Hacettepe University Graduate School of Social Sciences

Department of International Relations

THE NON-PARTICIPATION OF ASEAN COUNTRIES IN THE INTERNATIONAL CRIMINAL COURT: A CONSTRUCTIVIST PERSPECTIVE

Aufa RADZİ

Master's Thesis

Ankara, 2019

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The jury finds that Aufa Radzi has on the date of 18 June 2019 successfully passed the defense examination and approves her Thesis titled "The Non-Participation of ASEAN Countries in the International Criminal Court: A Constructivist Perspective".

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ABSTRACT

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The establishment of the International Criminal Court (ICC) was celebrated by many as international criminal justice is seen as entering into a new phase of development and anti-impunity norms being formally institutionalized. The ICC is tasked with prosecuting individuals who are accused of perpetrating genocide, crimes against humanity, war crimes, and crimes of aggression. The ICC, which derives its powers and jurisdiction pursuant to the 1998 Rome Statute, is the only permanent and independent international criminal court in the international system. However, except for Cambodia, the Member States of the Association of Southeast Asian Nations (ASEAN) are reluctant to be a part of the ICC which indicate a contestation of the norms of the ICC by the ASEAN Member States. According to the social constructivist theory, shared ideas and norms impact states' decision in a socially constructed lenses of the world. In particular, ASEAN's norms are said to be the sovereignty of states and non-interference in domestic matters as reflected in the "ASEAN Way". The purpose of this paper is to analyze the different level of participations in the ICC by the ASEAN Member States, in particular Cambodia, Malaysia, Philippines and Myanmar through contestation based on their identity.

Key Words

ASEAN, the International Criminal Court, Social Constructivism, norms, sovereignty, non-interference, shared ideas, Rome Statute.

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ABBREVIATIONS

ADHR - ASEAN Declaration of Human Rights

AEC- ASEAN Economic Community

AICHR-ASEAN Intergovernmental Commission on Human Rights

APSC-ASEAN Political Security Community

ARF-ASEAN Regional Forum

ASCC-ASEAN Social-Cultural Community

ASEAN-Association of Southeast Asian Nations,

AU-African Union

BIA-Bilateral International Agreement

CICC-Coalition for the International Criminal Court

ECCC-Extraordinary Chambers in the Courts of Cambodia

EU-European Union

ICC-International Criminal Court

ICERD-International Convention on the Elimination of All Forms of Racial Discrimination

ICJ-International Court of Justice

ICRC-International Committee of the Red Cross

ICTR-International Criminal Tribunal for Rwanda

ICTY-International Criminal Tribunal for Yugoslavia

IHL-Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity

ILC-International Law Commission

IMT-International Military Tribunal for Nuremberg

IMTFE-International Military Tribunal for the Far East

IR-International Relations

KLWCC-Kuala Lumpur War Crimes Commission

KLWCT-Kuala Lumpur War Crimes Tribunal

NGO-Non-Governmental Organization

NLD-National League for Democracy

OTP-Office of the Prosecutor

PGA-Parliamentarians for Global Action

SPSC-Serious Crimes Process Court

TAC-Treaty of Amity and Cooperation

UDHR-Universal Declaration of Human Rights

UK-United Kingdom

UN-United Nations

UNGA-United Nations General Assembly

UNSC-United Nations Security Council

UNTAC-United Nations Transitional Authority in Cambodia

US-United States

ZOPFAN-Declaration for a Zone of Peace, Freedom and Neutrality

INTRODUCTION

Throughout the 20th century, the world had seen mass atrocities and heinous crimes being committed by humans against one another. More often than not, atrocities were perpetrated by or upon the command of state authorities, despite their primary duty to protect the state's population. Concerning war crimes, genocide and mass killings, with the establishment of the United Nations (UN), the conclusion of the Genocide Convention of 1948 and the four Geneva Conventions of 1949 (as well as its Additional Protocols), the international community signaled that "enough is enough". Moreover, the concept of international criminal responsibility has started to be taken more seriously at the international level, as evidenced by the setting up of criminal tribunals to bring war criminals and those who commit crimes against humanity before justice.

In 2002, to prosecute war crimes, genocide, crimes against humanity and crimes of aggression, a permanent international court was established at The Hague, Netherlands. Exceeding the expectations of many in the international community, the International Criminal Court (ICC)—which derives its legality and jurisdiction from the 1998 Rome Treaty on the International Criminal Court (i.e. the Rome Statute)—managed to obtain enough ratifications only in two years (McGoldrick et al., 2004, p. 43). As of 2019, 122 states have ratified the Rome Statute.[1] Initially, only two out of ten Association of Southeast Asian Nations (ASEAN) Member States, namely Cambodia and the Philippines ratified the Rome Statute, joining the ICC in April 2002 and August 2011 respectively (UN Depositary Notifications, 2002; 2011). In early March 2019, Malaysia decided to join the ICC and submitted the instrument of accession to the Rome Statute (UN Depositary Notification, 2019a). However, on 17 March 2019 the withdrawal of the Philippines from the ICC took effect officially after the instrument of withdrawal submitted the year before. The withdrawal came as a reaction after the ICC's prosecutor announced that a preliminary examination to look into the Philippines' government's "war against drugs" campaign wherein alleged extra-judicial killings were committed

[1] As of 2019 the State Parties to the Rome Statute comprise of 33 African states; 18 Asia-Pacific states; 18 Eastern European states; 28 Latin American and the Caribbean states; and 25 Western European and other states (ICC, 2019). For an illustrated map of the Rome Statute State Parties, see the website of the Assembly of the State Parties (https://asp.icc-cpi.int).

by the state (ICC, 2018a). Further, in a surprise move, after only a month, Malaysia withdrew its decision to accede to the Rome Statute in April 2019 (UN Depositary Notification, 2019b). Thus, currently only Cambodia is a member of the ICC and Southeast Asia is indeed the region that has the least participation in the ICC. This, as Schuldt (2015) argues, implies that there is a "hesitation" on the part of Southeast Asian countries to join the ICC.

ASEAN countries had not always been indifferent to the idea and establishment of an international criminal court. In fact, almost all ASEAN member countries (with the exceptions of Cambodia, Laos and Myanmar) had participated in the debates at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome (Rome Proceedings) to the extent of showing full support for the establishment of the ICC (Rome Proceedings, 1998). However, their interest seems to have faded away after the ICC was fully established. While some argue that the Asian region is under-represented in the ICC (Noguchi, 2006, p. 586), Toon (2004) suggests that the ICC is getting a "lukewarm" reaction from the Southeast Asian states (p. 218). Further, Williams and Byrnes (2013) state that "the participation by states of the Asia-Pacific region in the ICC regime lags behind that of other regions" (p. 1024). Similarly, Tan (2014) argues that it is "unclear whether or not other ASEAN states will be ratifying the Rome Statute in the near future" and suggests "examining the regionalization of criminal law in Southeast Asia" as an alternative.

Accordingly, this thesis focuses on the non-participation of ASEAN states in the ICC. The word "participation" is chosen in order to signify an active participation—consisting of activities such as signing and ratifying the Rome Statute, being a State Party, appointing judges to the ICC, training local lawyers, etc.—and in essence being a part of the ICC institutions and working procedures towards developing the norms of international criminal justice. When states do not ratify the Rome Statute, they remain outside the proceedings and the annual Assembly of the ICC. Non-participation in this sense is seen in the non-ratification of the Rome Statute and the resistance of ASEAN Member States to join the ICC. The term "ASEAN states" is chosen for purposes of this thesis instead of "Southeast Asian states" in order to analyze how the states socialize and construct their identity within the framework of the ASEAN regional organization.

Furthermore, almost all states in the Southeast Asia region are members of ASEAN, with the exception of Timor Leste.

Accordingly, this thesis studies the role played by identity—be it state identity or regional identity—in shaping states' decision to be a part of international institutions such as the ICC. The reasons why ASEAN states are resisting to the ICC have been attributed to "Asian values" or to the "ASEAN way" that prioritize non-interference in the domestic affairs and the sovereignty of the state (Kapur, 2013, Schuldt, 2015). In fact, the terms "Asian values" or the "ASEAN way" have been used in human rights debates since the 1990s, and they reflect the construction of a regional identity (Dupont, 1996; Kraft, 2001). As the ICC was formed based on the concept of international criminal justice and the idea of upholding universal human rights, there arises the debate of universalism versus relativism. This reflects a dichotomy between the Western world and Asia with regard to the universality of human rights. While developed countries in the West portray the image that human rights are "inalienable, inherent and universal", Asian countries do not accept this view (Kraft, 2001, p. 33). Tan (2011) states that such portrayal by the West is a "post-war construct with strong Western liberal democracy influences" (p. 12). Hence, the case in point is when pressure to uphold human rights came from industrialized Western countries, it was met with resistance from ASEAN (Kraft, 2001, p. 34).

The references to Asian values and the ASEAN way in the literature imply that identity plays a role for ASEAN member countries in shaping their decision to be a part of an international institution such as the ICC. Following from this, this thesis places at its core the following assumptions: ASEAN views the ICC as a Western construct that contradicts with its identity. Moreover, from an ASEAN point of view, the basic idea behind the ICC and the powers bestowed upon it challenge states' sovereignty as well as the basic principle of ASEAN—i.e. non-interference in domestic matters, which has become a part of their identity.

Accordingly, in order to answer its main research question, this thesis conducts an analysis through a constructivist perspective, by an emphasis on the concepts of identity, socialization, history, culture and norms as the causal factors in ASEAN's

commitment and policy-making in relation to their participation in the ICC. This thesis is grounded on the constructivist argument that identity assumptions such as being "Western", "developing" and/or "Islamic" play a crucial part in states' policy-making as they accordingly determine who is an ally, and who is an enemy—i.e. we and the "others". Following from this, it asks the question whether or not identity is a significant factor in the non-participation of ASEAN states in the ICC. It then seeks to challenge the perception of ASEAN towards the ICC by questioning the identity of the ICC as well as it being a Western construct.

In the literature, works focusing on the ICC incorporate a wide array of issues. While the establishment of the ICC has extensively been examined by rationalist arguments that focus on cooperation and transaction costs problem, the debate has deepened through constructivist analyses (Fehl, 2004). In particular, the ICC is regarded as an important institution for realizing international criminal justice norms. Some argue that the ICC has improved some states' domestic laws through the principle of complementarity and the improvement of the norm of appropriate behavior. For instance, some argue that the ICC has been able to "deter some governments and rebel groups seeking legitimacy" in the international system (Jo & Simmons, 2016). However, some others are skeptical as to the effectiveness of the Court to carry out justice. Their arguments are based on the fact that the ICC's relevance was challenged pursuant to the United States of America's (US) campaign against the ICC through persuading other states to sign Bilateral International Agreements (BIA) (Baltaci, 2014; Betti, 2016), as well as the fear of exodus of African countries from the ICC (Chan & Simons, 2016). Moreover, there have been efforts to undermine the legitimacy of the ICC with the accusations of bias and unfairly targeting Africans and/or African countries as almost all investigations at the ICC concern African countries and/or individuals (Maklanron, 2016).

The relationship between ASEAN states and the ICC is mostly studied from a legal perspective. Answers are sought to questions such as how amendments need to be made to domestic laws need to be in accordance with the Rome Statute; the legal impact on Thailand if they join the ICC (Thirawat, 2005); and the reasons for the non-ratification of the Rome Statute by Indonesia (Huikuri, 2017). Schuldt (2015) offers a detailed

analysis of the relationship between Southeast Asia and the ICC but does not dwell into the identity aspect. Although he refers to "Asian values" in his article, he does not examine the "sociological question of whether Asian values influence Southeast Asian governments in their position towards the ICC" (Schuldt, 2015, p. 99).

In light of the above literature review, this thesis addresses a gap in the current ICC and ASEAN scholarship, and adopting a constructivist approach it dwells into the question of how states construct their identity? Although ASEAN's identity has been studied with regard to regionalism, it has not been studied with regard to its member states' perception towards participating in international regimes or institutions such as the ICC.

To this end, this thesis adopts qualitative methods to examine how ASEAN countries construct and perceive their identity *vis-à-vis* their participation in the ICC as an international institution. In order to do so, it also challenges ASEAN's view towards the ICC, and accordingly questions the identity of the ICC. As Jackson and Sorensen (2013) suggest, "state identity is expressed through key decision makers" (p. 224). To this end, primary textual sources such as speeches by leaders and elites, country statements, parliamentary proceedings, as well as national and/or organizational archival documents are examined through content analysis. Secondary sources such as published academic articles are used to determine what sort of debates and arguments are available in the literature. Furthermore, to trace the process of ideas and their institutionalization in practice (Sikkink, 1993; Klotz, 1995), the method of process-tracing is adopted to show how certain norms and ideas affect states' action and foreign policies. Last but not least, the cases of four representative ASEAN states, namely Cambodia, the Philippines, Malaysia and Myanmar are studied. While the former is a State Party to the Rome Statute, the latter three are not. In this vein, these four countries are chosen for purposes of analysis due to their stark differences in their state identities and socialization with external actors. In particular, Cambodia had a history of atrocities and experience with international tribunals, the Philippines is regarded to be a close ally of the United States (US), whereas Myanmar is heavily influenced by China, and Malaysia seems inclined to be closely associated with the Islamic world.

In this vein, while building the grounds for its main argument, this study seeks answers

to the following sub-questions: (1) To what extent do identity and socially constructed ideas affect the perception of ASEAN countries towards the ICC? (2) How do Southeast Asian countries that make up ASEAN construct their identities? (3) In terms of their identity, what does it mean for them to participate or not to participate in the ICC? What is their perception of international criminal justice?

Accordingly, the structure of the thesis is as follows: The first chapter introduces the theoretical framework of the thesis and focuses on the notion of construction of identity through norms and shared ideas. In particular, it examines how norms affect states' identity and interests.

The second chapter focuses on the historical background of ASEAN and aims to understand the identity and norms of ASEAN. Moreover, it investigates the role this identity plays in relation to the stance of ASEAN countries towards the ICC. Through process tracing, it explores the experiences of criminal tribunals in Southeast Asia, debates on the Rome Statute, and how ASEAN countries are involved in the contestation of the ICC's norms. This chapter also looks at the ICC's norms and how it came about, as well as the development from having to establish *ad hoc* criminal tribunals to a permanent international court. It asks, to what extent does ASEAN's identity as a regional organization that emphasizes non-interference, consultation and economic development affect its member states' decision to join the ICC?

Building on such background, the third chapter studies the cases of Cambodia, the Philippines, Malaysia and Myanmar to further scrutinize the role of identity in the participation of states in the ICC. The final chapter concludes that ASEAN and its member states place importance on identity when determining their foreign policy. At the end of its analyses, this thesis expects to find how ASEAN Member States contest the ICC's norms *vis-à-vis* the norms of ASEAN.

CHAPTER 1

THEORETICAL FRAMEWORK

This chapter provides a brief background on the theoretical approach of this thesis, namely social constructivism. One of the questions that International Relations (IR) scholarship seeks to answer is why states follow international law and agree to treaties that legally bind them. States do this even though there is no higher authority in the international system compelling them to do so. To explain this phenomenon, constructivists explore the concepts of "ideas", "norms", "identity", and "socialization" (Katzenstein, 1996; Finnemore, 1996; Wendt, 1999). Thus, a way to analyze the non-participation of ASEAN states in the Rome Statute, is to identify the relationship between identity and the acceptance of international norms by states.

