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Message from Chairman

Yordan Gunawan
Chairman, International Conference on Law and Society 6, Universitas Muhammadiyah Yogyakarta

Assalaamu’alaikum Warahmatullahi Wabarakatuh,

In the Name of Allah, the most Gracious and the most Merciful. Peace and blessings be upon our Prophet Muhammad (S.A.W).

First and foremost, I felt honoured, on behalf of the university to be warmly welcomed and to be given the opportunity to work hand in hand, organizing a respectable conference. Indeed, this is a great achievement towards a warmers multilateral tie among Universitas Muhammadiyah Yogyakarta (UMY), International Islamic University Malaysia (IIUM), Universiti Islam Sultan Sharif Ali (UNISSA), Universiti Sultan Zainal Abidin Malaysia (UNiSZA), Fatoni University, Istanbul University, Fatih Sultan Mehmet Vakif University and Istanbul Medeniyet University.

I believe that this is a great step to give more contribution to the knowledge development and sharing not only for eight universities but also to the Muslim world. Improving academic quality and strengthening our position as the procedures of knowledge and wisdom will offer a meaningful contribution to the development of Islamic Civilization. This responsibility is particularly significant especially with the emergence of the information and knowledge society where value adding is mainly generated by the production and the dissemination of knowledge.

Today’s joint seminar signifies our attempts to shoulder this responsibility. I am confident to say that this program will be a giant leap for all of us to open other pathways of cooperation. I am also convinced that through strengthening our collaboration we can learn from each other and continue learning, as far as I am concerned, is a valuable ingredient to develop our universities. I sincerely wish you good luck and success in joining this program

I would also like to express my heartfelt thanks to the keynote speakers, committee, contributors, papers presenters and participants in this prestigious event.

This educational and cultural visit is not only and avenue to foster good relationship between organizations and individuals but also to learn as much from one another. The Islamic platform inculcated throughout the educational system namely the Islamization of knowledge, both theoretical and practical, will add value to us. Those comprehensive excellent we strived for must always be encouraged through conferences, seminars and intellectual-based activities in line with our lullaby: The journey of a thousand miles begin by a single step, the vision of centuries ahead must start from now.

Looking forward to a fruitful meeting.

Wassalamu’alaikum Warahmatullahi Wabarakatuh
Foreword

Trisno Raharjo
Dean, Faculty of Law, Universitas Muhammadiyah Yogyakarta

Alhamdulillah all praise be to Allah SWT for his mercy and blessings that has enabled the FakultasHukum, UniversitasMuhammadiyah Yogyakarta in organizing this Inaugral International Conference on Law and Society 6 (ICLAS 6).

This Conference will be providing us with the much needed academic platform to discuss the role of law in the society, and in the context of our two universities, the need to identify the role of law in furthering the progress and development of the Muslims. Muslim in Indonesia and all over the world have to deal with the ubiquity of internet in our daily lives life which bring with it the advantages of easy access of global communication that brings us closer. However, internet also brings with it the depraved and corrupted contents posing serious challenges to the moral fabric of our society. Nevertheless, we should be encouraged to exploit the technology for the benefit of the academics in the Asia region to crat a platform to collaborate for propelling the renaissance of scholarship amongst the Muslims.

This Conference marks the beginning of a strategically planned collaboration that must not be a one off event but the beginning of a series of events to provide the much needed platform for networking for the young Muslim scholars to nurture the development of the Muslim society.

UMY aims to be a World Class Islamic University and intend to assume an important role in reaching out to the Muslim ummah by organising conferences hosting prominent scholars to enrich the development of knowledge. This plan will only materialise with the continuous support and active participation of all of us. I would like to express sincere appreciation to the committee in organising and hosting this Conference.
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The Urgency of ASEAN Human Rights Court Establishment to Protect Human Rights in Southeast Asia

