

# Promoting the use of undercover operations to combat narcotic drug trafficking in the ASEAN Community: The equilibrium of crime control and due process<sup>1</sup>

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## **Abstract**

*The creation of the ASEAN Economic Community will exacerbate drug trafficking in the ASEAN Community. After comparative study of a more advanced community like the European Union in combating transnational organised crime, this research suggests that the member states of the ASEAN should enact legislation adopting the special investigative techniques, including undercover operations. In Article 20 of the United Nations Convention Against Transnational Organised Crime (“UNTOC”). This was been developed and recommended as the appropriate instruments to combat this crime. Such legislation would be considered with a supranational institution like the ASEAN Court of Human Rights, which may be set up to protect human rights of the ASEAN’s people. Advantages of these recommendations include legalising the use of special investigative techniques as well as ensuring the admissibility of the evidence obtained from these operations at a national level. Furthermore, the set-up of the ASEAN Court of Human Right will allow the court to review the use of special investigation operations that can infringe individuals’ rights to fair trial and privacy in all member states of the ASEAN. The use of undercover operations in the ASEAN Community will be shaped to become one of the most effective techniques in the new era of criminal adjudication processes which can be used as an instrument to bring the equilibrium of crime control and due process back to society.*

**Keywords:** ASEAN Community; Human rights; Narcotic drug trafficking; Undercover operations

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## **1. Introduction**

The general investigative techniques which have been designed to obtain or collect evidence in ordinary criminal cases are unmatched to the situation of narcotic drug trafficking in Thailand and the ASEAN Community. Special investigative techniques, including

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<sup>1</sup> The author is grateful for useful comments from Professor Peter Duff, Professor of Criminal Justice at the University of Aberdeen Scotland United Kingdom,.

undercover operations, have been developed to tackle this serious crime. Even though the use of undercover operations is one of the necessary special investigative techniques to combat narcotic drug trafficking in Thailand and the ASEAN Community, some encroachment on the individual rights and freedom of people occurred in some cases. However, these special investigative techniques are grounds for proper compromise between the ideals of crime control and due process for member countries of this Community.

Most narcotic drug trafficking is transnational organised crime. Given their nature, general investigative techniques cannot combat this effectively. At the international level, the undercover operation has been regarded as a powerful instrument to fight against transnational organised crimes, including narcotic drug trafficking. However, undercover operations are an intrusive and sometimes a dangerous technique, in developed countries, appropriate mechanisms were designed to control the use of these special investigative measures. Given the need to apply the undercover operations technique and the need to mitigate its potential detrimental effects, the ASEAN Community should analyse the experience of a more developed country or community to use this special investigative technique with the least effect on individual rights and freedom of people.

## **2. Undercover Operation and the effects on Human Rights**

Many accomplishments of the use of undercover operations to combat narcotic drug trafficking are the best evidence of the important of this special investigative technique. However, by the nature of undercover operations, they can easily breach or affect the right to a fair trial and the right to privacy, which are fundamental rights of people in democratic countries. Hence, the use of undercover operations should be limited and legally used in accordance with the law only in necessary cases.

### ***2.1 Standard of proof in criminal proceeding***

Because crime is considered as a social phenomenon which effects social security, the evolution of legal systems has been developed to investigate the facts in criminal cases.<sup>2</sup> Nowadays, in democratic countries, there are often said to be two main systems which are used to investigate the facts in criminal cases. Firstly, the adversarial system which has traditionally been used in Common Law countries such as England, most Commonwealth countries and the United States,<sup>3</sup> and the inquisitorial system which has been used in Civil Law countries such as France, Germany and Italy.<sup>4</sup> Even though the two systems lead to different types of criminal proceedings, the presumption of innocence is guaranteed in both systems.<sup>5</sup> The presumption of innocence is considered as a universal right that is recognised in many international human rights conventions such as Article 11 (1) of the Universal Declaration of Human Rights 1948 (UDHR)<sup>6</sup> or Article 14 (2) of the International Covenant

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<sup>2</sup> Richard Quinney. Structural Characteristics, Population Areas, and Crime Rates in the United States. *Journal of Criminal Law, Criminology and Police Science*. 1966, vol. 57, no. 1, pp. 45-52.

<sup>3</sup> Richard Vogler. *A World View of Criminal Justice*. Aldershot: Ashgate Publishing Limited, 2006. pp. 129-155.

<sup>4</sup> *ibid*, 17-43.