In the last decade, "constructivist analysis has shifted in the direction of identity and its strategic consequences" (Checkel & Katzenstein, 2009; Mitzen, 2006). International law is a prime example of norms which emerged out of shared understanding of appropriate behavior that are codified into treaties. However, with regards to the institutionalization and implementation of norms, there are certain stumbling blocks. The ICC for instance, was established out of the shared understandings of anti-impunity norm (Mills & Bloomfield, 2017). However, the implementation of this norm is not as widely accepted across the world as its meaning is contested (Wiener, 2007). Meaning of norms become contested, especially in political practice as different actors seek to interpret it differently (Niemann & Schillinger, 2016, p. 33). Therefore, this thesis looks at the "contestation of norms" (Wiener, 2007; 2014) and investigates how important the identity of actors is in their acceptance of or resistance to norms, as well as the role of "norm antipreneurs" (Bloomfield, 2016; Bloomfield & Scott, 2016).

As a main idea, constructivists consider the world as a social construct built through interactions and shared ideas (Wendt, 1999). According to Wendt (1999), "two basic tenets of constructivism" are that "the structures of human association are determined primarily by shared ideas rather than material forces" and "the identities and interests of purposive actors are constructed by these shared ideas rather than given by nature" (p.

1). Moreover, according to Adler (1997), "the manner in which the material world shapes and is shaped by human action and interaction depends on dynamic normative and epistemic interpretations of the material world" (p. 322). Furthermore, "[c]onstructivists also stress the importance of normative and ideational structures because these are thought to shape the social identities of political actors" (Reus-Smit, 2005, p.196). These "non-material structures" (i.e the normative and ideational structures) shape identities of actors through imagination (where actors perceive the limitation of how they should act, practically or ethically), communication (where actors seek to use norms as justification for their behavior) and constraint (where norms place certain constraints on the actor's conduct) (Reus-Smit, 2005, p. 198).

Constructivism also studies changes in the international system and places importance on the role of language and speech act (Fierke, 2013). However, there is not a single approach within constructivism. The main division is between conventional constructivists and critical constructivists which arises from questions of epistemology and methodology (Hopf, 1998; Reus-Smit, 2005; Cho, 2009). Conventional constructivists study the external construction of state identity, whereas critical constructivists are concerned with the internal constructions or rather a reconstruction of identity (Cho, 2012). Despite their differences, the common ground that both approaches agree on is that international relations are social constructions that exist because states give meaning and value to concepts such as states, sovereignty, alliances and international institutions.

1.1. NORMS AND IDENTITY

Constructivism opens the path for scholars to further study norms in the international system (see, for instance Finnemore & Sikkink, 1998; Checkel, 1999; Wiener, 2014; Winston, 2008). Although norms have been discussed in other theories of international relations, constructivists show in what conditions and "how norms matter" (Klotz, 1995). Norms are defined as "shared understandings" (Checkel, 1999, p. 88) and as "standard[s] of appropriate behavior" which are accepted by a community with a "given identity" (Finnemore & Sikkink, 1998, p. 891; Katzenstein, 1996, p. 5).

The studies on norms in the literature consist of how norms are accepted by actors and how they, in turn, shape identities and interests of the related actors. Norms are regarded to have "constitutive and regulative", or "constraint" functions. Social constructivists are of the view that the "constitutive and regulative" functions of norms shape national interests and identities (Finnemore & Sikkink, 1998; Wiener, 2014; Wendt, 1999; Lantis & Wunderlich, 2018; Winston, 2018).

Constructivist scholars also distinguish between regulative and constitutive norms (Björkdahl, 2002). Norms constitute actors' behavior through socialization practices wherein actors develop a shared understanding of "what is right or wrong", and "it is these ideas that shape what actors want, who actors are, and how actors behave" (Ba & Hoffman, 2003, p. 210). Thus, it is argued that actors seek to "do the right thing" (logic of appropriateness) rather than "maximizing their material interests" (logic of consequences) (Wendt, 1992; March & Olsen, 1998). The "process of inducting actors into the norms and rules of a given community" involves the act of communications and interactions between the actors (Checkel, 2005, p. 804). For example, the mechanism for the spread of international norms includes a socialization process such as mimicking, social influence, persuasion, coercion, emulation and learning (Johnston, 2005; Dingding, 2009).

Regulative norms on the other hand, prescribe and regulate the "proper enactment of an already defined identity and establish rights and obligations" (Björkdahl, 2002, p. 15). Norms can regulate the behavior of actors by changing their beliefs and for the proper enactments of their identity (Kowert & Legro, 1996, p. 2). Björkdahl (2002) also argues that "norms and interests are mutually constitutive" (p. 16). This is due to the shared understanding that defines the identity of the actors who socialize together. According to Katzenstein (1996), "the concept of 'identity' comes from social psychology, where it refers to the images of individuality and distinctiveness ('selfhood') held and projected by an actor and formed (and modified over time) through relations with significant 'others'" (p. 14). According to Hopf (1998), "in telling you who you are, identities strongly imply a particular set of interests or preferences with respect to choices of action in particular domains, and with respect to particular actors" (p. 175). Identity thus brings a "sense of belonging" to something common, a sense of "who we

are" and "how we differ from others" (Acharya, 2009, p. 29). According to Klotz (cited in Björkdahl, 2002), "norms are related directly to collective identities, and are regarded as interconnected with self-interests" (p. 16). However, according to Winston (2018) "identity cannot be consistently applied to normative reasoning" because it changes, is complex, has different types of attributes, and is a "multifaceted concept that is not determinative of single standards of appropriate behavior" (p. 642). Despite this, collective identity of states with the same shared norms is still relevant to the analysis of acceptance of international norms.

The spread of international norms was theorized by Finnemore and Sikkink (1998) where norms first "emerge" domestically and become international norms through the efforts of norm "entrepreneurs" who support and spread the norms. They suggest that norms then go through broad acceptance or "norm cascade", and these two stages are "divided by a threshold or 'tipping' point, at which a critical mass of relevant state actors adopt the norm" (p. 895). Where a majority of actors accept the norm, the norm is considered "robust" (Lantis & Wunderlich, 2018). Finally, comes the third stage of "internalization" where the norms are no longer contested or debated by the actors and obtain a "taken for granted" quality (Finnemore & Sikkink, 1998, p. 895). The cycle is considered as complete when international norms affect domestic change. This process is known as the "life-cycle of norms" (Finnemore & Sikkink, 1998).

More recently, constructivist IR scholars have also developed a "norm diffusion" model (Solingen, 2012; Acharya 2004; Lenz, 2013; Björkdahl & Gusic, 2015), wherein "norms, ideas, institutions, policies and practices in one organization affect the dynamics of regionalism elsewhere" (Lenz cited in Allison-Reumann, 2017, p. 41). Norm diffusion is especially applied to explain the spread of liberal and human rights norms. Acharya (2016) introduced a "more complex picture of norm diffusion [...] which gives more attention to local actors, their ideas and capacity to resist, localise and repatriate 'universal' norms and to create and export new ones from local contexts" (p. 1158). This is termed as "norm localization" where norms are "localized and translated to fit the context and need of the norm-takers" (Acharya, 2013a, p. 467). This new study has arisen from criticisms of human rights norms and liberal ideas that are claimed to place emphasis on Western norm entrepreneurs and the "supposedly universal ideas that

were successfully diffused to replace 'bad' local practices, especially in the non-Western world" (Acharya, 2016). Wiener (2007), on the other hand, argues that a successful norm diffusion depends on "cultural validation" (p. 5).

1.2. NORM CONTESTATION

Notwithstanding that the studies on norm diffusion have paved the way to better understand the spread and acceptance of norms, recent studies have shifted from norm life-cycle and norm diffusion, and rather placed the emphasis on norm contestation (Wolff & Zimmermann, 2016). According to Wiener (2007), norms are contested by default (p. 6). Contestation is said to continue even after institutionalization (Welsh, 2013, p. 380). This is because norms are not necessarily "what is good" as the perception of what is "good" can change over time. Norms thus set what is acceptable and deemed appropriate by the group that believes in it at the time. Hence, as Welsh (2013) suggests, norms' meaning cannot be assumed to be linear or unchanging (p. 380).

When norms go out of the boundary of their "sociocultural context of origin, a potentially conflictive situation emerges based on the de-linking two sets of social practices (i.e. cultural and organizational practices)" (Wiener, 2007). In her book entitled *A Theory of Contestation*, Wiener (2014) suggests that there are "three types of norms: fundamental norms (type 1), organizing principles (type 2), and standardized procedures (type 3)" (p. 7). Between fundamental norms and standardized procedures there is the legitimacy gap. It is important to try to "close the legitimacy gap through regular contestation at the intermediary level" (Wiener, 2014, p. 55). Fundamental norms are not highly contested but standardized procedures are (Wiener, 2014, p. 36). Unlike conventional constructivists who regard contestation in a negative light and assume that it shows non-compliance to the norms, Wiener suggests that contestation opens up the discourse for norms' meaning, provides the space for norms' deliberation and gaining of legitimacy. Regular contestation helps to lessen the conflictive outcome of political contestation by providing space for contestation, rather than trying to close it (Wiener, 2014). Therefore, the more debates on the meanings of norms the better it is for closing the legitimacy gap between fundamental norms and standardized procedures.

Previous studies have shown that norms can "degenerate" or disappear when they are not accepted, especially when "non-compliance becomes the rule instead of the exception" (Panke & Petersohn, 2011, p. 721). However, there are certain instances where the contestation of the norms can lead to the strengthening of the norm instead of norm failure (Wiener, 2014; Lantis & Wunderlich, 2018). This is especially so when the norm has been institutionalized. It is thus argued that "[c]ontestation only enhances the legitimacy of norms if it is institutionalized and 'only under certain conditions such as social interaction in shared context over a prolonged period of time'" (Wiener, 2010 as cited in Wolff & Zimmermann, 2016, p. 524).

The approach adopted by Wiener is the reflexive approach which investigates social interaction in relation to norms. Wiener's argument is that reflexive approach "works with the underlying assumption of norm flexibility" and "locates the norm itself in the practice" (Wiener, 2004, p. 191). The meaning of norms also depends on the cultural context. Thus, norms not only structure behavior and social practices but also obtain their meaning from the practices, and may change according to the interpretation of the meaning (Niemann & Schilinger, 2016). Therefore, in order to study opposition to a norm, scholars have to uncover the "normative positions that underlie opposition to the principle, rather than assuming that all such opposition is driven by power considerations or 'misunderstandings'" (Welsh, 2013, p. 389).

To further understand the contestation of norms, this thesis will adopt the terminology of norm "antipreneurs" as introduced by Bloomfield (2016) to refer to "actors who defend the entrenched normative status quo against challengers, as opposed to entrepreneurs who try to spread the new norm and change the status quo" (p. 321). Bloomfield (2016) further states that "[n]orms are *entrenched* because they are formally institutionalised (that is in treaties, judicial precedents and regimes' decision-making procedures) or because it has a very long pedigree in state practice" (emphasis in original, p. 321). Therefore, even after institutionalization, there still can be resistance against the norm by norm antipreneurs. For example, "[n]orm resistance happens against the diffusion of liberal human rights values, when norm challengers are frustrated by the institutionalization of human rights and engage in transnational strategies to pursue their agenda" (Sanders, 2016).

Debates on resistance to and contestation of norms do not include physical resistance or any acts of violence on the norm challengers' part. It rather mostly involves verbal resistance or abstaining from engaging in debates. Norm contestation thus seeks to answer the puzzle of why there are challenges to the implementation of certain fundamental norms which have been successfully institutionalized and widely accepted through international treaties (Wiener, 2014, p. 34). In light of these various ways actors can resist or contest norms, the next chapter will examine the norms of ASEAN vis-à-vis the norms of the ICC.

CHAPTER 2

ASEAN AND THE ICC

This chapter traces the relationship between ASEAN and the ICC as well as ASEAN countries' contestation towards the ICC. In doing so, it looks at the construction of ASEAN's identity and how the norms of ASEAN affect the political decisions and/or foreign policy-making of its member states, in particular towards the ICC. To this end, it first explores the historical background of ASEAN, and overviews its socialization process and the construction of identity and norms in the region. It then explores the historical background of the ICC and the norms institutionalized by the establishment of the Court. In tracing ASEAN's contestation of the ICC, this thesis looks at the role of norm entrepreneurs such as the European Union (EU) and several non-governmental organizations (NGOs) in spreading the anti-impunity and international criminal justice norms, and the competing norm antipreneurs who seek to maintain the status quo of state sovereignty.

2.1. HISTORICAL BACKGROUND OF ASEAN

The Southeast Asian region is dynamic and one of the fastest growing economies in the world. Its regional organization, ASEAN is also considered the most successful regional organization among developing countries (Acharya, 2009, p. 6). ASEAN was founded on 8 August 1967 pursuant to a meeting attended by the Foreign Ministers of Malaysia, Singapore, Indonesia, Philippines and Thailand (the founding members) in Bangkok. At this meeting, the founding members signed the 1967 ASEAN Declaration (also known as the Bangkok Declaration) that laid out the salient points of ASEAN's establishment some of which are to achieve economic growth, regional peace and to avoid external interference (ASEAN, 1967). In 1971, ASEAN Member States agreed to the Declaration for a Zone of Peace, Freedom and Neutrality (ZOPFAN), which placed emphasis on ensuring that the region is free from external interference (ASEAN, 1971). Further, at the First Bali Summit in 1976, ASEAN agreed to a Treaty of Amity and Cooperation (TAC) in Southeast Asia and the Declaration of ASEAN Concord

(ASEAN Declaration) laying out the principle of peaceful settlement of disputes and non-interference in order to promote cooperation towards international peace and security (ASEAN, 1976a; 1976b). The 1976 TAC further expanded the role of ASEAN beyond the Bangkok Declaration. A decade after the Bangkok Declaration, the Bali Summit marked an important step as ASEAN leaders instead of the Foreign Ministers attended the Summit.

In the nineteenth century most ASEAN countries were still undergoing colonization. Throughout the sixteenth to the early part of twentieth century, Malaysia, Singapore, Brunei (which were then Malaya) and Myanmar (which was then Burma) were British colonies. Meanwhile Laos, Vietnam and Cambodia were under the French Indochina. Indonesia, on the other hand, was colonized by the Dutch while the Philippines was under the Spanish rule until it was ceded to the US. Thailand (then known as Siam) was the only independent kingdom and free from colonial powers. In the early twentieth century, anti-colonial movements started to gain grounds especially after the Japanese forces entered Southeast Asia in World War II. At the end of the twentieth century, most of the states in the region gained independence. Thus, ASEAN Member States can be said to share a common historical experience as the region was colonized by Western powers, with the exception of Thailand (Acharya, 2009, p. 29).

The early years of ASEAN towards regionalism was not smooth. There were internal instability and nation-building issues as most of its members had just gained independence from their colonial masters. As Acharya (2009) notes, "regional security and stability in Southeast Asia was particularly grim" as the region was grappling with problems of legitimacy of newly independent governments, interstate dispute, outside intervention and weak unity among the new nation-states (p. 5). In the 1960s, the region was split between the ASEAN-5 states (the founding members) and the communist Indochina (comprising of Vietnam, Laos, Cambodia). Further, a few years before the establishment of ASEAN, between 1963 to 1966, there was an "undeclared war" between Indonesia and Malaysia (with Singapore which was a part of Malaysia at the time) pursuant to Indonesia's "*Konfrontasi*" policy—that is confrontation—against the formation of Malaysia (Barry, 2015; Acharya, 2009, p. 5).

There were also competing influences in the region mainly by the US and the Soviet Union during the Cold War. Thus, ASEAN is said to emerge in the midst of mistrust between the newly independent states and political volatility in the region (Roberts, 2012, p. 44). The membership of ASEAN expanded with the inclusion of Brunei in 1984, Vietnam in 1995, Laos as well as Myanmar in 1997 and Cambodia in 1999.

