

***The Development of Regional Human Rights Systems in  
America and Southeast Asia<sup>1</sup>***

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Abstrak

Tulisan ini akan membandingkan perkembangan dua sistem HAM yang ada di kawasan Amerika dan Asia Tenggara. Di satu sisi ada ASEAN *Intergovernmental* Commission on Human Rights (AICHR), komisi HAM yang dibentuk oleh ASEAN pada tahun 2009, dan di sisi lain ada American Commission on Human Rights (IACHR) yang dibentuk oleh OAS pada tahun 1959. Kedua komisi HAM ini memiliki fungsi utama untuk mempromosikan perlindungan HAM di kawasan tersebut. Selain analisis tentang bagaimana masing-masing sistem dibentuk, tulisan ini juga akan mengimplementasikan teori keefektifan organisasi internasional untuk melihat sejauh mana aturan-aturan yang dibuat oleh masing-masing institusi dijalankan. Pengorganisasian tulisan adalah sebagai berikut. Bagian pertama akan membahas temuan teoritis tentang kemunculan rezim HAM dan efektifitas organisasi internasional. Selanjutnya adalah deskripsi masing-masing sistem HAM regional, AICHR dan IACHR. Bagian terakhir tulisan akan membandingkan kedua sistem HAM regional dengan menggunakan beberapa parameter seperti fitur organisasi, idosinkratik organisasi dan perubahan cara pandang organisasi tentang HAM, yang dipercaya akan menentukan keefektifan kerja masing-masing sistem.

**Kata kunci:** hak asasi manusia, norma, institusi regional, kawasan, efektifitas rezim

**Introduction**

The end of the Cold War has brought moral and ethical issues back to the international arena. One of the matters is human rights. Essentially, this particular subject is not new in international politics. In fact, several international efforts have been taken to broaden the message of human rights throughout the world long before the Cold War was even started. One of the prominent endeavors in promoting human rights was the establishment of a general human rights' framework in the Universal Declaration of Human Rights in 1948. However, due to ideological and military rivalries between the United States of America and the USSR, which led to the beginning of the Cold War in the 1950s, moral and ethical campaigns were halted and undermined for several decades.

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In 1993, an international conference that marked the beginning of relieving the universal norm of human rights was held in Vienna, Austria. The World Conference on Human Rights was actually not the first conference on human rights (the first conference was held in Tehran in 1968), but it was the first time that such a forum had reached a consensus where each participant state agreed to come with a national action plan for human rights improvement and better protection of human rights.<sup>2</sup> In Article 37 of the Vienna Declaration and Programme of Action, the importance of regional arrangements is stated “to play a fundamental role in promoting and protecting human rights.” Regional arrangements (i.e. regional organization) must “reinforce universal human rights standards, as contained in international human rights instruments, and protection.”<sup>3</sup>

This paper will specifically look at the development of regional arrangement in human rights promotion and how effectively the human rights system implement its role. In regards to efficiency, this paper argues that the effectiveness of an organization will be determined by parameters such as design features, distribution influences, and organizational idiosyncrasies. There are two regional institutions that will be further discussed. First is the Inter American Commission on Human Rights (IACHR), under the Organization of American States (OAS). Then there is the ASEAN Intergovernmental Commission on Human Rights (IACHR), under the Association of the South East Asian Nations (ASEAN). The structure of this paper is as follows: The first section reviews theoretical findings regarding the emergence of a human rights regime and on effectiveness of international organizations. This will be followed by the description of each regional human rights system, the AICHR and the IACHR. The last part of the paper compares the development of each institution in promoting human rights.