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ABSTRACT
The issue of Human Rights enforcement in Southeast Asia has become the serious problem and attracts the attention of international community. Principally, ASEAN has mentioned the Human Rights as one of the focus and be a part of the ASEAN Charter in 2008. It was followed by the establishment of ASEAN Inter-Governmental Commission on Human Rights (AICHR). AICHR is the commission of Human Rights enforcement in Southeast Asia which has a duty, function, and an authority to conduct dissemination and protection of Human Rights. In the end of 2016, however, the function of protection mandated to AICHR have not achieved yet. It can be proved by several cases of Human Rights violation which still exist and have not settled yet. One of case which attract the public attention recently is human rights violation towards Rohingya in Myanmar. Using the juridical-normative method, the research aims to examine the urgency of Human Rights court establishment in Southeast Asia region which able to issue the decision that bind the ASEAN members or the violating parties. The data shows that ASEAN needs to establish a regional court which intended to settle the Human Rights violations in ASEAN region. Furthermore, the research also highlights three strong factorsshould be settled by ASEAN for establishing human rights court i.e. the significant distinction of democracy and human rights development among the members, the strong implementation of non-intervention principle, and the financial matter to sustain the court.

Keywords: Human Rights, ASEAN, AICHR, Human Rights Court

I. INTRODUCTION
Established in 1967, the Association of Southeast Asia Nations (ASEAN) is a key regional organization in the world today. While the original aims of the organization did not encompass human rights explicitly, its profile has been raised in recent years in relation to human rights. In a welcome note of ASEAN, human rights already integrated into its framework by adopting ASEAN Charter on 2007. Consequently, various bodies have been established as part of the quest for a regional human rights mechanism. For example, ASEAN has established a body which purposed to promote and to protect human rights in ASEAN namely ASEAN Inter-Governmental Commission on Human Rights (AICHR). Another two sectoral bodies which working on the field of human rights are established namely ASEAN Commission for Promotion and Protection of the Rights of Women and Children (ACWC) and the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW). ¹

Those sectoral bodies are paralleled with national institution (such as local courts, national human rights commissions, and ombudspersons) and international mechanism particularly the United Nations (UN). The plurality of mechanisms and actors are important, it means that human
rights protection interplays with the issue of power and the need for checks and balances to prevent abuse of power. This panoply also provides inspiration for addressing the challenge of human rights in Southeast Asia comprehensively and effectively, with key implications for the region and beyond.2

Many crimes have occurred in ASEAN caused by the difficulty of the courts to settle the cases. The court which usually handles the crimes in International scope is International Criminal Court (ICC). The establishment of ICC aimed to settle the extraordinary crimes including genocide, war crimes, crimes against humanity, crimes against aggression. However, the extraordinary crimes are not only categorized on those four, but also include terrorism. It is referring to the crime that cause more danger and more threat to human life. Although, there are institutions or courts exist to handle it, but the cases remain happen.

The establishing of human right court in ASEAN is to facilitate the court process which conducted or suffered by ASEAN countries. The function is to facilitate ASEAN countries to settle the case which happen within the ASEAN without bringing it to the ICC. The development of International Criminal Law has challenge the lawyers in settling the serious violations of human rights and international humanitarian law. The deterrent effect of international prosecutions is unclear. Moreover, international criminal justice represented only one possible response to atrocities. Truth and Reconciliation commissions, for example, may be more effective in certain testimony, historical record corrections, and victims’ solace. While international criminal justice constitutes an increasingly important area, it raised the questions on how the international legal system could effectively respond to atrocities.3

II. RESEARCH QUESTION
Is it possible to establish the ASEAN Court of Human Rights due to the existence of Non-Interference principle?

III. RESEARCH METHOD
A. Type of Research
This is a normative legal research4 combined to comparative and statutory approach5 in analyze the issue of the establishment of human rights court in ASEAN. In this study, the authors use the method of exploration method that aims to recognize or get a new view of a phenomenon which is often able to formulate the research problem more precisely or to formulate the research hypothesis.6

In this case, the research is done by surveying the literature and the study of the urgency of the establishment of human rights court in ASEAN by looking its efficiency and comparing to another related human rights court. Doctrinal method is also used in this research which focusing on reading and analyzing primary materials (such as the legislation) and secondary materials (such as legal dictionaries, textbooks, journal articles, case digest and legal encyclopedias).7

B. Technique of Collecting Data
The data were collected by library research such reading, analyzing, and deriving conclusion from related documents (charters, declarations, law books, legal journals, internets and other which related to the main problem of this research).
C. Data Analysis

The data were analyzed systematically through juridical point of view. Systematically means the research analyzes international laws which related to the issue of ASEAN human rights violations. Juridical thinking means connecting the law principles, charters, declarations, and another related to the main problem of this research.

