

CHAPTER FOUR

FINDING AND ANALYSIS

A. The Sovereignty of a State

1. Emergence and Development of the Concept of Sovereignty

The idea of sovereignty is complicated. In the national law of the state, the state shows up as a sovereign power and as political association of society. The state divides its power into three branches of power which are legislative, executive, and judiciary force. These three divisions of power is also known as *trias politica*.¹ In their relation to each other inside the global community, every nation takes an interest based on sovereign uniformity, which causes another significance of sovereignty, which supplements the one particular to the inward life.²

The meaning of sovereignty is the absolute, supreme, and uncontrollable power by which a free state is administered and from which all particular political forces are inferred; the deliberate

¹ *Trias Politica* is a doctrine of separation of power in government system that aims to prevent the abuse of power in order to guarantee the rights of the citizen. This doctrine was proposed by John Lock (1632-1704) and Montesquieu (1689-1755)

² Jana Maftei, 2015, 'Sovereignty in International Law', *Acta Universitatis Danubius Juridica*, Vol. 11, No. 1

autonomy of a state, combined with the privilege and power of managing its domestic issues without external interference.³

In international law, the sovereignty is a constituent component of state and the international personality requires that the public power is independent, which gives the nature of sovereign state. Sovereignty is most part considered, that general component of the state, which represents the state supremacy and independence of state power in expressing and achieving the governors' will as general will, mandatory for the entire society.⁴

The idea of sovereignty appears in the fifteenth century for assigning the position of the ruler in the feudal hierarchy and it originates from Latin, the word *supremitas* means a person's condition in hierarchy, which there is nobody above him and he is not subordinated to anybody.⁵

In the period of Middle Ages there were the significant and important advancements of the idea of sovereignty. Jana Maftei who quoted Jean Bodin in his *Les six livres de la Republique* 1576 explains sovereignty as *summa potestas*, which perceives no other higher

³ Accessed on <https://legal-dictionary.thefreedictionary.com/State+sovereignty> on 22 February 2018 at 3:37 p.m.

⁴ Jana Maftei, *Op cit*

⁵ *Ibid*

authority. According to Bodin, sovereignty is supreme, ceaseless, unified, basic and imprescriptible. He also stated that:

“Sovereignty is the absolute and perpetual power of a Republic, which the Latins call *majestatem*/Majesty [...] Sovereignty is not limited, nor in power, nor in content, nor in time.”

In the 17th century, Thomas Hobbes, a philosopher, elaborated the notion of sovereignty. He stated that sovereignty was law that cannot be revolt. Hobbes realized that this situation could lead to tyranny due to the massive power that the ruler has.⁶

So, from the concept of sovereignty in the middle ages, it can be concluded that sovereignty is the highest power which is inviolable.

Ending the 30 years of War in 1618-1648 in Europe, which later created Westphalia treaty of peace, is the beginning of modern era that change the existing system. The aim of this treaty is to create the lasting peace in the region. The state in the international community is allowed to have the absolute sovereignty and this statement becomes the basis of the treaty. This component allows the general approaches such as the *jus-naturalism* and positivism trying to elucidate vital thoughts in characterizing the idea of sovereignty in respect to the guideline of sovereign equality, an equivalent right perceived to all international

⁶ Stephen D. Krasner, 2001, Sovereignty, *Foreign Policy*, No. 122, p. 21, Washingtonpost Newsweek Interactive, available at <http://www.jstor.org/stable/3183223> accessed on 10 March 2018 at 8:58 a.m.

actors, for non-interference toward the domestic affairs of others state, and for the regional autonomy of the states.⁷

In the late 18th century new advancements in the idea of sovereignty was introduced. State sovereignty transforms into national sovereignty, the elements of sovereignty are exchanged from the king to the state and the citizen. The expression of this trend is illustrated eloquently by the United States Independence Declaration (1776) and *Déclaration des droits de l'Homme et du citoyen* (Declaration of the Rights of Man and Citizen), and the France Constitution during the French revolution (1789-1799). The *Déclaration* stated that the source of sovereignty originates within the state and there is no party that can run the authority that does not explicitly proceed from the state. This statement is known as the first concept of the sovereignty of the state. The 1791 French Constitution applied the state sovereignty in article 1 stated that sovereignty is indivisible, inalienable and imprescriptible. The Constitution explains further that sovereignty belongs to the state that no one is able to dictate the exercise of the sovereignty.⁸

The evolution of the idea of sovereignty is in the beginning of 20th century. In this period, the sovereignty is more flexible with cooperation with other states and respects international obligation created by

⁷ Jana Maftei, *Op. cit*

⁸ *Ibid*

international actors. In the mid of the 20th century, many experts discussed the relative sovereignty of the state. Pasquale Fiore shows that a state can operate without the interference of other countries, but within the limits set by international law. In 1935, Jean Delvaux expressed that keeping up the principle of sovereignty is contradictory with the international law. On the contrary, with the limits set by international law, the sovereignty does no longer mean arbitrary power and without reservations.⁹

After the World War period, it impressively creates negative ideation of sovereignty. The reason is due to the possibility of abuse of power and war which motivate sovereignty in the classical sense. A few experts go so far as to challenge the legal personality of the state and therefore also its ability to have rights and obligation. Depending on their political goals and the two major totalitarian systems of the 20th century, nationalism, socialism and communism had specific approach on sovereignty.¹⁰

The interest of a state is also played a role in the development of sovereignty in the 20th century. The interest here is often referred as political interest of a state. The state is no longer see themselves as individual state, but also they think more universal. The universal

⁹ *Ibid*

¹⁰ *Ibid*

interest of the state is the human rights law, environmental law, humanitarian law, etc.¹¹ The evidence of universalism concept in Indonesia could be found in the preamble of the 1945 Constitution stated that the participation to establish world order based on freedom, perpetual peace and social justice.

