

ASEAN BRIEFS

ASEAN's Approach on Genocide and Crimes
against Humanity: A Review



Vol. 5/ Issue 1/ December 2017



ASEAN Briefs is a regular publication about current developments on ASEAN regionalism, especially in the Political-Security, Economic as well as Socio - Cultural Pillars.

**The Habibie Center -
ASEAN Studies Program ASEAN Briefs**

Project Supervisor:

Rahimah Abdulrahim
(Executive Director)
Hadi Kuntjara
(Deputy Director for Operations)

Head of ASEAN Studies Program/Editor:

A. Ibrahim Almuttaqi

Researcher:

Fina Astriana
Muhamad Arif
Askabea Fadhillah
Hana Hanifah Bastaman
Vierna Tasya Wensatama

Finance and Administration:

Mila Oktaviani

Design and Publication:

Lany Sekar

Genocide and Crimes against Humanity

The criminalization of genocide was legally codified through the Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”), as adopted by the United Nations General Assembly in 1948.¹ The Convention provides a thorough definition of genocide as

“any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.”²

Meanwhile, in a number of international treaties throughout different periods, there are differences in the definitions of crimes against humanity. The earliest definition used in trials took place in the Nuremberg and Tokyo ad hoc trials after the Second World War, but the first permanent court for international crimes did not exist until the Rome Statute successfully established the International Criminal Court. Describing them as “the most serious crimes of concern of international community as a whole”,³ the Rome Statute provides the most comprehensive definition of crimes against humanity, together with crimes of genocide, aggression, and war

crimes, to date.⁴ Although they may seem similar, genocide and crimes against humanity are two different crimes. Crimes against humanity are the systematic, mass killings of a very large number of individuals. Genocide, on the other hand, has a different focus – not on the killing of individuals, but on the destruction of groups, also comprising of individuals. Nonetheless, both genocide and crimes against humanity are *jus cogens*: peremptory norms in the highest hierarchical position, compared to all other norms and principles.

Recently, there have been strong allegations from the international community that Myanmar has been committing crimes against humanity on the Rohingyas. Troops in Myanmar have allegedly committed crimes against humanity by killing thousands of people and the OHCHR, as well as NGOs such as Human Rights Watch⁵ and Amnesty International⁶, have continually concluded that events in Myanmar strongly lead up to the act of crimes against humanity by the



Burmese government. In the earlier uproars, many would even categorise the distressing events in Myanmar as ethnic cleansing,⁷ which was later also supported in September 2017 by the United Nations High Commissioner for Human Rights, Zeid Ra'ad al-Hussein, saying that what happened to the Rohingyas at that time in Myanmar “seems a textbook example of ethnic cleansing.”⁸ However, the situation in Myanmar seems to only have gotten worse in time: al-Hussein more recently made a statement indicating that elements of genocide may be present in the Rohingya crisis⁹.

Meanwhile, International NGOs have voiced their concerns and urged preliminary investigations on alleged crimes against humanity in the Philippines. President of the Philippines Rodrigo Duterte, along with some high-level government officials, have on many times openly advocated for a war on drugs which have left many killed extrajudicially..

The ASEAN Approach

The ASEAN Charter embodies a list of principles all member states must commit to uphold and act accordingly, with two of them being “respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice” and “upholding the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN Member States”.¹⁰ The ASEAN Charter as the constituent document of the organisation does not yet regulate how its member states shall implement the said principles, especially on preventing and ending grave violations of human rights such as genocide and crimes against humanity, and as a regional grouping with legal personality, ASEAN should take a firm position on where it stands when it comes to crimes against humanity perpetrated or committed by its member state(s). The European Union, for example, has developed a set of rules for its member states on issues of genocide and crimes against humanity, such as the decision on the investigation and prosecution of crimes of genocide, crimes against humanity, and war crimes,¹¹ as well as the decision setting up a European network of contact points in respect of persons responsible for such crimes.¹²

Coordination between EU member states’ national law enforcement units is constantly emphasised in the decisions, and considering the binding nature of European Council decisions, the regional organisation has shown some strong efforts to bring all member states together and put an end to the most serious crimes of concern to the international community as a whole.