### **Theoretical Findings**

First of all, the study of international organizations is mostly dominated by arguments on why organizations were founded in the first place. Each of the theoretical perspectives comes up with different arguments based on their essential stand points. The realists, who focus on power politics interplay, believe that international organizations are merely instruments for achieving hegemonic (major state) powers’ interests. Then there

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<sup>2</sup> Kevin Boyle, 1995. “Stock-taking on Human Rights: The World Conference on Human Rights, Vienna 1993”, *Political Studies*, No. XLIII, pp. 79-95

<sup>3</sup> UN Commission on Human Rights, 1993. *Regional arrangements for the promotion and protection of human rights in the Asian and Pacific region.*, 9 March 1993, E/CN.4/RES/1993/57, [online] in <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3b00f0b75f>, [accessed 9/10/2012]

are the liberals, whose belief in progress and cooperation as the panacea for global problems make them strongly endorse the establishment of international organizations in order to reach peace and prosperity in the long term. Meanwhile the radicals, who scrutinize the international political system as a by-product of the capitalistic economic system, argue that international organizations only reflect the interests of the wealth that will continue to exploit the poor.<sup>4</sup>

These points of view have also been reflected in the theories of international human rights regime establishments. There are at least theoretical schools of thought that are usually applied in explaining the establishment of international institutions such as human rights regime. The first theory is based on the assumption of how the nature of international systems shapes a state's policy. The realists argue that in the anarchic system (where no higher authority governs the world), states always pursue their interests – in terms of military and economic power – in institutions. Therefore, institutions are nothing but a way for dominant states to pursue their interests.<sup>5</sup>

Second is the ideational theory where it shows that interest is not the only or main reason why states oblige the human rights regime. There is also the determination to uphold certain ideals about what is right and what is wrong. For the idealist, these perceptions will lead states to create a formal institution in which they can legitimize the ideas they believe.<sup>6</sup>

Third is the school of liberalism. Liberalists believe that the establishment of international regimes will change state behavior through procedures applied in the regime. However, it is important to note that the rationality of a state plays an important role in deciding whether or not states join international regimes. As pointed by Andrew Moravcsik<sup>7</sup> the determination to obey an international institution is the result of a two-level game, where domestic bargaining between actors results in the decision to comply with certain institutions.

What happened after the international regime was formed? On the evolution of a regime, the idealists look on driving forces such as human rights NGOs and individual that will put pressure on government to comply with human rights treaties. For the liberalist,

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<sup>4</sup> Clive Archer, 2001. *International Organization*, 3<sup>rd</sup> ed., London: Routledge.

<sup>5</sup> Robert Keohane cited in Tony Evans, 2001. *The Politics of Human Rights*, London: Pluto Press.

<sup>6</sup> Laurence R. Helfer, 2002. "Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes", *Columbian Law Review*, Vol. 102, pp. 1832-1911

<sup>7</sup> Andrew Moravcsik, 1998. "Explaining the Emergence of Human Rights Regimes: Liberal Democracy and Political Uncertainty in Postwar Europe", *Working Paper Series* 98-17

the evolution of a regime depends on state's strategies in executing their commitment to international treaties. In the case of human rights regime, these strategies include the incorporation of international commitment into national law and the use of supranational judicial review to interpret those commitments and assess alleged violation.<sup>8</sup>

Furthermore, while scholars can establish a great quantity of theories about the establishment of international institutions, works on effectiveness have not been produced profoundly. Basically "effectiveness" is different with "compliance". Compliance, is "a state of conformity or identity between an actor's behavior and a specified rule,"<sup>9</sup> whereas according to Levy, Young, Zürn<sup>10</sup>, effectiveness, "has to do with the contributions institutions make in solving the problems that motivate actors to create them."<sup>11</sup> They suggest that the efficiency of international institutions should be measured by analyzing exogenous factors, from the behavioral changes within the organization to the distribution of influence, and endogenous factors such as the design features of the institution.

### **ASEAN And AICHR**

The Association of South East Asian Nations (ASEAN) is a regional organization that consists of Southeast Asian countries. It was formed on 8 August 1967 in Bangkok, Thailand, by five countries: Indonesia, Malaysia, Philippines, Singapore and Thailand. Since the accession of Brunei Darussalam in 7 January 1984, the number of ASEAN members gradually increased with the accession of Vietnam (28 July 1995), Lao DPR and Myanmar (23 July 1997) and Cambodia (30 April 1999).

