

Law, Legitimacy and the ASEAN Intergovernmental Commission on Human Rights

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ABSTRACT

This article examines the legitimacy of the ASEAN Intergovernmental Commission on Human Rights (AICHR). It considers: (1) the nature of legitimacy and the role of legitimacy as an element of compliance with international law; (2) the idea that *regional* arrangements for promoting and protecting human rights possess a particular form of legitimacy; (3) the legitimacy of ‘soft law’ such as the forthcoming ASEAN Declaration on Human Rights; (4) problems with legitimacy where international institutions are established in regions with a majority of non-democratic states. The article concludes that the answer to the question of whether the AICHR is a ‘legitimate institution’ is a complicated and highly qualified one.

Keywords: *international human rights law; Asia Pacific region; legitimacy; international relations*

(1) INTRODUCTION

Anxieties about legitimacy permeate the discourse on regional governance in Southeast Asia.¹ They have reached their apogee in relation to the ASEAN Intergovernmental Commission on Human Rights (AICHR), which was inaugurated on 23 October 2009 as a ‘consultative’ body, with primarily ‘educative’ and ‘promotional’

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¹Acharya (2009) suggests that one of the reasons for this is that assessments of Asian regionalism employ European-style institutionalization as a yardstick for judging effectiveness, which leads to conclusions pointing to the failure and limitations of Asian regionalism.

functions, lacking enforcement powers, triggers for sanctions and a system of reprisals (Ginbar, 2010). These factors, together with the time lag between ASEAN's 1993 announcement that it intended to create a human rights body and the eventual establishment of the AICHR in 2009,² and the reluctance of many ASEAN states to ratify core international human rights treaties,³ (Linton, 2008) have been read as signalling a reluctance on the part of ASEAN states to become part of a legalized human rights regime such as those that exist in Europe or the Americas. For critics, the inclusion of a reference to a 'human rights body' in the Charter of the Association of Southeast Asian Nations (ASEAN Charter) was a plausible response by ASEAN state leaders to external pressure; "when the ASEAN countries agreed in July 2007 to stipulate in the Charter the creation of such a [human rights] body, they were concerned about their international image" (Katsumata, 2009, p.628).

To date, international relations scholars have largely been concerned with analysis of the origins of the AICHR and the motivation(s) behind the Association's decision to establish the body (Gerstl, 2010; Katsumata, 2009; Munro, 2010). Pessimistic conclusions have been drawn from the application of realist (Gerstl, 2010) and constructivist (Katsumata, 2009) assessments of these motivations.⁴ A study of the legitimacy of the AICHR invites a different way of understanding the body's nature and potential. Specifically, legitimacy highlights the fact that power in international law does not always stem from the structural design of institutions or their articulated powers, and is not necessarily pre-determined by an institution's origins. Instead, institutional power (the ability to effect change) accretes or diminishes according to perceptions that the institution is appropriate for the socio-political circumstances in which it operates and has a capacity to meet the interests of relevant actors. In relation to international human rights institutions, the relationship between the institution, the state, and domestic and international audiences, is central to understanding the power of legitimate institutions. The type of political system within the state is one of the factors which determine how and when states will respond to internal and external pressures

² Most scholars trace ASEAN's progression to the establishment of a regional human rights body to the 1993 *Vienna Declaration on Human Rights*, which emanated from the Vienna World Conference on Human Rights. Amongst other proposals, the Vienna Declaration recommended that resources be made available for the establishment of regional arrangements for the promotion and protection of human rights. One month later, at the Twenty-Sixth ASEAN Ministerial Meeting in 1993, ASEAN's Foreign Ministers announced that "in support of the Vienna Declaration and Programme of Action," ASEAN should "consider the establishment of an appropriate regional mechanism on human rights." Joint Communique of the Twenty-Sixth ASEAN Ministerial Meeting' (23-24 July 1993) at para 16, <http://www.aseansec.org/2009.htm>.

³ All ASEAN states have ratified: the Convention on the Elimination of All Forms of Discrimination against Women [CEDAW], adopted 18 Dec. 1979, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (1980) (entered into force 3 Sept. 1981), 129 U.N.T.S. 13, reprinted in 19 I.L.M. 33 (1980) and the Convention on the Rights of the Child [CRC], adopted 20 Nov. 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (1989) (entered into force 2 Sept. 1990), reprinted in 28 I.L.M. 1448 (1989). Singapore, Brunei Darussalam, Thailand, and Malaysia, have entered substantial reservations to these conventions.

⁴ More positive has been the 'liberal institutionalist' perspective proffered by Simon S.C Tay (2008).

for change (Risse, et al., 1999). In liberal democratic states, for example, it has been argued that interest groups are able to use the influence of international institutions to make political demands of states, and that within these states, those who govern find it difficult to justify non-compliance with legitimate institutions (Simmons, 2009).