This practice, however, has not yet been seen in ASEAN, as there are no forms of agreements or even consensus by its member states on such issue to date. One may argue that the ASEAN Intergovernmental Commission on Human Rights (AICHR) has the capacity for the job in concern. AICHR itself was established in 2009 as mandated by the ASEAN Charter, stating that “[i]n 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.”¹³ Nonetheless, since the time of its establishment, AICHR has encountered many challenges in protecting human rights. For instance, the ASEAN Human Rights Declaration was initially planned by AICHR to become a “landmark political document in terms of human rights in the region, reflecting the aspirations of the people of ASEAN”, that “will set the landscape for human rights cooperation in the South East Asia region”.¹⁴ However, it is seriously questionable how the Declaration fails to at least mention either genocide, war crimes, ethnic cleansing, or crimes against humanity, and to date, there has not been any other document issued by AICHR discussing those matters either. This may be partially due to the limited functions mandated to the Commission and how it is also restrained by ASEAN’s so-called ‘golden rule’ of non-interference in doing its job. The rule has always been fundamental to the very existence of ASEAN as a regional grouping, and the history of AICHR also shows how the Commission was actually designed and shaped to fit the existing non-interference mould.

It also then becomes problematic when ASEAN Summits are somehow designed for high-level officers and are packed with ceremonial events, resulting in little effective time to discuss complicated issues such as allegations of certain member states committing crimes against humanity. Hopes continue to subside

as the last two ASEAN Summits in the Philippines failed to address the issues of the Rohingya and Duterte’s war on drugs. Playing host to the Summits, the Philippines strongly rejected any mention of its much-criticized anti-drugs operations, albeit having been repeatedly accused of committing extrajudicial killings.¹⁵ Among the extensive discussion agenda throughout the short gathering of Southeast Asian’s highest officials, meaningful talks on human rights violation happening in the region also failed to make the cut. It is, indeed, a pity – as the highest forum of ASEAN being the ASEAN Summit is designed to decide upon any “case of a serious breach of the Charter or noncompliance”.¹⁶ Nevertheless, one cannot simply rely on the Summits alone. Both theoretically and in practice, the currently available mechanism suggests that rather than going through a clear procedure of legal proceedings, a state’s alleged situation of serious breach will be brought to a series of dialogues with slow deliberation process, with high possibilities of such state invoking non-interference or other political hindrances.

As much as the responsibility of protecting people lies within the hands of their own governments, when a state fails to do so, it is expected that the international community shall help – not with the intention to jump in and disturb state sovereignty, but rather to ensure that no human beings are being deprived of their fundamental human rights. International law recognises that the obligation to protect people from genocide and crimes against humanity is *erga omnes* – a Latin term for ‘towards all’, suggesting the obligations owed by states to the international community as a whole. One way to indirectly invoke state responsibility is through upholding the commitment of Responsibility to Protect (R2P). Responsibility to Protect, an international consensus made in 2005 during the UN World Summit, showcases the commitment that “[e]ach individual state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity”.¹⁷ The Resolution also documented the commitment of the international community to “use appropriate diplomatic, humanitarian and other peaceful means [...] to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity” and to “take collective action [...] should peaceful means

be inadequate and *national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity*”¹⁸

Despite the said commitments made and the evident *faux pas* of states to protect their population, Southeast Asia has not seen a significant collective movement in pushing problematic states to refrain from conducting further crimes, let alone to be held responsible for them. Indeed, individual states are making positive movements on their own, such as Indonesia with its diplomatic approaches to Myanmar,¹⁹ and these acts deserve appreciation as they show initiatives to putting a stop to the tragedies. However, if seen as a grouping, the acts seem to have served little to no meaningful effect to states committing the crimes. The silence of ASEAN member states as a grouping on issues of genocide and crimes against humanity is, to say the least, disappointing. The failure of certain countries to resolve crimes against humanity on their own is highly likely to affect their implementation of protecting their citizens through the law. Among the ten member states of ASEAN, only two have ratified the Rome Statute: Cambodia and the Philippines, but the implementation in both countries are perhaps not necessarily exemplary.