IV. DISCUSSION

A. ASEAN

ASEAN formation was preceded by an organization established in 1961 called the Association of Southeast Asia (ASA), a group consisting of the Philippines, Malaysia, and Thailand. ASEAN was officially established on 8th of August 1967 by five foreign ministers from Indonesia, Malaysia, the Philippines, Singapore, and Thailand. They signed the ASEAN Declaration, commonly known as the Bangkok Declaration. The creation of ASEAN was motivated by a demand of economic development.

ASEAN grew when Brunei Darussalam became its sixth member on 7th of January 1984, barely a week after gaining independence. ASEAN achieved greater cohesion in the mid-1970s following the changed balance of power in Southeast Asia after the end of the Vietnam War. The region’s dynamic economic growth during the 1970 have strengthened the organization, enabling ASEAN to adopt a unified response to Vietnam’s invasion of Cambodia in 1979. ASEAN’s first summit meeting, held in Bali, Indonesia on 1976, resulted an agreement on several industrial projects and the signing of a Treaty of Amity and Cooperation, and a Declaration of Concord. The end of the Cold War between United States of America and the Soviet Union at the end of the 1980s allowed ASEAN countries to exercise greater political independence in the region, and in the 1990s ASEAN emerged as a leading voice in regional trades and security issues.

On 28th of July 1995, Vietnam became ASEAN’s seventh member. Laos and Myanmar (Burma) joint the next two years on 23th of July 1997. Cambodia supposed to join at the same time as Laos and Myanmar, but its entry was delayed due to the country’s internal political struggle. It later joint on 30th of April 1999, following the stabilization of its government.8

Since ASEAN’s establishment, international relations in Southeast Asia have played out at two levels: the state-to-state bilateral level and the ASEAN multilateral level. At each level, there are two sets of relationship among Southeast Asia state themselves and the relationship of the Southeast Asia state to external actors the great powers. At the ASEAN level, an analysis of southeast Asia’s international relations must add the question of how the two levels with the four categories of transaction mutually interact in term behavior at one level influencing behavior at another one. For example, at the policy level this question is opposite to the discussion of Myanmar and Indonesia regional roles and impact.9

1. Human Rights and Human Security

The principled value base of the contemporary international human rights regime to which Southeast Asian states belong was first enunciated in the 1945 preamble to the charter of the United Nations reaffirming faith in fundamental human rights, in the dignity and worth of the human person, and the equal rights of men and women. Article 2 of the charter states that a principle of the UN is “sovereign equality,” which means that the UN has no authority to intervene in matters essentially within the domestic jurisdiction of a member. The tension between the international goal of protecting human rights and the domestic authority of a sovereign state has been the constant thread in the dialogue between defenders of rights and alleged violators. This
tension is replicated at the Southeast Asia regional level in ASEAN’s inability to reconcile its claimed commitment to the norms of democracy and human rights with its insistence that state sovereignty and noninterference were the bedrock of the region’s international relations.10

2. Regional Views of Human Rights

Despite the UN’s rights system’s claim to universality, there is no unified view on human rights either globally or in Southeast Asia. To many Southeast Asian elites, the West’s emphasis on civil and political rights in a democratic framework is the expression of a historical and cultural process in economically developed societies. According to ASEAN leaders, the preoccupation from West ignores economic, social, and cultural rights that are of paramount importance for the full realization of human dignity and individual achievement. The more extreme views see the West’s human rights campaign as a kind of political or cultural neo-colonialism, particularly it is applied to trade and to aid on the basis of rights judgements.