The road to the establishment of a regional human rights instrument and mechanism in ASEAN has been long and winded. It was in 2008 when ASEAN adopted the ASEAN Charter that the path to human rights practice and protection in Southeast Asian region become clearer. This is because the Article 14 of the ASEAN Charter specifically mentions that "ASEAN shall establish an ASEAN human rights body." Following the adoption of the ASEAN Charter, ASEAN introduced the terms of reference (TOR) of the ASEAN human rights body in Bangkok.

According to the TOR, the purposes of the AICHR formation among other are "to promote and protect human rights and fundamental freedoms of the peoples of ASEAN"

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<sup>8</sup> Helfer, *ibid.*

<sup>9</sup> Kal Raustiala, and Anne-Marie Slaughter, 'International Law, International Relations and Compliance', in Beth Simmons, Walter Carlsnaes, Thomas Risse, 2002. *Handbook of International Relations*, London: Sage Publications, p. 539

<sup>10</sup> Marc A. Levy, Oran Young. R., Michael Zurn, 1994. "The Study of International Regimes", *WP-94-113*

<sup>11</sup> *ibid.*, p. 20

and “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.”<sup>12</sup>

### **OAS And IACHR**

The Organization of American States (OAS), the oldest regional organization in the world, was established in 1948 where 21 states in the Western Hemisphere signed the Charter of OAS. Over the years the members of OAS has expanded to 35 countries range from the top of the Western Hemisphere, Canada, to Argentina. Cuba was among the OAS founding countries but in 1962 its membership was suspended due to ideological differences that contrasted with the Inter-American system.

The history of human rights mechanism in the Western Hemisphere can be traced back since the early Inter-American conferences. One of the important records in the human rights protection in the Western Hemisphere is the American Declaration of the Rights and Duties of Man (also known as American Declaration). It was signed on 2 May 1948, preceded the United Nations’ Universal Declaration of Human Rights which was adopted on 10 December 1948. The American Declaration elaborates the civil and political rights, economic, social and culture rights. It ranges from right to life, liberty and personal security, right to equality before law, right to religious freedom and worship, right to inviolability of the home, right to education and right to work and fair remuneration.<sup>13</sup>

Since the status of the American Declaration is non binding, the OAS then tried to produce a legal binding instruments. On 22 November 1969, the regional consensus on the American Convention on Human Rights, was reached among the OAS members. Furthermore in order to ensure the compliance to the convention, special bodies were founded. First is the Inter-American Commission on Human Rights and second is the Inter-American Court of Human Rights.<sup>14</sup>

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<sup>12</sup> ASEAN, 2009, *ASEAN Intergovernmental Commission on Human Rights (Terms of Reference)*, [online] in <http://www.aseansec.org/Doc-TOR-AHRB.pdf> [accessed 05/05/2013]

<sup>13</sup> IACHR, n.d., *American Declaration of the Rights and Duties of Man*, [online] in <http://www.cidh.oas.org/Basicos/English/Basic2.American%20Declaration.htm>, [accessed 05/05/2013]

<sup>14</sup> OAS, 2011a. *What is the IACHR?*, [online] in <http://www.oas.org/en/iachr/mandate/what.asp>, [accessed 05/05/2013]

## **Comparing the Development of the AICHR and the IACHR**

In this section, the analysis starts with pointing out the rationals of forming regional human rights systems. It is followed by comparing the essential characteristics of each system. Moreover, in regard to effectiveness, this paper will look at each of the features of an intergovernmental body. As pointed out in the previous section, this paper believes that a better design feature correlates with the effectiveness of a system. The same principle goes with the level of independence and the distribution of influence within an organization.

It is important to note that the comparison between the two organizations may seem unbalanced, as IACHR has been in power for 50 years, in comparison to AICHR, which was established in 2009. The IACHR is noticeably far more experienced in the area of promoting human rights regionally. However, the effort to compare each system is important in the study of human rights as well as the study of international organizations. This will demonstrate what scholars have been debating in the context of universalism vs. cultural relativism on human rights.<sup>15</sup> This debate revolves around whether rights (also social practices, values and moral rules) are culturally determined or “prima facie universal.”<sup>16</sup> Moreover, it will also interesting to analyze the power politics in the implementation of human rights. As pointed out by the realists, in the anarchic world system, international organizations are tools for states to gain their goals.