Before acceding to the Rome Statute in 2011, the Philippines already had a basic national framework: Republic Act Number 9851 (“RA 9851”), known as the Philippine Act on Crimes against International



Humanitarian Law, Genocide, and Other Crimes against Humanity. The law is not without issues: Section 9(a) of RA 9851 fails to comply with the Rome Statute in putting an end to immunity of heads of state in cases of genocide and crimes against humanity. The exception provided for in Section 9(a) seeks to protect a reigning president from any suits during their tenure. It is regrettably contrary to Article 27(2) of the Rome Statute stating that “immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.” Through this rule, the said war on drugs has seen the Philippines brought to the International Criminal Court (ICC), although only to see an insignificant result. A self-confessed Davao Death Squad hitman Edgar Matobato, represented by his lawyer Jude Sabio, filed a complaint before the ICC reporting Duterte for the alleged ‘mass murder’. The preliminary investigations are underway but Duterte is reported to have been dropped from the respondents list,²⁰ although rather interestingly, international law recourse does not stop there. Pushing aside all the allegations of holding Duterte responsible, heads of state can – and in fact shall be – held liable for any crime against humanity committed within their own territories. Through a statement made on a genocide case judgment, the International Court of Justice (ICJ) confirmed that “according to international law, there is no doubt that every Head of State is presumed to be able to act on behalf of the State in its international relations”.²¹ The principle of complementarity embodied in the Rome Statute, nonetheless, require applicants to have exhausted effective national remedies before bringing a case upon the ICC. It means that in investigating, prosecuting, and trying cases falling under the Rome Statute, national jurisdictions of state parties to the Rome Statute have prevalence over the ICC – as long as the proceedings are done in an impartial, honest, and good faith manner. If a state fails to do so, the ICC then has the opportunity to step in.

On the other hand, Cambodia incorporates rules on genocide and crimes against humanity into its Criminal Code,²² specifically in Articles 183 to

192.²³ The definitions provided in the articles are in line with how they are defined in the Genocide Convention as well as the Rome Statute, and the Criminal Code makes it clear that there will be no impunity for serious offences in relation to international humanitarian law, as Article 8 states that “the provisions of this Code may not constitute a condition for denial of justice for the victims of serious offences provided in a separate law in relation to violation of international humanitarian law, international practices, or international conventions recognized by the Kingdom of Cambodia.” However, Cambodia only has a court to deal with 1970s crimes.²⁴

Attempts to codify genocide and crimes against humanity in non-state parties to Rome Statute are regrettably bleak. A valid example can be seen in Indonesia, where the drafted revision of its Criminal Code appears to be lenient on crimes against humanity. Many have addressed their criticisms towards the most recent amendment draft of the Criminal Code, in which genocide and crimes against humanity have different definitions with the ones in the Rome Statute – which Indonesia has not acceded to – and how perpetrators of such extraordinary crimes can probably be granted pardons.²⁵ In light of these possibilities, it becomes clear that incorporating rules on extraordinary crimes in a criminal code can easily be problematical. There are reasons why extraordinary crimes are categorised as so, and to not distinguish them from more ordinary crimes could degrade the gravity of the crimes themselves and their aftermaths. In Myanmar, particularly on the Rohingya issue, things might become significantly harder to resolve. Myanmar has not ratified the Rome Statute, therefore a trial on Rohingya events can only be made possible through the United Nations Security Council’s referral – a political move that very understandably only invites more scepticism into the long road of resolving the crimes. Realistically, as Myanmar draws closer to China, the emerging power in UNSC will continue to veto any effort to bring Aung San Suu Kyi and her top general to The Hague, as it has done before.²⁶

However, not ratifying or acceding to certain treaties does not automatically release ASEAN

member states from some of the obligations. The ICJ declares that “[a] State which is not yet party to the Convention when acts of genocide take place might well be in breach of its obligation under customary international law to prevent those acts from occurring”.²⁷ The existence of formally codified national laws, therefore, is not of the essence, and neither is the status of ratification/ accession to Rome Statute or any reason states may take cover behind. As genocide and crimes against humanity are included in the non-exhaustive list of jus cogens, the responsibility of states to prevent and act upon genocide and crimes against humanity still exists, if not stronger than ever.

