

Tilburg University

**EXAMINING THE ASEAN INTERGOVERNMENTAL
COMMISSION ON HUMAN RIGHTS (AICHR): THE
CASE STUDY OF THE ROHINGYA CRISIS**

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LIST OF ABBREVIATIONS

ACMW	ASEAN Committee on Migrant Workers
ACTIP	ASEAN Convention against Trafficking in Persons, Especially Women and Children
ACWC	ASEAN Commission on the Promotion and the Protection of the Rights of Women and Children
AICHR	ASEAN Intergovernmental Commission on Human Rights
AIPO	ASEAN Inter-Parliamentary Organisation
ASEAN	Association of Southeast Asian Nations
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
EPG	Eminent Persons Group
GOM	Government of Myanmar
HLP	High Level Panel
ICCPR	International Covenant on Civil and Political Rights
IOM	International Organisation for Migration
NGOs	Non-Government Organisations
NHRIs	National Human Rights Institutions
OSHRD	Office of Human Rights Studies and Social Development
R2P	Responsibility to Protect
RSD	Refugee Status Determination
RTG	Royal Thai Government

SAPA-TAFHR	Solidarity of Asian People’s Advocacy – Task Force on ASEAN and Human Rights
SDG	Sustainable Development Goals
SOLAS	International Convention for the Safety of Life at Sea
TAC	Treaty of Amity and Cooperation
TOR	Terms of Reference
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNHRC	United Nations Human Rights Council

1. INTRODUCTION

In October 2009, the Association of Southeast Asian Nations Intergovernmental Commission on Human Rights (ASEAN AICHR) was the first sub-regional human rights body in the Asia-Pacific region that was established by the ASEAN.¹ This has set a new stage of rights development in Southeast Asia.² Having said that, the AICHR's lack of response to the issue of human rights in the region such as the Rohingya issue, is the main criticism since the beginning of the AICHR in 2009.³ There are several reasons why the AICHR has been criticised. According to many critics, AICHR's failed response to the Rohingya crisis was relatively influenced by two essential factors.⁴ First, the so-called ASEAN Way, in which the ideas of human rights is not entirely compatible with Asian values.⁵ There is a high regard for "*non-interference in the internal affairs of ASEAN Member States*",⁶ and "*respect for the right of every Member State to lead its national existence free from external interference, subversion and coercion*".⁷ In addition, there is a typical pattern that is regarded as the standard in the "*pursuance of a constructive and non-confrontational approach and cooperation to enhance promotion and protection of human right*".⁸

¹ Basham-Jones, D. (2012). ASEAN's Intergovernmental Commission on Human Rights: A Pale Shadow of What it Could have Been. *Asia-Pacific Journal on Human Rights and the Law*.

² Nugroho, B. (2013). After Three Years of the AICHR: What is next?. *International Conference on International Relations & Development*.

³ Ibid.; Olivia, Y. (2014). Will the ASEAN Intergovernmental Commission of Human Rights (AICHR) Grow Its Teeth?. *Jurnal Hubungan Internasional*, 3 (2).

⁴ Ibid.

⁵ See Nugroho, above n 2.

⁶ Association of Southeast Asian Nations. (n.d.). Article 2.1 (b) - *Terms of Reference of ASEAN Intergovernmental Commission on Human Rights*. Retrieved 2017 from Human Rights Library-University of Minnesota: <http://hrlibrary.umn.edu/research/Philippines/Terms%20of%20Reference%20for%20the%20ASEAN%20Inter-Governmental%20CHR.pdf>.

⁷ Ibid., Article 2.1 (c) of the Terms of Reference.

⁸ Ibid., Article 2.4 of the Terms of Reference.

Second, results of evaluation points out to the lack of formal mandates of the AICHR.⁹ Article 14 of the ASEAN Charter provides “*that the AICHR shall operate in accordance with the Terms of Reference (TOR)*”.¹⁰

As a reference to the AICHR, the TOR imitates the ASEAN Charter’s cautious approach towards human rights.¹¹ There is a doubtful speculation on how the AICHR will protect the human rights in ASEAN, even when the TOR states that the AICHR is created to *promote* and *protect* human rights in Southeast Asia.¹² Seemingly, there is no concise explanation as to its implementing programmes or structures, not to mention the fact that the AICHR does not have a power to give sanction to human rights abusers.¹³ In this dissertation, it is my desire to probe into the substance of the criticisms made by the critics, by examining AICHR’s approach on the Rohingya crisis.

The long chronological history that dates back from the British colonisation era shows evidence of violence issue on Rohingyas. This has caused the lives of hundreds who were killed in the process, while thousands of citizens were displaced for the reason of homes destruction.¹⁴ The violent events that started in 2012, as well as those of 1978, 1992, 2001, and 2009 was due to the widespread discrimination against the Rohingya in the Rakhine State.¹⁵ This systemic discrimination against the ethnic group have been

⁹ See Nugroho, above n 2.