2. Challenge of Sovereignty

The basis of the idea of state is International law. Thus, the state depends on the establishment of sovereignty, which is characterized as preeminent power particularly upon the body politic. The concept of sovereignty of state could be seen from the thought of the state itself. Be that as it may be, the advancement of international law has gradually debilitated the state sovereignty, creating a clash between international law and state sovereignty. This alignment arose due to while the effort to maintain peaceful condition and state sovereignty. In other words, the international law itself has presently gotten to be a risk to state sovereignty.

The case of the appearance of United Nations which supervised the election in Haiti at the beginning of 1990 caused pros and cons. There is an evidence that the state does not only recognize the international

¹¹ Monica Garcia Salmenes Rovira, 2014, The Politics of Interest in International Law, *The European Journal of International Law*, Vol. 25, No. 3, p. 772

law, but also recognizes the international body. This case is challenging the concept of sovereignty of state. The state is forced to follow this treatment in order to gain the international legitimacy by ignoring the concept of absolute power over a body politic and freedom from external control.¹²

Another case of a clash of international law and state sovereignty is the nuclear testing of Iranian government. It could be seen from the case that the real form of clash with the national sovereignty. In this case, it is clear that the limitation of state sovereignty that what is permissible and what is prohibited to conduct. United Nations in collaborating with International Atomic Energy Agency (IAEA), both of these international organizations aim to create a positive and peaceful utilization of atomic energy.¹³

In running their purposes, the UN and IAEA limit states' trial on atomic energy, obviously restricting what is permissible. The official of IAEA stated that the urgency of international supervision which previously only requires domestic supervision of the use of atomic energy. This statement issued due to the Iranian nuclear testing at the late of 2009. In response to the IAEA statements, Iran agreed to be

¹² Jason Riegert, "The Irony of International Law: How International Law Limits State Sovereignty", available at <https://aglr.wordpress.com/2010/04/05/the-irony-of-international-law-how-international-law-limits-state-sovereignty/>, accessed on 26 February 2018 at 2:28 p.m.

¹³ *Ibid*

supervised by the external party towards the facilities of nuclear testing of Iran. This issue later questioning the article in UN Charter. IAEA violates the rights of the state, recognition of state sovereignty and freedom, and prohibition of intervention towards the domestic matters of a state. It is obviously that the actions of IAEA consciously violate the UN charter.¹⁴

From this case, it could be seen that the idea of national jurisdiction is not supreme due to the existence of impressive cover between national and international law.

International law has extended from its original core which discusses the region and the states jurisdiction. It presently incorporates the issue of human rights, financial matters, environment, workers, etc. The existence of international law obliged the states not to intervene the domestic matter of other sovereign states. An exemption to this obligation is made for humanitarian matters which are related to human rights and racial abuse. This exemption exists due to the justification of intervene whenever the occurrence of violation of human rights. The rights of the people are protected and granted by international law. In the application, the protected rights from other states are limited. From the case we can imply that the limitation of state sovereignty is not fully

¹⁴ *Ibid*

bad. They still have their sovereignty due to the one who makes the international law it the state itself. The states also still have their power by having option of what kind of international law that they want to sign or not.¹⁵

The other cases that reflect the clash of international law and state sovereignty are the case of humanitarian intervention and campaign against terror. NATO (North Atlantic Treaties Organization) had a military intervention in Kosovo for the purpose of ending the massive ethnic cleansing. The report of the Independent International Commission on Kosovo stated that military intervention conducted by NATO was illegal but justifiable. The reason of why the action was illegal due to the UN Security Council did not approve the military intervention. In any case, the Commission believed that the intervention is legitimized since all diplomatic ways had been failed and the purpose of the intervention is to liberate the persecuted majority population of Kosovo from a long period under the Serbian government.¹⁶

In responding the case of humanitarian intervention, UN Secretary-General Kofi Annan in his 55th Central Assembly demanded for a new humanitarian intervention principle. In his humanitarian crisis report, he stated that violation of human rights such as war crimes, crimes against

¹⁵ *Ibid*

¹⁶ Ruti Teitel, 2009, "Sovereignty Humanized", *American Society of International Law*, Vol 103, p. 417

humanity and genocide is justifiable to intervene by Security Council. His declaration is also known as Annan Doctrine. At the time, he emphasized that the scope of human rights violation and international humanitarian law are primary factor to recommend an intervention. Further, he explained that the state must be responsible to protect and is a state cannot and reluctant to protect its citizen from violation of human rights, the Security Council must embrace the responsibility.¹⁷