<sup>5</sup> William van Caenegem. *Advantages and disadvantages of the adversarial sytem in criminal proceeding*. (Law Faculty Publication 1999) Bond: Bond University, 1999. Access from:

<[http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1223&context=law\\_pubs](http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1223&context=law_pubs)>

<sup>6</sup> The Universal Declaration of Human Rights 1948 (adopted 10 December 1948 UNGA Res 217A(III)) Art 11(1).

on Civil and Political Rights 1966 (ICCPR)<sup>7</sup> and Article 6 (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, ECHR).<sup>8</sup> Consequently, under the presumption of innocence, the standard of proof in criminal cases of democratic countries is that the defendant's guilt must be proved to the intimate conviction of the trier of fact or beyond a reasonable doubt. This standard of proof provides the greatest protection for the presumption of innocence in criminal proceedings of democratic countries.<sup>9</sup> Therefore, the accused are not required to prove their innocence but only need to establish a reasonable doubt that they might be guilty in order to secure a discharge.<sup>10</sup>

## ***2.2 Transnational organised crime and criminal proceeding***

In democratic countries, the presumption of innocence and proof beyond reasonable doubt/ intimate conviction are used as fundamental rights to protect people from mistakes in criminal proceedings. Nevertheless, in the case of transnational organised crime like narcotic drug trafficking, it might be argued to be a different situation because these transnational organised crimes have well-organised structures to withstand this standard of criminal proceeding. For example, Mr. Wei Hsueh-Kang, the commander of the United WA State Army's (UWSA or WA) Southern Military Command, who is the boss of the dominant narcotic drug trafficking network in Myanmar, Thailand and Southeast Asia.<sup>11</sup> Wei Hsueh-Kang's narcotic drug trafficking organisation is considered as a one of the biggest narcotic drug trafficking network in Southeast Asia, and possibly worldwide. His organisation has a structure like a big company which can be divided into many departments. Each department will have a senior officer who has responsibility for illegal business like manager in a business company<sup>12</sup>. In practice, with the organisation structure like this, it is very difficult for law enforcement officer to obtain any criminal evidence which is relevant to the head of the criminal organisation. This is the answer why the United States Department of State (USDOS) is offering a reward of up to 2 million dollars for information leading to the arrest or conviction in the United States of this man.<sup>13</sup>

Moreover, most criminal organisations earned massive profits from illegal business therefore, they could easily hire or train the best lawyers to help them in criminal proceedings. In the worst case, they may use their dirty money to persuade officers in criminal proceeding such as the police, public prosecutor and judge to assist them in various ways.<sup>14</sup> Regarding complexity of criminal organisations and their strong financial status, it can be seen that transnational organised crime, like narcotic drug trafficking, is not ordinary street crime but it

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<sup>7</sup> The International Covenant on Civil and Political Rights 1966 (adopted 16 December 1966 UNGA Res 2200 A (XXI)) Art 14 (2).

<sup>8</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 6 (2).

<sup>9</sup> Edward Lawson. (2<sup>nd</sup> ed.) *Encyclopedia of Human Rights*. London: Taylor & Francis, 1996. pp. 508-509.

<sup>10</sup> Paul Roberts and Adrian Zuckerman. (2<sup>nd</sup> ed.) *Criminal Evidence*. New York: Oxford University Press, 2010. pp. 247-252.

<sup>11</sup> *Narcotics Rewards Program, Wei Hsueh-Kang*. (USDOS BUREAU OF INTERNATIONAL NARCOTICS AND LAW ENFORCEMENT AFFAIRS 2014) Washington DC: The United States Department of State, 2014. Access from: <<http://www.state.gov/j/inl/narc/rewards/115358.htm>>

<sup>12</sup> *Trafficker Information, (DEA FAR information 2014)* Bangkok: Drug Enforcement Administration Far East Region, 2014. Access from: <<http://dea-rewards.com/len/wantedinfo.php?tid=24>>

<sup>13</sup> *Narcotics Rewards Program, Wei Hsueh-Kang*. (n11).

<sup>14</sup> Peter Yam Tat-wing. *The Resource Material Series No. 58. Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders*. 2001. pp. 27-39.

is a crime that is been committed by professional criminals who know how to use the fundamental rights granted by criminal procedure for their advantage. Consequently, law enforcement officers who use general investigation techniques to obtain evidence in case of transnational organised crimes have a difficult time to combat these criminal organisations.