Although ASEAN was established primarily to prevent the influence of foreign powers in the region, throughout the decade ASEAN engaged foreign powers through diplomatic relations and talks to lessen their impact. Hence, ASEAN is used as a mechanism to carry the voice of Southeast Asian states to the international arena and to attract big powers' attention. In 1990, the ASEAN Regional Forum (ARF) was established as a regional multilateral security forum to engage other major powers in Asia Pacific. However, despite the Organization's increased security role, ASEAN remains a sovereignty bound organization, refraining from intervention and focusing more on preventive diplomacy (Acharya, 2005).

ASEAN had different roles during different periods where each period has raised different challenges. For example, during the Cold War it was a force of stability among developing nations against the interference of competing major powers. Despite that, ASEAN had its fair share of criticisms over the years, especially during the Asian Financial Crisis in 1999 wherein it was regarded as failing to "provide a united front in dealing with challenges of globalization" and over its inaction to the alleged atrocities happening in Myanmar (Acharya, 2009). Acharya (2009) argues that ASEAN is not yet a "security community" as defined by Deutsch et al. (cited in Acharya, 2009), but is working on the region-building process towards having a collective identity (p. 7).

Acharya (2009) explains the three processes that reflect collective identity: "commitment to multilateralism; development of collective security; and setting boundaries and membership criteria of the group" (p. 30). In 2015, ASEAN agreed to form the ASEAN Community which comprises of three pillars of the ASEAN Economic Community (AEC), the Political Security Community (APSC) and Social-Cultural Community (ASCC), and adopted the ASEAN Community Vision 2025 which aimed at better integration of the region. In this regard, this thesis looks at the evolution of ASEAN identity and norms throughout the years.

2.2. THE DEVELOPMENT OF ASEAN'S NORMS

ASEAN started out as a regional grouping that did not have a common identity but went through an identity-building process throughout the years which is a social and political construct and not found by their common culture (Acharya, 2005). This is because ASEAN is not a homogenous group of states as the member states have diverse political systems, religions, history, cultures and ethnicities. The requirement for membership seems to be based on geographical location, not political system, unlike the EU which requires its members to adopt liberal democracy. ASEAN also has members with different political systems. According to Croissant and Lorenz (2018), Southeast Asia's political system is represented in three groups. Citing Schedler (2006) they state that Cambodia, Malaysia, Singapore and Myanmar practice "electoral authorianism" where power is obtained by election but the government places disadvantages on the opposition parties through authoritarian political practices (Croissant & Lorenz, 2018, p. 8). Meanwhile, the "lack of multiparty in Brunei, Laos, Vietnam and Thailand (since the coup d'état in 2014)" shows that they practice "closed autocracies". Also, citing Merkel (2004), they consider the Philippines and Indonesia as "defective democracies" (Croissant and Lorenz, 2018, p. 8). As Roberts (2012) observes, ASEAN also has members with varying degree of socio-economic status based on Gross Domestic Products (GDP) per capita; on the higher tier such as Singapore and Brunei, the middle tier such as such as Malaysia, Thailand, Indonesia, Vietnam and Philippines and on the lower tier such as Laos and Myanmar (p. 64). Further, some ASEAN countries have constitutional monarchies, as in the cases of Thailand, Cambodia and Malaysia.

Despite having different national identities, Acharya (2009) suggests that ASEAN is part of an "imagined community" (p. 286) as the leaders of ASEAN "engaged in a process of socialization within the institutional context of ASEAN, have 'imagined' themselves to be part of a distinctive region" (Acharya, 2013b, p. 27). Throughout their discussions to establish ASEAN, the leaders also insisted that ASEAN's identity should be an independent identity. Thus, the 1967 Bangkok Declaration stated that the "national identities must be preserved" and the 1976 Bali Declaration stated that states should "vigorously develop an awareness of regional identity and exert all efforts to create a strong ASEAN community" (Acharya, 2009, p. 86). ASEAN's identity is thus

agreed upon by the leaders instead of what was based on their common culture. Furthermore, the boundary of this so-called imagined community is geographical as ASEAN had only accepted membership from countries located in Southeast Asia, making a distinction with East Asia, hence leaving out countries such as Japan and Korea, as well as South Asia including countries such as India and Pakistan which seemed to have a common identity based on geographical location. However, Timor Leste's membership is still being considered despite its application to join has been pending since 2011 (Yu, 2018).

2.2.1. The "ASEAN Way"

The emergence of the "ASEAN Way" which signifies the principle of sovereignty, non-interference, and peaceful means of conflict resolution became a code of conduct to manage conflicts in the region. It also serves as a guide for how member states should develop their policy within the ASEAN context (Acharya, 2009; Busse, 1999). However, ASEAN does not have any "formal norms" governing the member states' behavior when it comes to their domestic policy of human rights as each of the member states has very diverse ways of governing itself (Severino, 2006). With regards to inter-state issues, ASEAN prefers consultations and negotiations than direct confrontations and forced interventions. This nature is also deeply rooted in the culture of Southeast Asians and their people. Through these norms they also developed "we-feeling" or a sense of belonging (Acharya, 2009, p. 30).

Collective identity, instead of the military pact is the real glue holding ASEAN members together (Busse, 1999). The ASEAN Way had been applauded as providing peace in the region as there has been no major war between ASEAN Member States since the inception of the Organization in 1967 (Acharya, 2009; Kivimaki, 2010). In 1978, when Vietnam intervened in Cambodia which resulted in the fall of the Khmer Rouge regime, ASEAN used "collective diplomacy for the purpose of diplomatically isolating Vietnam in the UN and denying international recognition of the People's Republic of Kampuchea (PRK)" (Roberts, 2012, p. 56). This reflects ASEAN's principle of not using force but using diplomacy in resolving issues and also its insistence on non-interference. Nevertheless, there were and still are border and

territorial disputes which have led to political tensions. Among these disputes were conflicts between Indonesia and Malaysia on the territorial sovereignty of Sulawesi Sea; and Singapore and Malaysia on Middle Rock and Pedra Branca Island. None of these disputes were actually dealt within the ASEAN forum but were referred to and resolved by the International Court of Justice (ICJ) (Roberts, 2012, p. 74).

Although ASEAN has been unable to deal with the territorial disputes between its member states, the fact that its members are engaging in talks and diplomacy with one another shows that armed confrontation is unlikely to happen between them. According to Kivimaki (2010) "[t]here has been no interstate conflict involving casualties between two ASEAN members, despite the fact that some ASEAN members have been traditional enemies before joining the organization" (p. 73). It is also noted that ASEAN countries also did not have any war against those outside of ASEAN. The ASEAN Political-Security Blueprint 2025 (ASEAN, 2016) seeks to strengthen and maintain this long-standing regional peace and stability by promoting the "shared values and norms" and the "principles of international law governing peaceful conduct among States" (p. 2). Furthermore, ASEAN Joint Communique of the 51st ASEAN Foreign Ministers' Meeting in Singapore reaffirms ASEAN's purpose as "maintaining and promoting peace, security and stability in the region, as well as to the peaceful resolution of disputes, including full respect for legal and diplomatic processes, without resorting to the threat or use of force, in accordance with the universally recognized principles of international law" (ASEAN, 2018). The ASEAN Way has thus been institutionalized and codified time and again in ASEAN's statements and declarations since its inception.

2.2.2. Diffusion of Human Rights Norms in ASEAN

Despite the success of the "ASEAN Way" to maintain inter-state peace in the region, the term has also been used as an often-repeated phrase by regional elites of ASEAN to justify silence over abuses of human rights and atrocities committed by member states domestically. The use of non-interference by ASEAN is also wider than non-intervention, where non-interference includes not making any statements to show disagreement regarding a state's policy. For example, ASEAN has been criticized for keeping silent and holding on to its principle of non-interference with regard to the

alleged atrocities committed by the military junta in Myanmar towards the Rohingya people. One of the reasons given by ASEAN leaders was that "intervening in one another based on human rights violations can lead to turmoil in the region" (Severino, 2006). In 2006, at the 13th ARF, the Ministers refrained from commenting on the Myanmar issue and stated that "Myanmar needs time and political space to deal with its many and complex challenges" (ASEAN, 2006). According to Rosyidin (2017), the lack of action by ASEAN with regards to the Rohingya crisis is a sign of the failure of the Organization to respect human rights in Southeast Asia.

Most of the time, adherence to human rights has been demanded by the industrialized West where the norms are based on liberal ideas such as natural law, the inalienable rights to life, liberty and estate (Kraft, 2001). Western norm entrepreneurs have been trying to advance liberal norms such as human rights, arms control and environmental protection which have been met with resistance from ASEAN Member States as economic development, survival of regimes and nation-building were higher on their agenda especially in the early years of ASEAN (Roberts, 2012, pp. 39, 46). Furthermore, ASEAN Member States went through a different historical and political experience than their Western counterparts. Human rights norms are seen as part of the Western ideology due to the fact that they emerged from the Enlightenment[2] period. The West went through Enlightenment and two world wars that developed and strengthened idealism and human rights institutions. Meanwhile, according to Busse (1999), Southeast Asia at the time "were ruled by small elite circles operating on the basis of patronage networks" resulting in a "highly private and informal political culture" (p. 48). Further, "[p]ublic debate of policy, let alone criticism, would have questioned personal loyalty and threatened the very basis of power" (Busse, 1999, p. 48). Therefore, human rights violations such as political repression seem to be accepted as necessary to ensure the survival of states (Ayoob, 1995, pp. 85-86 as cited in Kraft, 2001, p. 44).

Moreover, the dichotomy between Western and Asian values can be seen in the joint communique issued pursuant to the 26th ASEAN Ministerial Meeting 1993 in

[2] The Enlightenment was an intellectual movement in the late 18th century that challenged traditional beliefs in religion, politics and learning in general in the name of reason and progress (Heywood, 2011, p. 27).

Singapore, wherein human rights were said to be "interrelated and indivisible comprising civil, political, economic, social and cultural rights" and should be "promoted with due regard for specific cultural, social, economic and political circumstances" (ASEAN, 1993a). As the EU has been the norm entrepreneur on the universality of human rights norms, the specific cultural and social circumstances are seen on the differences of attitude towards death penalty and caning (Severino, 2006, p. 131). According to Acharya (cited in Kraft, 2005), ASEAN states are "reluctant to accept norm change" because "norm persistence reflects a fundamental incompatibility between trans-national norms and the 'ASEAN Way'" (p. 6). Allison-Reumann (2017) further suggests that the EU regards itself as the global defender of human rights but could not diffuse human rights change in ASEAN because "the EU's political aims and narrative regarding human rights are often incompatible with ASEAN's priorities. In addition, perceptions in Asia do not consider the EU as a political actor or normative power but rather a practical partner with which to cooperate on a needs basis" (p. 51). Another hurdle to the diffusion of human rights norms is that most of the ASEAN Member States see human rights as another agenda and part of post-cold war politics (Tan, 2011, p. 12). Therefore, human rights norms as protected by international institutions such as the UN are seen as Western liberal democracy agenda. The fact that five countries are permanent members of the UN Security Council (UNSC) and hold the power of veto feeds the suspicions by developing countries towards the human rights institutions.

Kraft (2001) notes an "Asian values discourse" collectively framed by ASEAN Member States, which includes two arguments. The first one is on the threat of human rights to security of states and economic development. The second one is that "human rights are no more than a Western construct to maintain the subordinate position of developing countries in the world order" (p. 45). This position can be seen in the statement of the former ASEAN Secretary General, Rodolfo C. Severino that "[n]ational sovereignty and its handmaiden, the principle of non-interference, are the only conceptual bulwarks protecting the small and the weak from domination by the powerful" (Severino, 2000b). Thus, it can be seen that the insistence on the "ASEAN Way" and "Asian values" are used as shields against pressure from foreign powers.

Although ASEAN perceives human rights and liberal values as Western, it does not always reject human rights norms. Most of ASEAN Member States accepted the Genocide Convention, Geneva Convention and the Universal Declaration of Human Rights (UDHR). ASEAN also adopted human rights norms instruments such as the ASEAN Declaration of Human Rights (ADHR) in 2012, the ASEAN Charter in 2008, and the ASEAN Intergovernmental Commission on Human Rights (AICHR) in 2009. Nevertheless, ASEAN has its own take on human rights, and insists on taking into consideration the cultural context and economic development (ASEAN, 1993b). The ADHR states that even though "human rights are universal, at the same time the realization of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds" (ASEAN, 2012b).

Some authors also note positive developments in the acceptance of human rights norms among ASEAN states (Frank, 2018). According to Frank (2018), "[t]he creation of international norms prohibiting genocide and mass atrocity after World War II, backed by the physical and moral force of the United Nations and the International Criminal Court (ICC), found their way into the value structures of ASEAN Member States" (p. 103). Frank (2018) also notes that there is a reduction in mass atrocities because ASEAN adopted the norms of preventing genocide and mass atrocities in addition to the global human rights revolution (p. 98). Acharya (2005) argues that there is a "shifting attitude especially towards norms of sovereignty and intervention". Bellamy (cited in Frank, 2018) suggests that Southeast Asian countries "incorporated norms adapting the values of global human rights" by "changing ideas about the nature of sovereignty and the responsibilities for protection" (p. 99). In the past, there had been attempts to change ASEAN's norms from non-interference to "soft intervention or constructive intervention" by the previous Deputy Minister of Malaysia, Anwar Ibrahim and "flexible engagement" by the Thai Minister, but these new concepts were rejected by other ASEAN leaders because they are beyond the scope of the traditional understanding of sovereignty and non-interference (Acharya, 2005). Nevertheless, there has been a slow shift from non-interference in ASEAN's engagement with Myanmar, where in 2012, the ASEAN Secretary General "raised the issue of Rohingya directly with the Ministers of Foreign Affairs of Myanmar and Bangladesh" (ASEAN, 2012a)

whereas the previous stand by ASEAN was not to get involved in the issue. Although there is no regional mechanism for violations of human rights in Southeast Asia, the establishment of AICHR in 2009 shows a positive direction towards taking human rights seriously (Jones, 2015, pp. 465-466). More recently, the ASEAN Political-Security Blueprint 2025 encourages member states to "ratify or to accede to international human rights instruments" and to "enhance engagement with the UN and relevant human rights mechanisms to which ASEAN Member States are parties" (ASEAN, 2016). Despite the positive developments towards protection of human rights on paper, it has yet to be seen whether ASEAN member countries will implement the same in practice, as well as at the domestic level. It can be seen that although ASEAN and its member states have accepted human rights norms as fundamental norms, they are also contesting the application of the norms.

2.3. ASEAN COUNTRIES' CONTESTATION OF THE ICC

As human rights matters are regarded as sensitive matters in general, ASEAN as a collective body has not yet discussed the ICC (Hassan, 2018), and in particular whether member states should support or reject it (Toon, 2004). The only statement by ASEAN to-date was co-jointly made during the 14th EU-ASEAN Meeting in Brussels in January 2003 where they "acknowledged that the establishment of the ICC is a positive development in the fight against impunity for crimes against humanity, war crimes and genocide" (ASEAN, 2003).

As discussed before, ASEAN's norms include the principle of state sovereignty, sustenance of regime and non-interference in domestic affairs. These norms which are entrenched in ASEAN's identity can pose a challenge to the diffusion of ICC's norms of anti-impunity, individual culpability and international criminal justice where a supranational body is given the power to prosecute and punish crimes/atrocities committed. The low ratification rates of the Rome Statute by ASEAN countries are feared to halt the development of international criminal law norms in the region, and reflect a reluctance to tackle impunity (Pillai, 2018). In Southeast Asia, the ICC is regarded as a "distant body of law and not relevant to the local practitioners" (IBA Outreach Report, 2008). The local practitioners do not have the chance to contribute to

the norm and have even lesser chance for being represented at the ICC as a prosecutor or a judge.