After the statements of Kofi Annan regarding the humanitarian intervention, in 1995, the UN Security Council authorized NATO military intervention in Bosnia due to the genocide of thousands of Muslim men. Under the Dayton Accords, The Serbian, Croatian, and Bosnian leader who were the member of former Yugoslavia agreed to end the war that has been lasted for three years facilitated by UN Security Council in peace settlement implementation. Unfortunately, the Serbian military and police intensified their operation against the Albanians in Kosovo. Without a resolution from UN Security Council, NATO air forces rescued the Albanian from the ethnic cleansing committed by the Serbian.¹⁸

¹⁷ *Ibid*

¹⁸ Helen Stacy, 2005, "Relational Sovereignty", *American Society of International Law*, Vol 99, p. 396-397

Based on the understanding of the UN Charter, NATO military intervention in 1999 could be considered as an illegal military strike. However, for the sake of humanity, the intervention could be concluded as justifiable.

The East Timor crisis is just another case of a clash between state sovereignty and international law. The result of referendum suggested by the president Habibie was beyond the expectation of Indonesia's government and military. Around 78.8 percent of voters voted to separate from Indonesia.¹⁹ In responding the referendum, Pro-Indonesia army attacked the East Timorese and destroyed the infrastructure, causing a majority of the civilians flee desperately looking for a safe place to hide.²⁰

To end the humanitarian crisis caused by Indonesian militia in East Timor, on 11 June 1999, the UN Security Council established United Nations Mission in East Timor (UNAMET) to give a freedom for East Timor.²¹ Australia also has a major role in the intervention. The Australian wanted to lead the International Force for East Timor (INTERFET) with the purpose of restoring security. The thing that

¹⁹ Angel Rabasa and Peter Chalk, 2001, *Indonesia's Transformation and the Stability of Southeast Asia*, RAND Corporation, p. 22

²⁰ *Ibid*, p. 23

²¹ Leonard C. Sebastian and Anthony L. Smith, 2000, *The East Timor Crisis: A Test Case for Humanitarian Intervention*, ISEAS – Yusof Ishak Institute, p. 66, taken at <http://www.jstor.org/stable/pdf/27912244.pdf?refreqid=excelsior%3Aa10ca7df4fb108af8df429a11160ac4a>, accessed on 19 March 2018 at 2:55 p.m.

makes East Timor intervention different from other intervention is that the intervention was considerably successful to solve the humanitarian catastrophe.

The following data show the list of Humanitarian Intervention in the post-Cold War.

Country	Year
Iraq	1991
Bosnia-Herzegovina	1992-1995
Somalia	1992
Cambodia	1994
Rwanda	1994
Haiti (by US intervention force)	1994
Albania (by Italian intervention force)	1997
Kosovo	1998-1999
Sierra Leone	1999
East Timor	1999

Table 1. List of Humanitarian Intervention in the Post-Cold War²²

The data from the table show that the existence of international law and international body do not make the state sovereignty absolute

²² *Ibid.*

anymore. There are some terms and conditions that justify the international law and international body to conduct the intervention in domestic affairs of a state. Based on the data, the thing that justify the external intervention in a state is correlated to the issue of humanitarian crisis. The United Nations as the authorized international institution has played a powerful role in keeping the parameter of justice and security. The UN Charter affirms the rights of the state from the exclusion of foreign intervention as it clearly seen in Article 2 (4) of the Charter. Nevertheless, the Charter also strongly protects the human rights, it can be found in the preamble of the Charter, Article 1 (3), 55 and 56.

Article 2 (4) is not an absolute prohibition, but a limitation for an intervention not to violate territorial integrity, political independence and not in conflict with the objective of the United Nations (in any other manner inconsistent with the purposes of the United Nations). Territorial integrity is intended if a country loses its territory permanently whereas in a human intervention the intervening party does not take the territory of the state permanently, such action is only to restore human rights.²³

UN Charter also established collective security systems which make the possibility of humanitarian intervention. The UN has power

²³ Erika and Dewa Gede Sudika Mangku, 2014, "Meneropong Prinsip Non Intervensi yang Masih Melingkar dalam ASEAN", *Perspektif*, Vol. XIX, No. 3, p. 182.

to intervene that include the intervention for humanitarian purposes in any member states. This action is legitimated by the UN Charter in Chapter VII. The reservation of domestic jurisdiction of Art 2 (7) of UN Charter does not apply in this situation. However, the power of UN intervention is limited by Article 39 of UN Charter to situations of threat to the peace, breach of peace, or an act of aggression. The term of threats to the peace is broadly understood as humanitarian crisis.²⁴

The humanitarian intervention is morally justified as it is the one and only way to rescue the innocent people who is being mistreated by their abusive government.²⁵ However, the UN must provide a clear mechanism on conducting humanitarian intervention, so the state will not misuse this action as a mask to invade the other state, as it was violently misused in the past and often used as a pretext for invasion or occupation of weaker states.²⁶

Based on the discussion above, the development of the concept of sovereignty encounter a significant changing since the creation of the concept in the past. At first inception of the idea, the sovereignty had the absolute strongest power and nothing can interrupt the power. It

²⁴ Vaughan Lowe and Antonios Tzanakopoulos, 2011, "Humanitarian Intervention", available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e306#>, accessed on 24 April 2018 at 8:47 p.m.