### ***2.3 The effects of undercover operation on human right***

In 1968, Herbert L. Packer, professor of law at Stanford University, presented one of the most influential academic theories of the criminal process, which postulates “two models of the criminal process”. The two models of Packer are the crime control model and the due process model. He presented the two models as two extreme value positions in criminal proceeding, The crime control model values fast, brief and efficient criminal proceedings in order to convict the factually guilty and reduce crime. However, this type of processing can easily harm or detract from the liberty of the people owing to the quick proceedings. On the other hand, the due process model values thoughtful, delicate and verifiable criminal proceedings, which effectively prevents mistakes in the process and emphasises civil liberties, but results in costly and delayed criminal proceeding<sup>15</sup>. In fact, it can be said that no country in the world adopts one set of values exclusively as a model for a criminal justice policy. Nevertheless, these analytical models can be used to explore criminal justice policies in every country to explain value choices made by that country.

#### **2.3.1 The effect of undercover operations on the right to a fair trial in criminal matters**

At an international level, the right to a fair trial is one of human rights, which is recognised as a fundamental right of the people in Article 10 of the Universal Declaration of Human Rights 1948 (UDHR).<sup>16</sup> Moreover, at a regional level, the right to a fair trial is also recognised in Article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, ECHR).<sup>17</sup>

Normally, in a trial of criminal court, the prosecutor has to disclose every evidence and testimony, which will be used to incriminate accused in the court because this is the right of accused to have adequate information to conduct his defence which presupposes an ‘equality of arms’ between the accused and the prosecutor.<sup>18</sup> However, the use of undercover operations can affect this right because the prosecutor does not want to disclose all details of the operation including the indentity of undercover officers, which are the most important thing of their working methods, in the court because if all the information about undercover operations are disclosed in the court, it can affect not only other undercover operations in the future, but also endanger the life or safety of undercover officers.<sup>19</sup>

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<sup>15</sup> Herbert L. Packer. *The Limits of the Criminal Sanction*. California: Stanford University Press, 1968. pp. 149-173.

<sup>16</sup> The Universal Declaration of Human Rights 1948 (adopted 10 December 1948 UNGA Res 217A(III)) Art 10

<sup>17</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 6 (1).

<sup>18</sup> Peter Noorlander. The impact of the human rights act 1998 on covert policing: Principles and practice. *The International Journal of Human Rights*. 1999, vol. 3, no.4, p.54.

<sup>19</sup> *Ibid*, 55.

### **2.3.2 The effect of undercover operations on the right to privacy**

The right to privacy is another human right that is recognised in Article 12 of the Universal Declaration of Human Rights 1948 (UDHR).<sup>20</sup> At a regional level, the right to privacy is also recognised in Article 8 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, ECHR).<sup>21</sup> This right aims to protect the privacy of people in many dimensions such as information privacy, communication privacy and territorial privacy.<sup>22</sup> By their nature, undercover operations can always affect or breach this right, especially the right to respect for private life. For instance, to combat transnational organised crime like narcotic drug trafficking, law enforcement officers have to rely on any information and evidences, which are obtained from undercover officers who disguise themselves and 'befriend' with a suspect over a period of time. It is clear that such operations would interfere with the suspect's right to respect for private life because a suspect is unaware that he is watching and talking with undercover officers.<sup>23</sup>

From the examples above, although an undercover operation is one of the best instruments to collect evidence and combat effectively complex crimes like transnational organised crime, people have to sacrifice some of their fundamental rights to this special investigative technique. Consequently, in democratic countries, which have a criminal justice system based on due process of law, the use of undercover operations should be limited and legally used (in accordance with the law) only in the case which general investigative techniques cannot obtain evidence to incriminate the accused.

### **3. Promoting the use of undercover operation to combat narcotic drug trafficking in the ASEAN Community**

In Europe, special investigative techniques including undercover operations have been developed to combat transnational crimes for a considerable period of time and showed their ramifications on the individual rights. Consequently, the Council of Europe legislated the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, ECHR) to provide minimum standard of human rights for citizens of all member states. Moreover, the establishment of the European Court of Human Rights could guarantee the protection of human rights and fundamental rights under this convention in both regional and national level. Comparing Europe with the newly established community like the ASEAN, this research analyses that the ASEAN Community still need more concentration on the development of the promotion and protection of human rights in the Community.

#### ***3.1 The protection of human rights and in Europe***

One of deriving reasons behind the advancement of human rights protection in Europe is the Convention for the Protection of Human Rights and Fundamental Freedoms

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<sup>20</sup> The Universal Declaration of Human Rights 1948 (adopted 10 December 1948 UNGA Res 217A(III)) Art 12

<sup>21</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 8 (1).