The aim of this article is to examine the concept of legitimacy in relation to the AICHR. I draw, where appropriate, on the experience of the world's extant regional human rights institutions, which have been created under the auspices of the Council of Europe, the Organisation of American States, the Organisation of African Unity and the League of Arab States.⁵ The issues I consider are organised around three central ideas: (1) the idea of 'the region' in international human rights law; (2) the legitimacy of 'soft law' in international human rights law; (3) the legitimacy of international institutions as a consequence of the democratic credentials of member states. Before I turn to these issues, I briefly discuss the idea of legitimacy and legitimacy's threshold question – the legal issue of state consent.

(2) Legitimacy in International Relations

Because of its association with the concept of compliance, the idea of legitimacy has long interested international lawyers and international relations scholars (Hurd, 1999; Coicaud and Heiskanen, 2001; Finnemore and Toope, 2001; Steffek, 2003; cf Mulligan, 2004). In the international order, as in the domestic order, there are three options for social control; the exercise of authority *via* means of (1) coercion, (2) self-interest or (3) legitimacy (Weber, 1947). Coercion requires that authority exercise or threaten the exercise of force, and so is costly and oppressive. Self-interest depends on a calculation that compliance will result in benefits. It requires continual acts of rational persuasion by authority to convince actors that there are payoffs to remaining in the

⁵ The Council of Europe was established in 1949. Its system for the protection of human rights includes the European Convention for the Protection of Human Rights and Fundamental Freedoms ('European Convention') and the European Social Charter. The European Court of Human Rights was established in 1953. The American Declaration of the Rights and Duties of Man was adopted by the Ninth International Conference of American States (the precursor to the Organisation of the American States ('OAS')) in Bogota in 1948. In 1959, the Inter-American Commission on Human Rights was created under the auspices of the OAS, and in 1969, the American Convention on Human Rights ('American Convention') was adopted by the OAS for implementation by the Inter-American Commission. The Inter-American Court of Human Rights was established in 1979. The Organisation of African Unity ('OAU') adopted the African Charter on Human and Peoples' Rights ('African Charter') in 1981. The African Charter, which came into force in 1986, provided for the establishment of the African Commission on Human and Peoples' Rights. In 1998, by way of a Protocol to the Charter, the OAU Assembly of Heads of State and Government approved the establishment of an African Court on Human and Peoples' Rights. The 1967 Arab-Israeli conflict provided the impetus for the League of Arab States ('Arab League'), to establish a Permanent Commission of Human Rights. The Commission's primary role is the promotion of human rights among League Member States. In 1994, the Arab League adopted the Arab Charter of Human Rights ('Arab Charter'), which failed to secure ratification by any of the League Member States. A revised Arab Charter was adopted in 2004. The revised Charter, which took effect from March 2008, established an expert Arab Human Rights Committee to consider reports submitted by Member States.

system and actors are required to constantly recalculate these payoffs; for these reasons it is highly demanding as a system of governance. Legitimate rule, as a third basis of authority, engenders compliance because actors hold “a generalized perception or assumption that the actions of an entity are desirable, proper or appropriate within some socially constructed system of norms, values, beliefs, and definitions” (Suchman, 1995, p.574). Legitimacy is thus the optimal basis for compliance. Where legitimacy exists, compliance is unproblematic and rule-breaking occasional (Hurd, 1999). Most social scientists argue in a circular fashion that legitimacy (as a subjective concept denoting perceptions of appropriateness) engenders voluntary compliance, and that compliance in the absence of coercion or self-interest is one of the indicators of a law or institution’s (normative) legitimacy (Bodansky, 2010).

The question of perspective is central to understandings of legitimacy in its subjective sense. Different actors are likely – indeed certain – to have different perceptions about the legitimacy of a regional institution. Jean Cohen distinguishes between internal and external legitimacy and argues that legitimacy is a different matter for those subject to an institution than it is for “outsiders.” (Cohen, 2008). The internal audience for whom legitimacy is relevant are states themselves, civil society representatives and rights-holders. Members of the international community constitute an external audience. Each of the internal groups may themselves have a different understanding of legitimacy. If the ‘audience’ of the legitimacy claim is the state, then limited independence and weak powers of enforcement might in certain cases increase the perceived legitimacy (appropriateness) of the institution in the eyes of its audience; “government actors....may put a much greater premium on sovereignty and consent, while civil society organisations may place much greater emphasis on participation and transparency” (Bodansky, 2010, p.314).

The Terms of Reference of the ASEAN I Intergovernmental Commission on Human Rights (TOR), state that the regional human rights commission is ‘inter-governmental’ and ‘consultative,’ comprised of state representatives who are ‘accountable to the appointing government.’⁶ These are provisions likely to make the body legitimate in the eyes of (some) ASEAN state members, who value the preservation of sovereignty and the principle of non-interference. These same provisions are likely to undermine the legitimacy of the AICHR in the eyes of civil society, who are critical of its lack of enforcement powers and apparent lack of independence. Different state actors within the region are themselves likely to hold different perceptions of the institution’s legitimacy. For the region’s more liberal states and older democracies, with established independent National Human Rights Institutions (NHRIs), the weak powers of the AICHR potentially undermine its legitimacy.

⁶ Article 3 of the Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights, adopted by the ASEAN Ministerial Meeting, 20 July 2009, available at: <http://www.aseansec.org>.