The Western and Asian views were compromised, if not reconciled, at the 1993 United Nations Vienna World Conference on Human Rights. The “Vienna Declaration” stated that “while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, nevertheless “it is the duty of regardless of their political, economic and cultural systems, to promote and protect all human rights and freedoms.” As for economic development, it was agreed that “while development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights as the legal context of national sovereignty and non-interference in domestic affairs was not challenged.

Shortly after the Vienna Convention, at its annual meeting of ministry of ASEAN reaffirmed its commitment to human rights and freedoms as set out in the “Vienna Declaration.” In line with this, the members agreed that ASEAN should consider the establishment of an appropriate mechanism on human rights. It was argued by ASEAN officials that a precondition for an ASEAN human rights body was the establishment of national human rights commission in each ASEAN state. National human rights agencies exist in only four ASEAN countries namely the Philippines (1987), Indonesia (1993), Malaysia (1999), and Thailand (1999).

The establishment of an ASEAN human rights is the contentious issues in the charter’s drafting. The CLMV body, a human rights compliance mechanism, has been included in the charter. No time frame was set for the foreign ministers and diplomatic to exercise common denominator consensus on what the terms of reference of the proposed human body might be. With the authoritarian states holding consensus vetoes, it is unlikely that any ASEAN human rights instrument will be approved or it will substantially alter the human rights practices of the undemocratic ASEAN states. It was the lack of credibility on the full protection of human rights in ASEAN that led Philippine President Arroyo to warn Myanmar to release Aung San Suu Kyi or the Philippines might not ratify the charter. One of Thailand’s most respected political scientists bitterly commented that ASEAN’s highly proclaimed charter has turned into a regional exhibit for Burma’s intransigent internal repression and blatant disregard for basic civil liberties.11

B. Extraordinary Crime in ASEAN

Crimes against humanity are extraordinary crimes. The law of crimes against humanity has primarily developed through the evolution of customary international law. The terms of the concept of Human Rights Crime as an Extraordinary Crime in Indonesia still has many interpretations and there is no standardization of raw, in a sense, what kind of crime that deserves to be included
in the category of extraordinary crime.

According to Muladi who tried to put forward some of the rationale for grouping an extraordinary crime. In the views of Muladi, the crime can be classified as *kriminogen* and *viktimogen* also potentially to harm the interests of various dimensions, from the security order, systematic or organized, threatening political stability, future development and others. ZainalAbidin added some statement based on Muladi’s opinion that in accordance with the principle of Intent Court, universality principle cannon treat several violations of human rights as an ordinary crime and as universal qualification of the crime against humanity.12

Based on the information above, extraordinary crime can be formulated that serious crimes against human rights because it has the specificity as described below: First, serious human rights crimes are against humanity as the background of motive power, carried out in a systematic and widespread. Second, serious human rights crimes result in the rending of the conscience of humanity, because of the enormity of the impact. Third, serious human rights violations betrayed the largest man on humanity. Fourth, human rights resulted in the emergence of serious crimes of terror, anxiety and fear in the community which can eliminate the public trust in the State. Fifth, serious human rights violations recognized internationally as the most serious crimes and even became an international jurisdiction if the settlement cannon be resolved at the national level.

Serious crimes against human rights can be concluded as the extraordinary crime. The crime has special characteristics and payloads, which is not the same and even more than the formulation of the evil that exists in the Criminal Code at the national level. Therefore, the handling of the cases was incredible and became a logical consequence to be categorized as extraordinary crime. The international community has recognized four types of serious human rights violations, the international jurisdiction, so that all countries that respect human rights can prosecute through the International Criminal Court (ICC). It is clearly stated in the Rome Statute of the establishment of International Criminal Court in 1998 that those four types of serious human rights violations namely genocide, crimes against humanity, war crimes, and crime of aggression. At the national level, Indonesia only adopt two types of serious human rights crimes, both the crime of genocide and crimes against humanity, as stipulated in the Law No. 26 of 2000 concerning on Human Rights Court.

