

RESISTANCY TO THE LAW ENFORCEMENT OF (ASEAN) REGIONAL HUMAN RIGHTS MECHANISM, WHAT NEXT?

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Abstract

Regional mechanism on the protection of human rights in ASEAN formally has been developed since 2007 through the adoption of the ASEAN Charter in 2007 and the establishment of the ASEAN Intergovernmental Commission on Human Rights (AICHR) in 2009. Nevertheless, efforts on the law enforcement for human rights violations committed by ASEAN citizens and/or within ASEAN territory by establishing ASEAN human rights court is hardly to achieve due to national interest of each member states. Accordingly, for the objective of achieving justice and certainty of law, cooperation among ASEAN member states should be developed through other mechanism. This article tries to identify existing situations with respect to the protection and fulfillment of human rights particularly in regards to criminal matters in the ASEAN countries. Accordingly, the article examines the responses of the Member States to the development of human rights mechanism in ASEAN. Finally, we try to propose other mechanism in regards to the protection of human rights by developing cooperation in the enforcement of international criminal law for cases related to criminal matters in particular among ASEAN countries.

Keywords: *human rights mechanism, international criminal law, regional cooperation, ASEAN*

I. INTRODUCTION

Human rights issue is one of the sensitive issues to be discussed among ASEAN countries. Issues of human rights tend to be covered by other matters such politics or economic growth. The government rather avoids the issue of human rights as part of their cooperation matters with other countries. The priority is economic cooperation among ASEAN countries through AFTA and other form of cooperation which develop rapidly while the idea of human rights regional mechanism experiencing slow movement.

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Although in 2007 ASEAN countries agree to adopt ASEAN Charter and established the ASEAN Intergovernmental Commission on Human Rights (AICHR) in 2009, there are critics addressing this commission. Learning from other region such as Europe, America, and even Africa, the idea of ASEAN human rights mechanism is proposed to guarantee the protection of human rights within ASEAN countries, particularly for its people who seek for justice and protection. However, persistency on the establishment of regional mechanism is clearly expressed by ASEAN countries through the name of the institution which called Inter governmental body instead human rights council or court as other regions. Furthermore, the role and function of AICHR still far from dream since the commission (AICHR) has no mandate to take any action towards any problems arise particularly in regards to the enforcement of law. Instead, AICHR is only mandated to promote human rights as stated by the TOR (term of reference).¹ Each country believes that human rights issue is internal and local issue that needs to be solved by local authority without involving other country.

However, undeniably, human rights violation can occur within transnational boundary or involve persons from more than one national. In addition, it can lead to criminal cases which regulated by international criminal law regime. For example, the popular cases of Indonesian migrant workers in Malaysia. Regardless their status as legal or illegal migrant workers (as this will be more related to immigration law), their basic human rights should be fulfilled. They should be able to communicate with their family at home, having appropriate working hours including holiday and leaves, receive adequate wage, freedom of expression, freedom of movement, not to be tortured, not to be persecuted arbitrarily, right to health, right to be informed, etc. In addition, issues of insurance and sexual violence towards the migrant workers also considered as neglected rights of the workers. Furthermore, part of the Illegal migrant workers are the victims of human trafficking which included into trans organized crimes as regulated on the Palermo Convention 2000. Although ASEAN has adopted the ASEAN Declaration on the Protection and Promotion of the Rights of the Migrant Workers

¹Achmad Gusman, et al, *Studi Terhadap Kelayakan Mekanisme Hak Asasi Manusia Dalam Forum Association Of Southeast Asian Nations (ASEAN)*, Laporan Penelitian, Unpad, 2013, p. 1-2.

at the 12th Summit on 2007, this declaration gives no legal bound when the rights of the migrant workers are violated.

Not only in regards to the migrant workers issue, other issues such as freedom of religion criminal acts such as terrorism, human trafficking, people smuggling, drugs and narcotics, refugee and even corruption is also related with the issue of human rights protection. In general principle of criminal law, we acknowledge principles in line with human rights protection such as legality principle, fair trial, and presumption of innocence. In practice, the accused of those crimes usually experience violations of those principles such as announcement in the media that they are terrorists before the trial, beating or other form of torture, cruel or inhuman treatment during investigation and even hiding the fugitive from other nationals due to the state interest. Those are evidences showing that human rights violation can constitute criminal cases and involve more than one country. Hence, there is importance of enforcing human rights through regional mechanism in ASEAN.