As regards the normative meaning and criteria of legitimacy, there exists a wide range of opinion.⁷ Legitimacy is what “justifies authority” (Bodansky, 2010) and this will change, depending on the nature and purpose of the authority and the nature of the relationship between the authority and its subjects.⁸ There is, however, general agreement among scholars that because the legal status of an international institution is based on the delegated authority it receives from the consent of states (Abbott and Snidal, 2000; Buchanan and Keohane, 2009) state consent is a necessary (but not necessarily sufficient) condition for international legal legitimacy (Franck, 1995, p.7-8; Wolfrum, 2010, p.7; Brune and Toope, 2010, p.52-53). The collective will of states is usually represented in a constitutive document; most often, in a treaty or charter, which is binding in law. When international institutions are not created this way, their legitimacy (and consequently their authority) is more likely to be ambiguous. The Inter-American Commission on Human Rights, for example, was established in 1959 pursuant to a mere Resolution passed at a meeting of Foreign Ministers (Scheman, 1965, p.336). It was not an official organ of the American Charter system, and for many years its uncertain status deprived the Inter-American Commission of a degree of institutional legitimacy and a source of secure funding to carry out its work (Buergeth, 1982, p.105-109). The situation was rectified in 1970, when the Protocol of Buenos Aires amended the Charter of the OAS and decreed the Commission a treaty-based organ.

In contrast to the Inter-American Commission, the AICHR is a body created pursuant to Article 14 of the Charter of the Association of Southeast Asian Nations, which is an agreement signed and ratified by all ten ASEAN members states and binding in international law. Article 14 of the Charter provides for the creation of an ‘ASEAN human rights body’ which will operate “in conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human

⁷ In the 1990’s, international legal theorist Thomas Franck produced a four-fold criteria of legitimacy in international law; (1) determinacy, (the clarity of the law’s message) (2) symbolic validation (authority through ritual or regularized practice) (3) coherence (consistency of the rule and its application with other rules) and (4) adherence (the connection of the rule to secondary rules) (Franck, 1995). More recently, international lawyers and political scientists have generated “complex standards of legitimacy,” which point to an institution’s attributes (minimal moral acceptability, comparative benefit, institutional integrity) and to its relationships with entities outside the institution – such as the support and endorsement of the institution’s goals and decisions by democratic states (Buchanan and Keohane, 2010). Another school of thought, connecting with the constructivist tradition in international relations, claims that legitimacy “is built through broad participation in the construction and maintenance of legal regimes...[which are]....grounded in underlying social norms...” (Brune and Toope, 2010). The overarching point made by Daniel Bodansky seems eminently plausible – that “legitimacy is among that class of concepts that we can define with more confidence negatively than positively.....it is difficult to establish that something is legitimate, but it is much easier to show that it is illegitimate.” (Bodansky, 2010).

⁸ Buchanan and Keohane (2010) have suggested, for example, that because the institutions of international governance are less “robust” than those of states, different, perhaps less rigorous standards of legitimacy, should be applied to international law-making institutions, than to institutions of governance at the state level.

rights and fundamental freedoms.” As the AICHR is created pursuant to the Charter, it possesses the authority given to it by the consenting states. Under the Charter, the AICHR is placed under Chapter IV as one of the “organs” of ASEAN, together with the ASEAN Summit, the ASEAN Coordinating Council, the ASEAN Community Councils, the Secretary-General of ASEAN and other key bodies. It is clear, then, that on the question of legality, the AICHR rests on secure foundations.

(3) The Idea of the ‘Region’ in international human rights law

In this section, I consider the idea that *regional* approaches to international arrangements for the protection of human rights possess a particular legitimacy (perceived and actual appropriateness to needs and circumstances). I concentrate on two widely accepted features of regionalism. The first is the increased potential for shared understandings about rights (their meaning, implementation and enforcement) to emerge from the facts of proximity and mutual economic and security interests. The second factor thought to underpin regional approaches to human rights is the link between human rights and regional peace.

(a) The Region and shared understandings about human rights

The emergence of regional human rights mechanisms is partly a matter of practical politics. Regions cohere around facts of geography and economic or security interests. The Council of Europe, the Organisation of American States, the League of Arab States, the Organisation of African States, and the Association of South East Asian Nations, have emerged as the result of concrete, interest-based alliances. Dialogue and exchange in relation to matters of mutual interest (peace, trade, border control), are thought to create vectors for communication about less tangible matters, such as human rights. In this way, pragmatic imperatives (the need to preserve economic and security relationships) provide incentives for reaching agreement about human rights, and work to foster the level of confidence needed before states are prepared to cede oversight on matters of domestic human rights, to a body outside the state. International arrangements amongst a more limited number of states, which hold similar geographic characteristics and share similar economic and security interests, are thought to increase willingness to accept the authority of regional institutions. Essentially, the idea is that regional economic and security institutions, perceived as legitimate because they are integral to development and prosperity, lend some of their legitimacy to regional human rights institutions. AH Robertson (1982, p.164-165) explains the evolution of regional systems for the promotion and protection of human rights in the following terms:

A state cannot be forced to submit itself to a system of international control; it will do so only if it has confidence in the system. It is much more likely to have such confidence if the international machinery has been set up by a group of like-minded countries, which are already its partners in a regional organisation, than if this is not the case. Moreover, it will be willing to give greater powers to a regional organ of restricted membership, of which the other members are its friends and neighbours, than to a world-wide organ in which it (and its allies) play a proportionally smaller part.