¹⁰ Association of Southeast Asian Nations. (n.d.). *The ASEAN Charter*. Retrieved March 2017 from Association of Southeast Asian Nations: http://www.asean.org/wp-content/uploads/2012/05/11.-October-2015-The-ASEAN-Charter-18th-Reprint-Amended-updated-on-05_-April-2016-IJP.pdf.; Shelton, D., & Carozza, P. (2013). *Regional Protection of Human Rights Pack*. Oxford University Press.; See Association of Southeast Asian Nations – Terms of Reference, above n 6.

¹¹ Ginbar, Y. (2010). Human Rights in ASEAN - Setting Sail or Treading Water?. *Human Rights Law Review*.; See Nugroho, above n 2.

¹² See Olivia, above n 3, p. 153.

¹³ Ibid.

¹⁴ Binti Haji Abdul Rahman, S. K. (2014). Rohingya Muslim Ethnic Violence: World’s Response and The Role of United Nations, p. 104. *International Conference of Global Islamic Studies*.

¹⁵ Zawacki, B. (2013). Defining Myanmar's "Rohingya Problem". *The Human Rights Brief*.

institutionalised by way of government policies and practices, including restrictions on marriage, family planning, employment, education, religious choice, and freedom of movement for a long time. Direct violence against the Rohingya was made possible by this system.¹⁶

In May and June 2015, following the discovery of mass graves in the smugglers' camps at the Thailand-Malaysia border, the Rohingya crisis began.¹⁷ In the Strait of Malacca off the coast of Thailand, Malaysia and Indonesia, thousands of Rohingyas from the Rakhine State of Myanmar and economic migrants from Bangladesh were found stranded in May 2015.¹⁸ In the Asian region, for several reasons, the Rohingya crisis is a relevant concern that cannot be ignored. First, according to the United Nations High Commissioner for Refugees (UNHCR), the Rohingyas are one of the world's largest and most prominent groups of stateless people.¹⁹ Further, the United Nations (UN) record shows that one of the world's most persecuted minorities are the Rohingyas.²⁰ Second, the AICHR, as a human rights body that is responsible for the *promotion* and *protection* of human rights in the Asian region²¹ – it can only be reasonable to look into how it has responded to the ever worsening Rohingya crisis that has persisted since the

¹⁶ Ibid.; Albert, E. (2017, January 12). *The Rohingya Migrant Crisis*. Retrieved April 2017 from Council on Foreign Relations: https://www.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/resources/docs/CFR_The%20Rohingya%20Migrant%20Crisis%20-%20Council%20on%20Foreign%20Relations.pdf.

¹⁷ Thuzar, M. (2016). Managing Movements of People in Southeast Asia: The ASEAN Response. In B. Gorawantschy, M. Sarmah, & P. Rueppel (Eds.), *Refugees and Migration in Asia and Europe*. Singapore: Konrad-Adenauer-Stiftung.

¹⁸ Pitsuwan, S., & Parameswaran, P. (2015, July 23). *Why Southeast Asia's Refugee Crisis Matters*. Retrieved May 2017, from The Diplomat: <http://thediplomat.com/2015/07/southeast-asia-refugees-in-crisis/>.

¹⁹ Kiragu, E., Rosi, A. L., & Morris, T. (2011, December). *States of denial: A review of UNHCR's response to the protracted situation of stateless Rohingya refugees in Bangladesh*. Retrieved May 2017, from The Office of the United Nations High Commissioner for Refugees: <http://www.unhcr.org/4ee754c19.pdf>.

²⁰ Radio Free Asia. (2013, February 11). *Burma: UN expert visits refugee camps*. Retrieved May 2017, from The Office of the United Nations High Commissioner for Refugees: <http://www.refworld.org/docid/511ce46723.html>.

²¹ See Association of Southeast Asian Nations – Terms of Reference, above n 6.

AICHR was established in 2009, and why do we see a non-engagement within the AICHR up to this day.

ASEAN institutions that cover a range of issues relevant to human rights and migration in the ASEAN region are: ASEAN Intergovernmental Commission on Human Rights (AICHR), the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC), and the ASEAN Committee on Migrant Workers (ACMW).²² With an overall responsibility for the promotion and protection of human rights in ASEAN, the AICHR is the most important human rights body as it is the main human rights institution in the ASEAN region.²³

For purposes of a more detailed discussion, this paper intends to focus on the ASEAN institution: the AICHR. In this paper, I will carefully scrutinise the AICHR's capacity in addressing human rights issues in the ASEAN region. That being so, I intend to use the Rohingya crisis as a case study to explore the competence of the AICHR's mandate, which aims to promote and protect human rights in the ASEAN region²⁴, while attempting to determine what factors led to its difficulty in carrying out its mandate. With the aforecited institution, I believe that such has the main capability and mobility to respond to the Rohingya crisis in the ASEAN region while maintaining a check on human rights issues, which Rohingya refugees are presently affronted with.