II. HUMAN RIGHTS VIOLATION IN ASEAN COUNTRIES: TRANSNATIONAL CRIMES, TRANS-ORGANIZED CRIMES OR NATIONAL CRIMES?

Reports from various group including United Nations shows that there are many human rights violations occurred within ASEAN countries with transnational issues such as perpetrators and victims are different nationality. The act can also include issues in international criminal law. Issues related to migrant workers are experienced by Indonesian, Cambodian and the Philippines' migrant workers in Malaysia and Singapore. The fraud started from the recruitment mechanism such as by fraudulent identity document to recruit children. This usually taken by agents who make the family heavily in debt, giving incorrect or improper job description, and charge excessive fees in recruiting potential migrant workers. The agent can be totally local agent, but it can also be joint corporations with foreign investors. Another violation committed by the agent such as forcing the potential migrant workers to stay longer in the training centre than they supposed to be but without adequate food, water and medical care. Furthermore, when they become finally

become employee, the employee or agents often keep their passport as a guarantee. As a result, it is difficult for the workers to quit or move to other employer when they were mistreated. In addition, their working hours is 14 – 21 hours a day (5 a.m. – 3 a.m. on the next day) without rest breaks or days off. Physical or psychological including verbal abuse or even sexual abuse is also experienced by the workers besides inadequate food, place and other basic standard of living. Worse, they do not receive full payment as they should be. In Malaysia, migrant workers who works in domestic are is not covered by the protection as regulated on the Malaysian Labor Laws. Basic protections governed by this law such as a weekly day of rest, annual leave, and limits on working hours. A migrant worker reports that her boss never let her get rest by always make her to clean the house often, while the wife shout and beat (kick, slap, pulled her hair, beat all over her body) her everyday and she never receive salary from the first day she work.

In Singapore, government imposes a security bond on each employer, who forfeits S\$5,000 [U.S.\$2,950] if their domestic worker runs away as it ruled by the immigration law. Other than that immigration regulations prohibit domestic workers from becoming pregnant. As a result, the Indonesian embassy estimates fifty complaints per day mostly from domestic workers. The Philippines embassy and the Sri Lanka High Commission estimate receiving forty to eighty complaints from domestic workers per month. However, many abuses are likely never reported, especially if an employer repatriates a domestic worker before she has a chance to seek help.²

Another situation is the condition of children in detention center. Report describes the condition of immigrant children in immigration detention in Indonesia and drugs detention in Cambodia and Vietnam. The significant matter from the situation is that children is not separated from adults, they are even beaten up by the guards when they try to escape.³ Inside drug detention center in Cambodia, forced labor including sex

² Human Rights Watch, Singapore: Domestic Workers Suffer Grave Abuses, <http://www.hrw.org/news/2005/12/06/singapore-domestic-workers-suffer-grave-abuses>, [21 October 2014] 4.50 pm.

³ Human Rights Watch, Indonesia: Children Seeking Refuge Find Abuse, Neglect, June 2013, <http://www.hrw.org/news/2013/06/24/indonesia-children-seeking-refuge-find-abuse-neglect> [21 October 2014 at. 3.50 pm].

abused often happen. This place also used by the government as the shelter for beggars, sex workers, street children and other “undesirables”.⁴ Other fact found that drug detention center detained drug users without providing evidence based treatment. In Vietnam, Cambodia and Lao PDR, detention center is considered as forced labor camp where tens of thousands of detainees work six days a week processing cashews, sewing garments, or manufacturing other items. If they reject the instruction to work or do not obey the rules of the center, they can be subjected to torture as the punishment. Furthermore, health and human rights conditions of the detainees are neglected. One cell can be filled with 60 people that cause detainees hard to sleep and far from health standard.⁵ As widely recognized, drugs offence often involves foreign perpetrators and there is no further information reporting particular treatment for foreign detainees. In fact, it was reported that an Iranian child is found in adult detention without companion of the family.