ASEAN's decision to establish a human rights body somewhat confounds this theory. First, the diverse political systems of states within the region, the low levels of ratification of international human rights conventions and extensive reservations to the treaties which are ratified (Linton, 2008) and the significant resistance of some ASEAN states to the idea of including reference to a human rights body in the Charter at all (Koh et al., p.2009), do not point to the emergence of shared understandings about human rights. A complicated picture emerges from the histories of the making of the ASEAN Charter (Koh et al., 2009). Some states – notably, Indonesia, the Philippines and Thailand, pressed for the inclusion of a human rights body with both promotion and protection functions, while other states saw moves to create such a body as divisive and hypocritical (Bwa, 2009, p.33). It appears that the factors which in the end secured agreement were (1) a sense of regional pride, the idea that a human rights body would endow ASEAN with, in the words of Philippine Foreign Secretary Alberto Romulo, “more credibility in the international community,” (AP, 2007) and (2) ASEAN leaders determination that there should be unanimity – that all ASEAN states should be part of the emerging human rights regime, that there would be no “ASEAN minus X” formula in relation to a human rights mechanism (Bothe, 2009). These pressures impacted both upon states advocating the establishment of a strong human rights body, and the less motivated states. The compromises which were eventually reached on the form and powers of the AICHR were the result of the imperatives of reaching agreement and reservations about ceding sovereignty. This picture accords with Oona Hathaway's quantitative analysis of treaty ratification and compliance. Hathaway explains that within regions, states have significant political and economic incentives to commit to emerging regional norms, even when they are unable or unwilling to meet those commitments: “where, as is often the case in the area of human rights, actual changes in practices are extremely costly and difficult to perceive, and treaty ratification is relatively costless and immediately apparent, ratification may be used to offset pressure for real change.” (Hathaway, 2001, p.2015) Hathaway's analysis shows that ratification of regional human rights treaties is frequently associated with markedly *worse* human rights ratings than is ratification of universal human rights treaties.

(b) Regional peace and human rights

In some regions, the lessons of history have spurred integration on human rights. Most wars are regional, fought on the borders between neighbouring states. While some doubt Kant's theory about the pacific nature of democracies (Alvarez, 2001; cf Alvarez and Slaughter, 2000) it remains a fact that neighbouring democracies do not invade one another. Constitutional democracies, which are seen as providing optimal protection for human rights, are seen as safeguards for regional peace. It is in the interests of all states in a region that human rights in every state are protected. This is one of the reasons why states seem inclined to support regional bases for monitoring the domestic actions of states. The 1907 *Convention for the Establishment of a Central American Court of Justice* was signed at the Washington Peace Conference, one of nine Conventions signed at the time to bring an end to hostilities in the region. The *European Convention of Human Rights* was drafted at the conclusion of the Second World War, to prevent the reoccurrence of the catastrophic war that had its origins as a regional conflict in Europe. Indeed after the Second World War, regional peace, underpinned by an architecture of regional human rights instruments, was thought to be the achievable goal. At the San Francisco Conference, "the debate was evenly balanced" between "underpinning international security on a centralised authority structure (the Security Council) or a network of regional security councils (one each for Europe, America and Asia)" (Kennedy, 2008, p.20). In the end, it was the United States strong preference for a centralised global body which prevailed. The (subserving) role of regional arrangements was preserved in Chapter VIII of the United Nations Charter.

ASEAN, however, has been notable as a regional organisation which has managed to avoid conflict and (by and large) maintain peace throughout the course of its forty year history, *without* making human rights a centre-piece of regional foreign policy. Indeed, ASEAN attributes its success to the fact that it has explicitly *avoided* bringing human rights into foreign policy and has instead extolled the principles of sovereignty and the doctrine of non-interference. The ASEAN Charter reaffirms the Association's commitment to 'sovereignty,' and 'non-interference,' which are referred to in the ASEAN Charter in the context of "respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States" (ASEAN Charter, Article 2(2)(a)). Sovereignty is also prominently articulated in the Terms of Reference of the AICHR (TOR Article 2(2.1)(a)). Sovereignty is a limitation on the right of states or international organisations to interfere in things which are "essentially a matter of domestic jurisdiction" (Article 2 of the Charter of the United Nations). Most basic of the matters traditionally within the domestic jurisdiction of a state are (1) a state's treatment of its own citizens and (2) the right of a State to place itself under any form of government which it wishes and to frame its own social institutions upon any model.

