
THESIS

MASTER PROGRAM OF

PUBLIC INTERNATIONAL LAW

LEIDEN UNIVERSITY

# "THE NEED TO ESTABLISH A REGIONAL HUMAN RIGHT COURT IN ASIA"

VERA W. SETIJAWATI

S1027263

2010 - 2011

21 July 2011

---

Supervisor: Dr. Mia Swart, LL.M

Total words: 14.998

CONTENTS

Abbreviations

| | | |
|---|---|---|
| 1. | UDHR | Universal Declaration on Human Rights |
| 2. | AHRC | Asian Human Rights Court |
| 3. | AHRS | Asian Human Rights Statute |
| 4. | UN | United Nations |
| 5. | ASEAN | Association of Southeast Asian Nations |
| 6. | ICCPR | International Covenant on Civil and Political Rights |
| 7. | Vol | Volume |
| 8. | US | United States |
| 9. | AHRC | Asian Human Rights Commission |
| 10. | LNRI | *Lembar Negara* Republic Indonesia (State Sheet of Republic of Indonesia) |
| 11. | PKI | Communist Political Party |
| 12. | N.Y. | New York |
| 13. | LN | *Lembar Negara* Republic Indonesia (State Sheet of Republic of Indonesia) |
| 14. | TLN | *Tambahan Lembar Negara* Republic Indonesia (additional state sheet of Republic of Indonesia) |
| 15. | TGPF | *Tim Gabungan Pencara Fakta* (Joint Fact Finding Team) |
| 16. | UNHCR | United Nation High Commissioner for Refugees |
| 17. | ILC | International Law Commission |
| 18. | ICTY | International Criminal Tribunal for the former Yugoslavia |
| 19. | Para(s) | Paragraph(s) |
| 20. | TNLRI | *Tambahan Negara Lembar* Republic Indonesia (additional sheet state of Republic of Indonesia |
| 21. | MPR | *Majelis Permusyawaratan Rakyat* (People of Assembly) |
| 22. | DPR | *Dewan Perwakilan Rakyat* (the House of Representative) |
| 23. | ABRI | *Angkatan Bersenjata Republic Indonesia* (the Army of Republic of Indonesia) |
| 24. | Komnas HAM | National Commission of Human Rights |
| 25. | SK | *Surat Keputusan* (the Letter of Decision) |
| 26. | ICC | International Criminal Court |
| 27. | HRI | Human Rights Institute |
| 28. | UCLA | University of California, Los Angles |
| 29. | pp | page |
| 30. | UNTS | United Nations Treaty Series |
| 31. | SCIO | State Council Information Office |
| 32. | ICJ | International Court of Justice |
| 33. | Rep. | Report |
| 34. | ECtHR | European Court of Human Rights |
| 35. | ECHR | European Court of Human Rights |
| 36. | ILM | International Legal Material |
| 37. | CFI | Court of First Instance |
| 38. | Doc | Document |

| | | |
|---|---|---|
| 39 | GAOR | General Assembly Official Records |
| 40. | EJIL | European Journal of International Law |
| 41. | ICL | International Criminal Law |
| 42. | IJIL | International Journal of Innovation and Learning |
| 43. | ECOSOC | Economic Social Culture |
| 44. | OHCHR | Office of the High Commissioner for Human Rights |
| 45. | GA | General Assembly |
| 46. | SC | Security Council |
| 47. | USA | United States of America |
| 48. | AICHR | Asian Intergovernmental Commission on Human Rights |
| 49. | NGO | Non Governmental Organizations |
| 50. | SCIL | Sydney Center for International Law |
| 51. | HRLRC | Human Rights Law Resource Center |

# "THE NEED TO ESTABLISH A REGIONAL HUMAN RIGHTS COURT IN ASIA"

## Chapter 1
## Introduction

The focus of the thesis contained in the following paper is the human rights cases in Asia, the ineffectiveness of the national legal process to deal with these rights abuses, the lack of a regional human rights court and the proposal for the application for the establishment of an Asian human rights court. The paper will begin with an analysis of gross human rights violations in Asia, for instance in the nations of Indonesia and China; what are the practices of Indonesia and China when they are obligated under national law to deal with human rights violations and why those allegations have not been prosecuted through domestic courts. The last and extremely important point is why the victims of those allegations cannot get their basic human rights under the justice systems in those countries. In the cases of China and Indonesia their domestic courts are unable to prosecute high level government officials who violate the human rights of their citizens, because the governments uphold impunity from prosecution for these high ranking officials. The question can then be asked who should prosecute the perpetrators? Or in the case of exhaustion of attempting to gain justice with the use of a country's legal system, for example for citizens of Asian countries which do not have a regional human rights court, where should these citizens go to be able to follow an effective legal process?

The answers to those questions may be found in the existence of international human rights mechanisms. Can those mechanisms respond to the needs of human rights victims in Asia? Those analyses of the international mechanisms are provided in chapter two of this thesis.

The existence of international mechanisms cannot acknowledge the need of Asian people to get justice. Consequently, in Asia there is a big gap between the protected rights of the population under human rights law and the implementation of the rights and the enforcement mechanisms for violation of human rights obligations. Should an Asian

human rights court be established? The answer for this question is described within the second chapter two of this thesis. A regional human rights court is the most effective method to assure the rights to reach an effective remedy on an internationally acceptable level and to provide access for the rights holders to an independent and legitimate regional court with the power to render binding judgments and to award adequate reparation to the human rights violations' victims.[1]

It is possible to establish a regional court in Asia as long as there is the political will of the member states in Asia. The international community can play an important role to encourage and facilitate the Asian leaders to place as a priority the establishment of a regional court; as the international community has expressed their consent on respecting and promoting human rights as the recognition of the inherent dignity, equality and inalienable universal rights of human beings.

[1] M. Nowak, *The Need for a World Court of Human Rights*, Oxford Journal, Vol. 7, 27 January 2007, at 251-259.

## Chapter 2

## Domestic Human Rights Remedy in Asia

"Can a sovereign state uphold impunity from prosecution for selected members of society and ignore the obligations under their respective constitutions to provide remedial rights for its citizens when there are gross human rights violations committed?"

### 2.1. Introduction

Traditional international law declares that a state can do whatever a state wants within its territory and the state can argue that the domestic jurisdiction and national problems are part of the national sovereignty. This is because a state is sovereign. This traditional form of law has been used to justify that Asian Countries, like Myanmar[2], Cambodia[3], Thailand[4], Philippines[5], Laos[6], Vietnam[7], Indonesia[8] and China[9] can uphold impunity from prosecution and detention among senior military officers, elite politicians, and higher levels of society and that they can continue to torture, as well as committing other unlawful cruel treatment and punishment[10]. This has been witnessed from the practices of the Indonesian and Chinese governments when giving immunity to some individuals within these two states. This is when individuals have committed crimes which have allegedly resulted in crimes against humanity and those alleged crimes have not been brought to justice. More importantly, from 1989 to 1999 China and Indonesia had

---

[2] Bureau of Democracy, Human Rights and Labor, 2009 Country Reports on Human Rights Practices, US. Department of State, 11 March 2010.
[3] Committee for Free and Fair Elections in Cambodia, *Cambodia Democracy, Elections and Reform*, 2009, at 5.
[4] Bureau of Democracy, Human Rights, and Labor, 2010 Country Reports on Human Rights Practices, US Department of State, 8 April 2011.
[5] Bureau of Democracy, Human Rights, and Labor, 2008 Country Reports on Human Rights Practices, US Department of State, 25 February 2009.
[6] Bureau of Democracy, Human Rights, and Labor, 2010 Country Reports on Human Rights Practices, US Department of State, 8 April 2011.
[7] Bureau of Democracy, Human Rights and Labor, 2009 Country Reports on Human Rights Practices, US. Department of State, 11 March 2010.
[8] AHRC-STM-248-2011, http://www.humanrights.asia/news/ahrc-news/AHRC-STM-248-2010 (retrieved on 18 June 2011).
[9] Bureau of Democracy, Human Rights, and Labor, 2009 Country Reports on Human Rights Practices, US Department of State, 11 March 2011.
[10] Human Rights in Asia: Serious Problems in 10 Countries, Asianews, 18 January 2006.

similarity in practice when the governments considered the exercised rights of their citizens might endanger upon states' interest. What the state's interest was unclear so that the states have the rights to impose Martial Law on their citizens while exercising their rights.

The author chooses the case of China, because China is one of permanent members of the Security Council of the UN, while Indonesia holds the Chairmanship of the Association of Southeast Asian Nations (ASEAN) in 2011[11]. If Asia needs to establish an Asian human rights court [AHRC], it needs China's consent and the idea of establishing an AHRC should be initiated by the Chairmanship of ASEAN, currently held by Indonesia. Whereas China, under the constitution, provides compensation for misconduct of the state agents, Indonesia does not provide compensation under the constitution, but it does provide compensation under national law[12]. Both nations have had to deal with remarks from the international community on past allegations of human rights, and many of these violations have not been brought to justice. This thesis highlights the states' practice of upholding impunity when the practice is amounting to torture, classified as crimes against humanity and the practice has not been adjudicated by a national court and indeed the victims have not received their remedial rights.

The thesis will focus first on determining whether there are violations of its citizens' rights and its government's obligations under their respective constitutions? Additionally, the second step is if there are violations of citizens' rights, whether states are obliged to pay compensation?

The protected fundamental rights through human rights laws are meaningless if the protection is not followed by adequate and effective remedy, like what should be applied in Indonesia and China. While the domestic courts are inappropriate to provide the remedial rights for the people in those countries, there are no other mechanisms that can be followed by the victims to ensure a fair level of justice.

[11] http://www.asean.org/21888.htm.
[12] The Law No. 26 Year 2000, about Human Rights Court, LNRI No. 208/2000, Article 35 (1).

## 2.2. Human rights application in Indonesia

The application will be assessed in two parts, before and after Indonesia adopted universal human rights. What are the protected rights under the Indonesian Constitution; what is the government's application to the protected rights; how the government fulfilled its obligation; and how the government has sponsored torture, prosecution, kidnapping and raping its citizens and refused to bring the perpetrators to justice.

### 2.2.1. The Human rights condition before the adoption of human rights law (1965 – 1998)

#### 2.2.1.1. The Constitution 1945

Indonesia had the constitutional law which was limited in its protection of human rights[13], for example, the right to life, liberty, security, an effective justice system, a fair and public hearing by an independent tribunal; the right not to be subject to arbitrary arrest, unlawful state conduct, and torture were not covered in the constitution and the constitution did not guarantee social justice[14]. Article 26 (2) of the Constitution regulated that "the matters relating to the nation were regulated in law," this meant that there was no effective protection from violation by the state power[15]. There was no separation of power in the first constitution (*Trias Politica)* and the constitution adopted the presidential system[16]; therefore it supported the politics of an authoritarian system under Soekarno and Suharto. Article 7 of the Constitution made it possible for the presidency to sustain its power, because there was no limitation of the period of the presidential term. The president as the head of executive controlled and monopolized power, which led to

---

[13] 1945 The Constitution of the Republic of Indonesia, 1945, Article 27 paragraph (1) "equality under the law" and paragraph (2) "right to work"; Article 28 "the freedom of association, assemble, and thought and expression are regulated in laws"; Article 29 paragraph (2) "freedom of religion"; Article 30 paragraph (1) "the right to participate in the national defense"; Article 31 paragraph (1) "the right of education" Article 34 "social welfare".

[14] K. KAWAMURA, *Politics of the 1945 Constitution: Democratization and Its Impact on Political Institution in Indonesia,* Institute of Developing Economic (IDE-JETRO), 2003, at 8.

[15] *Id.*,at 24.

[16] *Id.*, at 5.

the arbitrary conduct of politics and law. To maintain its position, the president made other political groups or the opposition groups incapable of competing or criticizing the government[17]. The state's obligations to provide justice were also limited, as is noted in Article 24 (1) of the Constitution, the independence of justice was interpretable because it was not clearly stated that judicial system should be independent from the executive and legislative powers. Moreover, the constitution did not provide a method of a judicial review mechanism[18]. Those articles within the first constitution made it possible for the government to infringe on its human rights obligations[19]. This is evident in the atrocious tragedy of the 30 September, 1965[20], when 7 senior generals and top government officials were brutally killed[21] . This resulted in the mass killing of the PKI's members and arbitrary detention of the PKI's members[22]. Those allegations and the perpetrators of those crimes have never been brought to justice.

### 2.2.1.2. Transitional period

In 1998, Indonesia decided to shift from a dictatorship to a democratic state which respects, ensures and promotes human rights. In other words, this is the period of transitional justice by applying judicial measures. The state has started to develop human rights systems. Regarding the principle of transitional justice, ensuring accountability, serving justice and achieving reconciliation[23], the state should respect and protect the rights of its citizens as well as promote the truth and justice for all citizens. That means

---

[17] *Id.*,at 13-14.
[18] *Id.*,at 15.
[19] *Id.*, at 26.
[20] B. R Anderson & R. T. McVey, A Preliminary Analysis of the October 1, 1965, *Coup in Indonesia* Ithaca, N.Y.: Modern Indonesia Project Cornell University, Interim Report, (1971); see also, H. Crouch, *The Army and Politics in Indonesia,* Ithaca, N.Y.: Cornell University Press, (1978); see also, B. May, *The Indonesian Tragedy,* Singapore: Brash, (1978); see also, R. Mortimer, *Downfall and Indonesian Communism under Soekarno, Ideology and Politics, 1959-1965,* Ithaca, N.Y.: Cornell University Press, (1974); cited in S. E. Wieringa, The Birth of the New Order State in Indonesia: Sexual Politics and Nationalism, Journal of Women's History 15.1 (2003) at 70-91.
[21] M. Green, Indonesia Crisis and Transformation 1965 – 1968, (1990) at 51.
[22] O. T. Tat, Memoirs of Oei Tjoe Tat, assistant to President Sukarno, Jakarta: Hasta Mitra, 1975 at 192. Oei Tjoe Tat was a former member of the Fact Finding Commission; see also, J. C. Raney, *Genocide in Indonesia,* Northwest Center for Holocaust, Genocide and Ethnocide Education, Western Washington University.
[23] Ambos, Building a Future on Peace & Development The Nuremberg Declaration on Peace & Justice, 2009, at 21.

eliminating the custom of upholding impunity[24], not sponsoring crimes against humanity and not refusing a clear and acceptable resolution for the victims.