As described in Chapter 1, state leaders sometimes challenge the meaning of norms and they may engage in contestation over the validity of the norms, or the application in international institutions. They do not dispute the validity of the institution or the basic norms, but engage in three different types of contestation as described by Wolff and Zimmermann (2016), the first of which is "Intensity: questioning the ways in which norms are applied to disputing their very validity"; the second is "Depth: arguments over specific and/or technical norms to fundamental challenges to basic features of the existing normative order", and the third is "Form of Contestation: conventional, institutionalized strategies to unconventional, disruptive practices" (pp. 531-532). Therefore, in order to analyze ASEAN countries' contestations of the ICC, the following section overviews the historical background of the ICC and its norms.

2.3.1. Historical Background of the ICC and Its Norms

The ICC marked a step towards institutionalizing international criminal justice norms. It aims to be a respected institution with the permanent authority to oversee the most heinous international criminal violations. Further, it was envisioned that a permanent court, unlike *ad hoc* tribunals, would less likely to be insinuated as politicized or selective in prosecution. Unlike the ICJ, which is a judicial organ of the UN, the ICC is an independent court. Moreover, the ICC is concerned with individuals' culpability with the rules and procedures similar to a domestic criminal court whereas the ICJ hears cases between aggrieved states.

The establishment of the ICC seeks to reduce the allegation of selective prosecution. In a way, it was also intended to develop norms of international criminal responsibility to make leaders act more responsibly towards preventing mass atrocity crimes from happening. As with the concept of national judicial system where criminals are prosecuted, tried and punished, this institution would not only uphold justice for crimes that have happened, but also as a deterrent for future cases.

The idea of a permanent and binding international court where international criminal justice can be carried out based on personal culpability indeed emerged from the West. In *Peace through Law* (1944), Kelsen envisioned the idea for a permanent international court and a world police to lead states towards international peace. Kelsen "developed the thesis of the primacy of international law" above states' sovereignty and the idea that international law is applicable to individuals for war crimes (Bongiovanni, 2014, p. 741; Zolo, 1998, pp. 317-318). According to Kelsen, in order to achieve universal peace, there are five factors—namely "[1] the primacy of international law, [2] its full legality; the full legality of international law requires [3] its effective application to individuals, including the application of criminal sanctions; the effective application of criminal law requires the [4] creation of rules of criminal international law and [5] the establishment of tribunals to judge the individual actions" (Bongiovanni et al., 2014, p. 743). Zolo (1998), however, argues that Kelsen's hope for a peaceful world based on universal morality and universal law may not be achieved, as there are states that have different cultures and different views of morality, which can give rise to mistrust against the universal system.

The efforts to develop a permanent court were also initiated by the West. The works toward the creation of an international criminal court had in fact started in the mid-19th century with the establishment of the International Red Cross,[3] to provide an avenue to punish those who commit crime in the name of the state (Schiff, 2008, p. 2). The concept of personal culpability for the crimes is also intended to deter leaders from acting above the law, or to stop mass atrocities (Heywood, 2011, p. 348). There had been *ad hoc* international criminal tribunals established to prosecute atrocities, but they were laden with criticisms. After the horrors of World War II, the Allied Forces established the International Military Tribunal for Nuremberg (IMT), which operated between 1945 and 1949 (also known as the Nuremberg Trials) to punish defeated Nazi leaders for which the charges included conspiracy against peace, crimes against peace, war crimes and crimes against humanity. The elements of crimes against peace were stated as the "planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaty" (Malanczuk, 1997, p. 354). However, the IMT was

[3] International Red Cross and Red Crescent movements are today grouped together under the International Committee of the Red Cross (ICRC).

criticized by some for being a "victor's justice" as the trials were set up by the victors of World War II, i.e. the Allied countries—United Kingdom (UK), US, France and Russia—to punish the defeated Germany. Further, the defendants were charged with *ex post facto* law where the crimes were defined with the law that was created after the crimes were committed (Heywood, 2011). It is the basic principle of criminal law that there is no crime without law—*nullum crimen sine lege*.

The lesser known tribunal after World War II was the International Military Tribunal for the Far East (IMTFE) that was established in 1946 (or also known as the Tokyo Trials). The IMTFE was established through the Supreme Commander for the Allied Powers, General MacArthur to try Japanese leaders for crimes against peace, crimes against humanity and war crimes committed during World War II.

Nevertheless, the IMT and IMTFE were particularly important for the development of the ICC as it was where the concept of "crimes against humanity" and personal culpability were first used and codified (Heywood, 2011, p. 335). Moreover, during the IMT the defense of following superior orders in the case of genocide were established to be unacceptable as according to the IMT (1947), "individuals have international duties that transcend the national obligations of obedience imposed by the individual States" (Cryer, 2005, p. 221).

After the IMT, laws against genocide, war crimes and crimes against humanity were put in place pursuant to the Genocide and Geneva Conventions. The Genocide Convention and the UDHR which were adopted by the UN General Assembly (UNGA) in 1948 were largely based on the principles laid out in the IMT as well (Heywood, 2011, p. 335). The UDHR, considered a "benchmark of international standards of human rights and the prevention of crimes against humanity" recognized the right of all humans to freedom, justice and peace. The Genocide Convention covers the specific act of genocide including the conspiracy, attempt and incitement to commit genocide (Article 3, Genocide Convention). In 1949, the UNGA adopted the Geneva Convention that provides basic laws of war regarding civil war and the two supplementary Protocols extending the laws to armed conflict situations.

The IMT also paved the way for the setting up of *ad hoc* tribunals for the mass killings and ethnic cleansing in the former Yugoslavia with the establishment of the International Criminal Tribunal for Yugoslavia (ICTY) in 1993 and the genocide in Rwanda with the establishment of the International Criminal Tribunal for Rwanda (ICTR) in 1994 (Heywood, 2011, p. 335). These *ad hoc* tribunals were convened by way of a UNSC resolution under Chapter VII of the UN Charter (UNSC Resolution 827 of 25 May 1993 for Yugoslavia and UNSC Resolution 955 of 8 November 1994 for Rwanda). Both the Geneva and the Genocide Conventions were invoked in these tribunals (Malanzcuk, 1997, p. 355). Lessons from the *lacunae* arising from the IMT such as right to appeal, no trial *in absentia* and independence of judges were also considered during the creation of ICTY and ICTR (Economides, 2001), and later, codified in the Rome Statute (see for instance, Article 33 of the Rome Statute).

In Southeast Asia, there was no UNSC-backed *ad hoc* international tribunal, but special tribunals were set up domestically with the assistance of the international community. The Serious Crimes Process Court (SPSC) in Timor-Leste was established in 2000 to deal with " genocide, war crimes, crimes against humanity, murder, sexual offences and torture" for the "crimes committed in East Timor" (Regulation No. 2000/15). It was set up to try the "human rights violations occurring prior to the independence of East Timor" where there were allegations that "militia groups created by the Indonesian military" committed these crimes (Standford Libraries, n.d).

In Cambodia, the Extraordinary Chambers in the Courts of Cambodia (ECCC) was established in 2006 to try the leaders of the Khmer Rouge for the crimes committed between 1975 and 1979 pursuant to the agreement between the UN and the Government of Cambodia (UN, 2003). The ECCC delivered its judgment against the high-ranking officials of the Pol Pot regime in 2018 convicting them for crimes against humanity, murder, forced marriage and forced rape. As the Cold War halted the development of international criminal law, there were difficulties to gather evidence and many of the accused have passed away which raised the criticism of delayed justice. Despite the criticism against the ECCC where there were allegations of corruption, mismanagement as well as criticism about the high costs, these prosecutions brought closure and a sense of justice to the victims and people in Cambodia.

Through the experience of *ad hoc* tribunals, Southeast Asian states perceive international criminal tribunals as being politically motivated and this seems to affect how they embrace international criminal justice (Palmer & Sperfeldt, 2016, p. 3). For example, in the case of Timor-Leste, Indonesian nationals were not convicted. Many Southeast Asian leaders were also excluded from the *ad hoc* tribunals' decisions and this made them reluctant to be subjected to an external criminal justice system.

Despite having anti-impunity laws in place and the ability of the UNSC to commence *ad hoc* tribunals, there was no avenue for prosecution and enforcement in a permanent institution (Economides, 2001). Further, not every case will get the attention of the UNSC and there are enormous costs to be considered. This led to the proposal for a permanent institution with international jurisdiction (Heywood, 2011, p. 348). Malanzcuk, (1997) states the "need for a permanent international court" succinctly as follows:

> The establishment of a permanent international criminal court would indeed overcome the problems arising from the time and efforts required to create ad hoc tribunals on a case-by-case basis, as for Yugoslavia and Rwanda. It would also dispense with the inevitable selective application of justice under the ad hoc method by only addressing certain conflicts and not others. Finally, the creation of such a court on a treaty basis would remove any doubts as to the proper legal basis of the court under international law, as distinct from the constitution of ad hoc tribunals by Security Council resolutions. But the practical disadvantage is, of course, that the court will only be able to operate with respect to states which decide to join the convention. To what extent a universal consensus on its statute can be achieved, in view of the conservative force of the doctrine of state sovereignty, has to be awaited (p. 360).

The ICC, at the very core, is perceived to challenge the sovereignty of states due to its supranational powers. However, this is a misnomer as the ICC is a court of last resort and the primary responsibility to punish atrocity crimes rests with the national courts. ASEAN states in particular are protective of their sovereignty and approach most international institutions with suspicion. Despite the issue with breaching state's sovereignty, in certain situations a supranational authority is needed to act, especially when the crime against citizens are committed by the state authorities themselves. States are supposed to protect their citizens, and when they fail to fulfil this basic duty, a higher authority than the state has to step in. However, since the international system is anarchic, the supranational authority needs consent from the states to act by way of

ratifying treaties. Thus, the establishment of the ICC to deal with these grave crimes is very much welcomed. When there is a permanent international institution to regulate a norm, the internalization of the norm is expected to develop and strengthen over time.

2.3.2. Contestations during the Rome Proceedings

The negotiations on the Rome Statute to establish the ICC involved 160 states to avoid accusation that the Court is developed by the few powerful states. The negotiations started in July 1998 using the "draft statute prepared by the International Law Commission (ILC) in 1994" (Wippman, 2004, p. 151). The draft statute was already completed in 1951 pursuant to the UNGA Resolution 260 (III) of 9 December 1948 but was revised on 9 December 1994 by the ILC. Revisions were made pursuant to the substantive and administrative issues and "intended to answer the political concerns of some of the world's major powers" (UN, 1996). The common goal of the states during the negotiations of the Rome Statute were:

> [t]o limit the future discretion of individual states by obligating them to support prosecutions under specified circumstances and by shifting decision-making authority from national government officials to judges and prosecutors independent of any state or particular group of states. More broadly, their goal was to shape what governments will in the future consider acceptable behaviour. This effort (which is continuing) is political but also legal; it is an attempt to achieve political goals through law. It builds on existing international law and legal institutions, including most notably the international criminal tribunals for Yugoslavia and Rwanda. More broadly, at least for liberal Western states and their NGO allies, it reflects a conscious attempt to expand the reach and impact of human rights and humanitarian law generally (Rome Proceedings, 1998, p. 160).

This is to show that states were interested in shaping the politics of the international system into a codified law through consensus by the states. Kofi Annan in his opening speech at the Rome Proceedings stated that the aim of the conference is to "create a statute that would be accepted and implemented by as many States as possible", even though he viewed that it will be a tough work to reconcile the conflicting principles and interests of many states (Rome Proceedings, 1998). With the exception of Myanmar, Cambodia, Laos and Vietnam which did not attend, all the ASEAN countries that took part in the Rome Proceedings supported the establishment of the ICC but emphasized the complementarity principle of the Court (Rome Proceedings, 1998). During the

proceedings, ASEAN members also placed emphasis on state sovereignty and to limit the UNSC's powers in order to prevent the ICC from becoming a political tool (Huikuri, 2017).

The arguments raised by ASEAN states in the proceedings show that state sovereignty and the overarching power of the proposed court are the major concerns of these states. The statements indicate fear of threats to the identity and norms of ASEAN of non-interference. ASEAN members insisted on a truly independent court and issues raised were on the referral mechanism of ICC, principle of complementarity, the role of Security Council, and the *proprio motu* power of the prosecutor. Singapore's delegate, for instance, said "account must be taken of the diversity of regional interests, different stages of development and social and cultural traditions, and the positions of the major Powers, in order to achieve a broad consensus and build an effective, working institution" (Rome Proceedings, 1998).

Indonesia, on the other hand, was active in commenting on the wording and drafting of the Statute. They suggested to include nuclear weapons as crimes against humanity and to limit the power of the Prosecutor to not to be able to initiate investigations *proprio motu*. Indonesia also supported the ICC's establishment but said that the ICC's "effectiveness would depend on universal accession by States to the Statute" (Rome Proceedings, 1998, p. 73). The Indonesian delegate further stated:

> Over-politicization had added to the difficulties of the negotiation process. It now appeared that the Court would no longer have jurisdiction only over situations where a national criminal justice system had totally or partially collapsed, but would also have the power to hear and overrule decisions on purely domestic matters taken by the executive and judicial branches of sovereign States in accordance with their national laws and constitutions. The danger of investigations being initiated for political motives could not be disregarded. While some had argued that the integrity of the Prosecutor and the filtering role of the Pre-Trial Chamber would provide safeguards against such investigations, neither Prosecutor nor judges could be expected to have a full understanding of the situation and internal security problems of each and every developing society (Rome Proceedings, 1998, p. 338).

It is clear from the statement of Indonesia that they feared that the ICC could be used as a tool to interfere in domestic matters of a state, or that the Court will not understand the cultural and social context of a developing country. While agreeing that the Court should be complementary to the national judicial system, the Philippines stated that the

"Prosecutor should be independent and entitled to investigate complaints *proprio motu*, subject to the safeguards of a pre-trial chamber" (Rome Proceedings, 1998, p. 82). Malaysia also supported the establishment of the ICC in principle, "bearing in mind diverse legal systems and cultures" and that sovereignty must always be upheld. Malaysia, however, stated that the "Prosecutor should not be empowered to initiate an investigation *proprio motu*" to avoid bias and in view of the complementarity principle. Cambodia did not attend the proceedings but was the first to sign and ratify the Statute among all ASEAN countries. However, during the vote for the adoption of the Rome Statute, Malaysia, Indonesia and Singapore abstained from the vote and did not sign the Statute. Thailand signed the Rome Statute, but it has not yet ratified it. Singapore's reason for abstaining from the vote was due to the fact that "chemical and biological weapons had been deleted from the list of prohibited weapons in the definition of war crimes" and "regretted the non-inclusion of the death penalty" (Rome Proceedings, 1998, p. 124).

Pursuant to a statement by the ASEAN Secretary General Mr. Rodolfo C. Severino in 2000, it can be seen that ASEAN supported the establishment of the international criminal court, but still held strongly to the principle state sovereignty. He remarked that there are "universal moral norms" and "common humanity" that "transcends national boundaries" and supported the "establishment of international criminal tribunals to bring to justice perpetrators of genocide and other crimes against humanity" (Severino, 2000a). However, at the same time he stressed the principle of state sovereignty and stated:

> [S]overeignty remains vitally important. Rogues and villains have used state sovereignty to shield themselves and their crimes. But, in a world of nation-states, a world without world government, the sovereignty of nations serves also as an essential and legitimate shield, a shield especially for weak states to protect themselves from domination by the strong [..] the expansion and application of international humanitarian law has to take into account the need for a delicate balance between the concept of inherent human rights and dignity on the one hand and the essential nature of state sovereignty on the other. Both are parts of international law (Severino, 2000a).