As well as reaffirming the tenets of sovereignty and non-interference, the ASEAN Charter also articulates the commitment of ASEAN's ten members to the triumvirate of democracy, human rights and the rule of law. The quandary for the AICHR is that the principles which underpin human rights (equality, participation and accountability), are principles derived from the idea of the modern liberal democracy. The predominant liberal view is that human rights and democratic principles are co-dependent; one cannot exist without the other. Habermas captures this idea by describing the genesis of rights as a 'circular process' in which rights, law and democracy are "co-originally" constituted (Habermas, 1998, p.122; Habermas 2001, p.119). The predominant liberal idea of human rights only has meaning in circumstances of popular sovereignty where citizens possess equal individual liberty and autonomy enabling them to participate in the processes of political power and law-making. From this perspective, popular sovereignty is only possible in circumstances where basic civil rights are protected to enable the exercise of political choice. This means that to meaningfully promote human rights, means to meaningfully promote an effective liberal democracy and its processes (free, fair, and periodic multiparty elections, which ensure the accountability of representatives for the exercise of the legislative or executive powers vested in them). But attempts to reform the internal governance structure of states are likely to be seen as beyond the purview of the AICHR, as they would conflict with provisions of the TOR which emphasise "non-interference" (TOR Article 2(2.1)(b)), "constructive and non-confrontational approaches" (TOR Article 2.4) and "the adoption of an evolutionary approach" (TOR Article 2.5).

One of the principal legal historians of *European Convention on Human Rights*, has described it as the product of "conflict, compromise, and happenstance." (Simpson, 2001, p.ix). Nevertheless, the leaders of Western Europe were largely convinced that entrenching human rights, constitutional democracy and the rule of law within the states of the region was the answer to preventing another catastrophic war. In the wake of 1945, this fact alone was sufficient to anchor the legitimacy of a regional convention, commission and court. But the pursuit of democracy and human rights has not been ASEAN's answer to maintaining regional peace. David Martin Jones commends this: "had ASEAN decided to promote democracy and human rights at the expense of the autonomy of its members to determine their own forms of rule, the grouping would today be less integrated, less developed, less secure – and less of a regional community." (Jones, 2008, p.279). It remains unclear to what degree the inauguration of the AICHR signals a shift in ASEAN's views about sovereignty and autonomy. What is clear, however, is that ASEAN's steps toward the construction of a regional human rights regime have thus far been tentative and conservative, and that ASEAN's historic ambivalence towards the peace – democracy – human rights nexus, will cause inevitable tension between sovereignty and human rights. In light of this tension, the body's apparent limitations (lack of enforcement powers, its consultative status, the fact

that Commissioners are “accountable” to appointing governments), have the potential to increase its legitimacy in the eyes of the sovereignty-conscious states of ASEAN (particularly Vietnam, Myanmar, Laos PDR and Cambodia) but to decrease its legitimacy in the eyes of those states which gravitate toward the western model of a liberal democracy (Indonesia, the Philippines, Thailand).

(4) The ASEAN Declaration and the Legitimacy of Soft law

This section of the article considers issues of legitimacy in relation to two formal aspects of the AICHR. The first is the forthcoming ASEAN Human Rights Declaration, which the AICHR is required to develop pursuant to Article 4.2 of the TOR. The second is the AICHR’s lack of enforcement provisions. These factors, together with the cautionary tone of Article 2’s of the TOR’s Principles about ‘avoiding politicisation,’ have been the source of some of the criticism levelled at what some have described as a body ‘without teeth’ (Durbach et al., 2009). What is the legitimacy of a body which wields influence only through the publication of reports, studies and findings, and the moral sanctioning which might result?

The general position in international law is that unlike conventions and treaties, declarations do not create legal rights or obligations or establish relations governed by international law (Schachter, 1977). The reasons why states turn to soft law (declarations, non-binding agreements, informal or voluntary standards, political pacts) instead of hard law (treaties and conventions under the *Vienna Convention on the Law of Treaties*), are various. In some cases, it would be impossible for states to successfully negotiate the terms of a formal binding treaty, because the subject matter is contentious and it is not certain that domestic procedures which accompany ratification in many states (such as approval by the legislature), would be forthcoming. It is also the case that conventions and treaties are often subject to taxing negotiations which can result in compromises and dilution of a party’s obligations. Most states are cautious about what they commit to. For this reason, declarations and non-binding standards sometimes cover a broader subject matter and are more detailed than binding agreements. In other cases, soft law is seen as preferable because of doubt about the willingness or capacity of some actors to fulfil the terms of the agreement. The consequences of violations can include adversely affecting the reputation of parties, and repeated non-compliance may undermine the legitimacy of the entire system. Finally, soft law agreements, which can be flexibly interpreted, have advantages in circumstances where some states are more willing to submit to legalization than others, perhaps because of their positive experience of prior engagement with international law. Underpinning all these reasons is the factor of uncertainty. It is difficult to gauge the impact of laws, particularly of human rights laws, on long-held tenets such as ‘sovereignty.’ Soft law provides an interstice between rejection of norms and

commitment to them, where learning processes can occur, and the effect of compliance to new standards can be tested.