<sup>22</sup> *Covert Investigative Techniques (SFO Working paper 2014)* London: Serious Fraud Office, 2014. Access from: [http://www.sfo.gov.uk/media/106970/covert\\_investigative\\_techniquesRIPA\\_sfo\\_operational\\_handbook\\_topic.pdf](http://www.sfo.gov.uk/media/106970/covert_investigative_techniquesRIPA_sfo_operational_handbook_topic.pdf)

<sup>23</sup> Peter Noorlander, (n18) p. 61.

(European Convention on Human Rights, ECHR). This convention provides many fundamental rights for all European citizens including, the right to a fair trial<sup>24</sup> and the right to respect for private and family life.<sup>25</sup> This convention provides not only the protection of human rights in the words in the convention, but also provides a mechanism and institution to protect human rights of citizens in practicality. Article 19 of the ECHR provides practical mechanism to protect human rights, which is the establishment of the European Court of Human Rights (EctHR). Article 19 of the ECHR states that “*To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as “the Court”. It shall function on a permanent basis*”.<sup>26</sup>

### **3.2 The use of undercover operations and the European Court of Human Rights**

The first section of this paper exhibits that undercover operations can easily affect or breach the right to privacy and consequently the right to fair trial. However, it could be regarded an essential instrument to combat transnational organised crime like narcotic drug trafficking. Examining the ECHR through the lens of Packer’s models, this research argues that although the convention is based on due process, there is still compromise with crime control. For example, the right to privacy and the right to fair trial of people are recognised as fundamental rights in this convention. However, these rights are not an absolute right. They can be qualified for reasons such as the national security, public safety or the prevention of disorder and crime.<sup>27</sup>

#### **3.2.1 Exceptions of the right to privacy**

Because the right to respect for private and family life in Article 8 is not an absolute right, it can be interfered with under the conditions set out in Article 8 (2) which states that “*There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*”.<sup>28</sup> This means that if law enforcement officers would like to interfere with this right legally, they need to pass scrutiny on a set of essential principles: firstly, the activity has to be ‘in accordance with the law’; secondly, it needs to be ‘necessary in a democratic society; and thirdly, it must comply with one of the aims listed.<sup>29</sup> Applying the use of undercover operations, this special investigative technique can clearly comply with the aims listed such as the interests of national security, public safety or prevention of disorder or crime. Nevertheless, the application of the first two principles is more complex, but can explain through the ECtHR case law. The phrase ‘in accordance with the law’ was interpreted

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<sup>24</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 6

<sup>25</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 8

<sup>26</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 19

<sup>27</sup> Hiral Bhatt, RIPA 2000: A human rights examination. *The International Journal of Human Rights*. 2006, vol. 10, no.3, pp. 288-289.

<sup>28</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 8 (2)

<sup>29</sup> Peter Noorlander, (n18) p. 52.

in *Malone v the United Kingdom* to mean that ‘the law’ in the meaning of this Article must be legislated in an Act of Parliament or in a rule of common law. A ministerial circular or an internal set of police guidelines is not capable of satisfying this requirement.<sup>30</sup> Furthermore, in *Klass v Germany*, the court also interpreted that the ‘in accordance with the law’ requirement had to provide a system of checks and balances which included components such as prior scrutiny and independent oversight as safeguards against abuse.<sup>31</sup>

For the ‘necessary in a democratic society’ requirement, the court interpreted this phrase in *Olsson v Sweden*<sup>32</sup> and *Niemietz v Germany*<sup>33</sup> to mean that the intrusive police methods should be used only to investigate serious crimes when other, less intrusive methods have been tried and failed or are not available. Any decision to empower intrusive methods has to be based on “*The existence of facts or information which would satisfy an objective observer [that there is reasonable cause to act]*”.<sup>34</sup> Consequently, if law enforcement officers in member states of the Council of Europe would like to deploy undercover operations, they must prove that their operations can reach to the minimum standard of these essential principles.

