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Protection of Human Rights in Southeast Asia with Special Reference to the Rohingya in Myanmar: A Critical Study of the Effect of ASEAN's Policy and Action on ASEAN Intergovernmental Commission on Human Rights (AICHR)

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Abstract

Since its inception over four decades ago ASEAN has always worked towards improving the lives of its citizens. Year 2009 has opened another chapter with the inauguration of AICHR pursuant to Article 14 of the ASEAN Charter at the 15th ASEAN Summit. Since then AICHR has conducted various activities. In the midst of these 'progress' the vital question remains unanswered; To what extent AICHR has been successful in protecting human rights of citizens in ASEAN countries? This shall be answered through qualitative legal research. This study serves as an analytical basis to predict the future development of the AICHR as well as human rights protection in South East Asia. Furthermore, it contributes to the reform of both ASEAN and AICHR toward implementation of human rights in the region. This research focuses on human rights issues of the Rohingya in Myanmar whereby ASEAN's policy and action relating to the issue are examined. The finding shows that the policy and action of ASEAN does not provide much support in protecting the rights of the Rohingya. On the contrary, the policy has hindered the effort of AICHR in protecting human rights. AICHR is considered not independent since it almost completely relies on ASEAN. As therefore, it is recommended that ASEAN and its member states take real and concrete measures to protect human rights. Hence, to achieve AICHR and ASEAN's objectives, ASEAN and its member states must respect human rights and support AICHR with necessary power and measure.

Keywords: AICHR, ASEAN, Human Rights, Myanmar, Rohingya

Perlindungan HAM di Asia Tenggara khususnya bagi Rohingya di Myanmar: Studi Kritis terhadap Dampak Kebijakan dan Tindakan Komisi HAM Antarpemerintah ASEAN (AICHR)

Abstrak

Sejak kelahirannya empat dekade yang lalu, ASEAN selalu berupaya meningkatkan taraf hidup rakyatnya. Tahun 2009 membuka lembaran baru ASEAN dengan adanya inaugurasi AICHR berdasarkan Pasal 14 dari Piagam ASEAN pada Konferensi Tingkat Tinggi ASEAN ke-15. Semenjak itu, AICHR telah melaksanakan berbagai kegiatan. Dalam perkembangannya, masih terdapat pertanyaan penting yang belum terjawab; sejauh mana keberhasilan AICHR dalam melindungi hak asasi dari warga negara-negara di ASEAN? Untuk menjawabnya, pertanyaan ini akan dijawab melalui penelitian hukum kualitatif. Penelitian ini berfungsi sebagai dasar analisis untuk memprediksi perkembangan AICHR juga perlindungan HAM di ASEAN. Selain

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itu, penelitian ini diharapkan dapat memberikan kontribusi terhadap reformasi ASEAN dan juga AICHR dalam perlindungan HAM di ASEAN. Penelitian ini memfokuskan pada isu HAM kelompok Rohingya di Myanmar dengan menelaah kebijakan dan tindakan ASEAN terhadap isu tersebut. Hasil penelitian menunjukkan bahwa kebijakan dan tindakan ASEAN tidak memberikan cukup dukungan dalam perlindungan HAM terhadap Rohingya, namun sebaliknya, kebijakan-kebijakan yang ada telah menghalangi upaya AICHR dalam melindungi HAM. Sehingga AICHR tidak benar-benar independen sebab AICHR bergantung nyaris sepenuhnya pada ASEAN. Oleh karenanya, ASEAN dan negara-negara anggotanya sebaiknya melakukan berbagai upaya yang nyata dan konkret untuk melindungi HAM. Agar AICHR bisa merealisasikan maksud dan tujuannya, ASEAN dan negara-negara anggotanya harus menghormati HAM dan mendukung AICHR melalui berbagai upaya dan kekuatan yang diperlukan.

Kata Kunci: AICHR, ASEAN, Hak Asasi Manusia, Myanmar, Rohingya

A. INTRODUCTION

The United Nations (UN) and the United States (US) are of the view that Myanmar government's actions towards the Rohingya amount to ethnic cleansing.¹ On the same note, EU foreign ministers also condemned the action and describe the situation in Myanmar as "extremely serious" by highlighting the widespread violence conducted by the military which include raping and killing of innocent Rohingyas.² In the midst of these condemnations is an important question, what is ASEAN's policy and action towards the Rohingya's case? The persecution of ethnic Rohingya is not only a domestic human rights issue, but it is a regional and global problem.³ The silence and inaction of other ASEAN countries on this issue will not put ASEAN in a good light because the newly inaugurated ASEAN Charter seems to be only a meaningless piece of document.⁴ Maybe there is little attention given and no action taken by ASEAN countries on this issue because they rely too much on the regional human rights body, namely the ASEAN

Intergovernmental Commission on Human Rights Commission (AICHR).

In the light of the circumstances set above, this paper seeks to analyze ASEAN's policy and action towards the Rohingya case and identify what has been done so far by the ASEAN to protect human rights of the victims. In particular, this paper examines AICHR's policies and action on the human rights violation of Rohingya peoples in Myanmar. The research also identifies hindrances faced by AICHR in protecting the Rohingya. Suggestions on related issues are also offered towards the end of the paper. Accordingly the paper is divided into three main parts which are: first, a brief overview on the Myanmar and Rohingya; second, the ASEAN's policy and action towards Rohingya case; and third, the ASEAN and the AICHR: hindrances to act on the human rights violation on Rohingya case.

B. MYANMAR AND THE ROHINGYA CASE

Myanmar, also known as Burma, joined as a member of the ASEAN on July 23, 1997.⁵ By March 2018, Myanmar's population is about

¹ Unknown, "Nobel trio: Suu Kyi responsible for Rohingya 'genocide'", *Al Jazeera*, March 1, 2018, <https://www.aljazeera.com/news/2018/02/stop-crime-nobel-laureates-visit-rohingya-call-suu-kyi-resign-180227081719019.html>.

² Unknown, "EU seeks sanctions on Myanmar military over Rohingya crisis", *Channel News Asia*, February 26, 2018, <https://www.channelnewsasia.com/news/asiapacific/eu-seeks-sanctions-on-myanmar-military-over-rohingya-crisis-9993160>.

³ Ahmad Rizky M. Umar, "ASEAN countries should find a solution to end the persecution of Rohingya," *The Conversation*, January 20, 2017 <http://theconversation.com/asean-countries-should-find-a-solution-to-end-the-persecution-of-rohingya-66919>.

⁴ Unknown, "Dear world: Don't expect so much from ASEAN on the refugee crisis", *The Phnom Penh Post*, May 21, 2015, <http://www.phnompenhpost.com/opinion/dear-world-dont-expect-so-much-asean-refugee-crisis>.

⁵ Ministry of Foreign Affairs Republic of the Union of Myanmar, "About ASEAN", *Ministry of Foreign Affairs Republic of the Union of Myanmar*, http://mofa.voonmyanmarbg.org/?page_id=322.