Before deciding on the transition of its justice system the government adopted the presidential decree on 7 July, 1993 to establish a national human rights commission; however, the government did not ratify the human rights laws, but in this decree it started to better respect human rights as laid down in the Universal Declaration on Human Rights (UDHR)[25].

Under Article 28 of the Constitution "the freedom of association, assembly and thought and expression" were supposedly protected, however the next part of the text stated that those freedoms were regulated in law[26]. The law No. 8/1985 regulates that in order to express citizens' thoughts and aspirations the citizens should communicate them through a civil organization[27]. It was prohibited to criticize the government publicly. Like in the Trisakti tragedy 12 May, 1998[28], university students from all over Jakarta and other cities protested that Suharto should step down from his 32-year dictatorial rule[29]; the protesters did not bring any dangerous weapons. Nevertheless, the military used force to stop the protesters and snipers shot randomly into the crowd of students at *Trisakti* University[30]. 4 students were shot dead on the street[31].

The *Trisakti* tragedy triggered anger among many Indonesian citizens. They protested and went on strike for the next three days, from 13 to 15 May, 1998. The government responded to the strike by committing sporadic 'state sponsored violence' in Jakarta and other big cities, for instance, many buildings like malls, public facilities, homes, cars and other vehicles were burnt. There was a lot of looting of stores, 1,223 people were killed, 122 people were injured, 4 people were kidnapped, and 85 women

---

[24] Sandyawan, A Draft of Collective Action Plan for Realization of Transitional Justice, Public Discussion at Petra University, Surabaya, 2005, at 1.
[25] Presidential Decree No. 50 Year 1993 , National Human Rights Commission.
[26] Law No. 8 Year 1985, LN 1985/44; TLN No. 3298, Civil Organization.
[27] *Id.*., Article 5 (d).
[28] Dr. S. Sherlock, *Crisis in Indonesia: Economy, Society and Politics*, Parliamentary Library, Parliament of Australia, 1998.
[29] M Angelina & R. Gunawan, *Eleven Years after the May Riot: We Have not Forgotten*, The Jakarta Post, May 12, 2009.
[30] P. Rudiah, *Women, Violence, and Gang Rape in Indonesia*, Cardozo Journal International Law & Comparative Law 255 (1999) at 251.
[31] A. Sulkifli, Setyardi, A. Fuadi, The Crisis Brought Suharto to Deep Ruination, Tempo Online, 29 December 1998.

were raped by gang rape[32]. Jakarta and other big cities[33] (Solo, Medan, Surabaya, Palembang, and Lampung[34]) in Indonesia experienced chaos and there was widespread public disorder.

While the causes and events of the 13-15 May Riots had still not been resolved, the Semanggi I tragedy happened on 11-13 November, 1998 still using the same pattern. Ironically, while the government was still violating its citizens' rights, the government started to shift the concept of human rights from a "particularism" to "universal" concept of human rights[35] and adopted the protection of universal human rights with a parliamentary decision as part of a national 'declaration of general principles' was integrated as a national agenda, TAP MPR No. XVII/1998 on 13 November, 1998. At Semanggi I, the government used Paramilitary groups (*Pam Swakarsa*)[36], who were reportedly recruited and organized by pro-Habibie Islamic Groups, to oppose and attack the protesters. The incident had been instigated by militant Islamic groups associated with the Habibie government and they were involved in the recruitment of the paramilitary groups. The protesters demanded the prosecution of Suharto[37]; the elimination of military seats in the MPR and the parliament; and corrupt public officials should be removed and to ban the previous ruling party, Golkar[38]. It was reported that the chaos caused many material and immaterial losses[39] as well as 18 university students were shot by the military and 109 people were injured[40].

---

[32] The Report of TGPF, executive summary, 23 October 1998, at 9 – 11.
[33] General Assembly 45 Billion and A President in the Period of Crisis, Tempo, Edition 01/03-07/Mar/1998.
[34] See the report of TGPF, *supra* note 32, at 1.
[35] B.Manan, Development of Human Rights and Regulation in Indonesia, 2001, at 54. [Emphasis added] he was a judge and Chairman of the Indonesian Supreme Court and he wrote this book.
[36] Writenet, *Indonesia Update: Transition and its Discontents, July – November 1998*,UNHCR, 1998.
[37] *Student Actions Demand Suharto Trial, Clash near Parliament*, Kompas Online, May 22, 1999.
[38] *Students Commemorate Parliament Occupation, Call for dissolution of Golkar*, Kompas Online, May 19, 1999.
[39] *7 churches and 11 cars were burned*, Detik.com, 23 November 1998; see also, *Dead Bodies became 14 people*, Detik.com, 23 November 1998; see also, *Gangster and civilian were fighting and 6 death*, Jawa Post (Surabaya), 23 November 1998; see also, *Jakarta, Riots in Jakarta: 6 people death*, Kompas, 23 November 1998; see also, *Jakarta, Conflict in Ketapang, West Jakarta, 7 people death*, Republika, 23 November 1998.
[40] Position Paper of Kontras, *Position Paper of Kontras, Trisakti, Semanggi I and II Cases*, Kontras, 2005, www.kontras.org/data/KERTAS_POSISI_TSS_2006.pdf. (retrieved on 28 May 2011).

### 2.2.1.3. Legal analysis of transitional period

The Trisakti 13-15 May Riots and Semanggi 1 were well organized riots[41] committed by state agents[42] that were the police in collaboration with the army; therefore, the conduct was attributable to the state[43]. According to Article 9 of the Law No. 26/2000[44] the state allegedly committed crimes against humanity[45] with the commission of torture, rape, prosecution and enforced disappearance of people. As identified by the TGPF[46], the pattern of the riots, in several places in Indonesia was the looting which was initiated by a group of provocateurs among the protestors and crowds. These provocateurs were from outside Jakarta and incited the masses to loot, burn buildings and cars. They were well trained. After finishing the delivery of their orders and provocation of the masses, they quickly left these places. This pattern fulfils the requirement of "the mental element of knowledge" to commit crimes against humanity sponsored by the state. The secret meeting conducted at Makostrad and only selected Armed Force officials, government officials, and community leaders[47] who could attend the meeting can be interpreted as the well-planned targeting of civilians in order to sustain its power. When the perpetrators knew the consequences of their conduct, it met the requirement of the psychological elements of the crimes[48]. The patterns of the riots were systematic attack, because the riots in every city applied the same modus operandi[49]. Regarding the *Blaskic* case[50] the systematic attack requires "an objective; continuous commission of linked crimes;

---

[41] See the report of TGPF, *supra* note 32, at 6.
[42] See A. Sulkifli, *supra* note 31, 2 Mei 1998.
[43] 2001, ILC Articles on Responsibility of States for Internationally Wrongful Acts, Article 4.
[44] See The Law *supra* note 12. For gross violation of human rights that occurred before the law was adopted there are two mechanisms regarding the law which are under Article 43 of the Law No. 26/2000 the cases should be adjudicated by an ad hoc human rights court or under Article 47 of the Law No. 26/2000 the cases settles by the Truth and Reconciliation Commission and Article 46 there is no expiration of the crimes.
[45] Marzuki, the rapes were occurred, Jawa Pos, September 25, 1998 at 1; see also the report of TGPF, *supra* note 32, at 7.
[46] Six Minister Has Been Given 1 Month for Examining the Controversial Finding of TGPF. Jawa Pos, 10 November, 1998, at 1; see also *TGPF: Sexual Attack Was Occurred at the May Riot*, Suara Pembaharuan, September 22, 1998, at 1; cited in, see P. Rudiah, *supra* note 30 at 269.
[47] See the report of TGPF, *supra* note 32, at 12.
[48] Lee, The International Criminal Court Elements of Crimes and Rules of Procedure and Evidence, 2001, at 16.
[49] See the report of TGPF, *supra* note 32, at 13.
[50] *Blaskic*, ICTY T Ch. 3.3.2000 para. 203.

significant resources; and implication of high-level authorities"[51]. The objective of the riots was to maintain the political power[52]; the Trisakti incident was designed as a triggering factor[53] and it continued onto 13-15 May, then it moved on to Semanggi 1. These crimes were linked crimes; the riots used the state's resources, like the army and police[54], snipers[55], weapons[56], and other state property; and the implication of the riots was the resignation of Suharto from his presidency[57].

Although during the Trisakti and 13-15 May tragedies there was no guarantee of freedom of expression and demonstration under the constitution, the state could not advocate and condone the committing of rape, torture, prosecution, looting, and incitement, because the state violated Article 9 of the law No. 26/2000. In this tragedy the government failed to be responsible for the negligence of duty, security, control and to prevent the unrest spreading to other areas. The official government[58] was supposedly responsible for the security in the areas of the riots. While during the Semanggi I tragedy there was protection of the freedom of expression in public under Law No. 9/1998[59] which was passed on 26 October, 1998, the protesters were supposedly protected under the Law No. 9/1998; however, the government repressed and infringed on their rights.

Under Article 35 of the Law No. 26/2000, the victims and the families of gross human rights violations can get compensation, restitution and rehabilitation. Article 43 (1) of the Law No. 26/2000 jurisdiction of an ad hoc human rights court is for the gross violation of human rights before the law was adopted. The law was adopted on 23 November, 2000, so the tragedies before 23 November, 2000 can be adjudicated at an ad hoc human rights court. Article 43 (2) of the Law, states an ad hoc human rights court is initiated by the House of Representatives on the basis of specified tragedies and an ad hoc court should be decided by presidential decree. This procedure makes it difficult for

---

[51] R. Cryer *et al*, An Introduction to International Criminal Law and Procedure, 2010, at 236.
[52] See the report of TGPF, *supra* note 32, at 12.
[53] *Id.*, at 6.
[54] An Ad Hoc Human Rights Court Trisakti/Semanggi should be conducted, Radio Nederland, 18 June 2001, transcript at http://www.rnw.nl.
[55] Elsam, Serious Human Right Violation, Trisakti, Semanggi I and II, 2002, http://elsam.minihub.org/kkr/Trisakti.html.
[56] A. Gunawan, Indonesian Army Declined the Suspect Brought Before the National Human Rights Court, http://www.tempo.co.id/hg/nasional/2001/05/21/brk,20010521-29,id.html 9 (retrieved on 29 May 2011).
[57] *Habibie Becomes President After Suharto Resigns*, CNN World, 20 May 1998.
[58] See the report of TGPF, *supra* note 32, point 2 at 18.
[59] The Law No. 9 Year 1998, about Freedom of Expression in Public, LNRI No. 181/1998, TLNRI 3789.

the victims to bring those cases before an ad hoc court. It is impossible for the state which should be responsible for the violations to prosecute itself. This is seen in the official statement of a special committee of the House of Representatives during the Megawati Soekarnoputri, the fifth president of Indonesia, administration which declared there was not enough evidence of gross violations of human rights[60] and the riots were just ordinary crimes. This means the government has no willingness to bring the case before an ad hoc human rights court and provide remedy and some type of closure for the victims.

### 2.2.2. The human rights condition under the amended Indonesia's Constitution and human rights law in Indonesia (1999)[61]

Before the constitution was amended, the first national decision of adopting the human rights law was made on 13 November, 1998[62] under parliamentary decision No. IV/MPR/1999, which gives the mandate to the executive to ratify international human rights law and restructuring the legal system to adopt the universal human rights concept[63]. This human rights law was finally adopted and put in place in 1999[64]. The amended Indonesian Constitution[65] secures the human rights of its citizens under Chapter XA of the Constitution, for instance, "the right to live and defend life"[66]; "the rights of recognition, guarantee, protection and certainty before a just law and of equal treatment before the law"[67]; "the rights to life, freedom from torture, freedom of thought and

---

[60] Recommendation 'Rotten Eggs' DPR and the Silent Attitude of the Government, Kompas Cyber Media, 15 May 2002.
[61] 2005, Ratification of International Covenant on Civil and Political Rights No. 12 Year 2005; 2005, Ratification of International Covenant on Economic, Social and Cultural Rights No.: 11 Year 2005; 1999, Ratification of International Covenant on The Elimination of All Forms of Racial Discrimination 1965 No.: 29 Year 1999; 1984, Ratification of Convention on the Elimination of All Forms of Discrimination Against Women No.: 7 Year 1984; 2003, Ratification of Convention on the Rights of the Child No. 23 Year 2003; The Law No. 5 Year 1998 ratification of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment; The Law No. 26 Year 1999 about Repeal of Act No. 11 of 1963 Concerning the Crime of Subversion.
[62] 1998, Decree of the People's Consultative Assembly of the Republic of Indonesia, No XVII/MPR/1998, adopted on 13 November 1998.
[63] See .Manan, *supra* note 35, at 82.
[64] Law of the Republic of Indonesia, Legislation No. 39 of 1999, Law Concerning Human Rights.
[65] 1945 the Constitution of the Republic of Indonesia, as amended by the First Amendment of 1999, the Second Amendment of the Third Amendment of 2001 and the Fourth Amendment of 2002.
[66] *Id.*,, Article 28 A.
[67] *Id.*,, Article 28 D (1).

conscience [...]" and those "rights cannot be limited under any circumstances"[68]; "the right to be free from discriminative treatment"[69]; however the citizens "shall have the duty to accept the restriction of the rights and freedoms established by law"[70]. Citizens have "the right of freedom to associate, to assemble and to express opinion"[71]. It is also regulated under Article 25 of the Law No. 39/1999[72]. Under the mandate of Article 28 J (2) of the Constitution and Article 70 of the Law No. 39/1999, the state has the right to restrict those rights and freedoms and the restrictions should be established by law. Although the human rights are protected under the constitution, the application remains unchanged.