### **3.2.2 Exceptions of the right to privacy and the right to a fair trial**

In the case of the right to a fair trial, Article 6 of ECHR provides minimum rights for civil and criminal proceedings, including principle of the ‘equality of arms’ between the accused and the prosecutor.<sup>35</sup> the ECtHR confirmed this principle in *Foucher v France*. The court held that “*Each party must be afforded a reasonable opportunity to present his case in conditions that do not place him at a disadvantage vis-a-vis his opponent*”.<sup>36</sup> In case of undercover operations, the prosecutor always used the concept of ‘public interest immunity’ for sensitive materials, which are used to incriminate the accused. In *Jasper v United Kingdom*<sup>37</sup> and *Fitt v United Kingdom*,<sup>38</sup> the ECtHR explained that this concept is compatible with the ECHR ‘under certain circumstances’, as long as special procedures are followed to safeguard the rights of the accused.<sup>39</sup> Thus, any evidence from undercover operations can be used to incriminate the accused, as long as special procedures are followed to safeguard the rights of the accused and the prosecutor can satisfy the court that there is no disadvantage to the accused.

### **3.3 *The impact of the European Court of Human Rights on criminal proceeding of member states***

Since individuals, nongovernmental organisations or groups of individuals can file applications directly to the EctHR if they are claiming to be victims of a violation of human

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<sup>30</sup> *Malone v the United Kingdom* (1984) 7 EHRR 14

<sup>31</sup> *Klass and others v the Federal Republic of Germany* (1978) 2 EHRR 214

<sup>32</sup> *Olsson v Sweden* (1988) 11 EHRR 259

<sup>33</sup> *Niemietz v the Federal Republic of Germany* (1992) 16 EHRR 97

<sup>34</sup> *Cambell v the United Kingdom* (1992) 15 EHRR 137

<sup>35</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 6 (3)

<sup>36</sup> *Foucher v France* (1997) 25 EHRR 234.

<sup>37</sup> *Jasper v the United Kingdom*, Application No.27052/95, Commission Report of 20 October 1998

<sup>38</sup> *Fitt v United Kingdom*, Application No.29777/96, Commission Report of 20 October 1998

<sup>39</sup> Peter Noorlander, (n18) p. 60-61.

rights. This had a great impact on criminal proceeding of member states. Every member state of the ECHR has to legislate, revise or modify the laws to comply with the minimum standard for the protection of fundamental rights in the ECHR. For example, the United Kingdom, which has legal systems based on common law system, had to legislate the Human Rights Act 1998 (HRA)<sup>40</sup> for complying with the right enshrined in the ECHR. The Human Rights Act 1998 provides the first time in the UK history right to individuals that they can be able to initiate criminal proceeding in domestic courts on the basis that states authority have violated the ECHR.<sup>41</sup> Furthermore, for purposes of using special investigative techniques like undercover operations legally under the ECHR and the HRA, the UK also legislated the Regulation of Investigatory Powers Act 2000 (RIPA 2000) in 2000.<sup>42</sup> The use of undercover operations is dealt with in Part II ‘*Surveillance and covert human intelligence sources*’.<sup>43</sup> It is very clear that the RIPA 2000 is designed to be a useful statute in order to eliminate many of deficiencies of the protection of fundamental rights in English laws, which are incompatible with the ECHR.<sup>44</sup> Hence, it can be said that the ECHR plays an important role in the development of the protection of human rights at both regional and national level.

### ***3.4 The ASEAN Community and the protection of human rights***

The association of Southeast Asian Nations (ASEAN), an inter-governmental organisation, has the ASEAN Charter as a model for members to respect and operate.<sup>45</sup> The promotion and protection of human rights in ASEAN is one of the most important missions of this charter. In the preamble, the ASEAN Charter states that “... *ADHERING to the principles of democracy, the rule of law and good governance, respect for and protection of human rights and fundamental freedoms;...*”.<sup>46</sup> Furthermore, to achieve the promotion and protection of human rights in the community, ASEAN will establish a human rights body to operate in accordance with the terms of reference to be decided by an ASEAN Foreign Ministers meeting.<sup>47</sup> In July 2009, the ASEAN Intergovernmental Commission on Human Rights (AICHR) was established to be human rights body of the charter when the Terms of Reference (TOR) of AICHR was adopted by the ASEAN Foreign Minister meeting.<sup>48</sup> Finally, for the reasons of promotion and protection of human rights and fundamental freedoms, in November 2012, the member states of the ASEAN also decided to set up “ASEAN Human Rights Declaration (AHRD)” as a framework for building human rights cooperation in the region and contribute to the ASEAN community.<sup>49</sup>

#### **3.4.1 The problem of human rights protection in the ASEAN Community**

<sup>40</sup> The Human Rights Act 1998

<sup>41</sup> *Covert Investigative Techniques (SFO Working paper 2014)*, (n22).