53 million people.⁶ Myanmar is a multi-racial country that includes 135 groups, including the Kachin, Kayah, Kayin, Chin, Bamar, Mon, Rakhine and San.⁷ Buddhist is a majority religion.⁸ It has become a party to several international human rights treaties such as CEDAW and CRC.⁹ Nevertheless, Myanmar has not ratified other main human rights instruments such as ICCPR, ICESCR, CAT and CERD. At the regional level, as member states of ASEAN, Myanmar have signed and ratified the ASEAN Charter¹⁰ which regulates the establishment of the ASEAN human rights body, the AICHR.¹¹ Furthermore, Myanmar has appointed its representative, H.E. Ambassador Kyaw Tint Swe, to sit in AICHR.¹² In addition, Myanmar is also a signatory to other regional human rights instruments, such as the Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration and the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers. On the domestic side, the Government of Myanmar through Notification No. 34/2011 has established the National Human Rights Commission of Myanmar. Based on the latest report in 2012, the Commission's

activities are focused on the treatment of prisoners and ethnic conflict.¹³ In spite of these positive steps, according to observers Myanmar tends to adopt an attitude or policy against the international norm and has a poor record of human rights protection.¹⁴ From 1962 to 2011, Myanmar was led by the military junta, and only in 2010 was held the first election after twenty years. The electoral process is claimed by the military junta to be a transition from military regime to civil democracy. The success of the transition is put in doubt by allegations of cheating and corruption during the election process.

For decades, Rohingya have faced discrimination and persecution in Buddhist-majority Myanmar.¹⁵ Myanmar has branded Rohingya as illegal immigrants from Bangladesh and systematically dismantled their legal rights and access to basic services in Rakhine, a state where they have lived for generations.¹⁶

More than 5,000 people have been living on a narrow strip of land between the two countries since some 700,000 Rohingya fled the burning of their homes in Myanmar in 2017.¹⁷ There are about 900,000 Rohingya

⁶ Worldometers, "Myanmar Population", *Worldometers*, March 3, 2018, <http://www.worldometers.info/world-population/myanmar-population/>

⁷ Bertil Lintner, "A Question of Race in Myanmar," *Asia Times*, June 3, 2017, <http://www.atimes.com/article/question-race-myanmar/>.

⁸ Charis Chang and AP, "Violence in Myanmar shows the world needs to stop romanticising Buddhism," *News.com*, September 17, 2017, <http://www.news.com.au/world/asia/violence-in-myanmar-shows-the-world-needs-to-stop-romanticising-buddhism/news-story/37bf65e55ec59eb1922f82942576161a>.

⁹ Jefferson R. Plantilla, "ASEAN and Human Right," *Asia-Pacific Human Rights Information Center*, September 8, 2008, <https://www.hurights.or.jp/archives/focus/section2/2008/09/asean-and-human-rights.html>.

¹⁰ Myanmar has ratified The ASEAN Charter on July 21, 2008.

¹¹ Article 14 of the ASEAN Charter.

¹² The ASEAN Secretariat, *AICHR The ASEAN Intergovernmental Commission on Human Rights What You Need To Know*, (Jakarta: ASEAN Secretariat, 2012).

¹³ Myanmar National Human Rights Commission, "Activities of the Myanmar National Human Rights Commission (5 September 2011 to 31 January 2012)," Myanmar National Human Rights Commission, 7–12, <http://mnhrc.org.mm/assets/uploads/2013/02/Report-from-Myanmar-Commission.pdf>.

¹⁴ BBC News Editor, "Myanmar Country Profile," *BBC News*, January 11, 2018, <http://www.bbc.com/news/world-asia-pacific-12990563>.

¹⁵ The Globe and Mail, "THE ROHINGYA CRISIS, Living in Limbo," *The Globe and Mail*, March 2, 2018, <https://www.theglobeandmail.com/news/world/the-rohingya-crisis-inside-the-camps-where-thousands-of-refugees-still-live-in-limbo/article38193463/>.

¹⁶ Ruma Paul, Shoon Naing, "Thousands of Rohingya flee 'no man's land' after resettlement talks," *Reuters*, February 28, 2018, <https://www.reuters.com/article/us-myanmar-rohingya-nomansland/thousands-of-rohingya-flee-no-mans-land-after-resettlement-talks-idUSKCN1GC0EE>.

¹⁷ Unknown, "Rohingya crisis: Military build-up on Myanmar border with Bangladesh," *BBC News*, March 1, 2018, <http://www.bbc.com/news/world-asia-43248015>; Charlotte Bellis, "Rohingya reflect: Six months since Myanmar exodus," *Al Jazeera*, February

in Bangladesh at the moment, according to UN refugee agency figures, with roughly 212,000 in the country even before the crisis last summer. Some of the camps in southern Bangladesh have existed since the early 90s, meaning anyone under the age of 25 has never lived outside a refugee camp.¹⁸ Being deprived of the basics - including education and adequate nutrition - remains an everyday reality for many Rohingya children, but human trafficking and sexual assault are now posing an extra threat.¹⁹ Myanmar continues to kill its Rohingya, now by denying them health care and sometimes food instead of by wielding machetes and firing bullets.²⁰

The United Nations has condemned the atrocities, calling them a textbook case of ethnic cleansing.²¹ Aung San Suu Kyi, the de facto leader of the ruling government, continues to blatantly deny ethnic cleansing of Rohingya Muslims in her own country, and she has also rejected the UN inquiry into crimes against Rohingya. In her latest speech in September, she questioned why so many Rohingya Muslims

had left when others were living peacefully in the state, pointing to an accusation that Rohingya themselves are "troublemakers."²² Although it is very obvious that religious cleansing of the Rohingya is taking place,²³ Aung San Suu Kyi constantly failed to condemn abuses against the Rohingya.²⁴ Scholars at Yale University and the US Holocaust Museum have already warned that this may be genocide, as has the United Nations human rights chief, Zeid Ra'ad al-Hussein. This genocide sometimes consists of violent attacks, but now mostly of denying food or medical care.²⁵ Myanmar has committed violations of numerous international and regional treaties it has ratified or accessed. The atrocities committed by the The State Peace and Development Council (SPDC) violate the provisions of numerous sources of international law, creating the perception of Myanmar as a rogue nation.²⁶ It is, indeed, the fact that the worst human rights violations in Southeast Asia today are taking place in Myanmar.²⁷ Myanmar continues to emphasise that the Rohingya

²⁵, 2018, <https://www.aljazeera.com/news/2018/02/rohingya-reflect-months-myanmar-exodus-180225103914874.html>; Holly Watt, 'Lives will be lost': Bangladesh rains promise further misery for Rohingya, *The Guardian*, March 1, 2018, <https://www.theguardian.com/global-development/2018/mar/01/bangladesh-monsoon-rains-further-misery-rohingya-myanmar>.

¹⁸ Holly Watt, "'Lives will be lost': Bangladesh rains promise further misery for Rohingya," *The Guardian*, March 1, 2018, <https://www.theguardian.com/global-development/2018/mar/01/bangladesh-monsoon-rains-further-misery-rohingya-myanmar>.

¹⁹ Plan International, "Rohingya children live in fear of human trafficking and sexual assault: Report," SBS News, <https://www.sbs.com.au/news/rohingya-children-live-in-fear-of-human-trafficking-and-sexual-assault-report>.

²⁰ Nicholas Kristof, "I Saw a Genocide in Slow Motion," *The New York Times*, March 2, 2018, <https://www.nytimes.com/2018/03/02/opinion/i-saw-a-genocide-in-slow-motion.html>.

²¹ Charlotte Bellis, "Rohingya reflect: Six months since Myanmar exodus," *Al Jazeera*, February 28, 2018, <https://www.aljazeera.com/news/2018/02/rohingya-reflect-months-myanmar-exodus-180225103914874.html>; Holly Watt, "'Lives will be lost':

Bangladesh rains promise further misery for Rohingya," *The Guardian*, March 1, 2018, <https://www.theguardian.com/global-development/2018/mar/01/bangladesh-monsoon-rains-further-misery-rohingya-myanmar>.