The final draft of the Rome Statute incorporated the issues raised during the debates and the concerns of the developing states on the issue of state sovereignty by putting into

place the principle of complementarity and establishing the ICC as a court of last resort. Nevertheless, sovereignty remains a big concern for ASEAN Member States.

2.3.3. Contestation by way of Non-Ratifications

The ratification of an international treaty does not only involve the agreement of the state to follow the norms and principles of the treaty, but also requires amendments to the domestic laws of the state. Signing the Rome Statute, even without ratifying it signifies that states have to "refrain from acts which would defeat the object and purpose of the Statute" (Article 18(a) Vienna Convention on the Law of Treaties). In the case of the ICC, changes have to be made to the local laws to include the four crimes under the Rome Statute to be punishable by domestic law. Due to this, the domestic political situation of a state also affects the decision of states for the ratification of the Rome Statute. In fact, most of the ASEAN Member States have cited domestic reasons as justification for why they did not ratify the Rome Statute.

It can be seen that several of the reasons put forward by ASEAN Member States for not ratifying the Rome Statute were due to domestic political conditions. One of the reasons raised was the need to amend national legislations which are inconsistent with the Rome Statute such as the provision providing immunity for the constitutional monarchs (Palmer & Sperfeldt, 2016). Other concerns are fear of "politically motivated prosecution", "prioritization of other development" and "lack of political will" (Palmer & Sperfeldt, 2016).

There are fears by the developing states that they will be recolonized using a different tactic if they were to open their domestic law to the jurisdiction of a foreign power such as through the ICC (Huikuri, 2017). After the Rome Statute came into effect, there were allegations that the ICC is a "form of neocolonialism", biased towards the African countries and not prosecuting strong countries in order to undermine the legitimacy of the ICC (Maklanron, 2016). This has given Southeast Asian countries more reason to be reluctant in considering becoming a member to the ICC. This narrative was started by those indicted and prosecuted by the ICC in order to delegitimize it (Lugano, 2017;

Maklanron, 2016).[4] It was taken very seriously by the African Union (AU) and specifically by South Africa (Maklanron, 2016, p. 84). The AU's relationship with the ICC strained due to the attempt to delegitimize the Court (Lugano, 2017). The AU alleged that the ICC was biased due to other conflicts in other continents which are not pursued by the ICC (Maklanron, 2016, p. 98). Some states thus view the ICC as a political tool by Western powers to keep the developing countries subordinate to the developed countries.

However, not being a party to the Rome Statute does not mean that a state is free to commit atrocities and can escape the jurisdiction of the ICC. Although the first two conditions for the ICC to have jurisdiction over a matter are if it was committed by a State Party national, or in a State Party's territory, cases can also be referred to the ICC by the UNSC (Article 12, Rome Statute). Further, in a new development, the ICC is opening an investigation on Myanmar by virtue of the deportation of Rohingya people to the territory of a State Party—namely Bangladesh under the provision of crimes against humanity (ICC, 2018b). Therefore, even though Myanmar is not a State Party, the ICC may still find a way to investigate atrocities that have been committed.

2.3.4. Contestations of the Structure of the ICC

The final draft of the Rome Statute was agreed and signed by 120 countries (UN Press Release, 1998). The Rome Statute provides that there are four main organs of the ICC: the Presidency, the Judicial Divisions, the Office of the Prosecutor (OTP) and the Registry (Article 34, Rome Statute). There are 18 judges in three divisions (Pre-Trial, Trial and Appeal) and the judges are appointed through a secret ballot during the Assembly of State Parties (Article 36, Rome Statute). This is to ensure the independence of the judges. While these aspects are not contested, the contestations of the structure of the ICC arise from three salient features of the ICC: complementarity, jurisdiction, cooperation. Accordingly, each of the contestation areas are examined as follows.

[4] The narrative was put forward to the UNSC for the referrals in Sudan and Libya, and Sudan's President Omar al-Bashir repeatedly accused the ICC as neo-colonialists. It was further strengthened by the efforts of the two accused persons in the situation in Kenya; Uhuru Kenyatta, William Ruto which formed the Jubilee Alliance (Lugano, 2017).

2.3.4.1 The Complementarity Principle

The Rome Statute limits the power of the ICC in order not to breach the norms of sovereignty. Hence, the ICC is complementary to a state's national court jurisdiction and can only have jurisdiction if the national court is unwilling or unable to prosecute the concerned cases (Articles 1 and 17, Rome Statute). This is known as the complementarity principle, which seeks to respect the sovereignty of states and ensure that the ICC is a court of last resort. However, although the ICC has the principle of complementarity, Huikuri (2017) argues that the ratification of the Rome Statute will "affect the trinity of the sovereign state system: exclusive territorial control, non-interference in the internal affairs of a state, and the right to conduct foreign policy according to states' own preferences" (p. 74).

However, it should be noted that the ICC is built upon the principle of the national state having the primary duty to prosecute atrocities. The ICC would have achieved its purpose if states improve their domestic laws to deal with mass atrocity crimes. A closer look at the elements of crimes under the Rome Statute allows us to observe that there is a high threshold for the crime to be proved. In fact, since the ICC's establishment, there have only been eight convictions because the threshold to prove beyond reasonable doubt is quite high (ICC, 2019a). Despite this, there are still some states which are skeptical towards the ICC as the international system is political in nature.

2.3.4.2. Jurisdiction

Southeast Asian countries also perceive the ICC as only enforcing international criminal law to the developing world, but not to the developed world. Although the ICC prides itself as an independent international court and not part of the UN system, the UNSC still can exert its influence on the ICC, and this worries most states. According to Article 13(b) of the Rome Statute, the UNSC can refer a situation to the ICC even if the situation occurred in a state which is not a party to the Rome Statute. Furthermore, with a resolution the UNSC can delay a prosecution for twelve months if it believes that the ICC would interfere with the Council's efforts to achieve international peace and security in an ongoing peace process (Article 16, Rome Statute, 1998). Developing

states further raise the argument that the US, Russia and China are not parties to the Rome Statute. Moreover, the UNSC referred the situation in Sudan and Libya, despite situations related to allies of the UNSC members have never been referred to the ICC. Many states fear that the ICC would be used as a tool by the UNSC permanent five members to further their influence while disregarding atrocities committed by those that they consider as their friends or allies. The non-universality of the ICC's prosecution will confirm the opponents of the ICC that it is a biased institution used by the great powers (Maklanron, 2016). However, in order to counter this argument, it can be argued that the UNSC may only refer a situation to the ICC and the determining factor whether the situation will continue to be investigated will depend on the preliminary examination and the decision of the Pre-Trial Chambers.

There are also other ways for cases to be brought before the ICC; i.e. through a self-referral by a Rome Statute party or by the Prosecutor's own conviction (upon authorization by the ICC). For example, four State parties to the Rome Statute, namely Uganda, the Democratic Republic of the Congo, the Central African Republic and Mali have initiated the self-referral mechanism for cases that happened on their territories. Whereas in Kenya and Côte d'Ivoire, the case was opened by the Prosecutor upon authorization by the ICC. The jurisdiction of the ICC also covers those "committed by a State Party national, or in the territory of a State Party, or in a state that has accepted the jurisdiction of the ICC" (Article 12, Rome Statute).

Furthermore, the threshold is also very high. After the referral stage, the OTP conducts a preliminary examination to see whether there is a reasonable basis to open an investigation (Article 15, Rome Statute). The process includes considerations on whether the ICC has jurisdiction or not, whether the case has already been prosecuted at the national court or not, and whether it would be in the interest of justice and the victim to proceed with investigation (Article 53(1), Rome Statute). The investigation cannot go on unless the requirements are met. At the investigation stage, the OTP will gather evidence and identify the suspect. The Pre-Trial stage is to ensure that the threshold is met and there is sufficient basis to proceed with the case. At the Pre-Trial stage held before three judges, the suspect's identity is confirmed, and it is ensured that the suspect understands the charges. The judges will then hear the parties being the Prosecutor and

the Defence, and decide whether the case will go to trial. The prosecution must prove the charge beyond reasonable doubt before a guilty verdict can be obtained. The verdicts are subject to appeal by both the Prosecutor and the Defence. Thus, the jurisdiction of the ICC is not arbitrary, and is subjected to safeguards as provided under the Rome Statute.

2.3.4.3. Cooperation principle

The ICC is dependent on the cooperation of the State Parties in the investigation and prosecution of crimes, the arrest and surrender of suspects, and providing access to evidence and witnesses which are listed as the duty of a State Party in Part 9 of the Rome Statute. This is because the ICC does not have its own enforcement forces and needs State Parties' cooperation for the physical transfer of the accused person to The Hague. The ICC's former President, Judge Silvia Fernandez de Gurmendi remarked:

> the ICC and the United Nations are also formally linked through a relationship agreement [...] The cooperation of the United Nations with the Court takes many forms. It includes logistical and security assistance in the field, administrative and personnel arrangements, and judicial assistance, such as disclosure of documents and making UN staff available for interview and testimony (ICC, 2017, pp. 7-8).

The cooperation by states remains as a challenge for the ICC especially in the arrest of suspects which are politically connected. For example, South Africa, which ratified the Rome Statute on 17 July 1998, had refused to assist in the arrest of President Omar al-Bashir of Sudan when he was in South Africa's territory although South Africa has a duty under the Rome Statute to cooperate with the ICC (Article 86 & 89, Rome Statute).

2.3.5. Contestation by Major Powers: the US and China

Contestation by the US and China against the ICC plays a role in affecting the decision of ASEAN Member States to join the ICC. In particular, the campaign against the Rome Statute by the US in the early days of the establishment of the ICC was one of the factors in the non-ratification of the Rome Statute by the Philippines and Thailand despite having signed the Rome Statute (Sandoval, 2006; Thirawat, 2005). As for China, its staunch support of the principle of non-interference is in line with the norms

of ASEAN. Nevertheless, both the US and China are the permanent members of the UNSC and have the ability to refer a non-ICC State Party to the ICC or to veto the decision. Further, the US and China have competing influence over the Southeast Asian region, especially over the control of the South China Sea and the Straits of Malacca. However, different ASEAN states have different level of engagement with the US and China.

2.3.5.1. The US

The US did not ratify the Rome Statute due to domestic considerations (Betti, 2016). Before the Rome Proceedings took place, the US was one of the pioneer states that supported the establishment of the ICC. However, after the establishment of the ICC, the US objected to the jurisdiction of the ICC on individuals in the "territory of a state party" as it wanted to avoid peacekeeping personnel all over the world to be subjected to the ICC's prosecution (Baltaci, 2014, p. 102). Although the US signed the Rome Statute, in 2002 during the "Bush administration it announced that it did not intend to ratify" it (Baltaci, 2014, p.105). It pursued the BIA with as many states as possible to block extradition of its nationals to the ICC, and also threatened to cut economic aids to the states that ratified the Rome Statute. Many states signed these agreements either under the "pressure to maintain good relations with the US" or as they are dependent on the US aid (Baltaci, 2014, p. 107). Among ASEAN Member States, the Philippines and Thailand signed the BIA. In the case of the Philippines, the BIA and the threat of cut in military funding affected its decision not to ratify the Rome Statute in the early years of the ICC. The BIA not only affected the credibility of the ICC but also renders the cooperation principle under Article 86 of the Rome Statute irrelevant.

Recently, the ICC Prosecutor took a huge step in trying to open an investigation in the situation in Afghanistan which could implicate the US (ICC, 2019b). The US revoked the visa of the Prosecutor, threatened economic sanctions on the ICC and the White House National Security Adviser John Bolton called it an "illegitimate court" (BBC, 2019; Kennedy, 2019). After a Pre-Trial, the ICC judges decided that there is no case to proceed as it "would not serve the interests of justice" and "rejected the request to open an investigation" (ICC, 2019b). Some criticized it as the ICC having no real

independence and still cannot take on major powers (De Vos, 2019). However, it can also be argued that the ICC has still taken a bold step towards challenging a major power.

2.3.5.2. China

During the Rome Proceedings, China was active in the debate on the Rome Statute and insisted that the ICC should not be a tool to interfere in other countries' internal affairs and emphasized the issue of state's consent and the complementarity principle (Rome Proceedings, 1998, p. 75). China voted against the Rome Statute as it was of the view that the Rome Statute did not address these concerns in full and in particular was against the definition of war crimes and crimes against humanity and the *proprio motu* power of the Prosecutor (Rome Proceedings, 1998, pp. 123-124). Tao (2015) suggests that China's rejection of the ICC was due to China's priority of "state sovereignty over human rights" and its perception that the ICC as "war-related security politics" (pp. 1093, 1097). Further, Tao (2015) remarks that "Chinese leaders tend to perceive human rights and relevant issues as instruments of 'hostile forces' to 'Westernize and divide' China" (p. 1110). This shows the stand of China which is shared by most ASEAN countries regarding human rights and towards the ICC. However, China did not necessarily reject the ICC fully, as it attended the Assembly of State Parties meetings as an observer, and in 2011 it voted in favor of UNSC Resolution 1970 to refer the situation in Libya to the ICC (Dukalskis, 2017, p. 31). Nevertheless, since 2012 under the Xi Jinping administration China has adopted a more "assertive foreign policy" and opposed referrals to the Court (Dukalskis, 2017, p. 31). China had also shown refusal to cooperate with the ICC as it has accepted Sudan's President Omar al-Bashir in its territory in 2011 and 2015 even though the ICC had already issued an arrest warrant against him (Dukalskis, 2017, p. 37). However, unlike the US, China has not explicitly influenced other states not to ratify the Rome Statute and stated the possibility of joining the ICC if its concerns are addressed (Dukalskis, 2017, p. 37).

2.4. Efforts of Norm Entrepreneurs

In light of the preceding analysis, it can be argued that ASEAN has its own entrenched norms which have become a part of their identity, i.e. the ASEAN Way and the principle of non-interference. Norm entrepreneurs such as the EU and several NGOs try to diffuse and spread the norms of the ICC in order to achieve the final goal of the universality of the ICC. There were also efforts by various NGOs to raise awareness about the Rome Statute and to dispel misinformation (Palmer & Sperfeldt, 2016). Two of the prominent NGOs are the Coalition for the International Criminal Court (CICC) and the Parliamentarians for Global Action (PGA). In trying to convince ASEAN countries to ratify the Rome Statute, the ICC's former President Judge Sang-Hyun Song traveled to Asia and met with "state officials and parliamentarians, and also with members of the legal community and non-governmental organisations" (ICC, 2011). His efforts were fruitful as in 2011 the Philippines ratified the Rome Statute and the Malaysian Cabinet agreed to accede to the Rome Statute (although ratification only happened in 2019). However, since contestation can still happen even after acceptance, we see that the Philippines and Malaysia withdrew their ratification from the Rome Statute.

Contestation by ASEAN Member States against the ICC norms happens through the role of norm antipreneurs such as opposition governments, domestic political actors and big powers such as the US and China in order to maintain the *status quo* of the entrenched norms of state sovereignty. The norm antipreneurs use strategies such as claiming that the ICC is a Western construct and a threat to sovereignty and identity of states. Thus, in the next chapter the analysis will be focused on the specific cases of four ASEAN Member States in order investigate how they contest the norms of the ICC with respect to their identity.

CHAPTER 3

THE NON-PARTICIPATION OF ASEAN MEMBER STATES IN THE ICC

This chapter studies four different ASEAN member states, namely the Philippines, Cambodia, Malaysia and Myanmar in order to analyze and compare the levels of their contestations of and participation to the ICC. On the one hand, the domestic political situation in ASEAN member states stands out as the main factor for their non-participation in the ICC. On the other hand, a limited understanding of what the ICC is, as well as a misunderstanding of the complementarity principle also seem to affect the decision of ASEAN member states regarding the ratification of the Rome Statute. The only ASEAN member state that has so far ratified the Rome Statute is Cambodia, and it did so as soon as the ICC was established in 2002. In this regard, the following sections examine the identity of the four states and how they engage with the ICC.