A shocking tragedy occurred in 2012 in Myanmar which attracts international community attention to the issue of genocide or crimes against humanity towards Muslims Rohingya. This crisis organized and fortified by Burmese officials, community leader, Buddhist monks, Arakanese ethnic and backed by state security force to attack Muslim neighborhood resulted in 125.000 Rohingya and other Muslims displaced, have no access to humanitarian aid and even not allowed to return home. Government provoking society to take action for the purpose to destroy Rohingya. Additionally, government authorities destroyed mosques, conducted violent mass arrests, and blocked aid to displaced Muslims following sectarian violence between Arakanese and Rohingya in June 2012. Instead of keeping the security and protecting the innocence, small numbers of riot police, army soldiers beat and killed Muslims who were persuaded to disarm. Furthermore, two community groups spread inchoate action by producing and distributing numerous anti-Rohingya pamphlets and public statements, explicitly or implicitly denying the ex-

⁴ Joseph Amon, Health and Human Rights Director at Human Rights Watch. Human rights watch, Cambodia: Drug Centers Detain, Abuse “Undesirables” <http://www.hrw.org/news/2013/12/08/cambodia-drug-centers-detain-abuse-undesirables>, [21 October 2014] 4.11 pm.

⁵ Human Rights Watch, Drug Detention Centers Offer Torture, Not Treatment, <http://www.hrw.org/news/2012/07/24/drug-detention-centers-offer-torture-not-treatment>, [21October 2014] 4.22 pm.

istence of the Rohingya ethnicity, demonizing them, and calling for their removal from the country, at times using the phrase “ethnic cleansing.” The statements frequently were released in connection with organized meetings and in full view of local, state, and national authorities who raised no concerns. Local authorities, politicians, and monks also acted, often through public statements and force, to deny Muslims their rights to freedom of movement, opportunities to earn a living, and access to markets and to humanitarian aid. The apparent goal has been to coerce them to abandon their homes and leave the area.⁶ As a result, many Rohingya try to escape to other country to seek asylum such as Sri Lanka (their origin), Malaysia, Indonesia and other closest countries. They take any measures, but mostly by sea transportation (simple boat). This causes other matters to neighboring states that is refugee issue which should adhere to international law regulations. Other issue of displacement due to the similar matter is also happen in the Philippines. Conflict between Moro National Liberation Front (MNLF) and the government of the Philippines causing more than 100,000 people become displaced and even try to escape to neighboring country for the security issue. As the immigrant, refugees were subjected to systematic detention, and migrant workers faced labor abuses.⁷

Conditions described above shows that human rights violation can be such criminal offences either bound by national law or international law or even both. Furthermore, not only lead to criminal offence but also trans-national crimes or trans-organized crimes or even core international crimes issues. A crime considered transnational crimes if it involving two or more countries as the perpetrator, victims, or venue of crime (*locus delicti*) and the crimes itself giving bad impact to each country involved. While trans-organized crime has particular character besides its should be cross border, the crime should also be organized as well as conducted by more than one person as perpetrators where each person has particular role within the crime.⁸ These two type of crimes

⁶ Human Rights Watch, Burma: End “Ethnic Cleansing” of Rohingya Muslims, <http://www.hrw.org/news/2013/04/22/burma-end-ethnic-cleansing-rohingya-muslims>, [21 October 2014] 4 pm.

⁷ <http://www.amnesty.org/en/region/malaysia/report-2013>.

⁸ Article 2 UN Convention on the Trans Organized Crimes”: “organized criminal group” shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or

are included to international crimes recognized as crimes that disrupt international security and order.

Bassiouni defines international crimes as crimes based on the international customary law, international conventions (including bilateral or multilateral agreement), and development of human rights conventions with the objective as purposed by national criminal justice system, that is to prevent harmful conduct through deterrence, to prosecute those who are accused of criminal violations and to punish those who found guilty. Accordingly, the enforcement of international criminal law shall be conducted by national authority.⁹ Edward M Wise categorize any crimes within the scope of international law and international aspect of national criminal law to maintain world peace and security, any related terrorism act and crimes within the scope of international agreement as international crimes.¹⁰ While Antonio Cassese consider that international crimes committed by state actors or individual, it should also related to armed conflict or any political or ideological dimension or related to (persuade, influence, tolerant or omission) any action by organized state actor or non-state actors.