²² Pavin Chachavalpongpan, "Is Promoting Human Rights in ASEAN an Impossible Task?," *The Diplomat*, January 19, 2018, <https://thediplomat.com/2018/01/is-promoting-human-rights-in-asean-an-impossible-task/>.

²³ Steve Redisch, "Brownback: Myanmar Conducting 'Religious Cleansing' of Rohingya," *VOA News*, March 03, 2018, <https://www.voanews.com/a/brownback-myanmar-conducting-religious-cleansing-of-rohingya/4278699.html>.

²⁴ Ruma Paul, "Nobel peace laureates to Suu Kyi: 'End Rohingya genocide or face prosecution'," *REUTERS*, FEBRUARY 28, 2018, <https://www.reuters.com/article/us-myanmar-rohingya-nobellaureates/nobel-peace-laureates-to-suu-kyi-end-rohingya-genocide-or-face-prosecution-idUSKCN1GC1S6>.

²⁵ Nicholas Kristof, "I Saw a Genocide in Slow Motion", <https://www.nytimes.com/column/nicholas-kristof>.

²⁶ John Arendshorst, "The dilemma of non-interference: Myanmar, human rights, and the ASEAN charter," *Nw. UJ Int'l Hum. Rts.*, Vol. 8, No. 1, 2009, p. 110.

²⁷ Pavin Chachavalpongpan, "Is Promoting Human Rights in ASEAN an Impossible Task?,"

issue is an internal affair, and seems to prefer dealing directly with interlocutors in a bilateral setting. Myanmar mostly bans foreigners from Rohingya areas.²⁸ Myanmar rejected to work with the UN, and the ASEAN seems to be the only platform where Myanmar feels comfortable enough to share and discuss the case.

C. THE ASEAN'S POLICY AND ACTION TOWARDS THE ROHINGYA CASE

It is really unfortunate that the AICHR is very silent on the issue of human rights violations in Myanmar. Among leaders of ASEAN member states, only Malaysia's former prime minister, Najib Razak, has condemned the violence in Myanmar. He described the military operations as "genocide".²⁹ In Indonesia, despite pressure from rights groups and Muslim groups in the country, the government stopped short of condemning Myanmar, but offered humanitarian aid to Rohingya refugees.³⁰ Singapore commits to help humanitarian effort through the ASEAN Humanitarian Assistance (AHA) center.³¹ There was an agreement between the government of Indonesia and Laos to cooperate to solve the humanitarian problem in Myanmar.³² Brunei also offers humanitarian assistance

to Myanmar by sending more Brunei NGO's to Rohingya refugee camps.³³ Cambodia remains with its stand not to internationalize the case as they perceive the issue as an internal affair of the Myanmar's government.³⁴ Thailand's government donates quite a lot to support the lives of Rohingya refugees in Bangladesh. However, the government refuses to recognize Rohingyas as refugees.³⁵ Vietnamese President lends support to Bangladesh in finding an effective and lasting solution to the Rohingya crisis but doesn't care about Rohingya or what happens in Myanmar.³⁶ Philippine, which is chairing the AICHR, has shown lack of concern for the Rohingya case.³⁷

The responses cited above are by individual member states. Most of them tend to avoid having formal and official standing on the issue directly. Most views and actions are only from the humanitarian aspects of the case. The important question at this stage is what is ASEAN's response collectively as an institution? It is hard to find explicit policy or statements coming from ASEAN as well the AICHR. On ASEAN's website, they upload "Speeches & Statements" of the Secretary-General of ASEAN, the Former Secretary-General of

<https://thediplomat.com/2018/01/is-promoting-human-rights-in-asean-an-impossible-task/>.

²⁸ Nicholas Kristof, "I Saw a Genocide in Slow Motion", *Loc. cit.*

²⁹ Ahmad Rizky M. Umar, "ASEAN countries should find a solution to end the persecution of Rohingya", <https://theconversation.com/profiles/ahmad-rizky-m-umar-325970>.

³⁰ *Ibid.*

³¹ Lydia Lam, "Singapore pledges \$100,000 in humanitarian aid to help in Myanmar's Rakhine crisis," *The Straits Times*, October 19, 2017, <http://www.straitstimes.com/singapore/singapore-pledges-100000-in-humanitarian-aid-to-help-in-myanmars-rakhine-crisis>.

³² Sheany, "Indonesia, Laos Agree to Help Solve Myanmar Crisis," *Jakarta Globe*, October 12, 2017, <http://jakartaglobe.id/news/indonesia-laos-agree-help-solve-myanmar-crisis/>.

³³ Ain Bandial, "As humanitarian crisis mounts, more Brunei NGOs step up to help Rohingya refugees," *The Scoop*, October 16, 2017,

<https://thescoop.co/2017/10/16/humanitarian-crisis-mounts-brunei-ngos-step-help-rohingya-refugees/>.

³⁴ Sao Phal Niseiy, "Cambodia's Prime Minister Is Wrong About Myanmar's Rohingya Issue," *The Diplomat*, February 09, 2017, <https://thediplomat.com/2017/02/cambodias-prime-minister-is-wrong-about-myanmars-rohingya-issue/>.

³⁵ Supalak Ganjanakhundee, "Thailand's refusal to recognise Rohingya as refugees leaves them in illegal limbo," *The Nation*, March 05, 2018, <http://www.nationmultimedia.com/detail/asean-plus/30340157>.

³⁶ Nguyen Quoc Huy, "What do people from Vietnam think about Rohingya refugees?," *Quora*, Apr 10 2017, <https://www.quora.com/What-do-people-from-Vietnam-think-about-Rohingya-refugees>.

³⁷ Raul Dancel, "Philippines 'respects' Malaysia's dissent on Asean's Rakhine crisis statement," *The Straits Times*, SEP 25, 2017, <http://www.straitstimes.com/asia/se-asia/philippines-respects-malysias-dissent-on-aseans-rakhine-crisis-statement>.

ASEAN, and other leaders. It assumes that their response on the case will be explicitly stated there. Unfortunately, few of their speeches talked about the case of Myanmar (Rohingya). The latest speech was Remarks by H.E. Dato Lim Jock Hoi, Secretary-General of ASEAN (2018 – 2022) in the Handover Ceremony for the Transfer of Office of the Secretary-General of ASEAN Jakarta on 5 January 2018 did not even mention one word about Myanmar for Rohingya.³⁸ The study also refers to research conducted and published by The Forum Asia. Unfortunately, there were no significant findings on the involvement of the AICHR from 2009/2010 (when it was established) until 2016.³⁹ In 2009/2010, the AICHR did not do anything on the increasing and systemic human rights violation in Burma where thousands of people are held in prison for exercising their political rights.⁴⁰ The Burmese activists said that

they submitted cases of human rights violation in Burma and heard nothing from the ASEAN's body. Many statements of The ASEAN about them being "people oriented" are contradictory with the action of some ASEAN governments.⁴¹ The AICHR's poor performance reflects most ASEAN's governments' lack of commitment on human rights, although they already have a common regional human rights body.

In 2011 when Indonesia was the chairman of the AICHR, the report concluded that Indonesia is generally regarded as one of the countries pushing most strongly for the advancement of human rights in ASEAN. Unfortunately, however, ASEAN, as the main institution, consistently adopted and used the "ASEAN way" to veto the policy of the AICHR.⁴² Working under severe political constraints at that time, the AICHR did not publish a single document during the year.⁴³ As a

³⁸ H.E. Dato Lim Jock Hoi, "Remarks by H.E. Dato Lim Jock Hoi Secretary-General of ASEAN (2018 – 2022) Handover Ceremony for the Transfer of Office of the Secretary-General of ASEAN" *Asean Secretariat*, January 5, 2018, http://asean.org/storage/2018/01/ASEAN-SG-Dato-Lim-Remarks-for-the-Handover-Ceremony-5-Jan-2018_FINAL-II.pdf.