### **a. Origins**

First, while it is said that the emergence of a regional human rights system is based on “shared interest and demand for establishing a framework for human rights protection,”<sup>17</sup> one should also look to see whether establishing the system is a rational decision. The formation of AICHR contributes to several events that happened in the Southeast Asian region. First is the stagnant phase that ASEAN was facing in the 1990s, especially when the economic crisis hit Asia. Second is the disorder that led to human rights violation in the transformation of power in Indonesia in 1998. Third is when human rights become more embedded in the foreign policy of Western states. As the economy of

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<sup>15</sup> Jack Donnelly, 1984. “Cultural Relativism and Universal Human Rights”, *Human Rights Quarterly*, Vol. 6, No. 4, pp. 400-419

<sup>16</sup>*ibid.*, p. 402

<sup>17</sup> Jina Kim, Development of Regional Human Rights Regime: Prospects for and Implications to Asia, in Yozo Yokota 2007, *The SYLFF 2007 Regional Forum Selected Papers on Human Rights and Creative Leadership*, SYLFF. [online] In <[http://www.tokyofoundation.org/sylff/wp-content/uploads/2009/03/sylff\\_p57-1022.pdf](http://www.tokyofoundation.org/sylff/wp-content/uploads/2009/03/sylff_p57-1022.pdf)>, [accessed 05/05/2012], p.57

ASEAN members continues to demonstrate good performance post the economic crisis of 1997, more demand came from the outside and the inside of ASEAN to further its integration. Thus, in the early 2000s, ASEANs agenda was dominated by events to reinvigorate the organization, including the signing of the ASEAN Charter in 2007. Indonesia's 2003 proposal for ASEAN countries in human rights promotion and protection was further elaborated in the ASEAN Charter, where ASEAN must establish a human rights body.<sup>18</sup>

The effort to embrace human rights is such a significant moment for ASEAN because ASEAN was known to be an organization who upheld the idea of non-interference. ASEAN countries were reluctant to the idea of a human rights system. This was shown by its newest members, Vietnam, Myanmar, Lao PDR, and Cambodia, as well as by ASEAN founding fathers. New members of ASEAN all come from authoritarian regimes, thus they have strong views on keeping all of their domestic affairs to themselves. Therefore, the accession of new ASEAN members was believed to be the result of re-assurement coming from ASEAN countries that the principle of non-interference will be held. As for the founding fathers of ASEAN, in the early 1990s, ASEAN leaders such as Lee Kuan Yew and Prime Minister Mahathir Mohamad clearly stated that human rights were a "Western" product and that they should be created as a special kind of right that matches with the needs of Asian countries. Doubts over the future of ASEAN human rights institutions are also shown in how long ASEAN took to create the AICHR. The initiation was declared in 1993 and it was finally launched in 2009. Not only that, but up until now, not all ASEAN states have ratified international human rights treaties.<sup>19</sup>

In the case of IACHR, the establishment of regional human rights systems at that time was influenced by the international setting of the Cold War between the US and the USSR. After the Cuban revolution took place in 1959, Cuba was seen as a threat for its potential to trigger another revolution in the Western Hemisphere.<sup>20</sup> The human rights body was created amid most Latin American countries and was reined by military

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<sup>18</sup> Rizal Sukma, 2011. "ASEAN's Human Rights Agenda: Modest Beginning, Reasonable Prospects – and How the West Can Help", *Asia Paper Series 2011*.

<sup>19</sup> Catherine Renshaw, 2010. "Understanding the New Asean Intergovernmental Commission on Human Rights: the Limits and Potential Theory", *University of New South Wales Faculty of Law Research Series*, Paper 53.