²⁵ Eric A. Heinze, 2009, *Waging Humanitarian War*, New York, State University of New York Press, p. 15

²⁶ Thomas Buergenthal *et al.*, 2002, *International Human Rights in a Nutshell*, United States of America, West Group, p. 3

began to change since the development of international law. The existence of international law softens the supremacy of the sovereignty. The modern international society has been conscious with the humanity. It makes the international society may participate in the domestic affairs of a state which previously this action was very taboo to conduct. But the participation of a state in domestic affairs of other state is limited only in the fields of humanitarian purposes. The occurrence of a humanitarian intervention is the evidence of the sovereignty is no longer absolute.

Even though the Charter of the UN prohibits the use of military forces towards other state, the Charter provides more conditions to protect and promote human rights. The Charter also obliged the state to provide humanitarian assistance if something horrible happened on humanity in a state. However, the UN as the authorized international organization must make a clear mechanism and methods on conducting humanitarian intervention. Such actions have to be done by the UN because intervention is breaking international order and irritates the sovereignty of state, even if the purpose is to assist humanitarian aid. So the possibility of misuse of action won't happen to an act of invasion and occupation to least powerful state. The international party participation is also needed to supervise the newly independent state and

injured state, the reason is to ensure that the state is in the right path of development.

In ASEAN, when the humanitarian crisis occurred in East Timor, the humanitarian assistance was provided by external agent, in this case the UN. This intervention happened because the existing organization in the region remained silent and refuse to involve in Indonesian internal affairs due to the consensus of not to intervene the internal affairs of each other. This prohibition is called as the non-interference principle. ASEAN firmly cling on the principle by embracing the non-interference principle. This situation happened in ASEAN where the modern international law allows involvement of external agents to settle the occurred humanitarian issue in a state. Whereas ASEAN is an international organization whose members are only destined to countries in Southeast Asia and are expected to solve their own regional issues. Unfortunately the existence of non-interference principle paralyzes ASEAN to do so. Resulting many cases of human rights violation left unchecked.

B. The Importance of Abolishment of Non-Interference Principle in ASEAN

1. The History and the Application of Non-Interference Principle in ASEAN

The countries in Southeast Asia have achieved a remarkable accomplishment by uniting 10 countries in the region that have the same purposes of regional peace and welfare. The achievement is reflected on the implementation of ASEAN Way that makes principle of non-interference as its core.²⁷

The principle was first lined out in the 1967 Bangkok Declaration as ASEAN's establishment document. The Bangkok Declaration stated that to maintain internal and regional security, member-states should prevent external interference. The non-interference policy was emphasized in the Kuala Lumpur Declaration of 1997.²⁸

The treaty that emphasized the prohibition of external interference is the Treaty of Amity and Cooperation (TAC) of 1976. There are six (6) primary principles adopted in this treaty. The principles are:

²⁷ Tram-Anh Nguyen, 2016, "Norm or Necessity? The Non-Interference Principle in ASEAN", *Cornell International Affairs Review*, Vol. 9, No. 1, available at <http://www.inquiriesjournal.com/articles/1318/norm-or-necessity-the-non-interference-principle-in-asean>, accessed on 3 March 2018 at 2:27 p.m.

²⁸ Mieke Molthof, *Op cit*

- a. Mutual respect for the independence, sovereignty, equality, territorial integrity, and national identity of all nations;
- b. The right of every State to lead its national existence free from external interference, subversion or coercion;
- c. Non-interference in the internal affairs of one another;
- d. Settlement of differences or disputes by peaceful manner;
- e. Renunciation of the threat or use of force; and
- f. Effective cooperation among themselves

The reason of the adoption of the non-interference principle by the ASEAN's founding member was mainly internal security concerns. The application of non-interference policy enables countries to focus on their own domestic matters, avoiding intervention or criticism from other state that could become an obstacle on nation development.²⁹

In spite of the fact that ASEAN effortlessly has made no action to define the meaning of interference, the reference of the ASEAN document follows the definition of the Westphalian sovereignty. According to Krasner, the meaning of sovereignty based on the Treaty of Westphalia is an organizational procedure for implementing a state that is based on the principle of territoriality and free from external influence from the structures of internal authority. The principle of non-

²⁹ Nehginpao Kipgen, 2012, "Association of Southeast Asian Nations (ASEAN): Cooperation Problems on Human Rights", *Strategic Analysis*, Vol. 36, No. 1, Routledge Taylor & Francis Group, p. 105

interference prohibits ASEAN member states to criticize and intervene domestic affairs of other states.³⁰ The Association practice before the mid-1990s recommends that it was understood as an involvement of a member states towards the other member state internal politics in the form of commentary or criticism through a military intervention. This expansive understanding drove the non-interference approach work as a course of action for the aversion of any acts by ASEAN member-countries expresses that would conceivably undermine the expert of the overwhelming political elite and upset internal administration in any of the part states.³¹