³⁹ Solidarity for Asian People's Advocacy Task Force on ASEAN and Human Rights (SAPA TFAHR), *Four Years On and Still Treading Water, A Report on the Performance of the ASEAN Human Rights Mechanism in 2013* (Bangkok, Thailand : Forum-Asia, 2014); Solidarity for Asian People's Advocacy Task Force on ASEAN and Human Rights (SAPA TFAHR), *A Commission Shrouded in Secrecy, A Performance Report on the ASEAN Intergovernmental Commission on Human Rights 2010-2011* (Bangkok, Thailand : Forum-Asia, 2012); Solidarity for Asian People's Advocacy Task Force on ASEAN and Human Rights (SAPA TFAHR), *Hiding Behind Its Limits, A Performance Report on the first year of the ASEAN Intergovernmental Commission on Human Rights (AICHR) 2009-2010* (Bangkok, Thailand : Forum-Asia, 2010); Solidarity for Asian People's Advocacy Task Force on ASEAN and Human Rights (SAPA TFAHR), *Breaking the Silence and Unlocking Barriers for Human Rights Protection in ASEAN, A report on the Performance of the ASEAN Human Rights Mechanisms in 2015* (Bangkok, Thailand : Forum-Asia, 2016); Solidarity for Asian People's Advocacy Task Force on ASEAN and Human Rights (SAPA TFAHR), *The Future of Human Rights in ASEAN Public Call for Independence and Protection Mandates, A Report on the Performance of the ASEAN Human Rights Mechanism in 2014* (Bangkok, Thailand : Forum-Asia, 2014); Burma Partnership,

Human rights situation in Burma/Myanmar (Bangkok, Thailand : Forum- Asia,); Progressive Voice, *Human rights situation in Burma/Myanmar* (Bangkok, Thailand : Forum-Asia, 2017); Asian Forum For Human Rights And Development (Forum-Asia) Solidarity for Asian People's Advocacy (SAPA) Task Force on ASEAN and Human Rights Working Groups On ASEAN (SAPA TFAHR & WGA), *Have They Passed The Litmus Test?, A Report on the Performance of the ASEAN Human Rights Mechanism in 2016* (Bangkok, Thailand : Forum-Asia, 2016); Solidarity for Asian People's Advocacy Task Force on ASEAN and Human Rights (SAPA TFAHR), *Still Window-Dressing, A Performance Report on the Third Year of the ASEAN Intergovernmental Commission on Human Rights (AICHR) 2011-2012* (Bangkok, Thailand : Forum-Asia, 2013); Burma Human Rights Network (BHRN), *Summary of situation update for December 2017* (London, United Kingdom: BHRN, 2018).

⁴⁰ Solidarity for Asian People's Advocacy Task Force on ASEAN and Human Rights (SAPA TFAHR), *Hiding Behind Its Limits, A Performance Report on the first year of the ASEAN Intergovernmental Commission on Human Rights (AICHR) 2009-2010* (Bangkok, Thailand: Forum-Asia, 2010), p. 142.

⁴¹ *Ibid.*

⁴² Solidarity for Asian People's Advocacy Task Force on ASEAN and Human Rights (SAPA TFAHR), *A Commission Shrouded in Secrecy, A Performance Report on the ASEAN Intergovernmental Commission on Human Rights 2010-2011* (Bangkok, Thailand : Forum-Asia, 2012), p. 35.

⁴³ *Ibid.*

result of the pressure there was no discussion on the Rohingya case although one of contributors to the report was Arakan Rohingya Refugee Committee (ARRC).⁴⁴ Until 2012, the AICHR remained silent on the case of ethnic minorities in Kachin and Arakan States in Myanmar.⁴⁵ This was due to no support from ASEAN. The AICHR needs the ASEAN to improve the mandate on the protection of human rights, so that the AICHR can address the case. The AICHR will lose its credibility if it fails to address such gross human rights violations as what is happening in Myanmar.⁴⁶ If this case was resolved at that time, maybe the problems of Rohingya would not be as massive as today. The year 2013 remains quiet on the issue of Rohingya.⁴⁷ In 2014 the AICHR inaugurated its 5 years of working. The report found that the AICHR continued to be focused exclusively on the promotion of human rights, while protection continued to be elusive. The AICHR's member commissions never come to agree to submit the proposal on the TOR revision to the AMM.⁴⁸ This was one of factors which made the AICHR powerless and voiceless on critical human rights violations in the region including on the Rohingya case.⁴⁹ Similarly in 2015, the AICHR continued to focus on promotional human rights activities in the form of

debate, workshop, training, and dialogue.⁵⁰ The AICHR remained inactive on some key human rights issues in the region such as cases of enforced disappearances in ASEAN.⁵¹

The ASEAN finally responded to the situation in the Rakhine State on 24 September 2017, a month after all acts of violence in Rakhine State that led to the exodus of Rohingya peoples to Bangladesh. The ASEAN issued the ASEAN Chairman's Statement on The Humanitarian Situation in Rakhine State. The Foreign Ministers of ASEAN expressed concern over the recent developments in Northern Rakhine State of Myanmar and extended their deepest condolences to all the victims and affected communities of the conflict. They condemned the attacks against Myanmar security forces on 25 August 2017 and all acts of violence which resulted in loss of civilian lives, destruction of homes and displacement of large numbers of people.⁵² The exodus began on 25 August 2017 after Rohingya militants attacked police posts, killing 12 members of the security forces. Those attacks led to a security crackdown. Myanmar's military says it is fighting insurgents but those who have fled say troops and Rakhine Buddhists are conducting a brutal campaign to drive them out.⁵³ Reading from the ASEAN Chairman's

⁴⁴ Solidarity for Asian People's Advocacy Task Force on ASEAN and Human Rights (SAPA TFAHR), *A Commission Shrouded in Secrecy*,

⁴⁵ Solidarity for Asian People's Advocacy Task Force on ASEAN and Human Rights (SAPA TFAHR), *Still Window-Dressing, A Performance Report on the Third Year of the ASEAN Intergovernmental Commission on Human Rights (AICHR) 2011-2012* (Bangkok, Thailand : Forum-Asia, 2013), p. 43.

⁴⁶ *Ibid.*

⁴⁷ Solidarity for Asian People's Advocacy Task Force on ASEAN and Human Rights (SAPA TFAHR), *Four Years On and Still Treading Water, A Report on the Performance of the ASEAN Human Rights Mechanism in 2013* (Bangkok, Thailand : Forum-Asia, 2014).

⁴⁸ Solidarity for Asian People's Advocacy Task Force on ASEAN and Human Rights (SAPA TFAHR), *The Future of Human Rights in ASEAN Public Call for Independence and Protection Mandates, A Report on the Performance of the ASEAN Human Rights Mechanism in 2014*

(Bangkok, Thailand : Forum-Asia, 2014), p. 6.

⁴⁹ Burma Partnership, *Human Rights Situation in Burma/Myanmar* (Bangkok, Thailand : Forum-Asia), p. 17.

⁵⁰ Solidarity for Asian People's Advocacy Task Force on ASEAN and Human Rights (SAPA TFAHR), *Breaking the Silence and Unlocking Barriers for Human Rights Protection in ASEAN, A report on the Performance of the ASEAN Human Rights Mechanisms in 2015* (Bangkok, Thailand : Forum-Asia, 2016), p. 31.