Bassiouni explain that international crimes should consider 10 characteristic such as:

1. Explicit recognition
2. Implicit recognition
3. Criminalization
4. Duty or right to prosecute
5. Duty or right to punish
6. Duty or right to extradite
7. Duty or right to cooperate
8. Establishment of criminal jurisdiction
9. Reference to establish ICC
10. Elimination of the defense of superior order

offences established in accordance with this convention, in order to obtain, directly or indirectly, a financial or other material benefit.

⁹ M. Cherif Bassiouni, *International Criminal Law I : Crimes*, Transnational Publishers, New York, 1986, p. 1-3.

¹⁰ Edward M Wise, *International Criminal Law: Cases and Materials*, Lexis Publishing, 2000, p. 1 – 5.

Cassese pointing four cumulative elements of such crimes can be categorized as international crimes, such as:¹¹

1. It contains violation of international customary laws (including treaty provisions, either explicitly or implicitly stated)
2. The rules proposed to protect important values of international community and binding all states as well as individuals
3. There is universal interest in representing the crimes, where any state can take legal measures to any accused although there is no direct link with the case.
4. Perpetrator acted in an official capacity.

Furthermore, Palermo Convention 2000 stated that transnational offence is crime is transnational in nature and:

- a. committed in more than one States or
- b. committed in one state but a substantial part of its preparation, planning, direction or control takes place in another state or
- c. committed in one state but involves an organized criminal group that engages in criminal activities in more than one state or
- d. committed in one state but has substantial effect in another state.¹²

From reports described previously, analyzed by the characteristic given by Bassiouni, Cassese as well as limitation given by the laws (Palermo Convention), human rights violation can also be considered as international crimes or included into transnational organized crimes. This refers to the fact that although the major issue is protecting every person in the fulfillment of their basic human rights, yet, human rights violation can constitute other crimes within the jurisdiction of transnational crimes and/or trans-organized crimes. The case of migrant workers mostly started with human trafficking as regulated by the UNTOC. Drugs offence and people smuggling also ruled by the UNTOC as trans-organized crimes where it involves more than one nationality, committed in one state but a substantial part of its preparation, planning, direction or control takes place in other states, it is also involve an organized criminal group with specific roles of each member of the group and their activities conducted in more than one state. Case of

¹¹ Antonio Cassese, *International Criminal Law: Second Edition*, Oxford University Press, 2008, p. 11 – 12.

¹² Article 3 para (2) UNTOC.

MORO in the Philippines and Patani in Thailand is labeled as rebellion act and they also labeled as terrorist. Terrorism act across ASEAN that mostly committed in Indonesia involves Indonesian and Malaysian nationals as the perpetrators while the preparation took place in Malaysia, Indonesia, Thailand and the Philippines as those countries also often become hiding place for the fugitive of terrorist act. Beating cases in detention center (both immigration and drugs) can be considered as torture here the enforcement of the convention is by applying criminal punishment for the perpetrators of torture. Last but not least, the case of Rohingya in Myanmar is a shocking human conscience as therefore it is included as crimes against humanity or even genocide with the evidence of inchoate to hate and to kill all Muslim particularly Rohingya in Myanmar. Although they have been in the territory of Myanmar for generations but they never been recognized as the citizen of Myanmar due to different belief and race.

III. ASEAN COUNTRIES RESPOND TO ASEAN REGIONAL MECHANISM

Efforts to achieve human rights regional mechanism in ASEAN started in 1998 through *Hanoi Plan of Action 1998* (HPA).¹³ Although ASEAN vision 2020 do not explicitly stated the need to protect human rights, ASEAN cooperation with European Council agree to cooperate in public service in order to increase welfare, social justice and human rights.¹⁴ This commitment restated on the *Joint Statement on Political Issues*¹⁵ and *Joint Declaration of the 9th EC-ASEAN Ministerial*.¹⁶

Support by the ASEAN people to support the cooperation particu-

¹³ HPA is 6 years action plan to establish ASEAN vision 2020. Tan Hsien – Li, *The ASEAN Intergovernmental Commission on Human Rights: Institutionalising Human Rights in SouthEast Asia*, Cambridge University Press, 2011, p. 152.