These are examples of extraordinary crime cases that occurred in ASEAN countries:

1. Indonesia (Terrorism)
   
   On 12th of October 2002, two bomb attacks at tourist bars on the Bali island which killed nearly 200 innocents, many of them are Australians. According to Rosa, terrorism is not only an ordinary crime, but also has become a crime against humanity because it is so widespread and systematic, which has killed thousands of innocent people. Among those crimes were tragedy of the World Trade Centre, an explosion Bali bombings, a blast bomb in Madrid, London bombing, and many more. It is acknowledged that terrorism is a latent danger that will arise and continue to occur within the international society.13

2. Thailand (Human Trafficking)
   
   Based on the 2000 United Nations Protocol to Prevent, Eradicate, and Punish Trafficking in Persons, especially women and children, United Nations (UN) defines human trafficking as: The recruitment, transportation, transfer, harbour, or receipt of persons, by the threat or use of force, or other forms of coercion, abduction, fraud, deception, abuse of power or vulnerability, giving or receiving of payments or benefits to obtain the consent of persons having authority over another person, for the purpose of exploitation.
Human trafficking considered as serious violation of human rights. It is because contribution to human trafficking are commonly believed to be related to poverty, globalization, and economic disparities among countries. An estimated one-third of victims worldwide were trafficked for economic purposes other than sexual exploitation (ILO, 2005a). In Thailand, the International Organization for Migration has estimated that currently there are about 1.9 million migrants in the Greater Mekong Sub-Region (GMS). In the past, a large influx of migrants into Thailand was due to war or internal conflict in other GMS economies. However, in recent years, migration from Thailand’s neighbours was stimulated largely by economic conditions.

A shortfall in low-skilled laborers in Thailand created a demand for migrant workers, from neighbouring relatively poorer economies with surplus labour. Although Thailand instituted a registration program for issuance of work permits to regularize the stay of migrant workers in the country, most of migrant workers in Thailand are illegal. Migrant workers enter Thailand through many channels, both legal and illegal, and in many cases, they became victims of human trafficking. Many of those who registered upon entry stayed beyond their permit period; others did not register at all.

In 2008, an estimated 1.3 million migrants in Thailand were unregistered. Their illegal status, coupled with their general lack of understanding of the relevant Thai laws and their rights plus the fear of deportation, open them up to exploitation and harassment from their employers, police, and other officials. The vulnerable conditions of migrant workers also provide fertile ground for corrupt practices to take place. Their abuse and the violation of their human rights and labour rights continue to be reported. Although linkages between human trafficking and the forced labour of migrants can be established, they are not always straightforward. Largely because of the economic situation in their own country, many aspirant migrants chose to migrate illegally on their own before being coerced or deceived into forced labour at their destination. Sometimes, if such adverse events do not occur at their first destination, the migrants may be trafficked or led into forced labour at their second or third destination. Therefore, the distinction of whether they were cases of human smuggling or trafficking is often raised, but any conclusion needs to be treated with care.

C. Myanmar (The Muslim Rohingya in Myanmar)

The Burmese military government claims that the Rohingyas are not indigenous people but have migrated from Bangladesh. However, even prior to 1962 Rohingyas were holders of government-issued identity cards and had also British-issued ration cards which affirmed they are citizens of Burma. Then on the pretext of checking these identity cards before the very eyes of the genuine holders of the cards, these old identity cards were forcibly taken and torn to bits just to refuse their identity.

In February 1978, the Burmese military junta launched a large-scale program with military precision aptly named “operation Dragon King” (Naga-Min). The indigenous Rohingyas were persecuted on false allegations of violation of nationality laws ultimately leading to mass killing and expulsion of the Rohingyas from their land. Nearly ten thousand of Arakani Muslims (Rohingyas) were killed in cold blooded murder and over two hundred thousand were pushed to Bangladesh on the plea that they are not indigenous children of the Burmese racial stocks, even though the Rohingyas already been there and existed for hundreds of years; the bones of their great grandparents are buried there. Before independence and particularly after independence there have been numbers of Muslim members of parliament (MP) and always two Muslim took a position in the
ministry of cabinet till the 1962 military coup.