The application of non-interference principle in ASEAN is clearly visible on the silence of the Association regarding the conflict and military coup in Thailand, East Timor in Indonesia, Mindanao in the Philippines and the political persecution of former Deputy Prime Minister of Malaysia. Even though ASEAN firmly cling on their commitment to not interfere each other internal issues, there are some cases where ASEAN violates the consensus they have agreed upon. ASEAN has interfered the domestic affairs of Myanmar and Cambodia. The intervention of ASEAN in both states shows an implication of double standard in application of non-interference principle. The

³⁰ Tram-Anh Nguyen, *Op cit*

³¹ Mieke Molthof, *Op cit*

Association treats the members differently. ASEAN implements the non-interference principle whenever issues happen inside its dominant members but tend to intervene the least powerful members.³²

The first case of violation of the principle happened in Cambodia. In 1997, there was a coup on the leadership of Cambodia in national elections. Hun Sen as the second Prime Minister of Cambodia took over the position of the head of government from the first Prime Minister Norodom Ranaridh. The coup occurred when Cambodia applied for the membership of ASEAN. As the application of non-interference, at the time ASEAN refused to involve in domestic dispute of Cambodia. Nevertheless, the attitude of ASEAN turned after a pressure from the West and Japan who are the main trading partner in the region. ASEAN decided to postpone the membership of Cambodia and sent their representatives to settle the crisis.³³

The second case of violation the principle is the case of Myanmar military coup in 1989. The junta rejected to give the leadership to Aung San Suu Kyi who just won the national election in 1990 and put her under house arrest for a long period. Dissimilar from Cambodia, ASEAN accepted the membership of Myanmar in 1997 in spite of intense rejections by the West because of the committed violations of

³² Tram-Anh Nguyen, *Op cit*

³³ *Ibid*

human rights. ASEAN directly accepted Myanmar because of its potential natural resources that are able to boost the economic growth of the region. Due to the unresolved human rights crisis in Myanmar, the European Union and United States refused to attend any meeting with ASEAN that involve Myanmar and annulled all kind of cooperation. As the result of the massive pressure from the West, ASEAN broke the non-interference principle by demanded Myanmar to release Aung San Suu Kyi and to improve the human rights situation.³⁴

The mentioned cases of violation of non-interference principle above show that the inconsistency of ASEAN member states towards the application of the principle. The table below shows you the attitudes of ASEAN implementing non-interference principle when conflicts occur in each member states.

Case	Conflict	Year	Conflict Parties	ASEAN Intervention?
1.	Cambodian coup d'etat	1997	Hun Sen Vs. Norodom Ramariddh	Yes
2.	Philippines-Mindanao conflict	1997-2007	Government of Philippines Vs. Muslim rebel group	No
3.	Political persecution of former Malaysian Deputy Prime	1998	Government of Malaysia Vs. Anwar Ibrahim	No

³⁴ *Ibid*

	Minister Anwar Ibrahim			
4.	Rebellion in Aceh, Indonesia	1999-2005	Government of Indonesia Vs. Free Aceh Movement (GAM)	No
5.	East Timorese crisis	1999	Government of Indonesia Vs. East Timorese	No
6.	Myanmar's Suppression of the pro-democracy movement	1997-2007; Aung San Suu Kyi's arrest (2002;2003-2007)	Military government vs. National League for Democracy (NLD led by Aung San Suu Kyi)	Yes
7.	Southern Thailand Rebellion	2003-2007; Tak Bai Incident (2004)	Government of Thailand Vs. Pattani rebellions	No
8.	Thai coup d'etat	2006	Royal Thai Army Vs. PM Thaksin Shinawatra	No

Table 2. List of ASEAN's Stance towards the Non-interference Application.

2. The Impact of Non-Interference Towards the Human Rights Development in ASEAN

The appearance of the non-interference policy that may seem like this is a way to promote the independence of the members due to the consideration of the colonization that they bitterly experienced in the past. But, the existence of non-interference can fill in as a *de facto* code of silence, especially on the issue of human rights.³⁵

Human rights is being marginalized in ASEAN. The Association refused the involvement of foreign countries or other international organizations that demand the region to reform their mechanism of the protection of human rights application. Even though the existence of reports from United States Department of State or Amnesty International and Human Rights Watch, ASEAN does not give its concern.³⁶

Numerous have required the abolishment of the non-interference policy, especially to offer path to a compelling treatment of human rights in the region. One of the figure that wanted to eliminate the non-

³⁵ Jodesz Gavilan, 2017, "The Deafening Silence of ASEAN on Human Rights Violations", available at <https://www.rappler.com/newsbreak/in-depth/187759-asean-2017-human-rights-violations-deafening-silence>, accessed on 31 March 2018 at 10:40 a.m.