¹⁴ Para 11, *Joint Declaration of the ASEAN-EC Ministerial Meeting*, Brussels Belgium, 21 November 1978. Diambil dari Working Group for an ASEAN Human Rights Mechanism, *ASEAN and Human Rights: A Compilation of ASEAN Statements on Human Rights*, 2003, p.2.

¹⁵ Par. 1. *Joint Statement on Political Issues*, Kuala Lumpur Malaysia, 8 Maret 1980., *Ibid*.

¹⁶ “The Ministers were of the view that international cooperation to promote and encourage respect for human rights and for fundamental freedoms for all without distinction to race, sex and religion should be enhanced”, *Ibid*, p. 3.

larly to establish regional human rights mechanism has started in 1993¹⁷ as the Ministerial meetings concludes the acceptance of the idea of regional human rights mechanism¹⁸ based on partnership, distribution of responsibility, and benefits for each party.¹⁹ However, different point of view in regards to the state obligation to fulfil human rights and the establishment of regional human rights mechanism is one of the causes of deadlock discussion. As in 1998, informal non-government groups is agreed to be established as the working group.²⁰ Furthermore, ASEAN agrees that regional human rights mechanism is part of the Action Plan including exchange of information in order to promote cooperation in protecting human rights in line with the UN Charter, UDHR and Vienna Declaration.²¹ In 2000, ministerial meeting agrees to take visible action to the establishment of ASEAN regional human rights mechanism.²²

Most ASEAN resistant to the idea, as therefore workshop was held to raise awareness and understanding on the establishment of regional human rights mechanism.²³ The seventh meeting of the High Level Task Force Meeting/HLTF, national commission of human rights of the member states is gathered and resulting the needs of legal ground to establish ASEAN human rights regional mechanism including its Term of Reference.²⁴ The proposal is that this mechanism body consist of intergovernmental in composition, have no role as advisory body, explain human rights clearly, presenting ASEAN view in international forum and having consultative status.²⁵ Afterwards, Cambodia, Laos, Myan-

¹⁷ Par. 15 *Joint Communiqué of the 24th ASEAN Ministerial Meeting, Kuala Lumpur, Malaysia, 19-20 July 1991. Ibid.*, p 3.

¹⁸ Par. 18 *Joint Communiqué of the 26th ASEAN Ministerial Meeting, Singapore, 23-24 July 1993. Ibid.*, p. 5.

¹⁹ Par. 4. *Joint Declaration of the 11th ASEAN-EU Ministerial Meeting, Karlsruhe, Germany, 22-23 September 1994. Ibid.*

²⁰ Par. 28. *Joint Communiqué of the 31st ASEAN Ministerial Meeting, Manila, Philippines, 24-25 July 2008. Ibid.* p. 7.

²¹ Par. 4. 9. *Ha Noi Plan of Action, Ha Noi Vietnam, 15 Desember 1998. Ibid.* p. 7.

²² Par. 33, *Joint Communiqué of the 33rd ASEAN Ministerial Meeting, Bangkok, Thailand, 24-25 July 2000. Ibid.*, hlm. 179. Par. 36 *Joint Communiqué of the 36th ASEAN Ministerial Meeting, Phnom Penh, Cambodia, 16 – 17 Juni 2003., Ibid.*, p. 185.

²³ Par. 32 *Joint Communiqué of the 35th ASEAN Ministerial Meeting, Bandar Seri Begawan 29 – 30 Juli 2002. Ibid.*, p. 182.

²⁴ *Ibid.*, p. 57.

²⁵ *Ibid.*

mar and Vietnam do not agree to the establishment of ASEAN Human Rights Commission; Thailand and Indonesia pros; while Brunei, Malaysia, Filipina and Singapore neutral.²⁶ By referendum, the conclusion of this meeting is that the ASEAN human rights body will only establish by the consent of all member states. This lead to decision that Human Rights body must be in line with the TOR prepared by the ASEAN secretariat as agreed by the foreign minister of ASEAN countries.²⁷ At last, in the third foreign minister meeting it is agreed that “ASEAN agreed to the fulfilment and protection of human rights for its nationals, as therefore ASEAN will support instead of defensive”.²⁸

Although this issue is strengthened by the provision of article 14 ASEAN Charter which stated that:

1. *In conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN human rights body.*
2. *This ASEAN human rights body shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting.”*