<sup>42</sup> The Regulation of Investigatory Powers Act 2000

<sup>43</sup> The Regulation of Investigatory Powers Act 2000, pt 2

<sup>44</sup> Hiral Bhatt, (n27) p. 310.

<sup>45</sup> *History of ASEAN. (MFA information 2014)*. Bangkok: Ministry of Foreign Affairs, 2014. Access from: <<http://www.mfa.go.th/asean/contents/files/other-20121128-163749-350622.pdf>>

<sup>46</sup> Charter of the association of Southeast Asian Nations (adopted 15 December 2008 ASEAN Secretariat: Jakarta)

<sup>47</sup> Charter of the association of Southeast Asian Nations (adopted 15 December 2008 ASEAN Secretariat: Jakarta) art 14

<sup>48</sup> *A Brief History of the ASEAN Intergovernmental Commission on Human Rights. (AICHR information 2014)*. Jakarta: ASEAN Intergovernmental Commission on Human Rights, 2014. Access from: <<http://aichr.org/about/>>

<sup>49</sup> *ASEAN Human Rights Declaration. (ASEAN information 2012)*. Jakarta: Association of Southeast Asian Nations, 2012. Access from: <<http://www.asean.org/news/asean-statement-communicues/item/asean-human-rights-declaration>>

Although ASEAN has the AHRD and the AICHR as instruments for the promotion and protection of human rights in the community, there are still problems in practice. Firstly, the problem of interpretation of AHRD because, unlike member-states of Council of Europe, member countries of ASEAN have very different backgrounds. The world development report 2011 of World Bank showed that ASEAN member-states are different in terms of population size, economic and political systems.<sup>50</sup> Related to these different backgrounds, member countries of ASEAN have various ways of interpreting the AHRD. For instance, Article 8 of AHRD states that “*The human rights and fundamental freedoms of every person shall be exercised with due regard to the human rights and fundamental freedoms of others. The exercise of human rights and fundamental freedoms shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition for the human rights and fundamental freedoms of others, and to meet the just requirements of national security, public order, public health, public safety, public morality, as well as the general welfare of the peoples in a democratic society.*”<sup>51</sup> Therefore, Brunei, Malaysia and Indonesia, which are Muslim countries, interpreted this Article that the rights of gay, lesbian, bisexual and transgender people could be limited by means of “public morality” under the article.<sup>52</sup> Moreover, many member countries of ASEAN prefer to interpret this declaration by using ‘Asian Values’ than ‘Western Values’. They believe that conceptions of human rights in Southeast Asia are different from the conceptions of human rights in Western countries.<sup>53</sup> Consequently, the interpretation of the promotion and protection of human rights of the AHRD may be different from the interpretation of the promotion and protection of human rights in Western countries in Europe or the United States.

Secondly, there is the problem of the regional institution to protect human rights in the ASEAN Community. This problem is the most important issue in the promotion and protection of human rights in the ASEAN Community because nowadays, ASEAN does not have a supranational institution directly to protect human rights and give remedies to the individual in case of the breach of human rights under the AHRD like the ECtHR of the Council of Europe.<sup>54</sup> At present, although, the power of the AICHR is only to monitor and make recommendations to member countries on the protection of human rights and fundamental freedoms in the ASEAN Community. The AICHR is not be able to act like a court with judicial power as like the ECtHR of the Council of Europe.<sup>55</sup> For this reason, in 2009, The Wall Street Journal, an American English-language international daily newspaper with a special emphasis on business and economic news, labeled the AICHR as “ASEAN’s Toothless Council”.<sup>56</sup> Moreover, in 2010, Amnesty International, a non-governmental organisation focused on human rights, also labeled the AICHR as a “disappointment” because it refused to respond to many complaints brought by victims, families and civil society organisations about human rights abuses in the ASEAN member countries.<sup>57</sup>

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<sup>50</sup> *World development report 2011. (World Bank Working Paper 2011).* Washington DC: World Bank, 2011. Access from: <[http://siteresources.worldbank.org/INTWDRS/Resources/WDR2011\\_Full\\_Text.pdf](http://siteresources.worldbank.org/INTWDRS/Resources/WDR2011_Full_Text.pdf)>

<sup>51</sup> ASEAN Human Rights Declaration (adopted 18 November 2012, ASEAN Secretariat: Phnom Penh) art 8

<sup>52</sup> Gerard Clarke. *The Evolving ASEAN Human Rights System: The ASEAN Human Rights Declaration 2012. Northwestern Journal of International Human Rights.* 2012, vol. 11, no. 1, pp. 21-22.