The factors outlined above could each be said to apply to the situation of ASEAN and its decision to draft a Declaration, rather than a Convention, on human rights. First, by all accounts, the provision in the ASEAN Charter on the creation of a human rights body, was the most contentious issue addressed by the High Level Task Force which advised on the drafting of the Charter (Patra, 2009, p.13). There is no assurance that agreement would be reached on the content of a binding human rights convention. Second, within those states that were required to submit the Charter to parliament for ratification, processes for approval were not devoid of controversy and conflict. For example, Indonesia's Department of Foreign Affairs presented the instrument of ratification to the ASEAN Secretariat a mere two days before the agreed deadline so that the Charter could enter into force by the 14th ASEAN Summit in Bangkok. Third, the willingness and capacity of ASEAN states to comply with human rights commitments is variable. ASEAN states are at different stages of economic development and possess different attitudes towards human rights. A convention detailing explicit obligations would make recidivism by one or more parties not only possible, but likely. Fourth, it is significant that the four ASEAN states which possess National Human Rights Institutions (independent, state-based bodies with a mandate to promote and protect international human rights) have been most receptive to the idea of a regional monitoring body. This suggests that the experience of states in engaging with these institutions (dealing with NHRI criticism of state practice and policy, responding to complaints brought by NHRIs on behalf of members of the public) has bought about learning processes within these states (Renshaw et al., 2011). One of these lessons is that human rights institutions and the discourse they engender, need not necessarily threaten the authority of the state. Soft law is well-suited to developing these learning processes, in ways that norms promoted through top-down, binding decisions by supra-state judicial bodies, may not be.

The scholarship on legalization and compliance in the field of international human rights provides strong evidence that 'hard law' does not necessarily increase states willingness to comply, and that propensity to comply flows instead from the sense of obligation which results from acceptance of laws deemed appropriate and necessary. What is important, then, is generating the sense that certain norms are and should be integrated into social processes. Legalization may not be the most appropriate tool for achieving this.

Three examples from the experiences of other regional human rights institutions serve to illustrate the point that state commitment flows from perceptions of legitimacy. First, in his study of the origins of the European system of human rights, Andrew Moravcsik juxtaposes the European regional experience of implementation of the 1953

European Convention on Fundamental Rights and Freedoms, with the experience of the Inter-American system in implementing the 1948 American Declaration on the Rights and Duties of Man: “the OAS system is, in a formal sense, patterned after the European system and is stronger than its model” (Moravcsik, 1995, p.181). But as Moravcsik points out, the Inter-American system reflects lower level of compliance with human rights norms, a fact explained by lower levels of consensus about human rights which exist amongst state leaders within the American system and the disparate range of democratic practices and institutions which exist amongst states within that region.

Second, an instructive example is provided by Laurence Helfer’s account (2002) of the withdrawal in the 1990’s of Jamaica, Trinidad & Tobago, and Guyana from the First Optional Protocol of the International Covenant on Civil and Political Rights, and (in the case of Trinidad and Tobago), from the American Convention, and finally the severing of ties between the courts of all three Caribbean nations and the Privy Council. The Privy Council decision in the Pratt case, preserving rights of petition to the Human Rights Committee and the Inter-American Human Rights Commission for defendants on death row, undermined the ability of Caribbean governments to manage domestic legal systems in ways supported by legal elites and by the general public (including mandatory death sentences for murder convictions).⁹ As a result, the governments of the three nations exited the international treaty system dealing with this subject. Exiting is one way in which states may respond when “international agreements expand into areas that clash with strongly held domestic preferences” (Helfer, 2002, p.1887).

Finally, Lutz and Sikkink (2000) examined the consequence of legalization in three areas of human rights law - torture, disappearance, and democratic governance, in Latin America in the 1970s and 1980s. These scholars found the least compliance in the most “legalized” area, (torture), and the most compliance in the least “legalized” area, (democratic governance). They concluded that legalization (precision and delegation) does not enhance commitment. Instead, commitment to human rights norms follows from the sense of obligation created by social processes of interaction.

From this, it is arguable that few positive results flow from pressuring states to accept regimes with binding jurisdiction, strong enforcement measures and individual rights of petition, in circumstances where there does not exist wide-spread (especially governmental) support for such measures. In some circumstances, the result of ‘over-legalization’ has been non-compliance, open defiance, and the ultimate weakening of support for an entire human rights system. From this perspective, ASEAN’s approach, which is to build capacity and consensus about human rights before creating judicial bodies with powers of coercion, could be argued as legitimate; as appropriate to a politically and economically diverse and rapidly changing region.

⁹ *Pratt v. Attorney-General for Jamaica* [1994] 2 A.C. 1 (P.C. 1993) (appeal taken from Jam.).

(5) Legitimacy and the Consent of Democratic States

I now turn to the internal character of ASEAN states and examine the implications of their disparate systems of government on the legitimacy of the regional human rights body. There is an argument that democratic procedures within states have a legitimising effect on international agreements, because of an essential link between democracy and accountability. The idea is that the processes of democracy (particularly rule by periodically elected representatives), ensure that representatives of states act with the imprimatur of the people when they make international law. Buchanan and Keohane (2009, p.38) write:

“the ongoing consent of democratic, rights-respecting, states helps to make global governance institutions accountable, by linking them, though indirectly, to publics who can hold their own states accountable.....the ongoing consent by rights-respecting democratic states constitutes the democratic channel of accountability and the well-functioning of this channel is generally necessary for accountability.”