3.1. THE PHILIPPINES

The Philippines is a republic with a presidential system which consists of more than 7000 islands. It has a Christian Catholic majority with Muslims and groups from other religions as minorities. Before the Spanish colonized the Philippines, it did not have a formal political system. Their struggle for independence started after a group of upper class educated Filipinos returned from their studies in Europe and started a secret society to overthrow the Spanish rule (Croissant & Lorenz, 2018). Despite winning the Philippine Revolution and declaring the first Philippine Republic in 1898, the Philippines was ceded to the US by virtue of the 1898 Treaty of Paris after Spain lost the Spanish-American War. The Americans "installed a civilian administration supervised by an American governor-general […] allowed limited self-rule, modernized the bureaucracy and the judicial system, and invested heavily in education, infrastructure, and economic development" (Croissant & Lorenz, 2018, p. 216). It was "the first Western colony in Southeast Asia to become independent on July 4, 1946, even though the country remained closely associated with the U.S. militarily,

economically, and politically" (Croissant & Lorenz, 2018, p. 216). The Philippines is an ally of the US and it relies on the US to manage the threat of China especially regarding the South China Sea. The Philippines identifies itself as a democratic state having "people power" after peacefully ousting the "dictatorship" of then President Ferdinand E. Marcos with the efforts of the civil society in 1986 (Fukuoka, 2015).

In 2002 after the ICC was established, the Philippines decided not to ratify the Rome Statute despite supporting the establishment of an international criminal court during the Rome Proceedings. The Philippines did vote in favor of the Rome Statute and signed it on the same day on 28 December 2000. During the 1998 Rome Proceedings, the Philippines also stated that it "was prepared to make the necessary changes to its national laws required by the establishment of the Court" (Rome Proceedings, 1998, p. 82). It made good of this promise and enacted the Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity (IHL) on 11 December 2009. The IHL Act filled the vacuum of fulfilling the treaty obligation under the Geneva Conventions and enabled the prosecution of heinous international law crimes domestically as provided by the Rome Statute (Roque Jr., 2008, p. 276). The IHL Act ensured that sovereign immunity cannot be used as a defense against such crimes (Section 9, IHL Act, 2009). The Philippines had already renounced war in its constitution (Philippine Constitution, 1987). However, as Roque Jr. (2008) remarked, despite having these laws in place, the legal system of the Philippines remains ineffective in the fight against impunity and "there nonetheless remains lingering doubts about whether the law may in fact do away with the defense of immunity" (p. 274). Nevertheless, the Philippines has always been a strong supporter of the international human rights system, as it was one of the founding members of the UN and has ratified most of the human rights instruments[5] (Sandoval, 2006).

[5] The Philippines has ratified the UDHR, 10 December 1948, UNGA res. 217 (LXIII); 1949 Geneva Conventions and Additional Protocol II; Convention on Prevention and Punishment of the Crime of Genocide, G.A. Res. 260A (1l1), 78 UNTS 277, *entered into force* 12 January 1951; International Covenant on Civil and Political Rights (I.C.C.P.R.), GA. Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 UNTS. 171, *entered into force* 23 March 1976; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966), 993 UNTS 3, *entered into force* 3 January 1976; Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment G.A. Res. 3452 (XXX), annex, 30 UN GAOR Supp. (No. 34) at 91, UN Doc. A/10034 (1975); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

Between 2001 and 2010, under President Gloria Macapagal-Arroyo, the Philippines refused to ratify the Rome Statute because of the situation in Mindanao. They cited restrictions to deal with internal rebellions, which implicates fear of interference in domestic policies at the national level (Toon, 2014). However, according to Sandoval (2006) the "true reason for the country's refusal to ratify the Rome Statute is its dependence on American military and economic aid, and the vehement opposition of the US to the ICC" (p. 275). Senator Defensor Santiago confirmed that "the US law disqualifies from military aid any party to the Treaty" (The Philippines Senate, 2006).

However, the Philippines acceded to the Rome Statute in 2011 under President Benigno S. Aquino III after the internal pressure and efforts to get the Philippines to ratify the Rome Statute, especially in the Congress and efforts at the judicial level where a *mandamus* petition was filed with the Philippine Supreme Court on 6 July 2005. The instrument of ratification was finally submitted by the President on 6 May 2011, however pursuant to Article 7, Section 21 of the Philippine Constitution, two-thirds of all the members of the Senate have to concur a treaty for it to become effective. After a hearing by the Senate Subcommittee on the International Criminal Court of the Committee on Foreign Relations on 28 July 2011, the ratification of the Rome Statute received full support from government bodies and NGOs alike (The Philippines Senate Committee Report No. 52, 2011). There were numerous efforts and lobbying behind the scenes before the Senate finally concurred to the ratification of the Rome Statute on 4 August 2011. In its preamble, the Resolution stated that the ratification shows the Philippines' "commitment to human rights" and "contribution to an effective international criminal justice system" (The Philippines Senate Committee Report No. 52, 2011).

After President Duterte came into power, he has been vocal against the ICC, especially after the news that his campaign on war against drugs was going to be investigated by the ICC. On 8 February 2018, the OTP announced that a preliminary examination was to be commenced for crimes allegedly committed since 1 July 2016 pursuant to the "war on drugs" operation by the government of Philippines' (ICC, 2018a). There were allegations of "extra-judicial killings in the course of police anti-drug operations" (ICC,

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Punishment, G.A. Res. 39/46, annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984), *entered into force* 26 June 1987.

2018a). A Filipino lawyer filed the complaint to the OTP by a letter dated 24 April 2017 (The New York Times, 2017). After the OTP announced that an investigation will be opened, President Duterte warned that the Philippines will withdraw from the Rome Statute, and it was followed by the submission of the instrument for withdrawal on 17 March 2018.

At the domestic level, the opposition lawmakers submitted a petition to the Supreme Court challenging the legality of the President's withdrawal from the Rome Statute as they claimed that the President cannot withdraw unilaterally. At the governmental level the Philippines denied that unlawful killings had occurred and that the "national court is willing and able to prosecute the crimes, if there are any" (Locsin, Jr., 2017). According to the statement by Ambassador and Permanent Representative Teodoro L. Locsin, Jr. on 30 October 2017 during the Report of the International Criminal Court at the UNGA Plenary Session:

> The Philippines is committed to upholding the rule of law and respecting human rights in the fight against illegal drugs. We do not condone killings. It is tragic that many deaths resulted outside of lawful police operations. They are being investigated and prosecuted in the Philippines' criminal justice system, as many of them were found to be rub-outs committed by unknown groups perhaps taking advantage of the government's campaign (Locsin, Jr., 2017).

He also pointed out that the ICC is a court of last resort and the Philippines has a "functioning criminal justice system able to prosecute these crimes [...] biased intervention even if merely vocal is not necessary" (Locsin, Jr., 2017). As of 2017, the Philippines was still supporting the ICC and encouraged more states to ratify.

In the statement at the UNGA Plenary Debate dated 2 July 2018 on the Responsibility to Protect and the Prevention of Genocide, War Crimes, Ethnic Cleansing and Crimes against Humanity by the Ambassador and Permanent Representative Teodoro L. Locsin, Jr likened the drug trade with terrorism and organized crime by "genocide-prone foreign powers, foreign state and non-state actors" (Locsin, Jr., 2018). The justification the Philippines authorities put forward for the war against drugs was that they were taking preventive measures for terrorism. However, Locsin did not agree with a distinctly Asian values of right and wrong as they should be universal:

> in every case we must acknowledge the universality of norms of right and wrong. These remain opposites. While one might disagree about what is right, let alone perfect in all circumstances, and practical in some; there can be no doubt about what is wrong and the necessity to fight it in every case. We cannot accept moral relativism. There are Asian attitudes but distinctly Asian values of right and wrong is pure nonsense. We cannot accept that there is no such thing as good and evil but—like beauty and ugliness in the mind of the beholder—the dichotomy is resolved by the convenience of the actor. Moral relativity is the greatest evil. (Locsin, Jr., 2018, p. 3).

President Duterte publicly displayed his rejection of the ICC's authority while stating that "[t]hey want to send me to prison and try me for genocide … They are a bunch of criminals, they cannot even show me how they (drug war victims) died, when they died, where" (Valente, 2018). He also accused the ICC of imposing European values on other countries and engaging in "international governing" (Valente, 2018). While addressing the Asia Pacific Association of Gastroenterology in Lapu-Lapu City, Cebu he remarked regarding the ICC and the EU: "What's your problem? Who are you to run my country? That's the problem with the European Union. They are into international governing. They create an ICC, European community, and they try to impose their values and the way they think how criminal[s] are categorized. It's new colonialism" (Valente, 2018).

Arguably, as a close ally to the US, the Philippines feels more justified in rejecting the ICC's authority as the US is also doing the same. During President Barack Obama's tenure, the US had softened its stance towards the ICC, while President Obama criticized President Duterte's war against drugs in 2017. However, as can be observed in Bolton's remarks against the ICC, the US has shifted back to its campaign against the ICC under the tenure of President Donald Trump. President Duterte lauded the US and stated "I think Bolton was right. He attacked the ICC. But before that, I was the one, and it got me into a quarrel with Obama" (Valente, 2018).

Nevertheless, even though the Philippines withdrew from the Rome Statute, "the ICC retains its jurisdiction over crimes committed during the time in which the State was party to the Statute and may exercise this jurisdiction over these crimes even after the withdrawal becomes effective" (ICC, 2018a). Thus, the withdrawal does not mean that the ICC ceases to have jurisdiction over the situation as the Court can still exercise jurisdiction for the period when the Philippines was a State Party. The withdrawal in fact came as a reaction and to bring home a point that the Philippines no longer supports

the ICC. On 29 October 2018, the Philippines explained its decision to withdraw from the ICC before the 73rd Session of the UNGA Plenary Meeting:

> The decision to withdraw is the Philippines' principled stand against those who politicize human rights, even as our country's independent and well-functioning organs and agencies continue to exercise jurisdiction over complaints, issues, problems, and concerns arising from its efforts to protect its people. True, as in all democracies, the wheels of justice grind slowly and not always exceeding fine; but they turn. We wish we could but we cannot give assurances to well-intentioned critics that we will shortcut justice to give them immediate retribution. But that would undermine the rule of law. We affirm our commitment to fight against impunity for atrocity crimes, notwithstanding our withdrawal from the Rome Statute, especially since the Philippines has national legislation punishing atrocity crimes (UNGA, 2018).

Although at the national level the Philippines accepts the ICC and does not contest the fundamental norms of international criminal justice, its contestation happens to undermine the credibility of the ICC. When state authorities perceive interference in their domestic matters, and in particular as the war against drugs was regarded as essential for national security, they rejected the authority of the ICC despite the fact that the Philippines has ratified all human rights instruments.

3.2. MALAYSIA

Malaysia has a federal state system together with a constitutional monarchy situated in the peninsula of Southeast Asia region. Historically, the Straits of Malacca under the Sultanate of Malacca in the 15th century was one of the most "dominant trading ports" and a "center for the spread of Islam" (Croissant & Lorenz, 2018, p. 143). The pre-independence Malaysia (known as Malaya) was colonized by the Portuguese in 1511, then by the Dutch in 1641, and with a British-Dutch Treaty in 1824 the British took control of Malaya until 1946. It has a Muslim majority population with Buddhist, Christian and Hindu minorities. The Federal Constitution of Malaysia provides for the special position of Malays and Malay Rulers (Article 153, Federal Constitution) to "rectify the perceived weakness of the Malay community in the economic field, the public service and the problem of Malay poverty at the time of Independence" (Suffian, 1972). With regards to its identity, Malaysia has always been closely connected to the Islamic world, by joining the Organization of Islamic Conference and being vocal on the issue of Palestine. During the term of the fourth Prime Minister, Mahathir

Mohamad, Malaysia has several times referred to "Western hypocrisy" in the international system and implemented the "Look East Policy". Malaysia acceded to the Genocide Convention in 1994 but still does not have any domestic legislation to prosecute genocide.

As stated in the previous chapter, Malaysia ratified the Rome Statute in March 2019 but withdrew from it the following month due to domestic political pressures. After being ruled by the same political party for the past 61 years since gaining independence from the British, the opposition won the election in March 2018 in a landmark victory. As a result, the fourth Prime Minister Mahathir Mohamad who held office from 1981 to 2003 became the seventh Prime Minister. The change was done peacefully and in a democratic manner, through election without violence or riots. For years, Malaysians demanded free and clean elections and a new Malaysia. The new government wanted to reflect that change by committing itself internationally, and accordingly at the 73rd UNGA plenary meeting in 2018, the Prime Minister stated that Malaysia will ratify two treaties, namely the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the Rome Statute:

> The new Malaysia will firmly espouse the principles promoted by the UN in our international engagements. These include the principles of truth, human rights, the rule of law, justice, fairness, responsibility and accountability, as well as sustainability. It is within this context that the new government of Malaysia has pledged to ratify all remaining core UN instruments related to the protection of human rights. It will not be easy for us because Malaysia is multi-ethnic, multireligious, multicultural and multilingual. We will accord space and time for all to deliberate and to decide freely based on democracy (NST Online, 2018).

The Prime Minister also reiterated what are to be expected of the new Malaysia at the 73rd UNGA plenary meeting:

> Malaysians want a new Malaysia that upholds the principles of fairness, good governance, integrity and the rule of law. They want a Malaysia that is a friend to all and enemy of none. A Malaysia that remains neutral and non-aligned. A Malaysia that detests and abhors wars and violence. They also want a Malaysia that will speak its mind on what is right and wrong, without fear or favour. A new Malaysia that believes in co-operation based on mutual respect, for mutual gain. The new Malaysia that offers a partnership based on our philosophy of "prosper-thy-neighbour". We believe in the goodness of cooperation, that a prosperous and stable neighbour would contribute to our own prosperity and stability (NST Online, 2018).

Time and time again Malaysia had made statements to show that Malaysia is a part of the international community and committed to multilateralism. The Foreign Minister Saifuddin Abdullah on 4 March 2019 stated that the accession to the Rome Statute shows Malaysia's "commitment to combating international crimes for global peace and security" and that "Malaysia stands ready to work with all state parties in upholding the principles of truth, human rights, rule of law and accountability" (Human Rights Watch, 2019). He also remarked that Myanmar should be referred to the ICC (Bernama, 2019). Regarding this issue, Prime Minister Mahathir Mohamad condemned the massacre at the 73rd UNGA meeting in the following words "I believe in non-interference in the internal affairs of nations. But does the world watch massacres being carried out and do nothing? Nations are independent. But does this mean they have a right to massacre their own people, because they are independent?" (NST Online, 2018).

However, at the domestic level, protests broke out and there was an uproar against the decision to ratify ICERD and the Rome Statute. Due to the new government's attempt to stabilize its position in the country, the Prime Minister reversed the decision to join the ICC and claimed that "people with vested interests" were attempting to pit the Malay rulers against him (Straits Times, 2019).