<sup>53</sup> *ibid*, p. 9.

<sup>54</sup> Vitit Muntarbhorn. *Regional Integration and Human Rights: European-Asian Reflections.* in PETSIRI, A., MARQUES, J.S., Roth, W (eds.), *Promoting Human Rights in Asia and Europe: The Role of Regional Integration.* Auflage: Nomos, 2009. pp. 15-20.

<sup>55</sup> *Ibid*, 19.

<sup>56</sup> *ASEAN’s Toothless Council. (WSJ Opinion Asia 2009)* New York: The Wall Street Journal, 2009. Access from <<http://www.wsj.com/articles/SB10001424052970203517304574303592053848748>>

<sup>57</sup> *ASEAN human rights commission stumbles at first hurdle.* (AI Asia Pacific 2010) : The Amnesty International, 2010. Access from <<http://www.amnesty.org.au/news/comments/22792/>>

### 3.4.2 The Problem of using undercover operations in the ASEAN Community

The information of United Nations Treaty Collection (UNTC) show that all member countries of the ASEAN have already ratified or accepted to the UNTOC.<sup>58</sup> Theoretically, the law enforcement officers in all member countries of the ASEAN should enjoy the use of undercover operations as one of the special investigative instruments to combat narcotic drugs trafficking in their countries. However, in practice, there are still some problems. At a national level, the use of undercover operations and other special investigative techniques of the UNTOC need a specific law to complete the legislative intent of the UNTOC. Without a specific law to control the use of undercover operations and other special investigative techniques, these special investigative techniques cannot fulfil the legislative intent of the UNTOC. For example, Thailand did not authorise the use of undercover operations as one of the special investigative instruments in the Narcotic Drug Trafficking Prevention Act B.E.2519 of Thailand.<sup>59</sup> Later, the use of undercover operations was dealt with in section 27 of the Special Case Investigation Act B.E. 2547 (amended B.E.2551) of Thailand, but narcotic drug trafficking offenses are not included as laws covered in the annex to this act.<sup>60</sup> Consequently, in narcotic drug trafficking cases, undercover operations cannot be used at present. If law enforcement officers would like to launch undercover operations in narcotic drug trafficking cases under this act, the operations must be approved on a case-by-case basis by a Board of Special Case (BSC), a board that consists of the Prime Minister acting as Chairman; the Minister of Justice as Vice Chairman; Permanent Secretary of the Ministry of Justice, Permanent Secretary of the Ministry of Finance, Permanent Secretary of the Ministry of Interior, Permanent Secretary of the Ministry of Commerce; the Attorney General, Commissioner General of the Royal Thai Police, Secretary-General of the Office of the Council of State, Judge Advocate General, Governor of the Bank of Thailand, President of the Law Society and nine expert members appointed by the Cabinet, among whom shall be persons having expertise and knowledge in each field of economics, banking and finance, information technology or law. The use of undercover operations in narcotics cases may be authorised by no less than two-thirds of the votes of its existing board members.<sup>61</sup> In practice, therefore, it can be seen that the use of undercover operations in narcotic drug trafficking cases is very inconvenient in Thailand.

On a related point, it can be argued that the absence of legislation does not axiomatically mean that there is no guarantee of human rights at all. The criminal courts of every country already protects the human rights for the people. If it appears to the court that any evidence derived by acting in bad faith or derived by means of the data arisen or derived wrongfully, such evidence shall not be admitted by the Court. For instance, in 1999, the Supreme Court of Thailand decided that evidence obtained by the use of undercover operation without the testimony of the relevant undercover agent cannot be admissible in the court.<sup>62</sup> However, it should be noted that the case-by-case basis could cause inconsistent outcomes. In the same year, the Supreme Court of Thailand decided to admit that kind of evidence in an other case.<sup>63</sup> Hence, legislating a specific law on the undercover operations, definition and

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<sup>58</sup> STATUS AS AT : 11-01-2015 05:00:46 EDT of United Nations Convention against Transnational Organized Crime. (UNTC information 2015) New York : United Nations Treaty Collection, 2015. Access from <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII12&chapter=18&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII12&chapter=18&lang=en)>

<sup>59</sup> The Narcotic Drug Trafficking Prevention Act B.E.2519 of Thailand (THA) added by The Narcotic Drug Trafficking Prevention Act (4<sup>th</sup> Edition) B.E.2545 of Thailand (THA)

<sup>60</sup> The Special Case Investigation Act B.E. 2547 (Amended B.E.2551) of Thailand (THA)

<sup>61</sup> The Special Case Investigation Act B.E. 2547 (Amended B.E.2551) of Thailand (THA), section 21

<sup>62</sup> Supreme Court Judgment No. 6801/2542 [1999] (THA)

<sup>63</sup> Supreme Court Judgment No. 7423/2542 [1999] (THA)

scope, as recommended by Article 20 of the UNTOC, could overcome this inconsistency and offer a promising way to maintain due process in investigation of narcotic drug trafficking cases.