In 2009, ASEAN establish *ASEAN Intergovernmental Commission on Human Rights* (AICHR). However, the name of “intergovernmental commission” is considered as the reflection of ASEAN countries” resistance to the establishment of ASEAN regional human rights mechanism as historically compared to other region, this is very uncommon. Additionally, the role and function of this body is only determined by the TOR with very limited mandate that is only to promoting human rights instead of human rights enforcement. While *European Court of Human Rights* or African Human Rights Commission has jurisdiction to conduct investigation or receive individual complain.²⁹ Furthermore, AICHR was established long after the existence of women, children and migrant workers thematic discussion and has its own institution.³⁰ Another con-

²⁶ *Ibid*, p. 58.

²⁷ *Ibid*, p. 63.

²⁸ *Ibid.*, p. 65.

²⁹ *Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights (TOR-AICHR)*, 20 July 2009, para 4.1 – 4.14. see also Tan, *Ibid*.

³⁰ Tan, *Ibid.*, hlm. 143. Lihat juga pidato Perdana Menteri Vietnam, Nguyen Tan Dung

cern is regarding funding, no clear statement for specific allocation of AICHR.³¹ AICHR is led by state representative of ASEAN Chairman hence the speed and scope of work of AICHR will follow the priority of the respected countries in the protection and fulfillment of human rights although decision making must be based on the ministerial meeting.³² On the first year of the AICHR established, there is no action taken in responding many humanitarian crisis in ASEAN such Maguinadanao massacre in 2009, violence against civilian in demonstration in Bangkok – Thailand in 2010, Rohingya massacre in Myanmar in 2012. Critics were delivered personally by Indonesia and Thailand, not as AICHR.

If we look back to the background of those critics, the establishment of ASEAN regional human rights mechanism meet many challenges. First, the issue of supra-nationalism, intra-regionalism, state sovereignty and non-intervention principle. There is concern to the possibility of conflict in ASEAN member states to the national interest in protecting the *status quo*.³³ The clear example is cases in previous part where ASEAN countries consider it as internal issue, while international community believes that those cases are in international concern where international intervention might happen for the settlement dispute. This is the matter avoided by ASEAN member states. Indonesian Human Rights Court for Timor Leste case might never exist without international pressure. Secondly, ASEAN members refer to the principles as known as *the ASEAN way* or the *ASEAN values* as the expression of basic characteristic of ASEAN people.³⁴ One of the values is that personal relation among delegation is very important in negotiation as well as discussion. As a matter of fact, informal meeting rather gives better result than formal meeting in conference room. ASEAN countries believe

dalam *Inauguration of the ASEAN Commission on Promotion and Protection of the Rights of Women and Children (ACWC)*, Hanoi, Vietnam, 7 April 2010, www.asean-sec.org/24478.htm.

³¹ *Ibid.*, hlm.143.

³² *Ibid.* hlm. 160.

³³ Tan Hsien-Li, *The ASEAN Intergovernmental Commission on Human Rights: Institutionalising Human Rights in SouthEast Asia*, Cambridge University Press, 2011., p. 141.

³⁴ David Capie and Paul Evans, “The ASEAN Way”, dalam Sharon Siddique and Sree Kumar, *the Second ASEAN Reader*, Institute of Southeast Asian Studies, Singapore, 2003., hlm. 45.

that process is more important than structure. ASEAN members prefer to leave sensitive issues or agenda that can trig a conflict although they are open for any input. This is shown by the participation of all members both pros and cons. Another characteristic of the ASEAN countries is consensus method in decision making. The most important principle that strongly hold by ASEAN member countries is non-intervention and sovereignty. This is stated in Bangkok Declaration 1967 as the legal ground in the establishment of ASEAN, ASEAN is established with the principle of equality, cooperation and regional stability in respect to principles of UN Charter.³⁵ Yet, this main principle also contributes as the most challenging issue in the establishment of ASEAN regional human rights mechanism.