In 2011, the research institute Freedom House (2011) classified only one ASEAN state – Indonesia – as a democracy based on the model of democracy articulated in Article 21(3) of the Universal Declaration of Human Rights: “the will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”¹⁰ Malaysia and Singapore possess parliamentary systems, but until recently, the political landscape of both these countries was dominated by a single party (Acharya, 2003, p.378-9). Thailand has been under democratic rule since the 1980’s, but has experienced coup d’états and periods of military rule (Dressel, 2010). In the Philippines, the dictatorship of President Marcos ended in 1986, but problems of corruption and impunity still undermine democratic governance. Laos and Vietnam are ‘people’s democracies;’

¹⁰ The Freedom House “freedom in the world” regime classifications use a seven-point ordinal measurement of ‘political liberties’ and ‘civil rights’ to produce a three-fold classification of political regimes as “free,” “partly free,” and “not free.” To qualify as an electoral democracy, a state must have satisfied the following criteria:

1. A competitive, multiparty political system;
2. Universal adult suffrage for all citizens (with exceptions for restrictions that states may legitimately place on citizens as sanctions for criminal offenses);
3. Regularly contested elections conducted in conditions of ballot secrecy, reasonable ballot security, and in the absence of massive voter fraud, and that yield results that are representative of the public will;
4. Significant public access of major political parties to the electorate through the media and through generally open political campaigning.

single-party communist states. In Brunei Darussalam, executive power is held by the Sultan (Funston, 1988). Myanmar has been under the rule of a military junta since 1962 and popular uprisings in 1998 and 2007 were suppressed. Elections held in 2010 and 2012, under a new Constitution, permitted the entry into parliament of a small democratic opposition, but did little to change the balance of power within Myanmar. In Cambodia, Hun Sen's Cambodian People's Party (CPP) has governed since 1979.

Is it possible to create a legitimate international institution in circumstances where the majority of state parties to the constituting instrument are not democracies? I suggest that the absence of electorally accountable systems of government in the majority of ASEAN states has two major implications for the legitimacy of the AICHR.

First, the absence of democracy within the state indicates a disjuncture between the interests of the state and the interests of (at least a majority) of the people. Without the imprimatur of the majority *vis a vis* rules and institutions which affect them, there is an argument that those rules and institutions cannot *prima facie* claim legitimacy. In these cases it cannot be said that the will of the people regarding the form and powers of the international institution, has been transmitted to the international level through representation at the state level. Christiano (2010, p.125) frames the question as: "if a state is non-democratic, do its decisions adequately reflect the significance of the duties to and burdens imposed on its population?" There is evidence that civil society groups within the ASEAN region were well aware of the significance of an inadequate public mandate for regional developments. In November 2006, the Solidarity for Asian People's Advocacies (SAPA) Working Group on the ASEAN, wrote to the Eminent Persons Group on the ASEAN Charter in the following terms (SAPA, 2007):

"We strongly recommend that the EPG put forward a proposed process for the ASEAN Charter through referendum in all Member States. This is to ensure that the ASEAN Charter is made known to all ASEAN citizens, and that they are given the direct hand in determining the future of ASEAN."

SAPA's call for a region-wide referendum represents a view widely-held by civil society, that the Charter did not reflect the will of the peoples of ASEAN. The difficulties of conducting a referendum in the ASEAN region are for some an insufficient answer to the Charter's lack of mandate.¹¹

¹¹ Termsak Chalermpananupap (2009, p.129-130) asks: "Can anyone really tell how such a referendum could be carried out in the ASEAN region? How much resource and time will be needed to do it fairly and democratically?"

Even where it exists, the legitimating function of the ‘democratic channel’ of accountability, is uncertain. The link between the people, their elected representatives and international rules or institutions, is an attenuated one. Scholars have pointed out that the bureaucratisation of the modern state means that public consent to governance occurs only at a very general level and that “the idea that authority can be delegated from the individual to the state and then from the state to an international institution, preserving the link of accountability between citizen and the mechanism of global governance, is implausible” (Buchanan & Keohane, 2009, p.37-38). Nonetheless, where the link does not exist at all, then the legitimacy of international law must inevitably be called into question.

Second, the internal political structure of states is relevant to the issue of compliance. There is evidence that democratic systems of governance improve the chances of states being pressured to comply with international norms through domestic political demands (Simmons, 2009). As I suggested earlier in this article, compliance itself increases legitimacy. In the case of non-democratic states, there is no electoral pressure on a government to comply with the reports and recommendations of an international institution, and within these states, civil society’s ability to leverage compliance through publicity is limited. In the case of electorally democratic states that might exist within a region comprised mainly of non-democracies, there will be a situation where a democratic state is asked to comply with the decisions of a body constituted by a majority of non-democratic states. In these circumstances, a democratic state might be tempted to resist compliance on the grounds that its own internal, electorally mandated measures to protect rights, are superior to those of the regional institution.