Because most of narcotic drug trafficking is transnational organised crime, to fulfil the legislative intent of this convention, paragraph 2 of Article 20 of the UNTOC states that *“For the purpose of investigating the offences covered by this Convention, States Parties are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using such special investigative techniques in the context of cooperation at the international level. Such agreements or arrangements shall be concluded and implemented in full compliance with the principle of sovereign equality of States and shall be carried out strictly in accordance with the terms of those agreements or arrangements”*.<sup>64</sup> Hence, it is very clear that the cooperation of state parties to this convention is one of the most important issues to combat transnational organised crime like narcotic drug trafficking. Nowadays, at the regional level, the ASEAN has the Treaty on the 2004 Mutual Legal Assistance in Criminal Matters as a cooperation in criminal matters of the ASEAN. Nonetheless, the scope of assistance in this treaty focuses on general assistance in criminal matters. It can be seen through Article 1(2) of the treaty.<sup>65</sup> The treaty has no specific mutual legal assistance in the use of special investigative techniques including undercover operations. Consequently, it could be a difficult situation for law enforcement officers in member states of the ASEAN to launch undercover operations to investigate narcotic drug trafficking in other territory of member states of the ASEAN.

#### **4. Conclusion and suggestion**

In conclusion, comparing the human rights protection under the ECHR with the ASEAN's perspective on human rights protection, it can be concluded that ASEAN still has many responsibilities on the development of promotion and protection of human rights because at a regional level, the AHRD is not sufficient to protect ASEAN people when compared with the ECHR of Europe. Besides, the Treaty on the 2004 Mutual Legal Assistance in Criminal Matters of the ASEAN does not focus on mutual legal assistance in the use of special investigative techniques including undercover operations. At a national level, the use of undercover operations needs specific legislation to complete the legislative intent of this special investigative technique. Unfortunately, some member states of the ASEAN such as Thailand do not legislate this special investigative technique directly into the Narcotic Drug Trafficking Prevention Act.

This research confirms that the promotion of the use of undercover operation to combat narcotic drug trafficking in the ASEAN Community is necessary for every member state of ASEAN. Nevertheless, the research recommends that the ASEAN should successfully follow the footsteps of a more developed community such as Europe in balancing between crime control and due process. Firstly, at a regional level, the ASEAN Community should legislate a more practical instrument than the AHRD such as “the ASEAN Human Rights Convention” including a supranational institution like “ASEAN Court of Human Rights”, similar to the ECHR and the ECtHR of Europe, for the protection of human and fundamental rights. With these instruments, the level of human rights protection in the ASEAN should be raised close to the level of the human rights protection of a more

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<sup>64</sup> The United Nations Convention Against Transnational Organized Crime and The Protocols Thereto (adopted 15 November 2000 UNGA Res 55/25), Art 20(2)

<sup>65</sup> 2004 Mutual Legal Assistance in Criminal Matters (adopted 29 November 2004 Ministers of Justice/Law, Attorneys-General: Kuala Lumpur) Art 1(2)

developed community such as Europe. Moreover, the regional cooperation of state parties to combat transnational organised crime like narcotic drug trafficking in the Treaty on the 2004 Mutual Legal Assistance in Criminal Matters should be amended. Specific legal assistance, focused on the use of special investigative techniques including undercover operations, should be added for more performance and transparency of the use of these special investigative techniques in the community. At national level, every member state of the ASEAN should legislate, revise or modify their specific law for complying with Article 20 of the UNTOC because this will help not only law enforcement officers to realise the scope of their authority in combating narcotic drug trafficking but also, help the criminal court to maintain the human rights such as the right to a fair trial and the right to privacy of people. It would help to legalise the use of special investigative techniques and ensure admissibility of the evidence obtained from these operations. With these recommendations, the use of undercover operations in the ASEAN Community will be shaped to become one of the most effective techniques in the new era of criminal adjudication processes which can be used as an instrument to bring the equilibrium of crime control and due process back to society.

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