Policy Recommendations

First, there needs to be a stronger implementation and compliance mechanism, particularly on human rights issues. As far as the ASEAN Charter enables, realistically the ASEAN Summit can only do so much in such a limited amount of time with all formalities ruled out. However, one must keep in mind that genocide and crimes against humanity are extraordinary crimes under international law, and must not be treated equally with other types of more ordinary ones. ASEAN shall possibly consider an exception to the non-interference principle in putting an end to gross violations of human rights.

Second, ASEAN member states must adhere to their commitment of taking the responsibility to protect as well as to prevent genocide and crimes against humanity that works in line with ASEAN Way – shall it still be seen effective in regards to responding to grave violations of human rights. Although prohibition of genocide as well as crimes against humanity are jus cogens norms, the non-derogability of preventing of such crimes is somehow still debatable. The non-interference card then becomes a convenient move to be played by states, therefore the difficulties to take serious actions upon them are inevitable. Considering that no legally binding mechanism exists in the organisational level of ASEAN, key players in preventing such crimes from happening

are, indeed, member states – both individually and collectively, as there has been calls by the international community for Southeast Asia to build either bilateral or multilateral cooperation for working towards the resolution of human rights issues. The participation of all levels – from diplomats, NGOs, to civil society – are equally essential.

Last but most definitely not least, ASEAN member states should work together in ensuring that victims of genocide and crimes against humanity are properly and adequately remedied. In almost all cases, the victims are not just simply the deceased – but the families, friends, relatives, and the distressed groups are also the ones who have to borne the loss of their beloved and struggle to cope with long years of the aftermath. As much as the responsibility of a perpetrator shall be invoked, the needs of remedies for the victims should not be forgotten or pushed aside.



Endnote

1 General Assembly Resolution 260

2 Genocide Convention, Art. II

3 Rome Statute, Preamble

4 Listed down in Article 7 of the Statute are ten categories of crimes against humanity, with one category of “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health” – providing a room for interpretation. Different with war crimes, acts of crimes against humanity can take place in peacetime and do not require armed conflicts for the acts to be categorised as so. See Rome Statute, Art. 5

5 ‘Burma: Military Commits Crimes Against Humanity’ (*HRW*, 25 September 2017) <<https://www.hrw.org/news/2017/09/25/burma-military-commits-crimes-against-humanity>>

6 Myanmar: Crimes against humanity terrorize and drive Rohingya out’ (*Amnesty International*, 18 October 2017) <<https://www.amnesty.org/en/latest/news/2017/10/myanmar-new-evidence-of-systematic-campaign-to-terrorize-and-drive-rohingya-out/>>

7 While no codified definition of ethnic cleansing yet exists, such situation amounts to crimes against humanity. See S/1994/674 27 May 1994 &

8 ‘UN human rights chief points to ‘textbook example of ethnic cleansing’ in Myanmar’ (*UN News*, 11 September 2017) <<https://news.un.org/en/story/2017/09/564622-un-human-rights-chief-points-textbook-example-ethnic-cleansing-myanmar>>

9 BBC Interview

10 ASEAN Charter, Article 2 paragraph 2 subparagraphs (i) and (j), respectively

11 European Council Decision 2003/335/JHA of 8 May 2003

12 European Council Decision 2002/494/JHA of 13 June 2002

13 Article 14, emphasis added

14 AICHR: About <<http://aichr.org/about/>>

15 AFP, ‘ASEAN summit: Manila talks skip human rights’ (*The Australian*, 14 November 2017) <<https://www.theaustralian.com.au/news/world/asean-summit-manila-talks-skip-human-rights/news-story/654fd5212d5955aded0ae77b80a8bfa0>>

16 ASEAN Charter, Art. 20(4) UNGA Res 60/1 (16 September 2005) UN Doc A/RES/60/1

17 UNGA Res 60/1 (16 September 2005) UN Doc A/RES/60/1

18 *Ibid.*, para. 139, emphasis added

19 ‘Indonesian minister to meet Suu Kyi amid protests over Rohingya’ (*Reuters*, 4 September 2017) <<https://in.reuters.com/article/myanmar-rohingya-indonesia/indonesian-minister-to-meet-suu-kyi-amid-protests-over-rohingya-idINKN1BF0PH>>