Another fact as the challenge to ASEAN regional human rights mechanism is conflict among ASEAN states is unavoidable. Indonesia and Malaysia have problem with territorial border, migrant workers and air pollution from forest fire. Malaysia and Singapore conflicted in land reclamation and destruction of environment by Singapore towards Malaysia. Borders issue also experienced by the Philippines and Malaysia and constituted armed conflict. Malaysia, Thailand, Cambodia, Laos and Vietnam has their history in regards to the ethnic and racial issues, as today we recognize several liberation movement from the Melayu and Muslim in those areas who considered as rebellion. As therefore, issue of sovereignty becomes the most important matter in ASEAN relations.

Furthermore, in regards to the sovereignty issue, human rights is considered as western product that threat state sovereignty.³⁶ Malaysia objection to the regional mechanism of human rights is due to the relativism that although human rights in universal in nature, but the implementation should adopt to each country condition. Malaysia considers the multi ethnic, religion and races of its national that hard to achieve the common values. In addition, Malaysia Prime Minister, Mahatir Muhammad argue that human rights campaign is the reflectin of disparity in international system.³⁷ In addition, various conditions of human rights in ASEAN countries also contribute the position of AICHR today.

³⁵ Robin Ramcharan, "ASEAN and Non-Interference", *Ibid.*, hlm. 52.

³⁶ Pernyataan Menteri Luar Negeri Malaysia Ahmed Badawi, *Straits Times*, 23 July 1991 dalam *ibid.*, hlm. 154.

³⁷ *Ibid.*

IV. ENFORCEMENT OF INTERNATIONAL CRIMINAL LAW TO PROTECT HUMAN RIGHTS: REGIONAL MECHANISM URGENTLY NEEDED

As examples described on the first and second part of this article, that many human rights violation cases in ASEAN members countries is not only local issue since they involve other jurisdiction such as different nationality in the perpetrators or victim, different location of the planning and execution of crimes, organized groups and even type of crimes which attract international community concern. Discussion on the international crimes, transnational crimes and trans-organized crimes has led to conclusion that those crimes can be categorized as transnational, trans-organized and international crimes. While ASEAN found difficulties in applying regional human rights mechanism to protect and enforce human rights within its jurisdiction, other solution to achieve justice should be considered.

International criminal law recognized two mechanism of enforcement, such as direct and indirect enforcement.³⁸ Direct enforcement is mechanism to prosecute the accused of international crime in the International Criminal Court. Indirect enforcement mechanism put national law as the priority to prosecute the accused of international crimes. Indirect mechanism can be conducted through agreement between respected countries or based on good offices or reciprocity principle. Technical matters that can be applied in regards to the cooperation among states is extradition, mutual legal assistance (MLA) including joint investigation and transfer of sentenced persons (TSP) or international transfer of prisoner (ITP).

Considering that ASEAN regional human rights mechanism in regards to the enforcement of human rights law is hardly to achieve, enforcement of international criminal law with indirect mechanism can be an alternative to seek justice for the victims, ending impunity and of course prove that ASEAN countries have serious concern to the protection of human rights. Issue of sovereignty as the most influential matter for ASEAN will be guaranteed by indirect mechanism since it applies national law instead of international law. The consideration of this

³⁸ Romli Atmasasmita, *Pengantar Hukum Pidana Internasional*, Refika Aditama, 2006, p. 15-16.

mechanism is basically the same, that every state has full sovereignty in applying its jurisdiction over cases linked with the respected countries in order to enforce the law. International criminal law principle stated duty of state to prosecute (*aut dedere aut judicare*), punish (*aut dedere aut punere*), extradite and cooperate if there is case involves international crimes. All mechanism of this indirect enforcement requires consent of every party involved. If a party does not wish to take action as proposed by other party, the mechanism cannot happen. In other words, sovereignty is fully respected in this mechanism.

In this regards, ASEAN countries have applied the mechanism and cooperation to enforce the law, particularly international criminal law. Besides, ASEAN Security Action Plan also listing cooperation among countries in human rights mechanism including arrangement of cooperation in extradition and mutual legal assistance within the community. ASEAN is in progress to establish extradition treaty and bilateral extradition treaties among ASEAN member countries as well as compile the existing bilateral Mutual Legal Assistance agreement. Hence it is a positive sign although ASEAN member countries considered resistance to the regional human rights mechanism, yet they are working for international criminal law cooperation. Supported by national legislations of extradition and mutual legal assistance in ASEAN member countries, cooperation to enforce the law appears more visible and accepted by ASEAN member countries.