³⁶ Li-ann Thio, Implementing Human Rights in ASEAN Countries: Promises to Keep and Miles to Go before I Sleep, *Yale Human Rights and Development Journal*, Vol. 2 Iss. 1, p. 3

interference principle in ASEAN was the former Secretary General of ASEAN, Surin Pitsuwan. He suggested the replacement of non-interference principle with a “Flexible Engagement” approach. This approach allows a member-states to discuss openly other state’s domestic matters. Unfortunately, Surin’s proposal for this approach was rejected outright by the majority of the member states due to the fear of loss of national sovereignty and put the stability of the region at risk.³⁷

Following the complicated discussion on the application of human rights in the region, there is a silence that openly expressed in ASEAN when it comes to human rights abuses. Some of the citizens of ASEAN member-states are encountering repression by their own country. Creating government authoritarianism that paralyzes some of the rights of the citizens that should be enjoyed universally.³⁸

In fact, out of 10 members of ASEAN, only Singapore and Malaysia who apparently do not violate the human rights. The following table shows the cases of human rights violation throughout ASEAN.

No.	Country	The Case of Human Rights Violation
1.	Cambodia	Genocide-related cases that remain unresolved in Pol pot regime

³⁷ Mieke Mothof, *Op. cit*

³⁸ Jodesz Gavilan, *Op cit*

2.	Thailand	Various shootings and bombings of Pattani Muslim minority from Thailand's central government as a result of separatist movement.
3.	Malaysia	Racial discrimination and the enforcement of the Internal Security Act
4.	Philippines	Rodrigo Duterte as the President conduct a brutal war against drugs that has killed thousands of people
5.	Myanmar	Allegation genocide committed by the Myanmar military and government towards the Muslim minority of Rohingya
6	Vietnam	Imprisonment of two citizen due to their criticism to the government ³⁹
7.	Indonesia	An extra-judicial killings, disappearances, and tortures committed by the Indonesian military in East Timor, Aceh, and Irian Jaya, where separatist movements exist

Table 3. List of Human Rights Violation in ASEAN

The data on the table shows that almost all of the ASEAN member states have violated the human rights. ASEAN's adherence to non-interference was most evidently manifested in its response to the 1999 East-Timorese crisis. Regardless of the status of the crisis as a serious

³⁹ Vincent Bevins, *Op cit*

regional security threat and pressure from the United States and the United Nations, there was a silence from the members of ASEAN, which emphasizes that the crisis is a domestic affair of Indonesia and should not be intervened on the grounds of humanity that ultimately constitute a unilateral decision by the West.⁴⁰

A tension once occurred with the non-interference policy when the expansion of the membership to include Myanmar. ASEAN was getting massive pressure by international human rights groups and the west due to the denial of the recognition of Aung San Suu Kyi who has unpredictably won the 1990 national election. Instead, the military junta put her under house arrest. Despite a massive pressure from the west to limit economic relations with Myanmar, the leaders of ASEAN leaders at ASEAN Ministerial Meeting in 1991 chose a constructive engagement policy with Myanmar. ASEAN hoped that by the application of policy will improve the human rights circumstance in Myanmar so that membership in ASEAN might continue easily.⁴¹

Since Myanmar officially becomes the part of ASEAN, the region is often seen as intricate in terms of regional cooperation due to its

⁴⁰ Wei Yang Toh, 2016, "Rohingya Crisis: Rethinking ASEAN's Principle of Non-Interference, Fox & Hedgehog", available at <http://www.foxhedgehog.com/2016/12/rohingya-crisis-rethinking-aseans-principle-of-non-interference/>, accessed on 28 February 2018 at 12:02 p.m.

⁴¹ Robin Ramcharan, "ASEAN and Non-interference: A Principle Maintained", *Contemporary Southeast Asia*, Vol 22, No. 1, p. 66

consensus decision-making mechanism and unwillingness to interfere the other domestic affairs of member states. The member states enjoyed this “closed-eyes” policy and called this action as the ASEAN Way. This policy has been criticized because it will risk the future of ASEAN human rights protection and promotion project in the verge of collapse that caused by the political will of each member states government.⁴²

ASEAN’s stubborn attitude to the reluctance to discuss regional human rights cannot last long. The issue of human rights is dynamic and frequently discussed topic around the world. After the end of the cold war, the issue of human rights is becoming the main topic in international relation. Embracing to the norms of non-interference and state sovereignty, ASEAN member state consent to not intervene the domestic affairs of each other state to maintain the stability of the region. As a result of the adherence of non-interference, the region does not give concern on human right issue in the region until early 1990s. The occurrence of massacre in Dili on 1991 ended the silence of ASEAN member state upon the discussion of human rights in the region.⁴³

⁴² Byron Nagy, 2016, “Human Rights and the ‘ASEAN Way’: Political Barriers to Progress”, available at <http://www.e-ir.info/2016/11/16/human-rights-and-the-asean-way-political-barriers-to-progress/> accessed on 2 March 2018 at 11:25 a.m.