The negative applications remain that there is no change as indicated in the following tragedy of Semanggi 2 on 24 September, 1999. The university students protested and rejected the drafted law about combating hazards which threaten the state[73], because the law gave more power to the government to decide on responses to natural disasters, civil disorder and armed conflict. This draft law gave power to military intervention in many areas of civil authority, or under the dual function of the Indonesian Military (*dwifungsi ABRI*)[74]. The military violently quelled the protesters[75]. The armed forces in the Semanggi 2 tragedy caused the deaths of 5 university students[76] and 6 citizens (in total 11 people died[77]) who were shot by the military[78]. 217 people were injured[79].

In response to the Semanggi 2 tragedy, the government tacitly supported the arbitrary killing by shooting the protesters and torture, because the government has been

---

[68] *Id.*, Article 28 I (1).
[69] *Id.*, Article 28 I (2).
[70] *Id.*, Article 28 J (2).
[71] *Id.*, Article 28 E (3); see also *supra* note 59, at Article 2.
[72] See the Law No. 39/1999, *supra* note 64 Article 25.
[73] www.propatria.or.id/.../RUU%20ProPatria/Draf%20RUU%20tentang%20Keadaan%20Bahaya%20%5B. (retrieved on 28 May 2011).
[74] Semanggi II Tragedy, The History of Reformation, http://www.semanggipeduli.com/Sejarah/frame/semanggi2.html (retrieved on 29 May 2011).
[75] *BBS, Parents, Activists Commemorate Forgotten Semanggi II Tragedy*, The Jakarta Post, September 17, 2009.
[76] R. Murphy, Yearbook of International Humanitarian Law 2001, T.M.C. Asser Press, 2004, at 540.
[77] See Position Paper, *supra* note 40 at 1.
[78] D. Kusuma & Prihandoyo, A Strategic Commando Soldier Was Accused of Shooting Yun Hap, Liputan6.com, 8/2/2001.
[79] See Position Paper, *supra* note 40.

inactive in seeking justice for the victims of these crimes[80]. Those violent conducts are attributable to crimes against humanity[81] because the acts were committed as part of a systematic attack[82] directed against a civilian population.[83] The allegedly committed crimes against humanity are in reference to the national law of Human Rights Courts[84]. The element of knowledge is evident when the government recruited the provocateurs and the provocateurs knew the conduct was part of a systematic attack directed against the civilian population.

### 2.2.3. The National Human Rights Commission.

On 5 June, 2001, Indonesia's National Human Rights Commission (*Komnas HAM*) established a commission of inquiry to examine several apparently linked incidents in Jakarta connected to the chaos and political turmoil of the months preceding and following the resignation of Suharto in 1998[85]. Nonetheless, the process of investigation conducted by the *Komnas HAM* had problems; one of the problems was that the *Komnas HAM* could not access information from the state's agencies and the army, as well as the national police were not cooperative. They refused to be interrogated by the *Komnas HAM*. The *Komnas HAM's* report concluded that there were gross human rights violations in the *Trisakti, Semanggi* I and II tragedies and allegedly 50 people committed human rights violations within those tragedies[86].

The National Commission on Human Rights announced that the commission found in the May Riots, 1998 (12-15 May 1998) there were allegedly systematic gross human rights violations and it recommended an ad hoc human rights trial should be established to examine the tragedy. The government has failed to conduct a state prosecution and bring the case before an ad hoc court. The victims of those tragedies have not received their remedial rights.

---

[80] Progress Case of Kontras, Activists Kidnapping in 1998, www.kontras.org/penculikan/perkembangan%20kasus.pdf.
[81] A. Gunawan, *University Students Protested Pansus Trisakti and Semanggi*, Tempointeraktif, 2001.
[82] A. Gunawan, *Immediately Established Human Rights Court for Trisakti Case*, tempointeraktif.
[83] See the Law No 26/2000, *supra* note 12 Article 9.
[84] *Id.*, Article 7 (B) and Article 9.
[85] *Komnas HAM* Decision SK No. 34/KOMNAS-HAM/VII/2001 of 27 August 2001.
[86] See Position Paper, *supra* note 40 at 2.

The result has been handed over to the Attorney General (*Kejaksaan Agung)* for further state prosecution. However, the Attorney General has never continued the prosecution and the case is still pending without clear explanation.

### 2.2.4. The lack of local remedy and the absence of government commitment to fulfill its human rights obligations[87]

The events of the *Trisakti*, the 13 – 15 May, 1998, *Semanggi* 1 and 2 tragedies, have shown that the local solutions and remedies are exhausted and the different governments (since Suharto until Susilo Bambang Yudhoyono) have been unwilling to legally prosecute the perpetrators[88] and give compensation to the victims[89]. Although, an official of the Ministry of Justice, Patrialis Akbar, promised that the government was willing to compensate the victims of the tragedy[90], the promise has not been fulfilled. He even stated that the investigation of human rights violations alleged committed by the government is not 'a priority for the government to investigate its responsibility in the bloodshed'[91].

### 2.2.5. Conclusion

Those allegations should be brought before the national human rights courts. Under Article 43 of the Law No. 26/2000, it is possible for government to establish an ad hoc human rights court to adjudicate the cases, prosecute the perpetrators and provide remedy for the victims and families. However, the government is unable and unwilling to establish an ad hoc court. The problems of incapability of the judicative organs are caused by:

---

[87] Human Rights Watch, *Country Summary, Indonesia*, January 2011 at 2.; see also, U.S. Department of State, Diplomacy in Action, *2009 Human Rights Report: Indonesia.*
[88] See M. Angelina, *supra* note 29.
[89] R. M. Sijabat, *Six Years After, May 1998 Tragedy still Unresolved,* The Jakarta Post, May 13, 2004.
[90] N. Osman & U. Haryanto, Indonesia Must Never Forget May Tragedy, The Jakartaglobe, May 14, 2010.
[91] *Id.*

1. the judicial system is not independent from governmental and political intervention[92] from the executive organs who will intervene on selecting the suspects[93] and influencing the verdict, or by politicians, or by rich people[94];
2. there is a lot of corruption in the judicial system[95]; and
3. the national tradition to uphold impunity from prosecution for some senior government officials[96], politicians, and rich people.

Those allegations have been investigated by the national human rights commission; however, the investigation report cannot be used by prosecutors to initiate a case and bring a case before the nation's courts[97]. The unwillingness of the judicial institutions indicates that there is no political will of the government to implement the human rights obligations.

As reported by Amnesty International, human rights violations in Indonesia are widespread and part of a pattern of systematic human rights violations which have unfolded over more than a quarter of a century. The human rights violations have become institutionalized by the structure of state and military power[98].

After utilizing judicial measures during the period of transitional justice, indeed the government has had successes in adopting the universal human rights law and installing the judicial system; nevertheless "the justice elements in transnational justice are understood as an ideal of accountability and fairness in the protection and vindication

---

[92] Asian Human Rights Commission, Indonesia: The Human Rights Situation in 2006, at 1.
[93] An Ad Hoc Human Rights Court Trisakti/Semanggi should be conducted, Radio Nederland, 18 June 2001, transcript at http://www.rnw.nl. (retrieved on 29 May 2011) "two police officers were tried by a military tribunal (the police was then part of the armed forces). Ten and four month sentences were imposed"; see Position Paper, *supra* note 40.
[94] Memorandum, Governmental Reforms to Re-attract Foreign Investment, Outside adviser # 609, 1 November, 2002, at 3, www1.spa.american.edu/mpacomp/indoa.pdf (retrieved on 6 June 2011).
[95] See U.S. Department, *supra* note no 87; see also, I. Parlina, *Antigraft body arrests bankruptcy judge for bribery*, The Jakarta Post, 3 June 2011; see also, C. Pasandaran, *Indonesia Bribery Scandal Judge To Quit*, Jakarta Globe, 18 December 2010; see also, *Former Judge Ibrahim Faces 12 Years Jail Term over Bribery Case*, Indonesia Today, 19 July 2010; *Prosecutor Cirus Vows to Challenge Indictment*, The Jakarta Post, 6 June 2011; see also, *11 Judges Reported to Supreme Court for Reprimand*, The Jakarta Post, 13 August 2009.
[96] See Asian Human, *supra* note 92.
[97] The result of TGPF has not officially investigated by the police or prosecutor; although institutionally they were part of the members of TGPF.
[98] Amnesty International ASA 21/017/1994, *Indonesia: Power and Impunity: Human Rights under the New Order*, 1994, http://www.unhcr.org/refworld/docid/3ac6a9b9c.html%20.

of rights and prevention and punishment of wrongdoing"[99] have not yet been fulfilled. Justice supposedly implies regard "for the interests of victims and for the well-being of society at large" but in Indonesia justice is still distributed among selected people.

The violation of human rights is being violated repeatedly by the state agents without proper prosecution. From *Trisakti* to Semanggi 2 the government has allegedly committed crimes against humanity. The government was thinking that they could do whatever they wanted, because a national court would not be able to prosecute them. Is there any other mechanism to prosecute the government when it violates its citizens' rights? After the victims of human rights abuses have exhausted the possibility of finding a local remedy, they still cannot get justice, so the question is where should they bring the case and claim, when Indonesia is not a state party to the International Criminal Court[100]?

### 2.3. Human Rights application in China

The application in China will be assessed in two periods before and after adopting human rights laws. Due to the absence of a National Human Rights Commission in China and of an official investigation into the case, the author's analysis is based on related articles in law journals and in newspapers about China and the Tiananmen case. When the author classifies the allegations against the Chinese government on the Tiananmen case it is clear that crimes against humanity were committed. This is based on the large-scale killing, the definition of the crimes, the targeted group as the object of the governmental policy that condones widespread or systematic violations of human rights[101]. The author realizes that China is not a member of the International Criminal Court[102] and the national human rights systems are not well installed, so it is difficult to protect the victims of massive human rights violations, for instance, in the Tiananmen case. In contrast, the protesters at Tiananmen Square have arbitrarily been put in jails while the officials have never been investigated for the killing, torture and finally faced prosecution. China strongly maintains that human rights are a domestic problem and no one can intervene in

[99] See Ambos, *supra* note 23, at 22.
[100] http://www.icc-cpi.int/Menus/ASP/states+parties/
[101] Taulbee, International Crimes and Punishment, A Guide to the Issue, 2009, at 16.
[102] See *supra* note 100.

these affairs[103]. If this reason is being used to keep on violating its citizens' rights then the question is where should the victims bring their claims for prosecution and justice? The national system is not adequate to protect their rights although the constitution clearly lays down human rights protection.

### 2.3.1. The human rights condition before adopting human rights law
### 1.3.1.1. The 1978 Constitution

China has had the 1954, 1975, 1978, and 1982 Constitutions. This thesis will begin by discussing the 1978 Constitution, although the 1978 Constitution was not the first Constitution to adopt traditional civil rights. However, the 1978 Constitution was the first Chinese Constitution after experiencing the chaotic cultural revolution[104]. Civil rights were covered by the 1978 Constitution, like the freedom of speech [...] and of demonstration[105]; no act of arrest, except by court decision under Article 47; the right to work under Article 48; the right to rest under Article 49; the right to education under Article 51[106]; the right to lodge complaints against state personnel and there was a right of appeal to higher levels if unsatisfied under Article 55 of the 1978 Constitution[107].

However, the application of civil rights in the 1978 Constitution was only the rights of the bourgeoisie and the proletariat's rights were being deprived by the means of production[108].

### 2.3.2. The human rights condition after adopting human rights law

China started to ratify the International Convention on the Elimination of All forms of Racial Discrimination on 29 December, 1981 and adopt the law in 1982[109] within the

---

[103] Ping, *Human Rights and Sovereignty*, AFAR, 2002.
[104] Kim, *The 1978 Constitution of the People's Republic of China*, 2 Hastings International Law and Comp. L. Rev. 251 (1979), at 276; see also Meisner, Mao's China, A History of the People's Republic, 1977, at 309 – 338; see also Zhenghui & Zhenmin, *The Developing Human Rights and Rule of Law in Legal Philosophy and in Political Practice in China, 1978-2000*, Jura Gentium I (2005), at 1.
[105] The 1978 China's Constitution, Article 45.
[106] Heer, *The 1978 Constitution of the People's Republic of China*, Vol. 4 1978, pp 309-322, at 318 – 319.
[107] See Kim, *supra* note 104, at 278.
[108] Guangming Ribao commentator, *Notes on the Human Rights Question*, Beijing Review, 1979, at 17.