⁵¹ *Ibid.*

⁵² Asean Secretariat, "ASEAN Chairman's Statement on The Humanitarian Situation in Rakhine State," *Asean Secretariat*, September 24th, 2017, <http://asean.org/asean-chairmans-statement-on-the-humanitarian-situation-in-rakhine-state/>.

⁵³ Unknown, "Myanmar: What sparked the latest violence in Rakhine?," *BBC News*, September 19, 2017, <http://www.bbc.com/news/world-asia-41082689>.

Statement on The Humanitarian Situation in Rakhine State, The ASEAN stands in favor of the Myanmar government. This was unfair, since there was no investigation conducted by the ASEAN's institution before they issued the statement. Malaysia disagreed with and was detaching itself from a separate statement. The Malaysian government was angry because the ASEAN statement made no mention of the word "Rohingya," members of a stateless Muslim minority group who allegedly have been targeted in atrocities in Myanmar's Rakhine state.⁵⁴

The Foreign Ministers of ASEAN acknowledged that the situation in Rakhine State is a complex inter-communal issue with deep historical roots. They strongly urged all the parties involved to avoid actions that will further worsen the situation on the ground. They agreed that viable and long-term solutions to the root causes of the conflict must be found, including encouraging closer dialogue between Myanmar and Bangladesh, so that the affected communities can rebuild their lives. The Foreign Ministers welcomed the commitment by the Myanmar authorities to ensure the safety of civilians, take immediate steps to end the violence in Rakhine, restore normal socio-economic conditions, and address the refugee problem through verification process. Unfortunately, there is no monitoring mechanism to observe how far the commitment has been implemented by the Myanmar authorities.

Having said nothing about Rohingya in the statement made by the Foreign Ministers of ASEAN, clearly shows that

human rights under the respectful institution of the ASEAN is a travesty. This is a real ignorance of Rohingya peoples, which in fact they are all ASEAN's citizens regardless of Myanmar's recognition of their citizenship. Ironically, instead of urging for immediate action to settle the dispute, the ASEAN insisted that all ASEAN member states remain passive.

D. THE ASEAN AND THE AICHR: HINDRANCES TO ACT ON THE HUMAN RIGHTS VIOLATION ON THE ROHINGYA CASE

The AICHR has been criticized for not responding to some human rights cases in South East Asia including the Rohingya crisis. Assessment of the AICHR's creation, design, and its works may shed some lights on the matter.

1. Analysis of AICHR's Formation, Objective and Principles

Establishing regional human rights mechanisms under the ASEAN was not seriously considered until the end of the Cold War until the five founding fathers of the ASEAN declared the Declaration of the ASEAN Concord (1976). The declaration's principle emphasized more on the anticolonialism human rights approach rather than the viewpoints of individual rights.⁵⁵ This is different compared to the West. For instance the establishment of human rights in the European region mainly is to promote and protect individual rights since the beginning.⁵⁶ Following the Declaration of the ASEAN Concord, in

⁵⁴ Unknown, "Malaysia Rejects ASEAN's Latest Statement on Rakhine Crisis in Myanmar," *Radio Free Asia*, September 25, 2017, <https://www.rfa.org/english/news/myanmar/asean-rohingya-09252017165325.html>.

⁵⁵ Yen Yung-Ming, "The Formation of the ASEAN Intergovernmental Commission on Human Rights: A Protracted Journey," *Journal of Human Rights* Vol. 10, No. 3, 2011, p. 397.

⁵⁶ It has been initiated in 1949 by the six founding fathers, who are also the founding fathers of the European Coal and Steel Community (ECSC) in 1950 and the European Economic Community (EEC) in 1957. They are Winston Churchill, Prime Minister of the United Kingdom; Konrad Adenauer, Chancellor and Minister for Foreign Affairs of the Federal Republic of Germany; Robert Schuman, French Republic Minister for Foreign Affairs; Paul-Henri Spaak, Prime Minister and Foreign Minister of Belgium

the Treaty of Amity and Cooperation in Southeast Asia of 1976 (TAC), the fundamental principles of ASEAN include nothing about rights of individuals but "the *right* of every State to lead its national existence", bearing in mind their recent national independence and the fear of communist invasion/subversion.⁵⁷ The leader of ASEAN put the principle of sovereignty and non-interference as their main principles that govern their relations towards any situation and issue including human rights.⁵⁸ These principles have prevented them from enacting policies and making statements to protect the human rights of members that may be seen as interfering in the domestic problems of another ASEAN member.⁵⁹ The ASEAN's leaders tend to avoid discussions on human rights at time of its formation.

It was not until 1991 that the term "human rights" appeared in the Joint Communique of the ASEAN foreign ministers. In the Joint Communique it is stated that the foreign ministers exchanged ideas on human rights issues in their relations between States. Although human rights are universal, the diversity of cultural, economic and social of individual States cause the implementation to the competencies and responsibilities of each State, and consequently the nature of human rights in the states are diverse. The Joint Communique also affirmed that the implementation of human rights should not be contrary to the principle of state

sovereignty.⁶⁰ The crux of the problem having a universal value and common implementation of human rights in ASEAN countries is not just the state of rights, but the fact that the very concept of human rights remains foreign to most states in the region. Most Southeast Asian governments continue to perceive security as being limited to preserving the regime rather than securing their people.⁶¹ This is a very serious problem and limits the work of the ASEAN human rights body. Many experts and activists push the ASEAN and its member states to adhere to international human rights law and practice, which is contrary to what most of its members intend.

The main challenge is perhaps how to make ASEAN own human rights standard and mechanism. A question related to this perhaps is whether the AICHR represents the intention and value of ASEAN or will a third party? The first attempt to build the regional human rights mechanism was actually in 1993, shortly after the 1993 Vienna Declaration and Programme of Action, where the Asean Ministerial Meeting (AMM) finally agreed on the need to establish a regional human rights mechanism in ASEAN.⁶² Following the agreement on the establishment of a regional human rights mechanism in 1994, in 1998 the ASEAN created an informal non-governmental working group in the realization of the ASEAN human rights mechanism.⁶³ In 2000, The AMM agreed on concrete steps to

in the 40s and 50s; Alcide de Gasperi, Prime Minister of the Republic of Italy; Ernest Bevin, United Kingdom Secretary of State for Foreign Affairs.

⁵⁷ Yen Yung-Ming, "The Formation of the ASEAN", *Op. cit.*, 397.

⁵⁸ Abubakar Eby Hara, "The Concerns and Sustainability of ASEAN Intergovernmental Commission on Human Rights (AICHR)," In *Sustainable Future for Human Security*, ed. Benjamin McLellan (Singapore: Springer, 2018), 49

⁵⁹ *Ibid.*

⁶⁰ Carlos P. Medina, Jr, *ASEAN and Human Rights: A Compilation of ASEAN Statements on Human Rights*, Philippines: Working Group for an ASEAN Human Rights Mechanism Publisher, 2003, p. 3.

⁶¹ Pavin Chachavalpongpun, "Is Promoting Human Rights in ASEAN an Impossible Task?", *Loc. cit.*

⁶² Carlos P. Medina, Jr, *ASEAN and Human Rights*, *Op. cit.*, p. 5.