⁴³ Yongwook Ryu and Maria Ortuoste, “Democratization, Regional Integration, and Human Rights: The Case of the ASEAN Intergovernmental Commission on Human Rights”, *The Pacific Review*, Vol. 27, No. 3, Routledge Taylor and Francis Group, p. 359

At the world conference on human rights in 1993, a declaration was approved by the UN member in Vienna and named Vienna Declaration. ASEAN member states also approved this declaration and became the beginning of the commitment of ASEAN member states to uphold human rights in Southeast Asia. This human rights conference declared the need for considering the establishment of regional and sub-regional level agreements for the promotion and protection of human rights. This made ASEAN to take a stance on promoting human rights, a stance widely known as the Asian Values.⁴⁴

In spite of the fact that ASEAN concerned on the subject of establishing a regional human rights institution back in 1993, there is no serious action taken until a High Level Task Force in 2006 to draft the ASEAN Charter. This Charter is a document that makes ASEAN become a more rules-based organization and a legal entity.⁴⁵ The ASEAN Charter, which was ratified by all member states in 2008, recognizes human rights as its values. Article 14 of the Chapter stated the commitment of ASEAN to establish human rights institution in the region. In October 2009, the ASEAN Intergovernmental Commission

⁴⁴ *Ibid*

⁴⁵ Andre Asplund, "ASEAN Intergovernmental Commission on Human Rights: Civil Society Organizations' Limited Influence on ASEAN", *Journal of Asian Public Policy*, Vol. 7 No. 2, Routledge Taylor & Francis Group, p. 193

on Human Rights (AICHR) was born.⁴⁶ The legal basis on protection and promotion of human rights of AICHR is Terms of Reference (ToR). However, the mandates of AICHR were formulated using the approach of “promotion first, protection later”. The ToR of AICHR does not include investigation power, supervising or enforcement. This condition makes the AICHR that become powerless human rights institution as the human rights activist stated. It creates slow progress and long debate in the application.⁴⁷

Since the establishment of AICHR as the institution to promote and protect human rights in the region, AICHR does not give a significant impact towards the protection of human rights in ASEAN. AICHR has been vigorously condemned for having no power and being toothless for very nearly a long time since it was established. It predominantly works through consultation and consensus among 10 members from part nations who additionally enjoy veto powers. This makes it difficult for the commission to discharge reports about a part state's asserted infringement.

It likewise does not help that there are no current punishments that can be forced on nations found to have tolerated human rights

⁴⁶ Yuyun Wahyuningrum, 2014, “The ASEAN Intergovernmental Commission on Human Rights: Origins, Evolution and the Way Forward”, Published Paper on *International Institute for Democracy and Electoral Assistance*, p. 6

⁴⁷ *Ibid*, p. 14

infringement. This is genuine regardless of whether infringement go straightforwardly against ASEAN's Declaration of Human Rights. Dissimilar to the European Union (EU) and the United Nations which research and investigate and in the end endorse punished those that neglect to follow up on their terrible human rights records, ASEAN member-states are fundamentally left unchecked. Mathew Davies also has the same way of thinking, cautions against pressuring ASEAN to adopt European Union style hard compliance practices.⁴⁸

There are numerous cases of violation of human rights occurred across ASEAN. The kind of the violation is different from each country, from the lightest level of violation in the form of discrimination through the gross violation of human rights could be found from the report. Despite numerous human rights violations have occurred in ASEAN, the region as if let that happen and prefer to close their eyes. This antipathy response of the ASEAN member states exists because of the consensus of the non-interference policy that binds them. This principle prohibits them to criticize or participate in internal affairs of a state, in this case is the prohibition to involve in occurred conflict or infringement of human right.

⁴⁸ Byron Nagy, *Op cit*

Unfortunately, the consistency of ASEAN towards the non-interference principle is questioned. There are some cases of ASEAN break their agreement by intervene the internal affairs of the member states. Apparently the application of the non-interference principle is applied only in the state who has big power and influence in the region. But when it comes to the least powerful state, ASEAN tends to push it to the corner. The situation of double standard of non-interference application in each member states will certainly worsen the image of ASEAN as a regional institution in the world and questioned its capability in solving the regional issues.

ASEAN have to take a revolutionary action to reform their concept of regionalism in order to prioritize the interest to protect humanity and to humanize the human being.

C. The Comparison between ASEAN and the European Union

Since the inception of the European Union in 1952, the EU has been through a long way to become a matured and developed international organization, from Community into a greater Union of diversity of states

that has comprehensive legal system.⁴⁹ The European Union is a group of democratic countries in Europe cooperating together improving their citizens life. The member states of EU remain independent nations and sovereign. What makes the union different from other international organization is that the state pools their sovereignty in order gain a strength. Pooling sovereignty practically means that the member states send some of their decision-making power to shared institution they have established. The purpose is the decisions on particular issues of joint interest can be created democratically at European level.⁵⁰

The background of the integration of Europe cannot be separated from the event of the World Wars. Over 50 million people lost their lives during the World War II. The survivors experienced a psychological devastation and physical destruction.⁵¹ The World Wars that devastated the whole European countries was occurred because of extreme understanding and application of nationalism idea of the nation state. So, basis of the establishment of regional institution was to fade the idea of nationalism. Thus, applied approach of regionalism was supra-nationalism.⁵²

⁴⁹ Margot Horspool and Matthew Humphreys, 2012, *European Union Law*, Oxford, Oxford University Press, p. 1

⁵⁰ European Union, *Op cit*, p. 1

⁵¹ Alina Kaczorowska, 2013, *European Union Law*, Oxon, Routledge Taylor & Francis Group, p. 4