Constitution. A series of human rights laws have followed to be ratified, for example, the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment of Punishment on 4 October, 1988[110] as well as the amendment of Article 17 (7) and 18 (5) of the torture convention on 10 July, 2002[111]; International Covenant on Economic, Social and Cultural Rights on 27 March, 2001[112], but China has not ratified the optional protocol to the International Covenant on Economic, Social and Cultural rights[113] as well as the International Covenant on Civil and Political Rights and the optional protocol[114]. Like in Indonesia, an international convention once ratified by the legislature, becomes part of the legal system in China and the conventions are lower than the constitution, but equal to domestic law[115].

### 2.3.2.1 The 1982 Constitution

The 1982 Constitution has started to adopt human rights under Chapter II[116], for instance, religious freedom[117]; no citizens may be arrested without the decision of a people's court and unlawful detention or restriction of citizens' freedom is prohibited[118]; freedom from insult[119]; citizens have the right to criticize and make suggestions regarding any state organ or functionary, make complaints or charges against any state organ for violation of the law or dereliction of duty and any state organ concerned must deal with complaints,

---

[109] M. Wan, *Human Rights Lawmaking in China: Domestic Politics, International Law, and International Politics*, Human Rights Quarterly 29.3 (2007) 727 – 753.
[110] United Nations Treaty Collection, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en (retrieved on 4 June 2011).
[111] United Nation Treaty Collection, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9-a&chapter=4&lang=en (retrieved on 4 June 2011).
[112] United Nations Treaty Collection, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (retrieved on 4 June 2011).
[113] United Nations Treaty collection, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en (retrieved on 4 June 2011).
[114] United Nations Collection, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (retrieved on 4 June 2011).
[115] See M. Wan, *supra* note 109.
[116] 1982 the Constitution of the People's Republic of China.
[117] *Id.*, Article 36.
[118] *Id.*, Article 37.
[119] *Id.*, Article 38.

then citizens who have suffered losses as a result of infringement of their civic rights by any state organ have the right to compensation[120]; while citizens are exercising their freedoms and rights, they may not infringe upon the interests of the state, of society or of the collective, or upon the lawful freedoms and rights of citizens[121]. Like many other constitutions, China's Constitution has also provided a guarantee for the citizens that all citizens are equal before the law[122]. The citizens also have the right to enjoy freedom of speech, of the press, of assembly, association, procession, and demonstration[123].

However, the government did not fully apply this obligation; the contradicted application can be seen in the Tiananmen massacre on 4 June, 1989. How can the promise of the constitution be fulfilled that it provides rights' protection and the remedial rights for governmental misconduct per Article 41 of the Constitution[124] while the events and actors of Tiananmen massacre have never been brought to justice and the victims have never received their remedial rights? This sub-chapter describes how the Chinese government responded to the Tiananmen massacre and rejected the remedy for the demonstrators and declined an impartial investigation. Unlike in Indonesia, the demonstrators in China have been prosecuted arbitrarily.

#### 2.3.2.2. The Peaceful Demonstration in the Tiananmen Square

In May, 1989, the government of China opposed a lot of demands to reform the governance system in terms of economy and politics[125]. The students also called for democratization in China. The protesters paralyzed Beijing, China[126]. The demonstration had spread to other cities in China, including Shanghai, Guangzhou, Xian and Chengdu[127] and involved an estimated one hundred million people[128]. The government

---

[120] *Id.*, Article 41.
[121] *Id.*, Article 51.
[122] *Id.*, Article 33.
[123] *Id.*, Article 35.
[124] Report to the United Nations on Human Rights in China, HRI/CORE/1/Add.21 (1993).
[125] Benjamin, *State of Siege: With Tiananmen Square The Epicenter, a Political Quake Convulses China,* Time, 29 May 1989, at 36.
[126] Elson, *China: Backed by the Army and Deng Xiaoping, Beijing's Hard Liners Win the Edge Over Moderates in a Closed-Door Struggle for Power,* Time, June 5, 1989, at 20.
[127] Talbott, *Defiance,* Time, 19 June 1989, at 10.
[128] R. Gunde, *Remembering the Carnage in Tiananmen: June 4, 1989,* a Forum at UCLA analyzes the legacy of Tiananmen and UCLA's Richard Baum interviewed on CNN.

was in panic and they warned the protesters that they would do whatever it was necessary to clamp down on what it described as "social chaos"[129].

Not only did the government shoot the protesters, but they were also arrested,[130] tortured and executed[131]. The most targeted people were the organizers of the demonstration and they were included in the list of the Chinese authorities' manhunts. The Chinese government labeled the protesters as "counter-revolutionaries" or "a planned conspiracy and a disturbance"[132]; although the protesters were not carrying any dangerous weapons when they went on strike and they were only exercising their constitutional rights under Article 35; moreover, they did not want to overthrow the government. They wanted to express their opinions, criticize government policy and suggest political reform as protected under Article 41 of the Constitution. The reformist group has been stigmatized by the government using the offence of "counter-revolutionaries[133]" so that the government had a legitimate reason under Chinese Criminal Law and martial law[134] to repress and forbid the reformist group[135].

### 2.3.3. Transitional Period

Despite several times experiencing transitional periods[136], this thesis will focus on analyzing the transitional period of China after the Tiananmen tragedy, because since then the international community has lodged many objections concerning the Chinese government's policy on handling the case, and the government has tried to meet the expectations of the international community.

---

[129] 1989: Massacre in Tiananmen Square, BBC, http://news.bbc.co.uk/onthisday/hi/dates/stories/june/4/newsid_2496000/2496277.stm (retrieved on 3 June 2011).
[130] G. Clark, *The Tiananmen Square Massacre Myth*, The Japan Times, 15 September, 2004.
[131] See 1989, *supra* note 129.
[132] Editorial, *It Is Necessary To Take a Clear-Cut Stand Against Disturbance*, Renmin Ribao, 26 April 1989, in Foreign Broadcast Information Service, Daily Report: China, 25 April 1989, at 24. the editorial was televised nationally on the evening news on 25 April 1989. Document 25 cited in M. Manion, Reluctant Duelists the Logic of the 1989 Protests and massacre, (1990) at xiv – xx.
[133] Criminal Law of the People's Republic of China, adopted at the Second Session of the Fifth National People's Congress on July 1, 1979, Article 100; see also Amnesty International, *Document – People's Republic of China: Nine Years After Tiananmen, still a "Counter-Revolutionary Riot"?*, ASA 17/11/1998.
[134] See the Constitution, *supra* note no 116, Article 89 (16).
[135] Lee & Copper, *Failure of Democracy Movement: Human Rights in the People's Republic of China, 1988-1989*, Contemporary Asian Studies, School of Law University of Maryland, Number 2, 1991, at 19.
[136] Chen, Chinese Law: Context and Transformation, 2008, at 23- 39.

Under pressure from the international community, and the development and involvement in the domestic and global market economy, China initiated the development of a legal system with fundamental change and transition. It led China to amend the 1982 Constitution in 1999 and again in 2004. In the 2004 Constitution amended Article 33 says that the state respects and preserves human rights and it is implied to the rule of law and integrated with democratic politics and human rights protection. Several changes have been made by the government for instance:

1. in 1990, "Administrative litigation law" the law that regulates the behaviors of the administrative and law enforcement agencies to prevent the lawful rights of citizens from being infringed. Additionally, "the Regulation on Administrative Reconsideration" the auxiliary regulation to the law. It established the system that public organizations support citizens to bring lawsuits and the system of protection of rights of action.
2. in 1994 China enacted the State Indemnity Law and the state has established the committee to hear such cases. If the state agents illegally injure the rights and interests of a legal person or organization while they are performing their functions, the victims shall be entitled to obtain the state's indemnity.
3. in 1997, the government revised the Criminal Code and added the principle of '*nulla poena sine lege*", "equal protection under the law" and "the punishment fitting the crime", the "crimes of counter-revolution" in old criminal law which were political and ideological in nature were replaced by "crimes endangering national security"[137].

The efforts to restructure the judicial system in order to adopt human rights have remarkably succeeded; however, the changes in its human rights discourse are to gain concrete material benefits and maintain its control over domestic society[138]. Despite those reformations, there has been no change in the state's system of democratic centralism; and adopting separation of state power; abolishing Article 51 of the Chinese Constitution and establishing the national human rights commission, which has the authority to investigate the human rights abuses are meaningless.

---

[137] See Zhenghui, *supra* note 104.

[138] Chen, *Explaining China's Changing Discourse on Human Rights, 1978-2004*, Asian Perspective, vol. 29, No. 3, 2005, pp. 155 – 182, at 160.

### 2.3.4. The legal analysis of the Tiananmen case and transitional period

There are uncertain numbers of victims because the government has never conducted an impartial investigation into the tragedy[139]. The Chinese government in relation to the Tiananmen case allegedly committed prosecution, torture and arbitrary detention directed against civilians[140]. When tanks rumbled on 3 June, 1989 through the main streets and the army moved forward to the square from several directions and started to use force against the protesters from Tiananmen Square on 4 June, 1989. The Chinese authorities then started to shoot at the protestors. It was estimated that thousands of students and workers were massacred[141], those attacks were systematic attacks directed against its civilians[142]. Those commissions allegedly constitute crimes against humanity. Premier Li Peng and President Yang Shangkun adopted martial law on 20 May, 1989, several days before the massacre in order to legalize their attack on the protesters. Following the adoption of martial law, the government imposed the law and troops occupied Beijing and started to kill. The adoption of martial law, the government announced it would strictly deal with the demonstrators [143], and selecting the targeted group as the object of the policy fulfilled the element of crimes against humanity, while the element of knowledge was found when the troops killed, tortured and detained the protesters[144] as part of national policy, and they knew the consequences of their conducts against civilians who were supposedly protected.

After the tragedy in October, 1989, the government passed the Law Governing Public Gathering Rallies and Demonstration which banned public gatherings and demonstrations[145] and this law was contradicted with the Article 35 and 41 of the 1982 Constitution.

---

[139] See Lee, *supra* note 135 at 15 – 17.
[140] *Id.*, at 22.
[141] Bowie, W. Dullea, *Effect of the Tiananmen Square Massacre upon Negotiations for the Draft Basic Law of the Hong Kong Special Administrative Region, The*, Journal International Law, 245 (1989-1999), at 246.
[142] 1998, Rome Statute of the International Criminal Court, 2187 UNTS 3, Article 7.
[143] See Lee, *supra* note 135 at 18 – 22.
[144] *Id.* at 36.
[145] *Id.* at 23.

Although the right to live is not secured under the constitution still the government could not sponsor the mass killing[146] of 20,000 people in Tiananmen using "the fragmentation bullets which are banned under international conventions"[147] because the protesters were exercising their rights under Article 41 of the Constitution to criticize the policy and under Article 35 of the Constitution to exercise their freedom of speech and demonstration.

The constitution does not secure the rights of its citizens subject to torture, but China has ratified the Convention against Torture and China is bound to fulfill its obligations under Article 2 and 4 of the Convention. Under Article 14 of this Convention and Article 41 of the Constitution, China also has the obligation to pay compensation to the victims and the obligation to prosecute the perpetrators under Article 4 of the Convention. The government also denied that the soldiers fired directly at non-dangerous protesters[148] and refused to bring the case before a national court[149] then declined to give compensation to the victims. The government denial violated Article 41 of the Chinese Constitution[150] and Article 4 as well as Article 14 of the Convention.

For the conduct of arbitrary detention, the government allegedly infringed their obligation under Article 37 of the Constitution.

The decision to reform the legal system in the transitional justice period was not focused on the interests of victims and society at large and was not followed by the installation of the human rights mechanisms to monitor, investigate, and prosecute the perpetrators. This condition made the transitional justice system unable to achieve solutions and justice for the victims.

The rights provisions within the Chinese Constitution – especially the rights to speech, [...] and demonstration are empty promises, because the protected rights without an independent mechanism for the redress of the rights violations, or for the review of lower-level regulation that may violate the constitution[151] are ineffective as the state

---

[146] H. Cover, *Teacher Recalls Tiananmen Square Massacre*, Oxfordmail, 4 June 2009.
[147] *A Soldier's Story about the Tiananmen Square Massacre*, Asiannews, 19 March 2009.
[148] Smolowe, *Deng's Big Lie: The Hard-Liners Rewrite History to Justify Arrests and Bury Democracy*, Time, 26 June 1989, at 32.
[149] See A Soldier's, supra note 147.
[150] *Report to the United Nations on Human Rights in China*, HRI/CORE/1/Add.21 (1993).
[151] Kellogg, *Constitutionalism with Chinese Characteristics?: Constitutional Development and Civil Litigation in China*, 2008, Indiana University Research Center for Chinese Politics & Business, at 2.

declines the notion of the constitution as legally-binding and it is not a guideline for the government to govern the state. More importantly, all constitutional rights and freedoms may be infringed by the government if the government considers that the rights and freedoms may conflict with the interests of the state[152]. Article 51 of Chinese Constitution makes all rights and freedoms 'empty promises' because the state can declare that the rights and freedoms conflict with the state's interests, and the state's interests will be decided by the government without written documents that can be accessed by the people.

Highlighting the practice of the Chinese government is the fact that a few days before the attack they imposed martial law, this background illustrates that the state does not adopt the principle of the separation of power. In a democratic state the adoption of law is supposedly based on the power of the legislative organ; additionally, the prosecution and arbitrary detention of protesters were supposedly included in the powers of the judicative organs; the executive organ has controlled those powers in order to hold onto its power. The government has insistently abused its power through the law[153] and controlled judicative and legislative organs; China has chosen the principle of a democratic centralism under Article 3 of the Constitution. Democratic centralism means that all administrative, judicial, and procutorial organs of the state created by the people's congress to which they are responsible and are under whose supervision they operate[154]. This system has made it possible to repress its citizens' rights by means of state interests. China does not want to separate the state's power because the concept of the separation of power is a Western concept[155] and it does not fit with the system in China according to Article 3 of the Constitution. In China, the formal system would seem to prohibit the use of the constitution as a source of law by courts in adjudicating disputes.[156] This condition has created the situation where the national and international human rights protection are nothing because the government abused the law and it needs law enforcement above the state which would make it possible to better guarantee the protection of victims if the state abuses the system.