20 Joseph Tristan Roxas, ‘Duterte no longer a respondent in raps vs. Davao Death Squad’ (*GMA News Network*, 31 August 2017) <<http://www.gmanetwork.com/news/news/nation/624085/duterte-no-longer-a-respondent-in-raps-vs-davao-death-squad/story/>>

21 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, ICJ Reports 1996, p. 595, para. 44

22 As amended in 2009 <https://www.unodc.org/res/cld/document/khm/criminal_code_of_the_kingdom_of_cambodia_html/Cambodia_Criminal-Code-of-the-Kingdom-of-Cambodia-30-Nov-2009-Eng.pdf>

23 Book 2, Title 1

24 Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006) <https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf>

25 Estu Suryowati, ‘Komnas HAM Minta Pemerintah Inisiasi RUU Empat Kejahatan Luar Biasa’ (*KOMPAS*, 14 June 2017) <<https://nasional.kompas.com/read/2017/06/14/23255451/komnas.ham.minta.pemerintah.inisiasi.ruu.empat.kejahatan.luar.biasa>>

26 ‘China, Russia block U.N. council concern about Myanmar violence’ (*Reuters*, 18 March 2017) <<https://www.reuters.com/article/us-myanmar-rohingya-un/china-russia-block-u-n-council-concern-about-myanmar-violence-idUSKBN16O2J6>>

27 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia), Judgment, ICJ Reports 2015, p.45, para. 95



Check out our latest edition of ASEAN Briefs and download at <http://thcasean.org/publication>

About The Habibie Center

The Habibie Center was founded by Bacharuddin Jusuf Habibie and family in 1999 as an independent, non-governmental, non-profit organisation. The vision of The Habibie Center is to create a structurally democratic society founded on the morality and integrity of cultural and religious values. The mission of The Habibie Center are first, to establish a structurally and culturally democratic society that recognizes, respects, and promotes human rights by undertaking study and advocacy of issues related to democratization and human rights, and second, to increase the effectiveness of the management of human resources and the spread of technology.

About ASEAN Studies Program

The ASEAN Studies Program was established on February 24, 2010, to become a center of excellence on ASEAN related issues, which can assist in the development of the ASEAN Community by 2015. The Habibie Center through its ASEAN Studies Program, alongside other institutions working towards the same goal, hopes to contribute to the realization of a more people-oriented ASEAN that puts a high value on democracy and human rights. The objective of the ASEAN Studies Program is not merely only to conduct research and discussion within academic and government circles, but also to strengthen public awareness by forming a strong network of civil society in the region that will be able to help spread the ASEAN message. With the establishment of ASEAN Studies Program, The Habibie Center aims to play its part within our capabilities to the ASEAN regional development.

About Talking ASEAN

Talking ASEAN is a monthly public dialogue held at The Habibie Center in Jakarta. Covering a wide array of issues related to ASEAN, Talking ASEAN addresses topics of: Economic Integration, Socio-cultural, & Democracy, human rights and regional peace, among others. Featuring local and visiting experts, Talking ASEAN is one of a series of twelve dialogues regularly held each month and open to a target audience consisting of ASEAN officials, foreign ambassadors & diplomats, academics, university students, businesses, and the media.

Cover Image: Kutupalong Refugee Camp in Bangladesh (Photo taken by John Owens/VOA) https://en.wikipedia.org/wiki/Rohingya_refugees_in_Bangladesh

www.thcasean.org



ASEAN Studies Program - The Habibie Center

The Habibie Center Building - Jl. Kemang Selatan No.98, Jakarta 12560
Tel: 62 21 781 7211 | Fax: 62 21 781 7212 | Email: thc@habibiecenter.or.id

 facebook.com/habibiecenter  [@habibiecenter](https://twitter.com/habibiecenter)  [@habibiecenter](https://www.instagram.com/habibiecenter)