During the army regime from 1962 to 1995, however, not a single Muslim was appointed to be a minister or even deputy minister. This is an evidence of utmost discrimination against the Muslims in Burma. In purpose to Muslim administrations, State Law and Order Restoration Council (SLORC) formed district councils, township councils and village ward councils. Even in the 100% Muslim villages in Arakan, army intelligence officers were place to guard the Muslims. The Burmese military junta has a special bias against the Rohingya. Throughout 34 years of army rule not a single Muslim was ever appointed as judge in the Supreme Court or the Session Courts or even in the Lower Courts. Muslim schools were nationalized in 1963. Thus, there are no any high school at the time. Muslim headmasters and senior Muslim teachers were replaced with Buddhist teachers.

The Muslims concentrated on trade and cottage industries and became quite successful. The army junta, however, has continuously tried to dislocate them in various ways particularly through inhuman atrocities and forced mass expulsion from Arakan. Rohingya refugee movements pose a non-traditional threat to human and societal security. Traditional security concerns have so far always ruled the game. Global political power, geo-strategic and security concerns as well as economic interests complicated the security dilemma with regard to Rohingya refugee issues, which made international community less interested in overcoming the current challenges. Political goals and political power contributed to ignore the potential danger of providing legitimacy to increase non-traditional threats emerging from the migration of Rohingya from Myanmar to Bangladesh and to other neighbouring countries.

The research found strong support for the proposition in this case: the more severe the violation of human rights, insecurity and repression, the larger the scale of the refugee flow. The more the refugee flow, the larger the non-traditional security threats. There is a positive correlation between the number of refugees and repression, the variety of which ranges from violations of human rights. Rwanda, Uganda, Kampuchea, etc. are also known for brutal mass executions. There is a clear link between migration and security as well. The perceived and actual threats were emerged from the plight of Rohingya refugee, from Myanmar to the border areas of Bangladesh and also to other neighbouring countries such as Malaysia, India and the Middle East. Refugee scholars are traditionally concerned with the human security of refugees, as they often flee to highly volatile areas and need protection. The security of refugees is often threatened in host countries like Bangladesh. Because this country has been struggling with rampant poverty and encountered with various economic challenges. Moreover, there is a lack of adequate international assistance and interest from UNHCR and other international communities to solve the Rohingya problem between Bangladesh and Myanmar. From the perspective of the security scholars, the focus is on the security of the host society (citizen and state).

C. The Establishment of Human Rights court

1. European Court on Human Rights (ECHR)

Discussing about the establishment of ASEAN Human Rights court, it is important and instructive to refer to other regional human rights courts. Southeast Asia in successfully establishing and designing their own human rights courts. Their developments may share important insight for many problems that Southeast Asia will probably encounter in the future. In fact, the international and regional courts have many lessons to learn from each other.14

It’s very important to distinguish the Human Rights Act 1998 (HRA 1998) from the European
Constitution for the Protection of Human Rights and Fundamental Freedoms, usually known as the European Convention on Human Rights. The Act is an ordinary Act of Parliament and is part of the law of the United Kingdom. The Convention is a legal instrument of the Council of Europe (the Council is identified and explained later in the chapter). The Convention is not part of UK law. However, its content, the rights and freedoms contained in it, are given effect in the law of England and Wales, Scotland and Northern Ireland by the Act.

The Convention is interpreted and applied by the Court of Human Rights. Its judgements are not directly binding as legal judgments in the United Kingdom. However, both the Convention and the judgements of the Court are central to any understanding of what the Human Rights Act is about. They are also major sources of principles followed by the UK courts when putting the Human Rights Act into effect.

In 1998, the original two institutions created by the ECHR, the European Commission of Human Rights (the Commission) and the European Court of Human Rights (the Court), were replaced by one institution on which each of the parties to the ECHR is entitled to one judge. The jurisdiction of the Court extends to all matters concerning the interpretation on application of the ECHR. An individual, a legal person, an NGO or a group of individuals can make an application to the Court alleging a violation of the ECHR. A member State may also allege a breach of the ECHR by another member State, but this is rare. An application will not be admissible unless all local remedies have first been exhausted. The application must then be made within six months. Applications can be made in any official language of a member State, but if the participant is careless, admissible, all subsequent documentation must be in an official language of the Court: English or French. The applications and pleadings are normally available to the public.