---

[152] See the Constitution, *supra* note no 116, Article 51.
[153] Amnesty International, *No One Is Safe, Political Repression and abuse of power in the 1990s, China*, 1996, at 9 – 30.
[154] See Kellogg, *supra* note 151, at 12.
[155] See Lee, *supra* note 135 at 57.
[156] See Kellogg, *supra* note 151, at 21.

International human rights laws have not been unbearable for Beijing since they have far weaker enforcement mechanisms than international trade laws.[157] International politics has had an indirect impact on Chinese human rights legalization. [158]

### 2.3.5. The lack of local remedy and the absence of government commitment to fulfill its human rights obligations[159]

Not only did the Chinese government impartially refuse to investigate the tragedy, but also the government refuses to provide a remedy for the victims. Ironically, the government prosecuted the demonstrators due to the violation of martial law and committing counterrevolution during the riots[160].

### 2.3.6. Conclusion

Although the international community has condemned the conduct and asked the Chinese government to adjudicate and investigate the case, China has been reluctant to accept the international intervention on human rights, because China thinks that human rights is a domestic affair and the intervention is Western policy "driven by power politics and expansion of influence"[161]; China prefers to resolve human rights problems through the self-correction mechanism rather than to follow the West's demands; however the self-correction for Tiananmen Square has never been done. China is still neglecting the obligation to provide a remedy to this case; peace may be in danger in China. China cannot develop a market-oriented economy without promoting, respecting and ensuring its citizens' rights[162].

---

[157] Wan, *Human Rights Lawmaking in China: Domestic Politics, International Law, and International Politics*, The Johns Hopkins University Press, Human Rights Quarterly 29.3 (2007) at 727-753.
[158] *Id.*.
[159] *Human Rights Commission Must Censure China*, 2000, http://www.hrichina.org/content/2735.
[160] Lewis, *China Is Said to Execute Some in Secret*, New York Times, 31 August 1989, at A3; see also See Lee, *supra* note 135, at 94 & 112.
[161] Jisi, *International Relations Studies in China Today: Achievements, Trends, and Conditions*, Institute of American Studies, Chinese Academy of Social Sciences, at 18.
[162] Zhao Qizheng, director-general of the State Council Information Office (SCIO), was being interviewed by the human rights magazine, *Different Views Between China and the West on Human Rights: Official*, 11 February 2002, http://english.peopledaily.com.cn/200202/11/eng20020211_90299.shtml.

The concept of sovereignty and the principle of democratic centralism make human rights protection endangered, while the number of human rights violations in China is increasing; is there any authority above the state that can give comprehensive human rights protection? The international mechanism of monitoring the application of human rights relies on the national system and the national system cannot protect them where the victims should bring their claims and where there is the absence of regional human rights court?

### 2.4. Concluding remark

The problems of human rights' application in Asia, such as in Indonesia and China are the national governments misuse of the judicial powers, no political will to undertake human rights obligations, and some senior officers are enjoying impunity from prosecution and detention. The culture of upholding impunity makes the violations possible to reoccur again because the perpetrators are unpunished.

Through the tragedies illustrated above, the practice of the Indonesian and Chinese governments constitutes crimes against humanity and it can be argued has become state practice in both Indonesia and China. Although, the states have adopted human rights laws, the practices of these states give the public the reminder of no change in their human rights protection. These States' practices tend to violate the citizens' rights. No one within Indonesia's and China's territories can claim that his or her rights have been violated by the states' agents and ask the government to be responsible for the violation; although the rights are protected under both the Chinese and Indonesian Constitutions.

China and Indonesia cannot uphold impunity because by upholding impunity China and Indonesia have violated their constitutions, which secure that everyone is equal before the law[163]. Indonesia and China have allegedly violated the *jus cogens* norms by repeatedly committing crimes against humanity. China and Indonesia have the international obligation to prosecute the perpetrators, because they allegedly infringed the highest norms of a civil society. If they failed to protect their citizens' rights, there is

[163] China's constitution under Article 33 and Indonesian constitution under Article 28 D (1).

justification for the international community to intervene in these nations' domestic affairs.

The remedial rights to the cases presented in this paper have not been provided yet, because the Chinese and Indonesian domestic judicial systems are inadequate to provide remedial rights. Chapter 3 will discuss where should the victims go to get their remedial rights as protected under international law and national law if the national systems cannot provide them? If there is a problem in the application of human rights and the national courts are incapable, who should solve the problem?

## Chapter 3

## The Need to Develop a Regional Human Rights Court in Asia

Whether the promise of the international community to waive respective "immunity of the state officials"[164] in the cases of gross human rights violations can be fulfilled? If adjudication can be carried out whether there is any mechanism that can be used?

### 3.1. Introduction

The failure of the Chinese and Indonesian governments to implement their human rights obligations under both their respective national and international laws gives a legitimate reason for the international community to encourage the leaders of Asia to establish an Asian human rights court [AHRC] because the national courts cannot provide justice to the victims. Whereas the current human rights treaties impose upon state parties the obligations to respect and ensure the human rights of their citizens. Beside those rights, there is the right of citizens to an effective remedy under international law. In order to avoid repeated gross human rights violations in Asia, the creation of an AHRC should be seriously considered by Asian countries. This court would have the power to render binding judgments and to award adequate reparations to the victims of human rights violations within the Asian region.

This chapter will discuss whether China and Indonesia are under obligation to adhere to international law? Whether there are any violations of international human rights committed by China and Indonesia? Can the international human rights mechanisms be applied in the Indonesian and Chinese conditions? What should be done regarding the problems in protecting the victims of gross human rights abuses in China and Indonesia? Whether there is any need to establish an AHRC?

---

[164] Dissenting Opinion of Judge Van den Wyngaert on Case Concerning the Arrest Warrant (Democratic Republic of the Congo v. Belgium), Advisory Opinions, Judgment of 14 February 2002, 2002 ICJ Rep. 837, para 23.

### 3.2. The States' obligations under International Law

Under international law there are two concepts of the international obligations that are *erga omnes*[165] and *jus cogens*[166] and human rights norms are a part of *erga omnes* and *jus cogens*, although not all human rights law is covered under those rules. Even though the existence of those concepts is in no doubt; many states have remained reluctant to accept those concepts[167]. In the *Anto Furundzija* case[168] it was stated that the prohibition of torture is a nation's obligation *erga omnes*[169] and the principle prescribing to torture relates to the hierarchy of rules in the international normative order, because of the importance of the values it protects, this principle has evolved into a peremptory norm or *jus cogens*[170].

The duty of the state is to bring the perpetrators to justice[171]. "Everyone has the right to a just and effective solution overseen by competent national tribunals for acts

---

[165] *Barcelona Traction, Light and Power Company, Limited* (New Application: 1962), Belgium v. Spain, Judgment of 5 February 1970, ICJ Reports 3, Para. 33; see also *East Timor* (Portugal v. Australia), Judgment of 30 June 1995, 1995 ICJ Reports 90, para 29; see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Bosnia and Herzegovina v. Serbia and Montenegro, Preliminary Objections, Judgment of 11 July 1996, 1996 ICJ Reports 595, para 31; see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, 2004 ICJ Reports 136, para. 159.

[166] *Al-Adsani v United Kingdom* (App. No. 35763/97), ECtHR, Judgment of 21 November 2001, 2002, 34 EHRR 11, ECHR 2001-SI, para. 61; see also *Prosecutor v. Furundžija*, ICTY-95-17/1-T, Judgment of 10 December 1998, reproduced in 38 ILM (1999) 317, para. 153; see also The General Comment No. 24 on "Issues relating to reservations made upon ratification or accession to the Covenant [on ICCPR] or the Optional Protocol thereto, or in relation to declarations under Article 41 of the Covenant", issued on 4 Nov. 1994 by the United Nations Human Rights Committee, para. 10; see also Case T-315/01, *Kadi v. Council of the European Union and Commission of the European Communities* (CFI 21 September 2005), para. 226; although the ICJ has reluctant to rely on *jus cogens* in the judgments, for example, the separate opinion of Judge ad hoc Dugard in *Armed activities on the Territory of the Congo* Democratic Republic of the Congo v Rwanda, Judgment of 3 February 2006, 2006 ICJ Reports 6; *Arrest Warrant of 11 April 2000*, Democratic Republic of the Congo v Belgium, Judgment of 14 February 2002, 2002 ICJ Reports 3, para. 58; cited in M. T. Kamminga & M. Scheinin, *The Impact of Human Rights Law on General International Law*, Oxford, 2009, at 6-7.

[167] M. T. Kamminga, *Final Report on the Impact of International Human Rights Law on General International Law*, in M. T. Kamminga & M. Scheinin, *The Impact of Human Rights Law on General International Law*, Oxford, 2009, at 4-5.

[168] *Prosecutor* v. *Anto Furundzija*, *supra* note 166.

[169] *Id.*, para 151.

[170] *Id.*, para 153.

[171] C. Edelenbos, *Human Rights Violations: A Duty to Prosecute?* Leiden Journal of International Law, Volume 7 Issue 02 (1994) pp 5-21 at 6.

violating the fundamental rights granted to him or her by the constitution or by law[172]" and the human rights protection of a country's citizens is *erga omnes* obligation[173]. More importantly the Universal Declaration is broader as the right to a remedy for violations of fundamental rights, presumably including the right to life and freedom from torture and arbitrary detention.[174]

The obligations of states to maintain human rights under international law are to respect and to ensure respect[175] for the rights, 'to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races'[176], 'to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction'[177], and to 'make these offences – all acts of torture – punishable with and by appropriate penalties'[178], to 'ensure its competent authorities proceed to a prompt and impartial investigation'[179], and to ensure the victims have the right to complain to and to have their cases promptly and impartially examined by competent authorities[180]. Moreover, a state has obligations to investigate and prosecute grave human rights violations as remedial recognition; those obligations should be imposed in order to avoid continuing cycles of violence or repression, and this is clearly stated in customary international law[181].

A state has the 'responsibility to protect the population from genocide, war crimes, ethnic cleansing and crimes against humanity'. "The international community through the UN has the responsibility to use appropriate diplomatic, [...] and other peaceful means in accordance with Chapter VI and VIII of the UN Charter, to help to

---

[172] 1948, Universal Declaration, G.A. Res. 217, U.N. Doc. A/810, Article 8; see also Arriaza, Impunity and Human Rights in International Law and Practice, 1995, at 32; see also T. Burgenthal, International Human Rights (1988) at 29-33.
[173] A.A.C. Trindade, Universal Declaration of Human Rights, 1948.
[174] N. R. Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, California Law Review, Vol. 78: 449, 1990, at 475.
[175] Common Article 1 The Geneva Convention, 1949, *Convention (1) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, 12 August 1949; see also 1966 International Covenant on Civil and Political Rights, 999 UNTS 171, Article 2.
[176] 1965, the International Convention on the Elimination of all Forms of Racial Discrimination, 660 UNTS 195, Article 2.
[177] 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, Article 2 (1).
[178] *Id.*,Article 4 (2).
[179] *Id.*, Article 12.
[180] *Id.*, Article 13.
[181] See Arriaza, *supra* note 174, at 452 – 453.

protect population" from such crimes. Those responsibilities were recognized by the UN General Assembly in the World Summit Outcome in 2005[182]. After this recognition, the UN Security Council reaffirmed it by passing motion to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity[183].

The principle *aut dedere aut judicare* – extradite or prosecute - has been included in the Convention on the Prevention and Punishment of the Convention Against Torture[184]. The treaty provides a basis for an emerging consensus among the international community that human rights violations must be investigated and prosecuted. The *Prosecutor v. Furundžija* case concluded that the rights of humans are not to be subjected to torture, summary execution, or disappearance. These conditions emanate from customary law, and give rise to the obligations followed by each state within the international community as a whole[185].

In conclusion, China and Indonesia under international law should have the obligations to bring the perpetrators of human rights violations to justice including to investigate and prosecute grave human rights abuses; to ensure that victims have the rights to complaint and receive effective remedy from its competent authorities, to take appropriate steps through international cooperation in order to make the offences of all acts of torture punishable; and to protect populations from international crimes.

### 3.3. The legal analysis of violation of states' obligation under International Law

Although, the prosecution for the violations of human rights are tacitly encouraged on behalf of governments either in an internal armed conflict in the countries themselves, or for the maintenance of power by a dictatorial regime, the practice is inconclusive. The practice of states has not demonstrated to reflect the existence of an obligation under international law to prosecute the perpetrators of gross violations of human rights. However, international law and its interpretation are evolving in the direction of an

[182] General Assembly Resolution 60/1 (2005), A/RES/60/1, paras. 138 – 139.
[183] Security Council Resolution 1674 (2006), Protection of Civilians in Armed Conflict, para. 4.
[184] GA Resolution 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984).
[185] See *Barcelona Traction, supra* note 165; see also Restatement (Third) of the Foreign Relations Law of the United Sates, section 702, comment n and reporter's note 11; T. Franck, The Power of Legitimacy among Nations (New York: Oxford University Press, 1990); cited in Arriaza, supra note 172, at 6; see also *Prosecutor v. Anto Furundzija, supra* note 166, para., 151. .

effective redress for human rights violations, thereby making it increasingly difficult for states to deny the existence of a legal obligation to prosecute[186], therefore China and Indonesia should not distance themselves from their obligations to apply mechanisms to solve past crimes against its citizens.