⁶³ *Ibid*, p. 7.

establish a regional human rights mechanism in ASEAN, and furthermore agreed on the need of establishment of a national human rights mechanism in several ASEAN countries.⁶⁴ There were various responses from ASEAN countries; some are positive and others tend to be resistant with the idea.⁶⁵ There was a very slow progress until they agreed to have an article specifically mandated by the ASEAN to create the Human Rights Body (Article 14 of the ASEAN Charter) until the ASEAN member states agreed to establish the AICHR in 2009. The decision to build the AICHR in 2009, returning backward to the first formal inception of human rights in the ASEAN reform policy in 2004, according to Davies was not merely the decision of ASEAN's leaders. He found out that there was a Track III actor, the Working Group for the Establishment of an ASEAN Human Rights Mechanism (the Working Group) who persuasively assured member states to talk and at the end to establish a human rights body, which was successfully achieved.⁶⁶ The expert in the Working Group stated that was visualized the body as a realistic, credible, and effective mechanism in setting up a regional human rights body in the ASEAN region.⁶⁷ How about the visualization of the ASEAN's head of states at that time? If their visualization

is similar to what has been visualized by the expert, the AICHR will actively respond to the Rohingya case. The situation will be huge. In fact, there is no sincere motive on the political agenda in ASEAN to human rights.⁶⁸ Thus the current body is not realistic, credible, and effective in protecting human rights of the people in the region.

Above analysis and explanations on the process of the AICHR's establishment shows how shaky the body is. Overall it gives some idea why the AICHR has not done anything significant in the Rohingya case. The principle of sovereignty and non-interference had much influence in the designing of the AICHR, and this could be identified as the main hindrance in the work of the IACHR on the Rohingya case.

2. Analysis of AICHR' Institutional Structure and Power

For ASEAN, the establishment of AICHR is regarded as a remarkable achievement of regional human rights mechanisms. However, the AICHR is entrusted with very little power compared to the regional mechanisms of America, Europe, and Africa.⁶⁹ While other regional mechanisms were formed based on a treaty, the AICHR was only formed based on a TOR, a non-legally binding instrument.⁷⁰ This section assesses the TOR, identifying

⁶⁴ *Ibid*, p. 179 and 185; Also see Abubakar Eby Hara, "The Concerns and Sustainability of ASEAN Intergovernmental Commission on Human Rights (AICHR)", p. 50.

⁶⁵ Carlos P. Medina, Jr, *ASEAN and Human Rights*, *Op. cit.*, p. 182.

⁶⁶ Mathew Davies, "Explaining the Vientiane Action Programme: ASEAN and the institutionalisation of human rights," *The Pacific Review*, Vol. 26, No. 4, 2013, p. 386.

⁶⁷ Kimberly Ramos Gamez, "Examining The Asean Intergovernmental Commission On Human Rights (AicHR): The Case Study Of The Rohingya Crisis," (PhD diss., Tilburg University, 2017).

⁶⁸ Mathew Davies, "Explaining the Vientiane Action Programme," *Op. cit.*, Abstract.

⁶⁹ Ben Saul, "Resistance to Regional Human Rights Cooperation in the Asia Pacific: Demythologising Regional Exceptionalism by Learning from the Americas, Europe, and Africa", *Sydney Law School Research Paper*, No. 10/107, 2010, p. 108.

⁷⁰ Alison Duxbury and Tan Hsien Li, "Human Rights Systems in the Asia-Pacific" In *The SAGE Handbook of Human Rights: Two Volume Set*, ed. Anja Mihr and Mark Gibney (United Kingdom: SAGE Publications Ltd, 2014), p. 636.

the drawbacks and at the same time looking for a solution within the system itself. This step is important to be done before moving forward to find an external solution which Member states usually are resistant to. The assessment of the TOR will start from the most criticized provisions which are AICHR's mandate, followed by other provisions which affect the works of AICHR on the human rights protection in the region.

a. Weak Mandate of AICHR

The AICHR's mandate and function are modest in the extreme.⁷¹ It is limited only to the monitoring of human rights rather than protection or enforcement.⁷² This leaves the questions: Can the AICHR reach the aim as it stated in the TOR with this very limited mandate? The word 'toothless' has often been brought up due to the limitation of the mandates that the AICHR has. There is no clear mandate about human rights protection as the AICHR is not entrusted with a power to give sanction or punishment to human rights violators.⁷³ In addition, no country visit and individual complaint.

Does this weak mandate the main problem of the AICHR in responding to many human rights violations? Yes, it does, under present circumstances, the AICHR will not make a meaningful contribution towards the tangible

protection of human rights of its citizens.⁷⁴ The TOR ideally establishes an independent human rights body with both promotion and protection functions which will have a role in monitoring the implementation of international human rights obligations arising from UDHR and many international human rights treaties where ASEAN member states are parties.

The former ASEAN Secretary-General, Surin Pitsuwan, stated that the AICHR is still in its formative years, and therefore it was not there yet to have an independent and strong mandate on protection. According to him, the establishment of the AICHR was the ASEAN's successful achievement, now human rights become an official dialogue in the region without fundamentally challenging ASEAN norms.⁷⁵ This has to be understood by many outsiders who always devalue the existence of the AICHR. It was inappropriate to say that the AICHR doesn't look like going to mean anything.⁷⁶ The AICHR needs time to change. On another positive note, the "ASEAN way" is believed to build stable relations amongst ASEAN members.⁷⁷

Despite all drawbacks of the AICHR's TOR, there is an opportunity for the AICHR to use

⁷¹ Naidi, Gino J. "The Asean Intergovernmental Commission on Human Rights: A Damp Squib." *Sri Lanka J. Int'l L.*, Vol. 22, 2010, p. 22.

⁷² See also Mandate and functions of the AICHR in the AICHR TOR; Aguirre, Daniel, and Irene Pietropaoli. "Human Rights Protection the ASEAN Way: Non-Intervention and the Newest Regional Human Rights System", *International Human Rights Law Review*, Vol. 1, No. 2, 2012, p. 295.

⁷³ Yessi Olivia, "Will the ASEAN Intergovernmental Commission of Human Rights (AICHR) Grow Its Teeth?," *Jurnal Hubungan Internasional*, Vol. 3, No. 2, 2015, p. 150.

⁷⁴ Naidi, Gino J. "The Asean Intergovernmental Commission on Human Rights: A Damp Squib." *Sri Lanka J. Int'l L.*, Vol. 22, 2010, p. 1.

⁷⁵ Poole, Avery. ""The World is Outraged": Legitimacy in the Making of the ASEAN Human Rights Body", *Contemporary Southeast Asia*, 2015, p. 372.

⁷⁶ *Ibid.*, p. 373.