The Court sits either as Committees of three judges, Chambers of seven judges or a Grand Chamber of seventeen judges. An application is first examined by Rapporteur (one of the judges) who decides whether it should go to a Committee or straight to a Chamber. A Committee, by a unanimous vote, may declare inadmissible or strike out an individual application. Otherwise, by majority vote, a Chamber will decide on the admissibility of the case and, if it is declared admissible — but is not settled — on the merits of the application. If the case raises a serious question of interpretation of the ECHR, or might result in a judgment inconsistent with a previous judgment of the Court, the Chamber may, before giving judgment, provided no party to the case object relinquish jurisdiction to the Grand Chamber. In exceptional cases, judgement of a Chamber may refer to a party to the case to the Grand Chamber, but it will be heard by the Grand Chamber only if that party accepts that the judgement of the Chamber raises serious questions of interpretation or application of the ECHR, or serious issue of general importance.15

2. ASEAN Human Rights Court

The issue of the establishment of ASEAN Human Rights Court has been discussed by the community of ASEAN itself. At present, there is a blueprint of the establishment of ASEAN Human Rights Court. At the 13th ASEAN Summit on November 18th to 20th, 2007, in Singapore, ASEAN leaders agreed to adopt the Charter of the Association of Southeast Asian Nations (herein-after ASEAN Charter), including an article that mandates the creation of an ASEAN human rights body (AHRB). Since ASEAN has never had any human rights organ, the adoption of the ASEAN Charter could be viewed as a major step forward in the process of establishing a human rights mechanism for ASEAN. It is, however, too soon to have any sense of accomplishment. The process is not over yet. In fact, it has just started. The ASEAN Charter does contain elements that
could affect the prospect of a strong AHRB. In the ASEAN Charter, the non-intervention principle retains its supremacy and is placed above the adherence to human rights norms.16

ASEAN values had established consultative style of discussion among member of ASEAN in resolving its regional disputes.17 The establishment of ASEAN Intergovernmental Commission on Human Rights (AICHR), transforming the ASEAN Human Rights Body,18 had been its realization. Under its Terms of Reference (TOR), ASEAN had affirmed such consultative style in their human rights settlement mechanism. It is ascertained that the nature of AICHR shall be an intergovernmental consultative body.19

Due to unresolved issues of human rights such as minority rights and human trafficking, AICHR role of advisory seems inadequate in addressing future challenges. What the region needs is a strong mechanism that is composed of independent experts who are able to: investigate and evaluate reports of human rights violations; consider individual complaints free from outside interference; and make decisions that the concerned nations are obligated to follow.20

Regarding the procedure of ASEAN human right court, the blueprint has determined the rules of procedures, structure and procedure before the ASEAN human rights court. As the proposed ASEAN, human rights court is expected to be a small human rights court, it should probably have a simple organizational structure. The first option is to establish a single-court formation, without dividing into smaller chambers or sections. The ASEAN human rights court will then be in charge of making decisions on admissibility and rendering judgements on merits. It is very important that procedure before the ASEAN human rights court should be explicit, clear and transparent. Hearings should be open, unless the ASEAN human rights court decides otherwise. In principle, the ASEAN human rights court’s judgements and annual reports should be made accessible to the public.21

On the way to establish a regional human rights court for Southeast Asia, challenges certainly abound ahead, especially when rapid changes have uncovered violations of human rights in all nations in the region. While challenges should be acknowledged, they nevertheless should not be an excuse for doing nothing and do not eliminate the possibility of a human rights court for Southeast Asia. In comparison to other regional states, Indonesia, the Philippines, Thailand and Malaysia appear to be in a better position to manage human rights issues and participate into the global framework of human rights protection. They have been more ready to accept a bolder foreign policy and deeper regional cooperation. Officials from these countries have been more active in pushing for change in the matters of human rights in ASEAN because they all have independent national human rights institutions accredited with status “A” and a vibrant network of human rights NGOs that has been playing an important force behind any steps of human rights evolution.