The unique success of Europe’s human rights regime has been attributed to “the existence of an autonomous independent civil society [and] robust domestic legal institutions,” coupled with pre-existing state commitment to human rights. (Moravcsik, 1995, p.180). The European experience, and the liberal theory most convincingly used to explain it, indicates that international institutions have the potential to strengthen or improve *extant* democratic practices, but function less successfully where democracy and the rule of law do not already exist. In Moravcsik’s words, the success of the European system lies in the fact that it seeks to “harmonise and perfect respect for human rights among nations that already effectively guarantee basic rights, rather than introducing human rights to new jurisdictions” (1995, p.180). The experience of the Inter-American and African human rights systems seem to support the view that the strength of international institutions lies in their ability to support the actions and institutions of *domestic* actors within already liberal or liberalising states, as domestic actors are in the end, the direct source of lasting and stable change. As one expert on the African human rights system writes: “[t]he African system has manifested its most significant domestic promise when it has been creatively deployed by activist forces in

the domestic social struggles that they often wage within certain African states. When the African system is so deployed, it can help shape the self-understandings and conceptions of interest held within key domestic institutions of target states..." (Okafor, 2007, p.12).

But in states where domestic actors are not permitted the freedom to lobby for change or to instigate reform, exogenous sources have far slighter prospects of transforming human rights practices (Risse et al., 1999). The experience of the world's regional human rights mechanisms highlights what Moravcsik terms "the tyranny paradox:" that human right enforcement is most costly and least effective when directed against the worst offenders (Moravcsik, 1995). Attempts by international institutions to reform non-liberal and quasi-liberal states using tools such as sanctions and shaming, have had only limited success. The Inter-American human rights system made minimal direct contribution to ending the coups and dictatorships in Haiti, Peru, and Guatemala. In Europe, the Council of Europe's investigation into the 1967 military coup in Greece led to Greece's withdrawal from the Council. Greece did not return to the Council until democracy was re-established *largely from within*, in 1974 (Sikkink, 1993). In light of this, expectations that the AICHR will be able to address the situation in Myanmar, ASEAN's least democratic state, should be constrained. Yet if the most significant human rights violations are created by authoritarian states, and the AICHR possesses only a limited ability to cause change in authoritarian states, then its legitimacy will be open to question.

(6) Conclusion

It is important to consider the legitimacy of the AICHR in historical perspective. The extant regional human rights systems have been formed as much by accretion, as by design. "Even in the relatively propitious circumstances of post-war Europe," writes Moravcsik, "the European human rights system required several generations to evolve." (1995, p.157). The European Convention on Human Rights was signed in 1950 by ten members of the Council of Europe. It was not until 1998, that European states ratified the 11th protocol to the European Court of Human Rights, giving applicants the right of direct access to that Court. In 1948, the Organization of American States was created under the Charter of the Organization of American States. It was not until 1978 that the American Convention on Human Rights entered into force, establishing the inter-American Court of Human Rights. The Organization of African Unity was established in 1963. It was not until 1981 that the African Charter on Human and People's Rights was adopted, establishing the African Human Rights Commission. The African Court on Human and People's rights was established in 2004 and the Court's first judges elected in 2006. Article 9.6 of the Terms of Reference of the AICHR provides for a review of the TOR by the ASEAN Foreign Ministers five years after its entry into force. One result of this review might be the strengthening of the AICHR's powers and an

increasingly legalized approach to its mandate. This will only occur if the body proves its legitimacy: its appropriateness to circumstances and needs.

This article has drawn attention to four aspects of the AICHR (and the regional context in which it operates) which are likely to impact on its legitimacy. The first of these is the Commission's status under the ASEAN Charter, which establishes the institution as a legally constituted body, with authority analogous to other regional institutions such as the ASEAN Coordinating Council and the Secretary-General of ASEAN. The threshold question of legitimacy (legality) is therefore established. The second aspect of legitimacy is the idea of 'the region' in international human rights law. Here, attention has been drawn to the differences between the regional histories of ASEAN and Europe, particularly (1) the European notion of a region of states which are "like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law" (Preamble to the European Convention on Human Rights) and (2) the idea of peace through the establishment of a society of constitutional democracies (Kant, 1795), neither of which are part of the regional milieu of Southeast Asia. I foreshadowed tension between the ASEAN Charter's articulation of "democracy, the rule of law and good governance, respect for and protection of human rights and fundamental freedoms" (Preamble to the ASEAN Charter) and commitment to principles of "sovereignty and non-interference," with implications for the legitimacy of the AICHR. The third aspect of legitimacy considered in this article is the legitimacy of the ASEAN Declaration, which will (presumably) guide the work of the AICHR and human rights developments within the region. I argued that in some circumstances, soft law possesses inherent advantages compared with more legalized arrangements and that in ASEAN's circumstances, soft law has the potential to facilitate processes of learning and socialization which might (ultimately) enhance the legitimacy of the AICHR. Finally, I considered the legitimacy of institutions created without the support of democratic states and in this regard, I foreshadowed negative consequences for the legitimacy of the AICHR.

Overall, the level of respect which ASEAN member states accord the ASEAN Intergovernmental Commission on Human Rights will determine its legitimacy. The factors I have discussed in this article are likely to be relevant in shaping state attitudes in this regard. In the meantime, the answer to the question of whether the AICHR is a 'legitimate institution', remains a complicated and highly qualified one.

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