⁷⁷ Kheng-Lian, Koh, and Nicholas A. Robinson. "Strengthening Sustainable Development in Regional Inter-Governmental Governance: Lessons from the ASEAN Way", *Sing. J. Int'l & Comp. L.*, Vol. 6, 2002, p. 642.

some provisions in the TOR to do a protection mandate. The first mandate of AICHR (which is to develop strategies for the promotion and protection of human rights and fundamental freedoms to complement the building of the ASEAN Community)⁷⁸ added with the other mandate (which is to obtain information from the ASEAN Member States on the promotion and protection of human rights),⁷⁹ can be used by the AICHR to accept individual complaints and to do investigations on human rights violations or at least to request information as follow ups to complaints. Basically, the TOR which consists of provisions may be skeletal, but legally there are no provisions that can stop AICHR to do the protection mandate.⁸⁰ This kind of wide interpretation can only work if the AICHR's representative is independent, however, it is not that easy to find such a kind of commissioner. There was a big hope when Rafendi Djamin chair the AICHR, in late March 2010, during the AICHR's first formal session in Jakarta, he was misfortune to have to be the 'public face' of that Commission as it rejected a request to investigate a complaint by families of journalists massacred in Maguindanao, Philippines, in November 2009.⁸¹ If at that time he accepted this

complaint, most probably AICHR's journey will not be as slow as today.

b. Non-Independence of the Commission

Apart from the issue of mandate, another shortfall of the AICHR is the status of the member of the Commission. There is an issue of independence. In addition, this body is not impartial because the TOR of AICHR specifically mentions that the AICHR only serves as a consultative body to the governments of ASEAN countries.⁸² Although in another point, it mentions that the AICHR's members to be determined as an independent, however in practice they are generally not independent from their government's interests.⁸³ ASEAN as an institution has to make the human rights body have its own independence. One element relates to staffing the institution. Since the staff is under a reward system, having to do with the support of the home state, an international official often feels compelled to maintain ties with his or her home state, giving rise to the problem of multiple or divided loyalties.⁸⁴

According to several reports on the Performance of the ASEAN Human Rights Mechanism by Forum Asia from 2009 to 2016 the problems also lie in the appointment process of the commission.⁸⁵ In 2009, only two member states, Indonesia and Thailand used an open and transparent procedure to appoint

⁷⁸ 4.1 TOR of the AICHR.

⁷⁹ 4.10 TOR of the AICHR.

⁸⁰ Ginbar, Yuval. "Human rights in ASEAN—setting sail or treading water?" *Human Rights Law Review*, Vol. 10, No. 3, 2010, p. 515.

⁸¹ *Ibid.*, p. 517.

⁸² According to the TOR of the AICHR, Membership of The AICHR shall consist of the Member States of ASEAN; and Each ASEAN Member State shall appoint a Representative to the AICHR who shall be accountable to the appointing Government.

⁸³ Aguirre, Daniel, and Irene Pietropaoli. "Human Rights Protection the ASEAN Way: Non-Intervention and the Newest Regional Human Rights System." *International Human Rights Law Review* 1, no. 2 (2012): 292; Ginbar, Yuval, *Op. cit.*, p. 514.

⁸⁴ Chen, Lung-chu, *An Introduction to Contemporary International Law: A Policy-Oriented Perspective*, Oxford University Press, 2014, p. 70

⁸⁵ *Supra*, n. 40.

their representative. Others are done behind the closed door and the appointees are without many competencies in Human Rights works.⁸⁶ There is no progress regarding this issue until 2019, where only Indonesia is consistent to use open selection by appointing Yuyun Wahyuningrum, a successor of Dinna Wisnu and Rafendi Djamin. Furthermore, the AICHR meetings are shrouded in secrecy. The agenda, minutes, and outcome are closed. Scant information released to the public. This is a very serious problem. In order to be accountable, the AICHR cannot keep working in secrecy.⁸⁷ During the research, gaining the data from the official channel was difficult to work.

c. Lack of Financial Support

Financial is also a matter for AICHR. The AICHR has a limited budget, no secretariat, no permanent office, and no paid employees.⁸⁸ In addition, the lack of financial support from the ASEAN to the AICHR indicates the ASEAN lack of intention to empower the body as well as to support human rights implementation in the region.⁸⁹ It envisages by those shaky foundations the AICHR could be no more as a human rights outlet manager. There are strong needs to change the constituent instrument of the AICHR, the TOR, to be able to work as a real human rights body that can protect its peoples' rights.

d. Weak Relationship with Other Human Rights Bodies within ASEAN

There is actually another strong basis for AICHR as well as ASEAN as an institution to go for enforcement of human rights mechanisms. This is explicitly stated in the TOR that the AICHR is the overarching human rights institution for the ASEAN Commission on the Rights of Women and Children and the ASEAN Committee on the Rights of Migrant Workers.⁹⁰

The AICHR has overall responsibility for the promotion and protection of human rights.⁹¹ Hence, supposedly the AICHR can work beyond the promotional function especially for certain issues of Women, Children and Migrant workers. Moreover, for the ASEAN Convention Against Trafficking in Persons, Especially Women and Children (ACTIP), the first substantive treaty in ASEAN, The AICHR has more opportunity to go for protection mandate. It will also test the relation of ASEAN with other non-ASEAN institution especially the UN who deal with this issue as the ACTIP provisions parallel the multilateral UN Convention Against Transnational Organized Crime and its Protocol against human trafficking (The Palermo Protocol).⁹² AICHR and these bodies have to build stronger relationships and work together to find out some way to give more human rights protection.

There are two main ASEAN bodies in which the AICHR have to work closely, the Secretary-General and the ASEAN Secretariat.⁹³ The Secretary-

⁸⁶ Solidarity for Asian People's Advocacy Task Force on ASEAN and Human Rights (SAPA TFAHR), *Hiding Behind Its Limits, A Performance Report on the first year of the ASEAN Intergovernmental Commission on Human Rights (AICHR) 2009-2010* (Bangkok, Thailand : Forum-Asia,2010), p. 6.

⁸⁷ *Ibid*, p. 141.

⁸⁸ Aguirre, Daniel, and Irene Pietropaoli, *Op. cit.*, p. 299

⁸⁹ *Ibid*, p. 18.

⁹⁰ Muntarbhorn, Vitit. "Enlarging the Space for the People: Whither Human Rights and Governance in ASEAN?", *Building ASEAN Community*, 2017, p. 213.

⁹¹ 6.8 TOR of the AICHR.

⁹² Muntarbhorn, Vitit, *Op. cit.*, p. 210.

⁹³ 7 TOR of the AICHR.

General of ASEAN may bring relevant issues to the attention of the AICHR in accordance with Article 11.2 (a) and (b) of the ASEAN Charter. In so doing, the Secretary-General of ASEAN shall concurrently inform the ASEAN Foreign Ministers of these issues.⁹⁴ However, this is hardly found in practice. In contrast, the AICHR has to bring human rights issues to the attention of the Secretary-General or other ASEAN main bodies and forums. In addition, The ASEAN Secretariat shall provide the necessary secretarial support to the AICHR to ensure its effective performance. To facilitate the Secretariat's support to the AICHR, ASEAN Member States may, with the concurrence of the Secretary-General of ASEAN, send their officials to the ASEAN Secretariat.⁹⁵

The Secretary-General and the Secretariat staff have "exclusively ASEAN character" responsibilities. The further question is what does it mean by "exclusively ASEAN character"? in executing their task, both have to be apolitical and professional, and always uphold the highest standards of integrity, efficiency, and competence.⁹⁶ In practice, these must be defined thoroughly and to perhaps some extent with a wide interpretation this could be a way for ASEAN as an institution to directly involve and show power in developing human rights regime in the region. In addition to that, member states are required to respect their independence and not "seek to

influence them" in the discharge of their responsibilities.⁹⁷

There are also many channels that could bring human rights issues at the level of ASEAN to level up the efficacy of human rights in the region such as at ASEAN Summit. However, as there are problems from the legality of ASEAN Summit decision which make this summit seems meaningless to advance human rights in the region, among others are the problem of incorporation (Lack of Direct Effect), the problem of hybridity and normative transplantation, the problem of diffuse or insufficient judicial oversight.⁹⁸ Bringing human rights issues at the summit are not the AICHR's responsibility due to their very limited power, however, other bodies such as the Secretary General have more capacity on it.

