAN Member States have continually explored ways of confronting co-members without transgressing the time-honored values of good neighborliness, mutual accommodation, and open discussions; thus carving out space for humanitarian intervention when necessary. Some Member States have thus proposed more direct ways of dealing with a neighbor’s internal concerns, other than by tolerance.

Consistent with the principle of non-interference, the ASEAN traditionally employs a “constructive engagement” approach. This style, as applied in the case of Myanmar in 1994, involved inviting leaders to ASEAN gatherings so they will see the benefits of joining. Myanmar became a member of the ASEAN in 1994 (Solidum, 2003). In 1997, former Malaysian Prime Minister Anwar Ibrahim proposed a bolder alternative in the form of “constructive intervention,” to allow the ASEAN to intervene before domestic problems escalate and affect other Member States. Since this was already considered radical, Thailand offered a new strategy of “flexible engagement” which allowed an open discussion of domestic affairs with regional ramifications. So far, what has been adopted is “enhanced interaction” where Member States can bring to the table a neighbor’s concerns that could affect them or the region. (Loke, 2005)

Critics argue that any possibility of humanitarian intervention within the AICHR framework remains remote, given the slow pace at which human rights and sovereignty concepts evolve. It must be understood however that the AICHR as a 2009 creation must be given time to grow, perhaps slowly but surely.

V. CONCLUSION: THE CHALLENGE TO STATE GOVERNMENTS, CIVIL SOCIETY AND THE ACADEME

The establishment of the AICHR elicited diverse responses from human rights advocates who have long lobbied for a regional human rights mechanism. Others expressed elation that finally an official document and body will embody ASEAN's human rights aspirations. More expectant ones, faced disappointment at a toothless office. The answer then to the question of whether or not humanitarian intervention has a place in the AICHR cannot be categorical. It is dependent not only on the perspective taken, but also on the engagement of actors and stakeholders with each other and with the new regional human rights body.

Ryu and Ortuoste (2011) trace the creation of the AICHR to two factors: the democratization process and a change in regional norms through the ASEAN's community building process. State governments and its leaders, as duty-bearers, carry the key to ensuring a flourishing democratic space that will allow full respect for human rights, including freedom of expression and opinion. Only when such rights are upheld can there be a healthy system for exacting accountability between the government and its people. The challenge to maintain democracy is never an easy one. Even Member States that have been steps ahead towards democratic governance, such as Thailand and the Philippines, have been subject to threats of democratic reversal.

Governments also face the challenge of establishing (in countries where there are none) and supporting independent and fully functioning national human rights institutions (NHRIs). Humanitarian intervention can only be appreciated in an environment where states take full responsibility for violations by ensuring that adequate mechanisms for redress are in place. Humanitarian intervention will find space in a regional body when state counterparts understand the primacy of rights in their own governance systems.

State leaders must also continue to play a lead role in setting the direction within their jurisdictions, and collectively within the ASEAN to end human rights violations. What has happened during the Saffron revolution in Myanmar

attests that official statements of state representatives set the tone of engagement and can provide the necessary encouragement towards a deeper understanding of humanitarian intervention and human rights.

Civil society takes considerable credit in pushing for the creation of the AICHR (Drummond, 2010). Human rights non-governmental organizations have been at the forefront of exacting accountability for violations at the national and regional levels. Their role has not been confined to human rights promotion, but includes the more important task of filling gaps in the system due to government neglect. While support for the AICHR is always welcome, civil society as claim holders must continue to critically question and challenge the regional system. A human rights organization in the Philippines has taken this direction by testing the limits of the AICHR through submitting a complaint in behalf of the victims of a massacre in the southern part of the country.¹⁹

Moreover, the AICHR has given the civil society a special role. The TOR specifically authorizes the AICHR to “engage in dialogue and consultation with other entities associated with the ASEAN, including civil society organizations and stakeholders, as provided by Chapter V of the ASEAN Charter” (Art. 4.8). The Charter refers to a list of certified entities associated with the ASEAN. But civil society must not be limited by such list. Whether accredited or not, they must continue to engage with the AICHR directly or indirectly through the various modes provided in the TOR.

The academe likewise plays a crucial role in the humanitarian intervention discourse. As discussed in the preceding chapters, the concept of humanitarian intervention opens a wide range of issues where various disciplines such as international law and relations, political science, sociology, economics, among others, can offer answers and explanations. Discussions on expanding the boundaries of sovereignty and related concepts must put forth policy recommendations that will aid Member States and the AICHR to better understand human rights and humanitarian intervention.

The AICHR offers these three major sectors – the government, civil society, and academe – opportunities to take part in AICHR’s work. Unfortunately, the

first opportunity proved to be less promising than expected. Article 4.2 of the TOR provided for the drafting of the ASEAN Declaration of Human Rights. Prior to its issuance, civil society planned to actively take part in the drafting process to ensure that the Declaration will adhere to the UDHR. But unlike the AICHR TOR, the Declaration's formulation did not employ a transparent and inclusive process. Despite calls not to railroad its approval, the ASEAN adopted a weak and extremely conservative Declaration on 18 November 2012.²⁰ The issuance drew flak from human rights advocates including the UN High Commissioner for Human Rights for departing from internationally accepted human rights principles and standards.²¹

Another chance for engagement is the TOR-mandated review of the AICHR five years from its entry into force (Art. 9.6). Stakeholders must look forward to 2014 for a round of assessments and a venue for concrete recommendations to strengthen the AICHR. In the meantime, government, civil society and the academe must continue to creatively work within the existing AICHR framework and maximize the opportunities it presents to create room for humanitarian intervention, promote a progressive understanding of human rights, and establish effective mechanisms to enforce rights.