Certain quarters have argued that the accession to the treaties should have been debated in the Parliament. However, it is noteworthy that there is no requirement in Malaysian laws to debate a decision to ratify an international treaty at the Parliament. Ratification of an international treaty only requires the Cabinet's approval, and under the previous government, Malaysia had agreed to accede to the Rome Statute after obtaining the Cabinet's approval in 2011. This decision was taken after the Malaysian Minister of Law and Parliamentary Affairs, Nazri Mohamed attended the 2010 Kampala Review Conference on the Rome Statute. At the Opening Address of the Second PGA Asia-Pacific Parliamentary Consultation on the Universality of the Rome Statute of the International Criminal Court at the Parliament of Malaysia on 9 March 2011, Mohamed (2011) stated:

> It is my fervent and sincere personal hope that after this Seminar more Asian countries will be persuaded to ratify the Rome Statute. The world events these past two months are evidence of the urgent need for more countries to be part of the ICC […] Malaysia's participation would certainly enhance its international

> prestige and inspire other Asia-Pacific nations as well. It would be a significant contribution to the promotion of international criminal justice. International justice is one of the most important expenditures a Government can invest in, not only for prevention, but also to help reconcile conflict situations in the world. The ICC observes the highest standards of fairness and due process. [...] The ICC needs unflinching support from the world community. Its integrity and fairness needs to be constantly enhanced and safeguarded by the international community, and that includes us - the Asia-Pacific community. Let us together try to put an end to unimaginable atrocities that have plagued humankind for far too long [...] Let us henceforth not further hesitate to ratify the Rome Statute. Let it not be stated again that this region is under-represented. Now it is an excellent time for us to adopt a stronger role in the ICC. What better time than now to show that in our conviction of our common destiny and our common responsibilities to forge a harmonious, peaceful and prosperous society in which justice will prevail.

The positive remarks made by the Minister showed that the ratification of the ICC was not a new agenda by the new Government, but merely a continuance of a previous decision. Furthermore, the issue of the ratification of the Rome Statute has actually been brought up in the Parliament several times over the years (Malaysian Parliament, 2014a, p. 110; 2014b, p. 49; 2015, pp. 63-66). In 2016 a question was asked by a Member of Parliament on the status of the ratification of the Rome Statute which has been pending for quite some time (Malaysian Parliament, 2016, p. 3). The Deputy Minister in the Prime Minister Department at the time, Dato' Sri Devamany a/l S. Krishnasamy in response stated that "in principle Malaysia supports the ICC", however, several legal implications in carrying out its duty under the complementarity principle of the Rome Statute have to be examined (Malaysian Parliament, 2016, p. 3). He raised the issue that in Kenya and Libya the ICC had failed to consider the national proceedings and to abide by the principle of complementarity; that Article 27 of the Rome Statute which provides no immunity for the Head of State would affect the immunity of the monarchy in Malaysia; and the ability of the UNSC to refer a case to the ICC which gives rise to the issue of the independence of the Court (Malaysian Parliament, 2016, p. 3).

There were calls made to the government to expedite the ratification of the Rome Statute due to the case of Malaysian Airlines MH17 plane which was shot by a ballistic missile over the Ukrainian airspace in July 2014 and this issue was raised again in the 2016 Parliamentary proceeding, where Member of Parliament Su Keong Siong stated that by being a party to the Rome Statute, Malaysia could refer the case to the ICC (Malaysian Parliament, 2016, p. 3). From 2011 until 2019, the Attorney-General

Chambers stated the status of the ratification of the Rome Statute as "pending further research".

After Malaysia submitted the instrument of ratification of the Rome Statute to the UN, some domestic actors played up the sensitivity of the issue by claiming that the Rome Statute is a threat to the monarchy, Islam, the special position of Malays and that it affects the country's sovereignty. These claims have been driven by political motives (RSIS, 2019). Further, a group of academics produced a paper to the *Majlis Raja-Raja* (Council of Rulers) which claimed that the Rome Statute will challenge the sovereignty of the Rulers as the Head of State (Chia, 2019). They argued that the Head of States are supposed to be immune from prosecution, and the Rome Statute would hold the monarch liable for atrocities as the Supreme Commander of the military. However, the paper was not peer-reviewed and only produced for the Council of Rulers. The information in the paper can be said to be misleading since in the event that the state commits atrocities, ultimately the Prime Minister as the one having actual control over the military would be liable, not the constitutional monarch as it lacks such control. Moreover, the Constitution of Malaysia previously provided immunity for criminal matters for the Head of the State, however there was an amendment to the Constitution that provides for a Special Court to prosecute a Head of State for criminal matters in his personal capacity (Article 32, Federal Constitution of Malaysia).

The opposition Member of Parliaments also raised the fact that other monarchical states in the region such as Thailand and Brunei did not ratify the Rome Statute. However, it is noteworhty that Thailand signed the Rome Statute and pursuant to the Vienna Law of Treaties, Thailand must not act to the contrary to the Rome Statute. Further according to Thirawat (2005), even if Thailand ratifies the Rome Statute, the King of Thailand should not be implicated as he only holds a symbolic position and the "direct and effective command" of the Thai armed forces is not under the King (p. 171).[6]

However, during the first tenure of Mahathir Mohamad in the early 1990s, Malaysia had been particularly suspicious of the Western world. Further in 2007, although no longer holding the Prime Minister position at the time, Mahathir argued that "there is a need

[6] It should also be noted that to stay within the limits of its subject matter, this thesis will not go into detailed legal arguments on the issue of the immunity of the monarchy.

for an alternative judicial forum to the ICC, which was unwilling to indict Western leaders" (Falk, 2011). Therefore, Mahathir initiated the establishment of the Kuala Lumpur War Crimes Commission (KLWCC)—also known as the Kuala Lumpur War Crimes Tribunal (KLWCT)—to investigate war crimes committed during the Iraq War as an alternative to the ICC. The KLWCT consisted of five judges and held a four-day proceeding where "a unanimous verdict found that former US President George W. Bush and former UK Prime Minister Tony Blair guilty of crimes against peace, crimes against humanity and genocide as a result of their roles in the Iraq War" (Falk, 2011). Even though the KLWCT and its verdict was largely ignored by Western media and leaders, Mahathir was aware of the limits of the Tribunal and stated:

> [w]e cannot arrest them, we cannot detain them, and we cannot hang them the way they hanged Saddam Hussein […] the one punishment that most leaders are afraid of is to go down in history with a certain label attached to them […]. In history books they should be written down as war criminals and this is the kind of punishment we can make to them (Falk, 2011).

Mahathir's position against war and war crimes can clearly be observed in his statement during the establishment of the KLWCT:

> War must be outlawed. That will have to be our struggle for now. We must struggle for justice and freedom from oppression, from economic hegemony. But we must remove the threat of war first. With this sword of Damocles hanging over our heads we can never succeed in advancing the interests of our countries.? War must therefore be made illegal. The enforcement of this must be by multilateral forces under the control of the United Nations. No single nation should be allowed to police the world, least of all to decide what action to take, [and] when (Falk, 2011).

Thus, one of the first things that Mahathir did after becoming the Prime Minister again was to ratify the Rome Statute to show commitment to the international criminal justice system. There were domestic criticisms that the new government is flip-flopping its decision, as it has previously wanted to ratify ICERD but backed off. The same issue happened with the Rome Statute where the instrument of ratification was first submitted and then withdrawn. Although Malaysia accepted the ICC's norms and wanted to be a part of the ICC, it is seen that the stability of the country is more important for the current government. However, it resulted in efforts to educate the public on the ICC where debates and seminars were held to dispel misinformation about the ICC, which would not have happened if the government did not ratify the Rome Statute.

3.3. MYANMAR

The Republic of the Union of Myanmar obtained independence from the British in 1948, and then it was under a military rule from 1962 to 2011. The transition from a military government to a democratic government took place when it ratified a new constitution and disbanded the Burmese military junta (Croissant & Lorenz, 2018, p. 179). In November 2015, Myanmar held its first contested national election since 1990 where the "National League for Democracy (NLD) won the election with a landslide victory" (BBC, 2015). Myanmar has a majority of Buddhists as well as Christian and Muslim minorities. However, it has one of the "ethnically most heterogeneous societies in Southeast Asia with 135 officially recognized groups" (Croissant & Lorenz, 2018, p. 179). According to Croissant and Lorenz (2018), the "failure to integrate ethnic minorities into the postcolonial nation-state has resulted in numerous and persistent intrastate conflicts between the state and ethnic rebel groups" (p. 205). It had seen a "high number of armed conflicts between the central government and a rich tapestry of different insurgent groups driven by nationalist, ideological, or economic motives" (Croissant & Lorenz, 2018, p. 179). The Rohingya people of Myanmar are the Muslim minority (also some Hindu) from the southwestern state of Rakhine and have suffered human rights violations over the decade (Dussich, 2018). In 2017, the conflict escalated when 500,000 to 600,000 Rohingya people escaped to Bangladesh when the military commenced a "crack-down" after the attacks by Rohingya insurgents on the government's security posts (Dussich, 2018). However, since the 1990s the Rohingyas have been escaping from the Rakhine state to the neighboring Bangladesh, Thailand, Malaysia and Indonesia.

Despite international calls to the UNSC to refer the situation in Myanmar to the ICC, some quarters believe that China will veto the decision with the support of Russia, as it has already attempted to stop a UNSC briefing on Myanmar in 2017 but failed (Nichols, 2018). At the briefing, China's UN Ambassador Ma Zhaoxu stated that the UNSC "should not get involved in country-specific human rights issues" (UNSC, 2018). In March 2017, the UN Human Rights Council established an Independent International Fact Finding Mission to investigate and preserve the evidence of atrocities in Myanmar committed since 2011 (UNHRC, 2019).

In 2018, the ICC Pre-Trial Chamber decided that the Court has the jurisdiction to open a preliminary examination on the situation in Myanmar, in particular "the alleged deportation of the Rohingya people from Myanmar occurred on the territory of Myanmar (which is a State not party to the Statute) to Bangladesh (which is a State party to the Statute)" as the crimes were committed on the territory of a State Party (ICC, 2018b). Bangladesh, a neighboring country of Myanmar ratified the Rome Statute on 23 March 2010. The OTP's statement on the ongoing preliminary examination indicated that Article 7 of the Rome Statute which provides the definition for crimes against humanity will be invoked in the preliminary examination stating that:

> the preliminary examination may take into account a number of alleged coercive acts having resulted in the forced displacement of the Rohingya people, including deprivation of fundamental rights, killing, sexual violence, enforced disappearance, destruction and looting. Office will further consider whether other crimes under article 7 of the Rome Statute may be applicable to the situation at hand, such as the crimes of persecution and other inhumane acts (ICC, 2018b).

In response to the statement by the OTP to open a preliminary examination, Ambassador Hau Do Suan (2018a), the Permanent Representative of Myanmar to the UN stated at the 73rd UNGA Plenary Meeting:

> Myanmar resolutely rejects the decision which is the result of faulty procedure and of dubious legal merit. Here, I would like to reiterate my Government's position that not being a party to the Rome Statute, Myanmar is under no obligation to respect the ruling of the Court. The decision was the result of manifest bad faith, procedural irregularities and general lack of transparency.

Furthermore, Myanmar tried to justify the military crackdown as a response to terrorist attack. According to Ambassador Hau Do Suan (2018a):

> The Government of Myanmar is aware of accusations regarding human rights violations in the aftermath of the August 2017 terrorist attacks. In line with the Government's commitment to the rule of law, an Independent Commission of Enquiry has been established on 30 July 2018. The Commission consists of two prominent international personalities and two national members. The Commission will investigate allegations of human rights violations and related issues following the terror attacks by the Arakan Rohingya Salvation Army (ARSA). The Government of Myanmar is committed to take necessary actions based on its findings. We are willing and able to take on the accountability issues for any alleged human rights violation where there is sufficient evidence.

Suan (2018a) further stated that "Myanmar also disagrees with the OTP's argument that population displacement across a national boundary is an essential objective element of the crime of deportation set out in Article 7(1)(d)" of the Rome Statute. Moreover, at the General Assembly Plenary Meeting on the Responsibility to Protect (R2P) and the Prevention of Genocide, War Crimes, Ethnic Cleansing and Crimes Against Humanity, Ambassador Hau Do Suan (2018b) stated:

> While recognizing the importance of the prevention of the atrocity crimes, I would like to underline the primary responsibility of states to protect their citizens. We are also concerned over the politicization and abuse of the International Criminal Court beyond its jurisdiction. Such actions would only jeopardize the legitimacy and integrity of the Court.

The Ambassador Hau Do Suan (2018a) also claimed that there was an "over-extended application of jurisdiction" and that "it does not accept the jurisdiction of the ICC" calling it "discriminatory, selective, biased, politically motivated and illegitimate ruling of the ICC jurisdiction over Myanmar" and "[w]hat the Prosecutor is attempting to do is to override the principles of national sovereignty and non-interference in the internal affairs of other states, in contrary to the principle enshrined in the UN Charter and recalled in the ICC Charter's Preamble" (Suan, 2018a).

Myanmar perceives the ICC as being politicized and the attempt to extend the jurisdiction of the ICC to Myanmar as interference with the domestic issues of the state. With regards to its identity, it can be observed that Myanmar guards the non-interference principle strongly and is extremely suspicious of Western powers. An example of this is the case when state authorities refused humanitarian assistance from the West during the Cyclone Nargis in 2008. Further fueling Myanmar's suspicion of international intervention was the existence of American and French warships in the waters waiting to give assistance and France's suggestion that the Responsibility to Protect applies in this situation as Myanmar refused the aid. Myanmar only accepted the international assistance when ASEAN stepped in as a communicator between Myanmar and the Western international humanitarian groups (Haacke, 2009).

3.4. CAMBODIA

Cambodia is a constitutional monarchy, with the king only holding a symbolic status. It has a majority of 90 per cent Khmer ethnicity and a majority of Buddhists (Croissant & Lorenz, 2018, p. 37). Cambodia went through a "threefold transformation: from civil war to postwar reconstruction, from a socialist one-party state to a multiparty electoral system, and from a centrally planned economy to a market economy" (Croissant & Lorenz, 2018, p. 37). The United Nations Transitional Authority in Cambodia (UNTAC), which is a UN peacekeeping operation formed in 1992-1993 pursuant to the 1991 Paris Peace Accord, was tasked with rebuilding the country after a civil war that claimed almost more than a million lives. The Khmer Rouge, which controlled Phnom Penh for four years led by Pol Pot, had caused the death of thousands of Cambodians through systematic killing. The victims include among others, those who were thought to be intellectuals, ethnic Vietnamese and Cham Muslims. The regime was only overthrown when Vietnam invaded Cambodia in 1979. It is to be noted that at the time, several ASEAN states opposed Vietnam's invasion of Cambodia, while Cambodia and Vietnam today reject the term "invasion" as they are of the view that Vietnam helped to end the Khmer Rouge's regime (Sim, 2019).

In contrast to all the three states mentioned in this chapter, Cambodia was among the pioneer states to ratify the Rome Statute (on 11 April 2002), and currently is the only ASEAN member state that is a member to the ICC (Song, 2005). Some authors remark that the support shown by Cambodia towards the ICC had to do with its experience with mass atrocities under the Khmer Rouge regime and the establishment of the ECCC (Song, 2005; Palmer & Sperfeldt, 2016). The experience of the ECCC and the genocide committed by Khmer Rouge served as a basis for the acceptance of the ICC's norms. However, according to Palmer and Sperfeldt (2016), Cambodia may accept the Rome Statute because there is a localization of the norms of international criminal justice and it does not show that it completely accepts the norms (p. 100). The ECCC was set up as a local court with international assistance—adopting both national and international laws, and appointing Cambodian and international judges—as it was found that Cambodia lacked the expertise and proper judicial system to prosecute the accused persons (UN, 2003; Croissant & Lorenz, 2018, p. 49).

Cambodia's identity is reflected as a post conflict state that aims to achieve peace. In a statement at the 70th Session of the UNGA High Level Forum on Culture of Peace, by His Excellency Ry Tuy: "as a country which has experienced its fair share of war and conflict in recent history, Cambodia embraces the culture of peace as the core value of our society" (Tuy, 2016). A year before, Ambassador Ry Tuy (2015) made a statement in a similar vein at the 69th Session of the UNGA High Level Forum on Culture of Peace, stating "[a]s a post conflict country and being ravaged by scourge of war in the recent past decades, and while working to rehabilitate its nation, Cambodia has envisaged the culture of peace, as our core value".