In sum, The AICHR shall work with all ASEAN sectoral bodies dealing with human rights to expeditiously determine the modalities for their ultimate alignment with the AICHR. To this end, the AICHR shall closely consult, coordinate and collaborate with such bodies in order to promote synergy and coherence in ASEAN's promotion and protection of human rights.⁹⁹

e. Lack of Commitment of ASEAN Main Institution to integrate Human Rights into Their Law and Policy

ASEAN focused more on its energies on economic growth and security.¹⁰⁰ It is well-known that ASEAN puts security as the topmost priority, so ideally,

⁹⁴ 7.1 TOR of the AICHR.

⁹⁵ 7.2 TOR of the AICHR.

⁹⁶ Tan, Eugene KB, "The ASEAN Charter as Legs to Go Places: Ideational Norms and Pragmatic Legalism in Community Building in Southeast Asia", *SYBIL*, Vol. 12, 2008, p. 180.

⁹⁷ *Ibid.*

⁹⁸ Desierto, Diane A., "ASEAN's Constitutionalization of International Law: Challenges to Evolution Under the

New ASEAN Charter." *Colum. J. Transnat'l L.*, Vol. 49, 2010, p. 298.

⁹⁹ 6.9 TOR of the AICHR.

¹⁰⁰ Chen, Lung-chu, *An introduction to contemporary international law: a policy-oriented perspective*, Oxford University Press, 2014, p. 64; Aguirre, Daniel, and Irene Pietropaoli, *Op. cit.*, p. 278.

human rights are under the pillar of the Security Community or perhaps has its own pillar. Unfortunately, human rights have both under Security Community Pillar by only stated ASEAN's commitment for promotion and protection of human rights in the region and under Socio-Cultural Community for certain human rights in particularly vulnerable groups of rights. It has no clarity at all, and no wonder if human rights are likely to be further diminished in the region. Most regrettably, there is no reference to human rights in the Economic Community Pillar.¹⁰¹ ASEAN should learn from the EU on how they integrate human rights into their economic union meaning that human rights and economics are related and can not dismiss each other. ASEAN both as an institution and member states have also to focus not only on economic integration but also human rights.¹⁰²

Not much can be expected from the AICHR if it is built on shaky foundations and created as a 'toothless tiger'. Nevertheless, we should not be pessimistic, but at the same time, we need to be realistic. As commonly acknowledged, a full-fledged regional

human rights regime is usually composed of three pillars: firstly, an overarching regional human rights convention, secondly, a human rights commission responsible for investigating and monitoring functions, and thirdly, a regional human rights court to protect individuals and to ensure enforcement of human rights laws.¹⁰³ It was proven in European, American, and African regions,¹⁰⁴ and it is something that the ASEAN should learn and adapt.¹⁰⁵ Further discussion on these regions will be in the next chapter.

If an absent and inaction culture maintains, the ASEAN just provides an unsatisfactory and very much artificial with its human rights mechanisms. To the worst of these cultures, ASEAN can be said to be a human rights violator. This may be a too far or too wild assumption on the ASEAN. However, if it happens, based on international law, ASEAN has a Responsibility as an International Organization as it is recognized in article 61.1 of the International Law Commission (ILC) Articles on the Responsibility of International Organization (ARIO) 2011 who can be charged to the institution in such a situation.¹⁰⁶ In

¹⁰¹ Hsien-Li, Tan, "The ASEAN Human Rights Body: Incorporating Forgotten Promises for Policy Coherence and Efficacy", *SYBIL*, Vol. 12, 2008, p. 252.

¹⁰² Baik, Tae-Ung, *Emerging regional human rights systems in Asia*, Cambridge University Press, 2012, p. 225.

¹⁰³ Yen Yung-Ming, "The formation of the ASEAN", *Op. cit.*, p. 394.

¹⁰⁴ There is a strong and clear background of the European under the auspices The Council of Europe (the CoE) was established in the aftermath of the second world war, has numbers of countries join forces to set up the Council of Europe to promote human rights, democracy and the rule of law across Europe. There was strong will from the states' leaders to avoid any war in the future such as those which had ravaged Europe in 1939-45 and earlier in 1914-18. There was a very important meeting in The Hague on 8-10 May that led to the establishment of this organization. A year later, the Statute of Europe was signed on 5 May 1949 at St. James's Palace, London by ten founding members which were Belgium,

Denmark, France, Ireland, Italy, Luxemburg, The Netherlands, Norway, Sweden, and the United Kingdom.

¹⁰⁵ For comparison, please see further on Rachminawati & Anna Syngellakis, "Law and policy: a useful model for ASEAN?," In *EU-ASEAN Relations in the 21st Century: Strategic Partnership in the Making*, ed. Daniel Novotny and Clara Portela (United Kingdom: Palgrave Macmillan, 2012), p. 108-23.

¹⁰⁶ http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf "A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the state, would have constituted a breach of the obligation."

addition, when an international body is absent or inaction in responding to gross human rights violations, the proponents may claim to do unilateral sanctions or even use of force in the form of humanitarian intervention.¹⁰⁷ This situation could happen in the near future in ASEAN, and to that, the organization must provide the rule of the game to avoid chaos.

E. CONCLUSION

Two main key findings are presented in this paper. Firstly, in relation to ASEAN's policy and action towards the Rohingya case. Secondly, on the hindrances of the AICHR to act on the human Rights violation on the Rohingya Case. It is hard to find an explicit and strong policy or statement of the ASEAN as well the AICHR on this case of Myanmar since all the discussion is behind closed doors. Each ASEAN member state responds differently and individually, but most of them tend to avoid having standing on the issue, they only involve the humanitarian aspects of the case. There was almost no policy on the Rohingya case in favor of the victims. No policy on the investigation of the case. The absence of policy on this case shows that the respectful institution of the ASEAN is a travesty. Both the existence of the ASEAN and the AICHR seem so useless in the Rohingya case.

Considering the nature of the AICHR, the ASEAN as the main institution has to support the AICHR by giving a clear policy and standing on this issue. The ASEAN elites may hold the ASEAN way by respecting Myanmar to settle their domestic dispute, however, they also have to create a mechanism to visit, to monitor and to give suggestions to end the conflict and protect the victims. It is also found that several hindrances have been identified for the

inaction of the AICHR, particularly in the Rohingya case. The hindrances affect the responses of AICHR in other cases of human rights in the region. First, the principle of sovereignty and non-interference that had much influence in the designing of the AICHR. Secondly, the hindrances from the institutional aspect of the AICHR are including: the weak mandate of the AICHR, limited only to monitoring function; the member of the Commission is not independent since it serves as a consultative body to the governments of ASEAN countries; the AICHR's meeting shrouded in secrecy, the lack of financial support from the ASEAN to the AICHR, and the use of the old fashioned ASEAN way by the ASEAN leader to settle the Dispute.

In order to remove all hindrances above, the ASEAN need to review the TOR and make some improvements on the main reform issues which are the mandate, the independency of the commission, the budget and other technical support for the AICHR. The ASEAN also needs to prepare seriously for the future of the AICHR which is stronger than the current system. On top of that, the ASEAN leaders need to seek and set their "new ASEAN Way" according to their new commitment stipulating in the ASEAN Charter and any other ASEAN legal instruments. While preparing a long-term reform of the AICHR, The ASEAN and its member states should make real and concrete efforts to protect human rights of Rohingya people which are spreading in some ASEAN member states and Bangladesh. They have to plan the future life of Rohingya people, because they are also citizens of ASEAN community.

¹⁰⁷ Bantekas, Ilias, and Lutz Oette, *International Human Rights Law and Practice*, Cambridge University Press, 2013, Second edition 2016, p. 93.

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