<sup>20</sup> Robert K. Goldman, 2009. "History and Action: the Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights", *Human Rights Quarterly*, Vol. 31, pp. 856-887. See also Ann Van Wynen Thomas and A.J. Thomas Jr., 1972. "Human Rights and the Organization of American States", *Santa Clara Law Review*, Vol. 12, No. 2, pp. 319-376

dictatorship regimes. The US, who vested interest in the security of the region, provided support to the authoritarian government in Latin America in order to combat the spread of communism in the Western Hemisphere. The decision to adopt the American Convention on Human Rights was (1) a rhetorical gesture and (2) considering the Convention as a non-operative clause.<sup>21</sup>

The early years of the Cold War had impacted the role of AICHR as OAS was consistently intervened by the US to meet its interests.<sup>22</sup> For example, in the aftermath of the Bay of Pigs Invasion, the US pushed a recommendation to declare Marxist-Leninism as incompatible with the Inter-American system. Following the recommendation, Cuba was expelled from OAS and AICHR became “the object of the Commission’s scrutiny since 1961.”<sup>23</sup> The administration of Ronald Reagan had even “financed and/or backed the counter-insurgency efforts of the governments of El Salvador, Guatemala, and Honduras, as well as Nicaraguan insurgents, despite their abysmal human rights practices.”<sup>24</sup>

Second, what is also important to discuss in the development of regional arrangements promoting human rights is how they reflect the “regional idiosyncrasies” (Kim 2007) of the organization. It is then argued that human rights bodies cannot be thoroughly independent, as they are subject to limitations such as sovereignty and national jurisdiction. In the case of IACHR, the two protocols in the American Convention on Human Rights, which is one of the main treaties in the Inter American system, provide “a very weak protection mechanism, reserving the individual petition system only for the violations of the rights to education and trade union rights” (p.61). In the terms of reference of AICHR, it is stated that the human rights body must respect the ASEAN principles, notably “non-interference in the internal affairs of ASEAN member states.” This has become the subject of criticism towards ASEAN. AICHR is regarded as “toothless tiger”, “thinly veiled”, because its role is only to advice not to enforce. Therefore, the independency of AICHR is in doubt since it is heavily determined by political bargaining within ASEAN members.<sup>25</sup>

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<sup>21</sup> Felipe Gonzalez, 2009. “The Experience of the Inter-American Human Rights System”, *VUWLR* No. 40, pp. 103-126

<sup>22</sup> Goldman, *ibid.*

<sup>23</sup> Goldman, *op.cit.*, p. 869

<sup>24</sup> Goldman, *op.cit.* p. 872

<sup>25</sup> Michelle S. Kelsall, 2009. “The New ASEAN Intergovernmental Commission on Human Rights: Toothless Tiger or Tentative First Step?”, *Analysis from the East-West Center* No. 90. See also, John Munro, 2011. “The Relationship between the Origins and Regime Design of the ASEAN Intergovernmental Commission on Human Rights (AICHR)”, *The International Journal of Human Rights*, Vol. 15, No. 8, pp. 1185-1214



## **b. Design Features**

When it comes to power and functions, IACHR outperforms AICHR. Firstly, IACHR is considered as a well-equipped human rights body in terms of basic legal document support. Starting with the American Declaration of the Rights and Duties of Man, a human rights instrument declared in 1948, before the initiation of the UN Universal Declaration on Human Rights. Besides that, IACHR is supported by several important human rights instruments, such as: (1) Statute of Inter-American Commission on Human Rights, (2) American Convention on Human Rights, (3) Inter-American Convention to Prevent and Punish Torture, (4) Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, (5) Inter American Convention on Forced Disappearance of Persons, (6) Inter-American Convention on the Elimination of All Forms of Discrimination against Person with Disabilities, and (7) Inter-American Democratic Charter.<sup>26</sup>

The AICHR, on the other hand, is only supported by these documents: (1) ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, (2) ASEAN Declaration Against Trafficking in Persons Particularly Women and Children, and (3) Declaration on the Elimination of Violence Against Women in the ASEAN Region. All of these documents were produced before the commencement of AICHR. The human rights body itself is based on the Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights. Moreover, it is stated that IACHR has the power to make recommendations to the governments of the member states, to produce reports on human rights protection, and to consider lodged by individuals or groups, or any non-governmental entity. Not only that, IACHR is also supported by the Inter-American Court of Human Rights, also known as the Court. According to Article 67, the Court's judgements "shall be final and not subject to appeal."<sup>27</sup>