The practice of committing torture that amounts to crimes against humanity is claimed to be sponsored by some state officials in Indonesia and China violates the *erga omnes, jus cogens* norms, Article 2 (1), Article 4 (2), Article 12, 13 and 14 of the Convention against Torture. Additionally, Indonesia and China have violated the obligations under customary international law on investigating and prosecuting the commissions of crimes against humanity, as well as on providing remedial rights for the victims. The violation of the *erga omnes* obligation "constitutes a breach of the correlative right of all members of the international community and gives rise to the claim for compliance accruing to each member of society, who then has the right to insist on the fulfilment of the obligation or to call for the breach to be discontinued"[187].

Since the *Pinochet* case[188] there has been the development in International law to waive the immunity from prosecution when concerned with international crimes. This was noted by Lord Browne Wilkinson after recognizing that torture on a large scale is a crime against humanity. In the *Pinochet* case it was stated that "the prohibition of torture become 'a fully constituted international crime' only by the adoption of the Convention against Torture, which set up a 'worldwide universal jurisdiction' and held that the notion of continued immunity for official states is inconsistent with the provisions of the Convention against Torture and torture cannot be a state function[189]; therefore the practice of China and Indonesia to uphold immunity is in conflict with the Convention against Torture and the alleged Torture was not part of the state function.

According to Lord Millet commenting on the *Pinochet* case[190], if the wrongful act violates *jus cogens*, customary international law authorizes universal jurisdiction in respect of international crimes and as stated by Lord Phillips, Lord Millet, and Lord Hope,

---

[186] See Edelenbos, *supra* note 171, at 16.
[187] See *Anto Furundzija* case, *supra* note 166, para. 151.
[188] Ex Parte Pinochet (Respondent) (On Appeal from a Divisional Court of the Queen's Bench Division) (No. 3), Judgment of 24 March 1999, reported as R. v. Bow Street Stipendiary Magistrate and others ex parte Pinochet Ugarte (Amnesty International and other intervening) (No. 3), 1999, 2 All E.R. 97.
[189] A. Bianchi, *Immunity versus Human Rights: The Pinochet Case*, EJIL, 1999, Vol. 10 No. 2 at 244-245.
[190] *Id.*; see also the First Pinochet Case: Immunity of a Former Head of State (1999) 48 I.C.L.Q 207 – 216.

the prohibition of torture has the character of *jus cogens*[191] as well as crimes against humanity. This means Indonesia and China under customary international law violates *jus cogens* and universal jurisdiction can be applied on China and Indonesia allegations.

Additionally, dissenting opinion from Van den Wyngaert on the *Arrest Warrant* case[192] stated international law encourages states to investigate allegations of crimes against humanity, even if the alleged perpetrators hold an official position in another state[193]. The judge also wrote "where [...] crimes against humanity are concerned, immunity cannot block investigations or prosecutions to such crimes, regardless of whether such proceedings are brought before national or before international courts".[194]

To conclude, this is similar with the Indonesian and Chinese courts, which are unable and unwilling to try the perpetrators even though it is clear that China and Indonesia are under those obligations to adhere to international law; therefore, international cooperation is needed to take proper steps to effectively punish offences of torture. International cooperation can be exercised through the UN and the ASEAN to create an impartial and independent AHRC that has universal jurisdiction to prosecute the commissions, as Indonesia and China have violated *jus cogens*. Not only have Indonesia's and China's practices breached international obligations, but also they have infringed on both these nations' obligation to protect their citizens under their constitutions and national laws. If the violations have never been brought to justice, they are likely to reoccur in the future, because the perpetrators are unpunished. This condition raises the question, what international mechanism can be used to bring the cases to court and to reach a satisfactory and fair solution?

---

[191] Hamid & Kadouf, *Immunity versus International Crimes: the Impact of Pinochet and Arrest Warrant Cases*, IJIL, Vol. 46, No. 4 (2000), 495-516, at. 504.
[192] See the Arrest Warrant case, *supra* note 164.
[193] *Id.*, para 10 at 143.
[194] *Id.*, para 31 at 158.

### 3.4. International mechanisms

When dealing with crimes against humanity, the International Criminal Court[195] [ICC] has the jurisdiction to prosecute[196] the perpetrator individually[197]; however in the condition of Indonesia and China, the ICC does not have jurisdiction because they are not parties to the Rome Statute[198] and the tragedies occurred before the Statute was entered into force[199].

Treaty bodies are not judicial organs that have the power to adjudicate a state if a state violates its obligations; the treaty bodies cannot enforce a state to fulfill its obligations. They have jurisdiction only for monitoring and encouraging state parties to the conventions to uphold and implement the international obligations. They have limited power[200]. The notion of those treaty bodies is to prevent the human rights violations, and when there are human rights violations those treaty bodies cannot award enforcement mechanisms or punishment of wrongful acts. In the Chinese case[201] when China denies the recommendation from the Human Rights Council, there is no enforcement mechanism to put into effects their recommendation; therefore, international monitoring human rights mechanisms need to be strengthened by establishing a mechanism that can guarantee the application of human rights obligations to be fully implemented. Additionally, China has made the reservation that China does not recognize the competence of the Committee against Torture as provided under Article 20 of the Convention against Torture. The Chinese position makes it difficult for the Committee to monitor the Chinese government when they apply their obligations under the Convention against Torture.

---

[195] See Rome Statute, *supra* note 142.
[196] *Id.*, Article 5.
[197] *Id.*, Article 1.
[198] *Id.*,, Article 14 (1).
[199] *Id.*,, Article 11 (1); the Statute entered into force on 1 July 2002.
[200] C. Breen, *The Necessity of a Role for the ECOSOC in the Maintenance of International Peace and Security*, Journal of Conflict & Security Law (2007), Vol 12 No. 2, 261-294.
[201] http://www.ohchr.org/EN/HRBodies/UPR/Pages/Highlights9February2009am.aspx, *Universal Periodic Review, 9 February 2009* (retrieved on 20 May 2011).

In conclusion, there are no other international mechanisms that have the jurisdiction to adjudicate the cases. Should the international community consider encouraging the Asian leaders to establish an AHRC?

### 3.5. The need to establish an AHRC

In the cases of China and Indonesia there are no other international mechanisms that can be used to adjudicate the cases, as a consequence, the promise made by the international community cannot be fulfilled; it can be fulfilled unless the international community promotes the establishment of an AHRC. The international community may play a significant role in the establishment of an AHRC through the General Assembly[202]. The GA may appoint the Secretary General to take a diplomatic approach with the Chairman of ASEAN to hold an ASEAN Summit in order to decide on the establishment of an AHRC. The Secretary General may individually approach all Asian leaders to support and assist the establishment of an AHRC. As declared in the World Summit, all countries have committed to help a state to build its capacity to protect their populations from gross human rights violations. In this case the assistance of all countries may be developed through capacity building projects of creating the judicial system of an AHRC.

Since some Asian countries have committed torture[203] and they violate *jus cogens*. The development on international law means that the term, "The King can do no wrong", especially for gross human rights violations, is now being excluded from international law[204], for example, in the *Pinochet* case.

Asian countries, for instance, China and Indonesia, have violated the *erga omnes* obligation, because they committed the commission of torture so that the international community has the rights to insist on the fulfillment of the obligation and to call for the breach to be discontinued. Moreover, they infringed *jus cogens* that the principle cannot be derogated from by states through domestic customs[205].

---

[202] See *supra* note 182, para 139.
[203] See *supra* note 2, 3, 4, 5, 6, 7, 8, 9, 10.
[204] Pellet & Olleson, The Law of International Responsibility, 2010, at 4.
[205] See *Anto Furundzija* case, *supra* note 166, para. 153.

China and Indonesia have the obligation to take appropriate steps through regional cooperation in order to make all commissions punishable by law. If ASEAN decides to set up an AHRC to render binding judgments, they cannot reject any decision, which is subsequently made.

The establishment of an AHRC will help to achieve the purpose of international human rights to protect and ensure citizens safety within this region. Learning from the practices of China and Indonesia, many Asian people cannot get protection from their own governments. This is in contrast to the fact that Asian governments have the obligation to protect their citizens from gross human rights violations. If the incumbent fail to protect, at least there is one regional human rights mechanism that can reassure the protection of Asian people's rights by peaceful means in accordance with Chapter VI and VIII of the UN Charter[206] . Establishing an AHRC will support the activities of ASEAN in maintaining peace and security in Asia, as well as consisting with the Purpose and Principles of the UN.

An AHRC is a human rights court that has the power to adjudicate the commissions of gross human rights violations committed by states in Asia and violations of human rights law. This court can be established through a regional body in Asia and the regional body in Asia is ASEAN. Regarding the fundamental duties of ASEAN[207] these are maintaining peace, security and democracy through the region and Article 1 (7) and Article 2 (2) (i) of the ASEAN Charter[208] [Charter] declare that member states should promote and protect human rights. To make ASEAN more powerful to maintain peace, security and democracy can be achieved by establishing an AHRC. An AHRC can support ASEAN activities in promoting and protecting human rights as it:

1. provides member states and their people with more accessible mechanisms for the protection of human rights, once national remedies have been exhausted;
2. raises people's awareness of their rights and places them in a more localized context and reflects their particular human rights concerns;

---

[206] 1945 Charter of the United Nations, 892 UNTS 119.
[207] D. K. Emmerson, *Critical Terms: Security, Democracy, and Regionalism in Southeast Asia*, Center on Democracy, Development and the Rule of Law, Stanford University, the USA at 19.
[208] The ASEAN Charter, http://www.asean.org/publications/ASEAN-Charter.pdf (retrieved on 25 June 2011).

3. to strengthen international human rights mechanisms;
4. helps member states to better address human rights concerns that cross borders, for example, transnational crimes and environmental disasters;[209]
5. assists national governments to fulfil the objective of human rights laws;
6. supports the community to maintain peace and security and to provide justice.

### 3.5.1. Political will of the member states of ASEAN

It was reported by the UN World Conference on Human Rights in June, 1993 the conference declared 'in support of the Vienna Declaration and Program of Action of 25 June, 1993. They agreed that ASEAN should also consider the establishment of an appropriate regional mechanism on human rights' [210]; therefore, the problem of monitoring the human rights violations in Asia will be solved by giving the opportunity to individuals in Asia to lodge a complaint(s) to an AHRC.

Article 14 of the Charter provides justification for the member states to establish an AHRC. To establish an AHRC is possible, because the ASEAN Intergovernmental Commission on Human Rights (AICHR) was established on 23 October, 2009 during the 15th ASEAN Summit; however, the AICHR is not a judicial body and it only has the same roles as the Human Rights Commission. That means there are no enforcement mechanisms. By learning the process of establishing the AICHR, an AHRC is likely to be created.

The proposal to set up an AHRC has been discussed among ASEAN members and there is the political will of the member states to set up a regional human rights mechanism. This can be seen within the Bangkok Action Points adopted by member states on 23 April, 2010. As emphasized by Mr. Muntarbhorn that national, regional and international systems are needed for the promotion and protection of human rights in Asia[211].

---

[209] United Nations Human Rights, Regional Office for South East Asia, http://bangkok.ohchr.org/programme/regional-systems.aspx.
[210] Joint Communiqué of the Twenty-Sixth ASEAN Ministerial Meeting, Singapore, 23-24 July 1993.
[211] UN Doc. A/HRC/15/39, (2010).

The ASEAN leaders need to get the support and encouragement from the international community. The participation of the UN is needed to reaffirm the proposal of ASEAN and move the proposal forward into the realization of setting up the court. Although Australia is not a member of ASEAN, Australia supports the notion of establishing an AHRC and other candidates are New Zealand, the Pacific Islands, Southeast Asian countries, for instance, Thailand and Indonesia[212] while Malaysia and the Philippines are possible candidates by looking at the joint position paper – formal discussions on the establishment of AIHRC took place in Jakarta on 27 August, 2009.

### 3.6. The practical preparation

In order to set up an AHRC there are some important preparation steps to be taken, for instance prior to establishing an AHRC, ASEAN Summit as the supreme policy-making body of ASEAN[213] should conduct a special meeting to decide on the establishment of an AHRC; to appoint a group of experts to prepare an Asian Human Rights Statute [AHRS]; and to adopt it which should be in accordance with the international human rights treaties. An AHRS should be attached as an Annex of the Charter and it is an integral part of the Charter. The ASEAN Foreign Ministers Meeting shall develop the terms of reference[214] for an AHRC. A group of experts that is appointed by the ASEAN Summit shall work in collaboration with the ASEAN Foreign Ministers[215]. A proposal of the Charter amendment should be submitted by the ASEAN Coordinating Council by consensus to the ASEAN Summit[216] and the amendment shall be ratified by all member states[217].

If there are states that want to be members of ASEAN, under Article 6 of the Charter, the membership of ASEAN can be enlarged, but if the location of a state is not in the Southeast Asia, so that the Article 6 (2) (a) of the Charter should be amended. Article 14 of the Charter should be amended by stating an AHRC should be a principal

---

[212] Asia Pacific Human Rights Mechanism Submission, www.law.monash.edu.au/castancentre/.../hrs-mech-asia-pacific-sub.2.pdf (retrieved on 29 June 2011), at 2 & 9.
[213] *Supra* note 205, Article 7 (2) (a).
[214] *Id.*, Article 14 (2).
[215] *Id.*
[216] *Id.*, Article 48 (2).
[217] *Id.*, Article 48 (3).

judicial organ of ASEAN, therefore it should be an independent[218] and impartial judicial organ then it is free from political intervention from the states' interests.