Regarding the subject included, ASEAN human rights court may compare from the nature of admissibility of cases from ECHR, European Court shall recognize case submitted by both individual and state party.22 It needs much progress to realize the idea of a ASEAN human rights court. Although the realization of such a proposal may proceed very slowly in the face of many challenges is evidence indicating that in a group of regional countries, positive change is possible and initial impetus may be created for further developments in favour of establishing a regional human rights court. It is about time that the region moved ahead and acted towards that goal. Though human rights advocacy in the region needs to be patient and realistic, they should not waver in their actions.23

On the other hand, the obstacles of establishing ASEAN human rights court is a high cost. At
a minimum, some amount of money must be available to build or buy or lease an office for the
ASEAN human rights court to arrange for the necessary facilities, provide accommodation for
judges, and provide salaries to the judges, registrar, lawyers, administrative assistants, specialists,
translators, interpreters, and accountants. This is certainly not a small amount of money. Hence,
it is not impossible to establish ASEAN human rights court if all of ASEAN state members have a
will to cooperate.

From the function of the AICHR, there are some functions which states that human rights
protection mechanisms in ASEAN resisting individual complaints, i.e. complaints of violations of
human rights as we know them in national level. For an example, individual may complaint to the
National Commission of Human Rights or to the Embassy, even to the National Commission for
Women.

Nevertheless, it is proposed that the ASEAN Human Rights Court received complaints from
individual but with the permission of the provisions that the state of individual has ratified this
Convention on ASEAN Human Rights Court. Thus, if there is an extraordinary crime and resulted
in one individual, the individual may bring the complaint to the AHRC, because AHRC will accept
individual complaint.

The establishment of the ASEAN Human Right Court is a step forward for ASEAN countries to
realize one of its objectives which are to strengthen democracy, enhance good governance and
the rule of law, to promote, and to protect human rights and fundamental freedoms by consider-
ing the rights and obligations of ASEAN states member. This formation will give a greater im-
provement of the implementation and enforcement of human rights in ASEAN.

Every single state as the member of ASEAN have their own representative judge. So, there will
be 10 judges in ASEAN human rights court. But for the country who is in the charge of dispute
cannot represent their judge to settle the disputes. If there are two disputed parties, the rest of the
judge should have appointed one more judge as an ad hoc judge. It is important to make odd
number of judges.

V. CONCLUSION and SUGGESTION

A. Conclusion

At present, there is a blueprint of the establishment of ASEAN Human Rights Court. On the
way to establish a regional human rights court for Southeast Asia, challenges certainly abound
ahead, especially when rapid changes have uncovered violations of human rights in all nations in
the region. It is not impossible, however, to establish ASEAN human rights court if all ASEAN state
members willing to cooperate and ratify the convention regarding the establishment of ASEAN
human rights court. By referring to the European Court of Human Rights, ASEAN can learn the
successful way to establish and to design their own human rights courts. Entering its new level of
regionalism as a more one-united-envisioned community by 2015, ASEAN had been put in the
position to reform its longstanding principle of ASEAN Way, especially in the view of human
rights cases. As presented by the other regionalism practice, an idea of the regional court in
ASEAN had a lot to offer. It is also considered as potential entry-points in strengthening the
community into a stronger regionalism, as it is aligned by the sole purpose of ASEAN. However,
a deeper research should be conducted in assessing a proper blueprint

B. Suggestion

To contribute to the implementation of a world order based on freedom, lasting peace and
social justice, ASEAN needs to establish a new human rights court. All ASEAN state members need to cooperate with each other and make a convention on the establishment of ASEAN human rights court. Then, all ten countries shall ratify to make the status of ASEAN human rights court is binding but the case which brought to ASEAN human rights court only the case that can’t be handled by domestic court. The authors suggest the location of ASEAN human rights court supposed to be in Singapore considering that the lowest crime rate and the most stable country in the aspect of economic, social, and political issues.

ENDNOTES

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10 Ibid.p.233
11 Ibid.p.250
17 Article 2 of 1976 ASEAN Treaty of Amity and Cooperation ("TAC")
18 Article 14 of ASEAN Charter
19 Article 3 of AICHR TOR
22 Article 33 and 34 of European Convention on Human Rights

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Article 33 and 34 of European Convention on Human Right

Internets