However, in the recent years, Cambodia has started to refer to the principle of non-interference and peaceful dispute resolution as can be seen in the statement at the 70th Session of the UNGA High Level Forum on Culture of Peace:

> In our pursuit of the culture of peace, it is important to accord full respect to the United Nations Charter, and focus conducting state business in accordance with the principles and purposes enshrined therein. In this light, sovereignty and territorial integrity of states, self-determination, and non-interference in the internal affairs of states should be fully respected. Moreover, the international community should reject the use of force and settle disputes peacefully through compromise and negotiation (Tuy, 2016).

Moreover, at the 73rd Session of the UNGA Plenary Meeting by the Ambassador and Permanent Representative of the Kingdom of Cambodia, Sovann Ke (2018) to the UN stated: "Indeed, conflict prevention is the prerequisite for securing a safe and prosperous future for our children. As such, the global community must channel its energies into settling disputes peacefully based on negotiation and compromise, and in accordance with respect for sovereign equality" (Ke, 2018).

From these it can be inferred that although Cambodia accepts norms of international criminal justice and supports the ICC, when it comes to domestic issues, it still tends to lean towards the principle of non-interference. The latest developments in the domestic politics of Cambodia, where the incumbent party is trying to strengthen their foothold in the country, is also noteworthy. Prime Minister Hun Sen is the "longest serving prime minister" in the world as he has been in power for more than 30 years (BBC, 2018). In 2018, in response to protests by Cambodian-Australian people of his visit to Australia, he stated: "I will follow you all the way to your doorstep and beat you right there […] I

can use violence against you" (Mollman, 2018). Hun Sen's party won in a landslide victory in 2018 after months of political repression, crackdown on dissents, systematic destruction of opposition party and forced repression of independent media and civil society (Chang, 2019).

Moreover, Cambodian courts issued arrest warrants against top opposition leaders living in exile who were planning to return to the country (Chang, 2019). Despite the criticisms that it was a flawed election because the opposition party was dissolved, Hun Sen after winning the election stated: "I will go to the United Nations to make a speech for you to see that as a sovereign state, which held its own elections, we don't need stamps of approval from anyone" (Thul, 2018). On the other hand, Cambodia is also a close ally of China and had blocked ASEAN from issuing a communique that would refer to a ruling by the Permanent Court of Arbitration on the issue of South China Sea wherein the decision was favorable for the Philippines (Mogato et al., 2016). Hun Sen had also turned to China for support after the US decided to cut aid to Cambodia and the EU started trade sanction on Cambodia due to its record on human rights and democracy (Tomiyama, 2018; Blenkinsopp, 2019). Thus, as Croissant (2018) suggests, Cambodia is deepening its tie with China while "turning its back on Western governments" (p. 199). With this, Croissant (2018) also notes that there is a decline in the political and civil liberties and Cambodia is seen to move towards authoritarianism (p. 199).

In 2014, a group of Cambodian villagers have written to the OTP to seek preliminary investigations from the ICC with regard to widespread land grabbing which can constitute crimes against humanity against the "Cambodian government and business leaders (referred to as the 'ruling elite')" (Sithyna, 2014; Arsenault, 2016). The government has ignored the case and "a spokesman for Cambodia's Council of Ministers said the government is not at all concerned about this case" (Arsenault, 2016). There is no decision on whether or not the ICC will open a preliminary examination on Cambodia yet. However, in the Policy Paper on Case Selection and Prioritisation dated 15 September 2016 the OTP stated that the ICC may assist any State Party "with respect to conduct which constitutes a serious crime under national law, such as the illegal exploitation of natural resources, arms trafficking, human trafficking, terrorism,

financial crimes, land grabbing or the destruction of the environment" (Office of the Prosecutor, 2016). Although the ICC has not yet formally expanded its jurisdiction, it indicated that it will assist State Parties by assessing crimes against humanity in a wider aspect, which could include land grabbing. It remains to be seen whether Cambodia will contest the ICC's jurisdiction in the event the OTP decides to open a preliminary examination in Cambodia in view of the increased authoritarianism of the current Prime Minister.

3.5. A COMPARISON

By virtue of being ASEAN Member States, the Philippines, Malaysia, Myanmar and Cambodia have socialized into the norms of non-interference in domestic matters and developed their identity through the ASEAN Way and Asian values. All the four states analyzed in this chapter consist of populations of multi-ethnic and multi-religious background. Colonization had sparked religious and ethnic conflicts in the region by merging certain territories which used to be under different rulers together or by such as in Mindanao in the Philippines, and Sabah in Malaysia; and by bringing in immigrants as foreign labors such as in the Rakhine State and Malaysia. Colonization had also changed their political system from informal to democratic, albeit with features of the past woven into the present system. Thus, it can be seen that Malaysia and Cambodia still maintain their constitutional monarchy as a symbol while vesting most powers to the Prime Minister.

On the other hand, for all the four states, the culture of not questioning the leaders are still ingrained in the society, although in recent years there have been civil movements to change the system. In Cambodia, the same Prime Minister and political party have been ruling the country since the 1980s. As for Malaysia, the same political party had been in power since its independence in 1957 until it was toppled in 2018. Myanmar was under a military junta and despite currently having a civilian government, the military still plays a strong role in the country. The Philippines had toppled the dictatorship in 1986 but continues to suffer a "defective democracy". The political system of these countries and the roles of the leaders are important factors in this

analysis as the level of engagement of civil society with the government affect the decision of the states to join the ICC.

As stated by Carlsnaes et. al (2012), “norm contestation today is more likely to take three other forms: (1) claiming an exception based on imminent threat, (2) challenging the validity of human rights with a different set of norms, (3) or redefining behaviour to fall outside the scope of a norm” (p. 835). Further, according to Mills and Bloomfield (2017), “Declining to join thus remains a powerful form of resistance” (p. 102). From the four states analyzed in this chapter, it can be observed that the norm antipreneurs put forth the norms and perceptions of the ASEAN Way such as the principle of non-interference, threat to sovereignty and arguments of Western construct as justification in their contestations of the ICC.

The socialization of states with external actors can also play a part in affecting their decision to join the ICC. As stated in Chapter 1, socialization involves mimicking and social influence between actors, thus affecting their perceptions towards the ICC. On the one hand, Myanmar is a close ally of China, on the other hand the Philippines has been a close ally of the US but in the recent years it has also been leaning towards China. In the cases of the two states, their allies’ rejection of the ICC allows them to feel justified in the doing the same. On the contrary, Malaysia—which is closely connected with the Islamic world and frequently champions issues related to Muslims—wanted to join the ICC as it sees that the Court has taken a bolder step towards addressing the issues of Myanmar and Palestine (by accepting Palestine as a State Party at the ICC in 2015 and opening a Preliminary Examination on the situation in Palestine). Moreover, it can be observed that as Cambodia has been getting closer to China and gaining support, it has started to reduce political and civil liberties contrary to the values championed by the West. Therefore, contestation by major powers also plays a part in ASEAN’s participation in the ICC.

Concerning ASEAN Member States’ perception of the “West”, they regard it in two different groups: the EU and Canada, and the US. They regard the EU and Canada as actors championing human rights and setting examples by joining the ICC, while the US as practicing “exceptionalism” as it has allegedly violated human rights and rejected the ICC. Nevertheless, ASEAN Member States perceive the West as a group of allies,

and they believe that the EU will not pressure the US into accepting the ICC while insisting developing countries to recognize the Court.

Despite different levels of contestation, it can be seen that there is no pressure coming from ASEAN or any of the member states to set the standard of behavior of accepting or participating in the ICC. The standard of behavior it seems, is to reject the ICC's jurisdiction. While the Philippines was seen to support the ICC at the beginning, the moment that it perceived the ICC as interfering in its domestic matters, it withdrew from the Rome Statute. Furthermore, this can be considered as an attempt by President Duterte to contest the validity of the ICC in order to deny any decision made by the ICC and to avoid prosecution. In Malaysia, despite finally having the political will at the governmental level to accede to the Rome Statute, the perception of a threat to sovereignty is still placed a higher importance than accepting the ICC. Likewise, Myanmar rejects all kinds of interference to its domestic matters. On the other hand, Cambodia, which has a history of receiving international assistance with the UNTAC and the ECCC, has been more open to accepting the ICC. However, Cambodia's final stance regarding the jurisdiction of the ICC yet remains to be seen if the OTP opens an investigation in Cambodia against the current Prime Minister.

CONCLUSION

This thesis sought to show how identity, norms and socialization can affect the participation of states in the ICC. When ASEAN Member States decline to ratify the Rome Statute, on their part, it shows resistance to the ICC. Although Cambodia is the only ASEAN Member State that is a member of the ICC, upon further analysis it can be seen that Cambodia has not fully internalized the norms of the ICC. Although it is visible that ASEAN Member States are rejecting the ICC, the way they are contesting it are different based on their own identity and socialization with external actors. From the analysis it can be observed that the anti-impunity norms as fundamental norms have been internalized by the four ASEAN Member States, since they have ratified the UDHR, Genocide Convention and the Geneva Conventions.

However, with regards to the implementation of the norms of international criminal justice, there is resistance by states. It can thus be argued that ASEAN Member States have not internalized the norms establishing that it is the responsibility of the state to prosecute atrocities when it involves their current leaders. Notwithstanding, as can be seen in the case of the Philippines and Malaysia after the 2010 Kampala Conference, with proper outreach and understanding of what the ICC is, states can change their minds about joining the ICC.

Nevertheless, as pointed out in Chapter 1, contestation and norm life-cycle are not linear. While at a certain point the norms seem to be accepted, there are situations where the norms seem to be contested again. This is due to the role of norm entrepreneurs and norm antipreneurs that continue to challenge each other as one seeks to affect a change while the other attempts to maintain the status quo, or resists the change. As suggested by Wiener (2014), contestation does not mean that the norms will fail, as with proper contestation and space for contestation, it can actually strengthen the norms until it achieves internalization and is no longer debated.

The ICC has shown that it is moving forward from an institution laden with accusations of being biased, ineffective and not independent towards taking bolder steps in investigating atrocities around the world. Nevertheless, the establishment of the ICC is far from being idealistic and it does not aim to punish every atrocity committed. In an

anarchic international system, it cannot be denied that politics may take precedence over prosecution or investigation of cases. However, the politicization of the ICC and processes can be reduced if the Court reaches the level of universality and accepted as a supranational power where atrocities cannot go unpunished. When or if the ICC achieves the level of universality, the big powers would have to take heed of the principle that no one is above the law. Further, the ICC's aim is not to encroach into the sovereignty of states, but to ensure that states take the primary responsibility of prosecuting the crimes at the national level, leaving the ICC as a court of last resort. As can be seen in the case of the Philippines and Cambodia, by virtue of being a State Party, the citizens of these states have applied to the ICC and had an international avenue to seek justice from when their national courts were unwilling and/or unable to act and investigate a sitting leader.

As some ASEAN Member States fear that the Court will not understand the nuances of Asian values and social contexts (as indicated by Indonesia's statement during the Rome Proceedings), being a part of the ICC can help to improve the ICC into a Court that has diverse judges from different backgrounds as State Parties may nominate their judges to the ICC. It can be seen from the appointment of a Filipino, Dr. Raul Cano Pangalangan as an ICC judge in 2015. Moreover, ASEAN Member States may be represented at the Assembly of State Parties to further develop the Court and its processes.

ASEAN and its Member States should not refrain from participating in the ICC as they have more advantages than disadvantages in being a State Party to the Rome Statute. Among the advantages are the development of norms of international criminal justice in the region and to have a voice at the Assembly of State Parties. This is important not only in combating the perception that the ICC is a "Western tool" but also to be more involved in the international community.

Furthermore, ratification of the Rome Statute signals a commitment in upholding the norms of international criminal justice. Rejecting the ICC's authority and jurisdiction does not necessarily shield a state from being investigated by the ICC when atrocities have been or are being committed. ASEAN as an organization should start opening the space for the contestation of the ICC at the regional level by discussing and debating its

Member States' participation in the ICC instead of keeping silent on the matter. This would require one of the Member States to take the initiative. Whereas at the domestic level, norm entrepreneurs should continue educating the public and dispelling misinformation about the ICC.

The ICC, as an institution that gives the power to the prosecutor and judges to implement the norms of international criminal law, shows the move towards global governance by the international community to punish violations of international criminal law. This is different from the pre-World War I norms wherein violations of war crimes or crimes against humanity were prosecuted by the state itself. Among the challenges faced by the ICC are to achieve universality and to ensure that states internalize these norms. As Kofi Annan (1997) stated in his speech to the International Bar Association, the aim of the Court is "to ensure that no ruler, no state, no junta, and no army anywhere can abuse human rights with impunity. Only then will the innocents of distant wars and conflicts know that they, too, may sleep under the cover of justice; that they, too, have rights and that those who violate those rights will be punished" (p. 366).

As a step further, future research may focus on comparing and contrasting ASEAN countries' cases with those of other developing states in other regions such as Africa and Latin America with regards to their identity as they have mostly ratified the Rome Statute. Such a study on identity can further contribute to an understanding of how states contest certain norms and how to diffuse the norms more effectively to achieve a universal ICC in its real sense.

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APPENDIX 1. ORIGINALITY REPORT

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MASTER'S THESIS ORIGINALITY REPORT

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Name Surname: Aufa RADZİ
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ADVISOR APPROVAL

APPROVED.

Assoc. Prof. Dr. Mine Pınar Gözen Ercan

APPENDIX 2. ORİJİNALLİK RAPORU

HACETTEPE ÜNİVERSİTESİ
SOSYAL BİLİMLER ENSTİTÜSÜ
YÜKSEK LİSANS TEZ ÇALIŞMASI ORİJİNALLİK RAPORU

HACETTEPE ÜNİVERSİTESİ
SOSYAL BİLİMLER ENSTİTÜSÜ
ULUSLARARASI İLİŞKİLER ANABİLİM DALI BAŞKANLIĞI'NA

Tarih: 18/07/2019

Tez Başlığı : The Non-Participation of ASEAN Countries in the International Criminal Court: A Constructivist Perspective

Yukarıda başlığı gösterilen tez çalışmamın a) Kapak sayfası, b) Giriş, c) Ana bölümler ve d) Sonuç kısımlarından oluşan toplam 76 sayfalık kısmına ilişkin, 18/07/2019 tarihinde tez danışmanım tarafından Turnitin adlı intihal tespit programından aşağıda işaretlenmiş filtrelemeler uygulanarak alınmış olan orijinallik raporuna göre, tezimin benzerlik oranı %28'dir.

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APPENDIX 3. ETHICS BOARD WAIVER FORM

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ADVISER COMMENTS AND APPROVAL

Approved.

Assoc. Prof. Dr. Mine Pınar GÖZEN ERCAN

APPENDIX 4. ETİK KOMİSYON MUAFİYETİ FORMU

HACETTEPE ÜNİVERSİTESİ
SOSYAL BİLİMLER ENSTİTÜSÜ
TEZ ÇALIŞMASI ETİK KOMİSYON MUAFİYETİ FORMU

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SOSYAL BİLİMLER ENSTİTÜSÜ
ULUSLARARASI İLİŞKİLER ANABİLİM DALI BAŞKANLIĞI'NA

Tarih: 10/07/2019

Tez Başlığı: ASEAN Ülkelerinin Uluslararası Ceza Mahkemesi'ne İştirak Etmemesi: İnşacı Bir Yaklaşım

Yukarıda başlığı gösterilen tez çalışmam:

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Uygundur.

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