Since in Asia there are many violations of torture[219] and some commissions of international crimes[220], the jurisdictions of the court are violations of human rights law and gross human rights violations committed by state agents in Asia, in respect to the application of, and interpretation or any questions of AHRS. For the interpretation of AHRS, states in Asia can submit an application to an AHRC. Concerning the violation of AHRS and gross human rights violations, individuals in Asia, whose rights have been violated by state agents, have the right to bring their complaints regarding violation of their rights protected under the AHRS before an AHRC. For the question of AHRS, states and individuals in Asia may bring an application before an AHRC. To accommodate the jurisdiction of an AHRC, one paragraph should be added in Article 24 of the Charter by stating that disputes which concern the interpretation and application of an AHRS and gross human rights violations shall be brought before an AHRC and may not be solved through negotiation, mediation, conciliation, inquiry and arbitration.

An AICHR may have the jurisdiction to investigate if there are alleged human rights violations committed by member states and the result of any AICHR investigation may be used to initiate a case to be adjudicated by an AHRC.

Any NGO may bring a claim before an AHRC. It should provide an adequate remedy for the victims of human rights violations and it is important while the national courts are inadequate to provide remedy and justice for them. It monitors the human rights application by member states. It shall be complementary to national human rights jurisdiction if a state has a national human rights court. An AHRC may implement international standards[221] and it can support the national engagement in the international human rights systems[222].

---

[218] Kim, *Development of Regional Human Rights Regime: Prospects for and Implications to Asia*, at 72.
[219] See *supra* note 203.
[220] Myanmar: Crimes Against Humanity in Eastern Myanmar, ASA 16/011/2008, 5 June 2008, Amnesty International,; see also Crimes in Burma, The International Human Rights Clinic @ Harvard Law School.
[221] SCIL, *Submission No. 5*, at 3-4.
[222] HRLRC, *Submission No. 15*, at 35.

### 3.7. Conclusion

An AHRC should be established because it will help the international human rights mechanism to apply and protect the Asian people's rights from states' abuses. Since Asian leaders have a responsibility to protect their citizens, and if they fail to protect, there is justification for the international community to protect the Asian people[223].

The promise of the international community that international crimes must not go unpunished and effective prosecution must be ensured. This can be fulfilled by establishing an AHRC, since in Asia there is still the absence of a regional court that can deal with human rights cases.

An Asian state's accountability for wrongful acts committed against its citizens can be prosecuted through an AHRC, while the individual responsibility for cases, which include the Tiananmen Square case, as well as the riots in Indonesia cannot be prosecuted through an AHRC. Nonetheless, those crimes cannot go unpunished; therefore the author proposes the international community through the Security Council can adopt a Resolution under Article 40, Chapter VII of the UN Charter[224]. In order to prevent any pending or ongoing cases being delayed further, the SC may call on Indonesia and China to comply with any investigation and prosecution of the perpetrators[225].

---

[223] See *supra* note 182, para 139.
[224] See *supra* note 206.
[225] See *supra* note 58.

## Chapter 4

## Concluding Remark

China and Indonesia are some of the best examples of the implementation and non implementation of human rights law. This is because Indonesia has installed a national human rights mechanism, while China has not yet put one in place. However, the applications of human rights laws remain with no clear difference between these two nations. Learning from the problems in China and Indonesia, the author concludes that the international human rights mechanisms that rely on the national enforcement mechanism need to be consolidated, because when the national mechanisms are incapable of providing justice for the victims then there is no other international mechanism that can be applied. Since the promise of the International community to waive the immunity of the state officials has been decided in the Pinochet case; consequently, the traditional international law that a state can do whatever a state wants within its territory cannot be applied to justify the wrongful acts of repressing its citizens' rights.

China and Indonesia have allegedly infringed on their obligations under both national laws and international law because they have allegedly committed crimes against humanity, so those allegations and actions cannot go unpunished. The problem of the application of human rights in China and Indonesia illustrates a typical problem in Asia.

Consequently to avoid repeated gross human rights violations and to ensure that there is protection of Asian people under international human rights legislation, the international community may apply further demand to the Asian leaders to establish an AHRC.

## Bibliography


**Book:**

1. O. Törnquist, *Dilemmas of Third World Communism: The Destruction of the PKI in Indonesia,* London: Zed Press, (1984).
2. M. Green, Indonesia Crisis and Transformation 1965 – 1968, (1990).
3. O. T. Tat, Memoirs of Oei Tjoe Tat, assistant to President Sukarno, Jakarta: Hasta Mitra, 1975.
4. Ambos, Building a Future on Peace & Development: The Nuremberg Declaration on Peace & Justice, 2009.
5. B. Manan, Development of Human Rights and Regulation in Indonesia, 2001.
6. Lee, The International Criminal Court Elements of Crimes and Rules of Procedure and Evidence, 2001.
7. R. Cryer *et al*, An Introduction to International Criminal Law and Procedure, 2010.
8. R. Murphy, Yearbook of International Humanitarian Law 2001, T.M.C. Asser Press, 2004.
9. Taulbee, International Crimes and Punishment, A Guide to the Issue, 2009.
10. Meisner, Mao's China, A History of the People's Republic, 1977.
11. M. T. Kamminga & M. Scheinin, *The Impact of Human Rights Law on General International Law,* Oxford, 2009.
12. Arriaza, Impunity and Human Rights in International Law and Practice, 1995.
13. T. Burgenthal, International Human Rights (1988).
14. A.A.C. Trindade, Universal Declaration of Human Rights, 1948.
15. T. Franck, The Power of Legitimacy among Nations (New York: Oxford University Press, 1990).

**Journal:**

1. S. E. Wieringa, The Birth of the New Order State in Indonesia: Sexual Politics and Nationalism, Journal of Women's History 15.1 (2003).
2. K. KAWAMURA, *Politics of the 1945 Constitution: Democratization and Its Impact on Political Institution in Indonesia,* Institute of Developing Economic (IDE-JETRO), 2003.
3. B. R Anderson & R. T. McVey, A Preliminary Analysis of the October 1, 1965, *Coup in Indonesia* Ithaca, N.Y.: Modern Indonesia Project Cornell University, Interim Report, (1971).
4. H. Crouch, *The Army and Politics in Indonesia,* Ithaca, N.Y.: Cornell University Press, (1978).
5. B. May, *The Indonesian Tragedy,* Singapore: Brash, (1978).
6. R. McVey, *PKI Fortunes at Low Tide, Problems of Communism* (Jan-April 1971).
7. R. Mortimer, *Downfall and Indonesian Communism under Soekarno, Ideology and Politics, 1959-1965,* Ithaca, N.Y.: Cornell University Press, (1974).

8. J. Southwood & P. Flanagan, *Indonesia: Law, Propaganda, and Terror*, London: Zed Press, (1983).
9. W. F. Wertheim, *Whose Plot?: New Light on the 1965 Events*, Journal of Contemporary Asia 9, no. 2 (1979): 197-216.
10. J. C. Raney, *Genocide in Indonesia*, Northwest Center for Holocaust, Genocide and Ethnocide Education, Western Washington University.
11. I. Sandyawan, A Draft of Collective Action Plan for Realization of Transitional Justice, Public Discussion at Petra University, Surabaya, 2005.
12. Dr. S. Sherlock, *Crisis in Indonesia: Economy, Society and Politics*, Parliamentary Library, Parliament of Australia, 1998.
13. Ping, *Human Rights and Sovereignty*, AFAR, 2002.
14. P. Rudiah, *Women, Violence, and Gang Rape in Indonesia*, Cardozo Journal International Law & Comparative Law 255 (1999).
15. Zhenghui & Zhenmin, *The Developing Human Rights and Rule of Law in Legal Philosophy and in Political Practice in China, 1978-2000*, Jura Gentium I (2005).
16. Kim, *The 1978 Constitution of the People's Republic of China*, 2 Hastings International Law and Comp. L. Rev. 251 (1979).
17. Heer, *The 1978 Constitution of the People's Republic of China*, Vol. 4 1978, pp 309-322.
18. Guangming Ribao commentator, *Notes on the Human Rights Question*, Beijing Review, 1979.
19. Lee & Copper, *Failure of Democracy Movement: Human Rights in the People's Republic of China, 1988-1989*, Contemporary Asian Studies, School of Law University of Maryland, Number 2, 1991.
20. Chen, Chinese Law: Context and Transformation, 2008.
21. M. Wan, *Human Rights Lawmaking in China: Domestic Politics, International Law, and International Politics*, Human Rights Quarterly 29.3 (2007).
22. Chen, *Explaining China's Changing Discourse on Human Rights, 1978-2004*, Asian Perspective, vol. 29, No. 3, 2005, pp. 155 – 182.
23. Bowie, W. Dullea, *Effect of the Tiananmen Square Massacre upon Negotiations for the Draft Basic Law of the Hong Kong Special Administrative Region, The*, Journal International Law, 245 (1989-1999).
24. H. Cover, *Teacher Recalls Tiananmen Square Massacre*, Oxfordmail, 4 June 2009.
25. Kellogg, *Constitutionalism with Chinese Characteristics?: Constitutional Development and Civil Litigation in China*, 2008, Indiana University Research Center for Chinese Politics & Business.
26. Wan, *Human Rights Lawmaking in China: Domestic Politics, International Law, and International Politics*, the Johns Hopkins University Press, Human Rights Quarterly 29.3 (2007).
27. Jisi, *International Relations Studies in China Today: Achievements, Trends, and Conditions*, Institute of American Studies, Chinese Academy of Social Sciences.
28. C. Edelenbos, *Human Rights Violations: A Duty to Prosecute?* Leiden Journal of International Law, Volume 7 Issue 02 (1994).

29. N. R. Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, California Law Review, Vol. 78: 449, 1990.
30. A. Bianchi, *Immunity versus Human Rights: The Pinochet Case*, EJIL, 1999, Vol. 10 No. 2.
31. Hamid & Kadouf, *Immunity versus International Crimes: the Impact of Pinochet and Arrest Warrant Cases*, IJIL, Vol. 46, No. 4 (2000).
32. C. Breen, *The Necessity of a Role for the ECOSOC in the Maintenance of International Peace and Security*, Journal of Conflict & Security Law (2007), Vol. 12 No. 2.
33. Pellet & Olleson, The Law of International Responsibility, 2010.
34. D. K. Emmerson, *Critical Terms: Security, Democracy, and Regionalism in Southeast Asia*, Center on Democracy, Development and the Rule of Law, Stanford University, the USA.
35. B. D. Costa, *Challenges for an Independent Asian Human Rights Commission*, ILSA Journal of International and Comparative Law 4 (1997-1998).
36. Kim, *Development of Regional Human Rights Regime: Prospects for and Implications to Asia.*

**International Convention:**

1. 1945 Charter of the United Nations, 892 UNTS 119.
2. The Geneva Convention, 1949, *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, 12 August 1949.
3. The International Covenant on Civil and Political Rights, 1966 International Covenant on Civil and Political Rights, 999 UNTS 171.
4. The International Convention on the Elimination of all Forms of Racial Discrimination (1965), 660 UNTS 195.
5. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), 1465 UNTS 85.
6. 1998, Rome Statute o the International Criminal Court, 2187 UNTS 3.

**National Law:**

1. The Constitution of the Republic of Indonesia, 1945.
2. 1945 the Constitution of the Republic of Indonesia, as amended by the First Amendment of 1999, the Second Amendment of the Third Amendment of 2001 and the Fourth Amendment of 2002.
3. The Law No. 26 Year 2000, about Human Rights Court, LNRI No. 208/2000.
4. Law No. 8 Year 1985, LN 1985/44; TLN No. 3298, Civil Organization.
5. The Law No. 9 Year 1998, about Freedom of Expression in Public, LNRI No. 181/1998, TLNRI 3789.

6. Ratification of International Covenant on Civil and Political Rights No. 12 Year 2005.
7. Ratification of International Covenant on Economic, Social and Cultural Rights No.: 11 Year 2005.
8. Ratification of International Covenant on The Elimination of All Forms of Racial Discrimination 1965 No.: 29 Year 1999.
9. Ratification of Convention on the Elimination of All Forms of Discrimination Against Women No.: 7 Year 1984.
10. Ratification of Convention on the Rights of the Child No. 23 Year 2003.
11. The Law No. 5 Year 1998 ratification of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment.
12. The Law No. 26 Year 1999 about Repeal of Act No. 11 of 1963 Concerning the Crime of Subversion.
13. Law of the Republic of Indonesia, Legislation No. 39 of 1999, Law Concerning Human Rights.
14. Presidential Decree No. 50 Year 1993.
15. 1978 Chinese Constitution, 5 March 1978.
16. 1982 the Constitution of the People's Republic of China.
17. Criminal Law of the People's Republic of China, adopted at the Second Session of the Fifth National People's Congress on July 1, 1979.

**National Documents:**

1. The Report of TGPF, executive summary, 23 October 1998.
2. Position Paper of Kontras, *Position Paper of Kontras, Trisakti, Semanggi I and II Cases*, Kontras, 2005.
3. Elsam, Serious Human Right Violation, Trisakti, Semanggi I and II, 2002.
4. Progress Case of Kontras, Activists Kidnapping in 1998.
5. *Komnas HAM* Decision SK No. 34/KOMNAS-HAM/VII/2001 of 27 August 2001.
6. *Human Rights Commission Must Censure China*, 2000, http://www.hrichina.org/content/2735.