Despite these weaknesses, which could be understood as a result of its recent establishment, AICHR actually has the advantage of improving its role in promoting and protecting human rights. ASEAN membership is much smaller in comparison to OAS, which has more than 30 members. The 'ASEAN way', ASEAN trademark has also help

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<sup>26</sup> OAS 2011b. *Basic Documents in the Inter-American System*, [online] in [http://www.oas.org/en/iachr/mandate/basic\\_documents.asp](http://www.oas.org/en/iachr/mandate/basic_documents.asp), [accessed 05/05/2013]

<sup>27</sup> Department of International Law OAS, 2012. *American Convention on Human Rights "Pact of San Jose, Costa Rica"*, [online] in [http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm), [accessed 05/05/2013]

the organization's longevity and minimize the political tension within its members. In comparison to OAS's military approach in dealing with political crisis in Haiti, ASEAN is arguably successful in handling the crisis in Cambodia without applying military forces.

### **Future Development of Human Rights Body in AICHR and IACHR**

This paper believes that the future for AICHR and IACHR lies in the ability to undertake the challenges coming from the inside and the outside of the organization. The ASEAN human rights body in this case, faces a greater challenges in order to implementing its human rights agenda. First, its mandate is limited to just an advisor to ASEAN members. It will be hard to gain a success human rights agenda where there is lack of reinforcing instruments (rules, sanction). Second, as pointed out by Sukma<sup>28</sup>, there is an "institutional defects"<sup>29</sup> within ASEAN that will continue to restrain the work of AICHR. One primary example is the status of ASEAN as an association not a supra-national organization. This is followed by the fact that most ASEAN agreements are non legally binding. In the case of AICHR, the situation has become more complicated since there is a division on AICHR functions and powers.

However, despite criticisms the existence of AICHR should be rewarded and taken as a major improvement in the history of ASEAN. The better improvement of human rights protection and promotion depends on forces within ASEAN, especially from non-governmental groups, as well as from the outside of ASEAN. While it may seem difficult, it is something that is not impossible to reach.

For the IACHR, it has the advantages of better equipped system. IACHR, with the Inter American Court of Human Rights, has the power to take "individual cases, on-site visits, thematic and country reports, the Court's judgements, and the adoption of precautionary or provisional measures" in promoting human rights in the Western Hemisphere.<sup>30</sup> However, in the long term, IACHR may reach a point of saturation due to several of these problems. First, IACHR is underfinanced. It only received 10% of the total budget of OAS. This financial problem has led to the delay in processing individual complaints amid increasing the number of individual complaints. IACHR is also criticized

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<sup>28</sup> Sukma, *ibid.*

<sup>29</sup> Sukma, *op.cit.*, p. 3

<sup>30</sup> Ariel Dulitzky, 2011. "The Inter-American Human Rights System Fifty Years Later: Time for Changes", *Quebec Journal of International Law* (Special Edition), p. 129

for its slow system. A study shows that the average years for admissibility is 3.10 years and the final decisions could reach more than 6 years.<sup>31</sup>

## **Conclusion**

This paper has discussed the development of regional human rights arrangement in Southeast Asia and the Western Hemisphere. First, there is AICHR that works under ASEAN, and second is IACHR, a human rights body that serves under OAS. The analysis starts with elaborating several theoretical findings regarding international organizations (and international regimes) and what factors determine on how organizations work effectively. It is then followed by describing the regional organizations, ASEAN and OAS, focusing on their histories and main functions. OAS, established in 1948, is the oldest regional organization in the world and its memberships encompass the American region. The ASEAN, formed in 1967, consists of Southeast Asian region countries. Both organizations established human rights bodies which main function is to promote and to protect human rights regionally.

By looking through parameters such as design features and regional idiosyncrasies, this paper had analyzed the effectiveness of AICHR and IACHR. AICHR, as a new human rights body set in the Asia Pacific, faces a greater challenge because its mandate is very limited. Unlike the IACHR which is given the authority to monitor human rights situation, to work on priority thematic areas and to receive petition coming from individual, AICHR only serves as a consultative body, an advisor to the ASEAN members. Meanwhile IACHR, which has been going through several development phases, needs to reform its management and also to confirm its independencies.

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