Data of national legislations of ASEAN countries

COUNTRY	EXTRADITION LEGISLATION
Brunei	<i>Extradition Act (Cap. 8) 1951</i>
Cambodia	<i>Penal Code: Part 2: Extradition (2007)</i>
Indonesia	<i>Law on Extradition (Law No. 1 of 1979)</i>
Laos	
Malaysia	<i>Extradition Act 1992 (Act 479)</i>
Myanmar	<i>Burma Extradition Act 1904 [Myanmar]</i>
Philippines	<i>Extradition Law 1977 (Presidential Decree 1069)</i>
Singapore	<i>Extradition Act (Cap 103)</i>
Thailand	<i>Extradition Act 2008</i>
Vietnam	<i>Chapters 37 and 38 of the Criminal Procedure Code (No 19/2003/QH11)</i>

Extradition relationship within ASEAN³⁹

	Brunei	Cambodia	Indonesia	Laos	Malaysia	Myanmar	Philippines	Singapore	Thailand	Vietnam
Brunei					BAW					
Cambodia				B					B	
Indonesia					B		B		B	
Laos									B	
Malaysia	BAW		B					BAW	B	
Myanmar										
Philippines			B							
Singapore					BAW					
Thailand		B	B	B	B		B			

B = Bilateral Treaty

BAW – Backing of Arrest Warrant Scheme

Not only in extradition, ASEAN member countries also sign and ratify Mutual Legal Assistance Treaty. The objectives of the treaty such as improving the effectiveness of the law enforcement authorities of the parties in the prevention, investigation and prosecution of offences through cooperation and mutual legal assistance in criminal matters. The content of the treaty stated the widest possible measure of MLA in criminal matter, where the execution will be in accordance with the domestic law of requested party with consideration for requesting party’s procedural requirement.

Furthermore, ASEAN Security Plan also arrange to enhance cooperation in combating transnational crimes and other trans-boundary problems, including money laundering, illegal migration, smuggling and illegal trade of natural resources, trafficking in persons, drugs and

³⁹ Ciara Henshaw, A study on the effectiveness of extradition within the ASEAN region, http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0CCEQFjAB&url=http%3A%2F%2Fwww.anu.edu.au%2Fnc%2Fconferences_workshops%2F2009_CrossingBorders%2Fpowerpoints%2FHenshaw.ppt&ei=zVhMVIPGKObmAWq84KoBA&usg=AFQjCNEYsGuRRVTn_Knm4NckjLT-3v12yQ&bvm=bv.77880786,d.dGY.

precursors, as well as communicable diseases and Strengthening law enforcement cooperation. ASEAN also agree to strengthening efforts in maintaining respect for territorial integrity, sovereignty and unity of member countries as stipulated in the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations. Emphasizing on the issue of sovereignty, ASEAN members agree to strengthen cooperation on the state's obligation not to intervene in the affairs of other neighbouring states, including refraining from the use of military, political, economic or other form of coercion aimed against the political independence or territorial integrity of other neighbouring state. Furthermore, cooperation to prevent the organisation, instigation, assistance and participation in terrorist acts in other neighbouring ASEAN Member Countries is also taken into consideration.[□]

Yet, there are matters that should be taken into consideration in applying this cooperation, such as legal system, prerequisite requirement, domestic legislation particularly concerning matters involved, type of offence, standard of evidence, consent mechanism, death penalty. Every country must respect the regulation of other country involved in the cooperation.

V. CONCLUSION

To comply with international law obligation to protect and enforce human rights, ASEAN member countries shall take any possible measure to cooperate, enforce and guarantee the protection of human rights towards their people. Facing reality that ASEAN member countries tend to resistance towards regional human rights mechanism, while violation of human rights still continue, there should be solution to achieve justice and protect human rights. Considering that several human rights violation also constitute criminal action and involve more than one countries that led to transnational or trans-organized or even international crimes, rules of international criminal law can be applied. Indirect mechanism which emphasizing national law application with high respect to state sovereignty can be the solution of this matter. Accordingly, cooperation among ASEAN member countries particularly

which supported by ASEAN Security Action Plan to strengthen cooperation among countries in extradition and mutual legal assistance is the most visible measure to balance the power of AICHR today.

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