**Highly qualified publicist:**

1. ILC Articles on Responsibility of States for Internationally Wrongful Acts, 2001.

**International documents:**

1. AHRC-STM-248-2011.
2. Background *Note: China*, Bureau of East Asian and Pacific Affairs, US Department of State, 5 August 2010.
3. Writenet, *Indonesia Update: Transition and its Discontents, July – November 1998*, UNHCR, 1998.
4. Human Rights Watch, *Country Summary, Indonesia*, January 2011.

5. U.S. Department of State, Diplomacy in Action, *2009 Human Rights Report: Indonesia*, http://www.state.gov/g/drl/rls/hrrpt/2009/eap/135992.htm#.
6. Asian Human Rights Commission, Indonesia: The Human Rights Situation in 2006, at 1 www.humanrights.asia/resources/hrreport/.../Indonesia2006.pdf - Indonesië.
7. Memorandum, Governmental Reforms to Re-attract Foreign Investment, Outside adviser # 609, 1 November, 2002, at 3, www1.spa.american.edu/mpacomp/indoa.pdf.
8. Amnesty International ASA 21/017/1994, *Indonesia: Power and Impunity: Human Rights under the New Order,* 1994.
9. Report to the United Nations on Human Rights in China, HRI/CORE/1/Add.21 (1993).
10. Amnesty International, *Document – People's Republic of China: Nine Years After Tiananmen, still a "Counter-Revolutionary Riot"?*, ASA 17/11/1998.
11. *Report to the United Nations on Human Rights in China. HRI/CORE/1/Add.21 (1993).*
12. Amnesty International, *No One Is Safe, Political Repression and abuse of power in the 1990s, China*, 1996.
13. The General Comment No. 24 on "Issues relating to reservations made upon ratification or accession to the Covenant [on Civil and Political Rights] or the Optional Protocol thereto, or in relation to declarations under Article 41 of the Covenant", issued on 4 Nov. 1994 by the United Nations Human Rights Committee.
14. Universal Declaration, G.A. Res. 217, U.N. Doc. A/810, 1948.
15. General Assembly Resolution 60/1 (2005), World Summit Outcome.
16. Security Council Resolution 1674 (2006), Protection of Civilians in Armed Conflict.
17. GA Resolution 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984).
18. Restatement (Third) of the Foreign Relations Law of the United Sates, section 702, comment n and reporter's note 11.
19. United Nations Human Rights, Regional Office for South East Asia, http://bangkok.ohchr.org/programme/regional-systems.aspx.
20. Joint Communiqué of the Twenty-Sixth ASEAN Ministerial Meeting, Singapore, 23-24 July 1993.
21. UN Doc. A/HRC/15/39, (2010).
22. Asia Pacific Human Rights Mechanism Submission, www.law.monash.edu.au/castancentre/.../hrs-mech-asia-pacific-sub.2.pdf.
23. SCIL, *Submission No. 5.*
24. HRLRC, *Submission No. 15.*

**Newspaper:**


1. Human Rights in Asia: Serious Problems in 10 Countries, Asianews, 18 January 2006, http://www.asianews.it/news-en/Human-rights-in-Asia:-serious-problems-in-10-countries-5154.html.
2. *ASEAN Leaders Support Republic of Indonesia to Facilitate Settlement of Thai-Cambodian Border*, 8 Mei 2011, http://www.aseansummit.org/news88-asean-leaders-support-ri-to-facilitate-settlement-of-thai-cambodian-border.html.
3. M Angelina & R. Gunawan, *Eleven Years after the May Riot: We Have not Forgotten*, The Jakarta Post, May 12, 2009.
4. A. Sulkifli, Setyardi, A. Fuadi, The Crisis Brought Suharto to Deep Ruination, Tempo Online, 29 December 1998.
5. General Assembly 45 Billion and A President in the Period of Crisis, Tempo, Edition 01/03-07/Mar/1998.
6. *Student Actions Demand Suharto Trial, Clash near Parliament*, Kompas Online, May 22, 1999.
7. *Students Commemorate Parliament Occupation, Call for dissolution of Golkar*, Kompas Online, May 19, 1999.
8. *7 churches and 11 cars were burned*, Detik.com, 23 November 1998.
9. *Dead Bodies became 14 people*, Detik.com, 23 November 1998.
10. *Gangster and civilian were fighting and 6 death*, Jawa Post (Surabaya), 23 November 1998.
11. *Jakarta, Riots in Jakarta: 6 people death*, Kompas, 23 November 1998.
12. *Jakarta, Conflict in Ketapang, West Jakarta, 7 people death*, Republika, 23 November 1998.
13. Marzuki, the rapes were occurred, Jawa Pos, September 25, 1998.
14. Six Minister Has Been Given 1 Month for Examining the Controversial Finding of TGPF, Jawa Pos, 10 November, 1998.
15. *TGPF: Sexual Attack Was Occurred at the May Riot*, Suara Pembaharuan, September 22, 1998.
16. An Ad Hoc Human Rights Court Trisakti/Semanggi should be conducted, Radio Nederland, 18 June 2001.
17. A. Gunawan, Indonesian Army Declined the Suspect Brought before the National Human Rights Court, http://www.tempo.co.id/hg/nasional/2001/05/21/brk,20010521-29,id.html.
18. *Habibie Becomes President After Suharto Resigns*, CNN World, 20 May 1998, http://articles.cnn.com/1998-05-20/world/9805_20_indonesia.suharto_1_suharto-habibie-indonesian-leader?_s=PM:WORLD.
19. Recommendation 'Rotten Eggs' DPR and the Silent Attitude of the Government, Kompas Cyber Media, 15 May 2002.
20. Semanggi II Tragedy, The History of Reformation, http://www.semanggipeduli.com/Sejarah/frame/semanggi2.html.

21. *BBS, Parents, Activists Commemorate Forgotten Semanggi II Tragedy,* The Jakarta Post, September 17, 2009, http://www.thejakartapost.com/news/2009/09/17/parents-activists-commemorate-forgotten-semanggi-ii-tragedy.html.
22. D. Kusuma & Prihandoyo, A Strategic Commando Soldier Was Accused of Shooting Yun Hap, Liputan6.com, 8/2/2001, http://berita.liputan6.com/hukrim/200102/7676/prajurit_kostrad_dituduh_menembak_yun_hap.
23. A. Gunawan, *University Students Protested Pansus Trisakti and Semanggi,* Tempointeraktif, 2001.
24. A. Gunawan, *Immediately Established Human Rights Court for Trisakti Case,* tempointeraktif.
25. R. M. Sijabat, *Six Years After, May 1998 Tragedy still Unresolved,* The Jakarta Post, May 13, 2004, http://www.thejakartapost.com/news/2004/05/13/six-years-after-may-1998-tragedy-still-unresolved.html.
26. N. Osman & U. Haryanto, Indonesia Must Never Forget May Tragedy, The Jakartaglobe, May 14, 2010, http://www.thejakartaglobe.com/home/indonesia-must-never-forget-may-tragedy/374846.
27. I. Parlina, *Antigraft body arrests bankruptcy judge for bribery,* The Jakarta Post, 3 June 2011.
28. C. Pasandaran, *Indonesia Bribery Scandal Judge To Quit,* Jakarta Globe, 18 December 2010, http://www.thejakartaglobe.com/home/indonesia-bribery-scandal-judge-to-quit/412395.
29. *Former Judge Ibrahim Faces 12 Years Jail Term over Bribery Case,* Indonesia Today, 19 July 2010, http://www.theindonesiatoday.com/bonds-headlines/1693-former-judge-ibrahim-faces-12-years-jail-term-over-bribery-case.html.
30. *Prosecutor Cirus Vows to Challenge Indictment,* The Jakarta Post, 6 June 2011, http://www.thejakartapost.com/news/2011/06/06/prosecutor-cirus-vows-challenge-indictment.html.
31. *11 Judges Reported to Supreme Court for Reprimand,* The Jakarta Post, 13 August 2009, http://www.thejakartapost.com/news/2009/08/13/11-judges-reported-supreme-court-reprimand.html.
32. Benjamin, *State of Siege: With Tiananmen Square The Epicenter, a Political Quake Convulses China,* Time, 29 May 1989.
33. Elson, *China: Backed by the Army and Deng Xiaoping, Beijing's Hard Liners Win the Edge Over Moderates in a Closed-Door Struggle for Power,* Time, June 5, 1989.
34. Talbott, *Defiance,* Time, 19 June 1989.
35. R. Gunde, *Remembering the Carnage in Tiananmen: June 4, 1989,* a Forum at UCLA analyzes the legacy of Tiananmen and UCLA's Richard Baum interviewed on CNN.
36. 1989: Massacre in Tiananmen Square, BBC, http://news.bbc.co.uk/onthisday/hi/dates/stories/june/4/newsid_2496000/2496277.stm.

37. G. Clark, *The Tiananmen Square Massacre Myth*, The Japan Times, 15 September, 2004, http://www.asiamedia.ucla.edu/article.asp?parentid=14621.
38. Editorial, *It Is Necessary To Take a Clear-Cut Stand Against Disturbance*, Renmin Ribao, 26 April 1989.
39. *A Soldier's Story about the Tiananmen Square Massacre*, Asiannews, 19 March 2009.
40. Smolowe, *Deng's Big Lie: The Hard-Liners Rewrite History to Justify Arrests and Bury Democracy*, Time, 26 June 1989.
41. Lewis, *China Is Said to Execute Some in Secret*, New York Times, 31 August 1989.
42. Zhao Qizheng, director-general of the State Council Information Office (SCIO), was being interviewed by the human rights magazine, *Different Views Between China and the West on Human Rights: Official*, 11 February 2002.

**Websites:**

1. Bureau of Democracy, Human Rights and Labor, 2009 Country Reports on Human Rights Practices, US. Department of State, 11 March 2010, http://www.state.gov/g/drl/rls/hrrpt/2009/eap/135987.htm.
2. Bureau of Democracy, Human Rights, and Labor, 2010 Country Reports on Human Rights Practices, US Department of State, 8 April 2011, http://www.state.gov/g/drl/rls/hrrpt/2010/eap/154403.htm.
3. Bureau of Democracy, Human Rights, and Labor, 2008 Country Reports on Human Rights Practices, US Department of State, 25 February 2009, http://www.state.gov/g/drl/rls/hrrpt/2008/eap/119054.htm.
4. Bureau of Democracy, Human Rights, and Labor, 2010 Country Reports on Human Rights Practices, US Department of State, 8 April 2011, http://www.state.gov/g/drl/rls/hrrpt/2010/eap/154390.htm.
5. Bureau of Democracy, Human Rights and Labor, 2009 Country Reports on Human Rights Practices, US. Department of State, 11 March 2010, http://www.state.gov/g/drl/rls/hrrpt/2009/eap/136015.htm.
6. Bureau of Democracy, Human Rights, and Labor, 2009 Country Reports on Human Rights Practices, US Department of State, 11 March 2011, http://www.state.gov/g/drl/rls/hrrpt/2009/eap/135989.htm.
7. http://www.asean.org/21888.htm.
8. www.propatria.or.id/.../RUU%20ProPatria/Draf%20RUU%20tentang%20Keadaan%20Bahaya%20%5B.
9. http://www.icc-cpi.int/Menus/ASP/states+parties/.
10. http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en.
11. http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9-a&chapter=4&lang=en.
12. http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en.

13. http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en.
14. http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.
15. http://www.ohchr.org/EN/HRBodies/UPR/Pages/Highlights9February2009am.aspx.
16. http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9-b&chapter=4&lang=en.

**Cases:**

1. *Blaskic,* ICTY T Ch. 3.3.2000.
2. Case Concerning the Arrest Warrant (Democratic Republic of the Congo v. Belgium), Advisory Opinions, Judgment of 14 February 2002, 2002 ICJ Rep. 837.
3. *Barcelona Traction, Light and Power Company, Limited* (New Application: 1962), Belgium v. Spain, Judgment of 5 February 1970, ICJ Reports 3.
4. *East Timor* (Portugal v. Australia), Judgment of 30 June 1995, 1995 ICJ Reports 90.
5. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide,* Bosnia and Herzegovina v. Serbia and Montenegro, Preliminary Objections, Judgment of 11 July 1996, 1996 ICJ Reports 595.
6. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, 2004 ICJ Reports 136.
7. *Al-Adsani v United Kingdom* (App. No. 35763/97), ECtHR, Judgment of 21 November 2001, 2002, 34 EHRR 11, ECHR 2001-SI.
8. *Prosecutor v. Furundžija*, No. IT-95-17/1-T, Trial Chamber of the ICTY, Judgment of 10 December 1998, reproduced in 38 ILM (1999) 317.
9. Case T-315/01, *Kadi v. Council of the European Union and Commission of the European Communities* (CFI 21 September 2005).
10. the separate opinion of Judge ad hoc Dugard in *Armed activities on the Territory of the Congo* Democratic Republic of the Congo v Rwanda, Judgment of 3 February 2006, 2006 ICJ Reports 6.
11. Dissenting Opinion of Judge Van den Wyngaert on *Arrest Warrant of 11 April 2000,* Democratic Republic of the Congo v Belgium, Judgment of 14 February 2002, 2002 ICJ Reports 3.
12. Ex Parte Pinochet (Respondent) (On Appeal from a Divisional Court of the Queen's Bench Division) (No. 3), Judgment of 24 March 1999, reported as R. v. Bow Street Stipendiary Magistrate and others ex parte Pinochet Ugarte (Amnesty International and other intervening) (No. 3), 1999, 2 All E.R. 97.
13. The First Pinochet Case: Immunity of a Former Head of State (1999) 48 I.C.L Q.