The AICHR, though far from being an ideal regional human rights body, must not spell the end of hope for humanitarian intervention and human rights. Its TOR is a living document that must respond to changing times. I must emphasize though that his paper does not advocate for a blind optimism as regards the role of the AICHR. The AICHR's limitations are real and can be frustrating. This work intends to encourage stakeholders to capitalize on the ASEAN's evolutionary process. The promise is that there is always change. As to how fast and to what direction the AICHR will evolve will ultimately depend on how governments, civil society and the academe will rise to the challenge of utilizing the opportunities presented by the AICHR and the ASEAN.

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Notes

- 1 Paper presented at the International Conference on Humanitarian Intervention, Doshisha University, Kyoto, Japan on 28-29 June 2011.
- 2 Assistant Professor, Institute for Governance and Rural Development, College of Public Affairs and Development, University of the Philippines Los Banos.
- 3 Here, I take the divergent view of regionalization and nationalization as challenges to globalization. However, I do not discount the fact that all three exist simultaneously and interact as parallel processes (Kacowicz, 1998) as discussed in the following paragraphs.
- 4 American Heritage Dictionary of the English Language (2000), 4th ed. Houghton Mifflin Company.
- 5 A more extensive conception of humanitarian intervention includes “non-military forms of activities of humanitarian NGOs” (Wheeler, 2003: 2) such as the International Committee for the Red Cross, Doctors without Borders, and Oxfam. For purposes of this discussion and consistent

with the aims of the conference for which this work was developed, humanitarian intervention will exclude non-military relief efforts, albeit these are external actions intended to save lives. As Lu (2007: 137) maintains, “activities such as provision of food, water, shelter, clothing and medical assistance, all of which are aimed at bringing immediate relief to a population in distress” may better be captioned as “humanitarian action” or “humanitarian assistance.” Lu makes further distinctions based on “substantive activities”: military intervention for military action with humanitarian purposes; economic intervention as one that comes in the form of “economic sanctions, boycotts and trade embargoes, as well as positive trade incentives and foreign aid.”

6 The United Nations Charter espouses respect for state sovereignty (Art. 2.1).

7 This paper uses “interference” and “intervention” interchangeably to mean “activity undertaken by a state, a group within a state or an international organization, which interferes in the domestic affairs of another state.” (Vincent, R. J., 1974: 13)

8 Shue cites Vincent (1974) who posits that the principle of non-intervention practiced by outside states enables a state to assert its sovereignty.

9 Lu cites Walzer, M. (1977). *Just and Unjust Wars*. New York.

10 Bazylar, M. (1987) “Reexamining the Doctrine of Humanitarian Intervention in the Light of the Atrocities in Kampuchea and Ethiopia.” *Stanford Journal of International Law*, 23: 600.

11 The Philippines former President Fidel V. Ramos was a member of this Commission. Paragraphs 138 and 139 state:

“138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.”

12 CSCAP Study Group on the Responsibility to Protect. (2010, February 26-27), Jakarta Indonesia. Accessed on June 23, 2012, from <http://www.cicp.org.kh/download/asean-isis%20and%20cscap/CSCAP%20RtoP%20Study%20Group%20-%20First%20Meeting%20Final%20Report.pdf>.

13 Barlett (2008).

14 *Ibid.*

- 15 Nevertheless, Welsh's four-fold test presents a workable, albeit imperfect, standard for evaluating humanitarian intervention. His proposed criteria will be used in the paper's discussion in Part IV.
- 16 7 April 1993, paragraph 26.
- 17 The Philippines was the first to establish a national human rights institution (NHRI) in Southeast Asia. Indonesia followed in 1993, while Malaysia and Thailand set-up their own in 1999.
- 18 Her inference, however, is now highly debatable especially with the violations in Myanmar and brewing issues as regards the Spratly Group of Islands.
- 19 The massacre involved the killing of around 60 civilians, including journalists, in Ampatuan town, Maguindanao, Southern Philippines allegedly upon orders of a political opponent of a gubernatorial candidate. The Center for International Law elevated the case to the AICHR through a "Preliminary Request" on the premise that the acts would not have been committed without the complicity of the state or its agents. (Maguindanao massacre reaches ASEAN Human Rights Body, Vera Files accessed on 3 June 2011 at <http://verafiles.org/main/news/maguindanao-massacre-case-reaches-asean-human-rights-body/>)
- 20 Available at <http://www.asean.org/news/asean-statement-communicues/item/asean-human-rights-declaration>
- 21 "ASEAN Human Rights Declaration fails to impress UNHRC." The Jakarta Post. 14 November 2012, available at <http://www.thejakartapost.com/news/2012/11/14/asean-human-rights-declaration-fails-impress-unhrc.html>