⁵² Maneesha Tripathi, 2015, "European Union and ASEAN: A Comparison", *International Journal of Research (IJR)*, Vol. 2, ISSN 2348-6848, p. 378

To restore peace in the region, on 18 April 1951 in Paris, six western European countries made the first integration of Europe named the European Coal and Steel Committee (ECSC). The ECSC is more likely only for a free trade treaty. To expand the scope of the institution, in 1957, the Treaty of Rome established European Economic Community (EEC). Finally on 7 February 1992, the Treaty on European Union or the Treaty of Maastricht was signed as the foundation of European Union.⁵³

Meanwhile in Southeast Asia, the applied approach of regionalism in ASEAN is intergovernmental approach. The reason of the application of the approach is because of the colonialism that mostly experienced by the Southeast Asian states. The existence of national movement in the past that furiously struggle to gain their independence was the reason of the regional integration in this region. The idea of integration is to keep their newly independent and sovereign nation from external powers⁵⁴.

Before the establishment of ASEAN in 1967, there were several attempt to integrate the region. The first attempt of integration was happened on 1961 by establishment of Association of Southeast Asia (ASA), but a conflict between Philippines and Malaysia ruined the attempt. Later, MAPHILINDO which a cooperation between Malaysia, Philippines and Indonesia appeared and replaced ASA. Again, this second attempt of

⁵³ *Ibid*, p. 377

⁵⁴ *Ibid*, p. 378

integration was failed due to political confrontation of President Soekarno.

⁵⁵ Finally, the last attempt of integration was successful. ASEAN was established due to the same experience of colonization (except Thailand) with the purposes of creating welfare and peaceful Southeast Asian Nations community.⁵⁶ After forty years of establishment of ASEAN, the leaders of ASEAN signed the historic Charter in November 2007. The Charter was designed to make the region as a single community. The existence of ASEAN for more than half-century is considered as successful regional integration in the world.⁵⁷

The structure of organization of European Union is almost as equal as a sovereign state that has Executive, Legislative and Judicial power. In executive body, there is the European Commission (EC). Just like the function of executive power, EC also has the same executive function in a state which is proposing a new legislation.⁵⁸ European Commission is an independent body which free from any intervention of a member state. The policy issued by the EC must uphold the interest as the citizen of European Union as a whole and not for individual interest of a state.⁵⁹ There is no comparable of this institution in ASEAN.⁶⁰

⁵⁵ Bambang Cipto, *Op cit*, p. 13

⁵⁶ Min-hyung Kim, 2011, "Theorizing ASEAN Integration", *Asian Perspective*, Lynne Rienner Publisher, Vol. 35 No. 3, p. 407

⁵⁷ Maneesha Tripathi, *Op cit* p. 378

⁵⁸ European Commission, *Op cit*, p. 7

⁵⁹ *Ibid*, p. 20

⁶⁰ Maneesha Tripathi, *Op cit* p. 379

The next is the legislature that consists of European Parliament and the Council of the European Union. The roles of the parliament are passing the European law, supervise democratically other EU institutions particularly the European Commission and it may adopt or reject the budget proposal.⁶¹ The Council is the primary decision-body of the EU. It represents the member states and there must be one minister from each national governments of European Union member. The Council that consists of the head of state or government usually conduct a meeting twice a year. The Council has six main duties.

- 1) Passing the European laws jointly with the European Parliament.
- 2) Coordinating the broad and social policies of the member states.
- 3) Concluding international agreements between EU and other countries or international institution.
- 4) Approving the annual budget together with the Parliament.
- 5) Developing the common foreign and security of the EU.
- 6) Coordinating cooperation between the national courts and police in criminal issues.⁶²

⁶¹ European Commission, *Op cit*, p. 11-12

⁶² *Ibid*, p. 14-15

ASEAN also has this kind of Council named Council of Minister of ASEAN, but the Council only meets once a year and does not have a legislative function.⁶³

Lastly, the judiciary power of the EU is the European Court of Justice (ECJ). The duty of the court is to ensure the EU legislation is interpreted and applied equally in all EU countries. It ensures there will be no different treatments on the same matters or clash in each policy of each member states.⁶⁴ Again, the existence of this kind of institution in ASEAN is none, but the founding treaty of ASEAN mentions a possibility of creating a high council that consist of the minister of the member states with limited role and *ad hoc* dispute settlement.⁶⁵

As the most advanced regional institution in the world, there is no other institutions that are able to be compared with EU. With perfectly structure of institution and clear duties, EU takes the lead of role model of regional institution. When there is an issue appeared in the region, EU is able to take decision by using unanimity or a majority vote. After the Union reached the qualified majority, EU can directly execute the decision in the region and individual state because the member states have pooled their sovereignty to the Union. Unlike what happened with ASEAN that still

⁶³ Maneesha Tripathi, *Op cit*, p. 379

⁶⁴ European Commission, *Op cit*, p. 25

⁶⁵ Maneesha Tripathi, *Op cit*, p. 379

shackled with non-interference principle, there is no clear and formal procedure of decision making in ASEAN. This condition makes ASEAN slower to take action and seemingly powerless to deal with their own regional issue.