²² Pisano, A. (2014, February). Human Rights and Sovereignty in the ASEAN Path Towards a Human Rights Declaration, p. 400. *Human Rights Review*.

²³ See Association of Southeast Asian Nations – Article 6.8 of the Terms of Reference, above n 6.; Quane, H. (2015). The Significance of an Evolving Relationship: ASEAN States and the Global Human Rights Mechanisms, p. 287. *Human Rights Law Review*.

²⁴ See Association of Southeast Asian Nations – Article 6.8 of the Terms of Reference, above n 6.

1.1. RESEARCH QUESTIONS

By using the Rohingya crisis as a case study, this paper aims to assess how the AICHR executes its primary purpose for existence. Thus, this paper points to the central question of, **how satisfactory is the AICHR in promoting and protecting human rights in the Asian region**. This dissertation intends to establish the following: (1) Unravelling the Rohingya crisis – On a national level, what do we mean by Rohingya crisis in Myanmar, and how is the Rohingya refugee crisis viewed on an international law perspective; (2) Analysis of AICHR’s response towards Rohingya crisis in both national and international level; and (3) What other ways can it engage itself in this kind of human rights issues in the region.

1.2. PURPOSE OF THE STUDY

In the current and on-going Rohingya crisis in Southeast Asia, in this dissertation it is my fervent purpose to: (1) Examine the capability of AICHR as a protector of human rights in the Asian region and also look into the criticisms of many scholars on the different factors affecting AICHR’s response towards protecting human rights in the region; and (2) Contribute to the intellectual discourse with the hope that someday, an effective and realistic AICHR as an overarching human rights body that aims to protect and promote human rights in the Asian region can be achieved, and a resolution may be reached to end the human rights violations against Rohingyas within the ambit of the AICHR.

1.3. RESEARCH METHODOLOGY

In this section, I will explain how this paper is organised and the methodology used to analyse AICHR’s approach towards the Rohingya crisis in Asia. Since this dissertation

paper is an analysis of the AICHR in the ASEAN region in response to the Rohingya crisis, this study is fundamentally based on a qualitative research method.

To fully assess the value of the AICHR as a human rights body in the Asian region, this paper will present the Rohingya crisis as a case study. By doing so, we can practically see how human rights issues like the Rohingya crisis was responded by the AICHR. The study is organised as follows – a general background of this dissertation has been achieved in the **previous section**. The **first chapter** of this paper gives us the chance to unravel the Rohingya crisis in the national and international level. To follow; the human rights concerns towards the Rohingyas and the Rohingya refugees; the international legal framework for the protection of the Rohingya refugees; and the response of the individual States in Southeast Asia towards Rohingya refugees. Subsequently, a historical development of the human rights regional institution: AICHR in the ASEAN region; the AICHR's TOR; AICHR's three year journey since its establishment in 2009 and the ASEAN Way, are provided in **second chapter**. A discussion on how the AICHR has approached the Rohingya crisis in the Rakhine State and the Rohingya refugee crisis in Southeast Asia is tackled and afterwards, the analysis on the response of the AICHR is analysed in the **third chapter**. What AICHR can provide and learn from the way they respond to the crisis, will be outlined in the **final section** of this study.

In my analysis on the approach of the AICHR to the Rohingya crisis and the refugee crisis, I will use secondary sources, such as: Peer-reviewed journals, articles, news articles, books, valid United Nations documents pertaining to the topic at hand, and human rights organisations' reports.

These aforementioned sources are essential and of great importance when addressing the approach of AICHR towards the Rohingya crisis and the refugee crisis in the ASEAN region.

To set the facts and circumstances, and to better understand the human rights concerns that Rohingyas face in Myanmar and in the perspective of international law, the next section is devoted to the Rohingya crisis in the Asian region.

CHAPTER 1

1. THE CASE STUDY: THE ROHINGYA CRISIS

Since 1978, the recipients of state-sponsored process of destruction were the Muslim minority of the Rakhine State, the Rohingyas. From the borderlands of Rakhine State, Myanmar, the Rohingyas were known to have deep historical roots and were recognised officially by three successive governments (Sao Shew Thaik: 1948-1952; Ba U: 1952-1957; Win Maung: 1957-1962)²⁵ of post-independence of Myanmar, to be both as citizens and as an ethnic group.²⁶

The violence and discrimination experienced by the Rohingya Muslim communities in Myanmar is where the root of the problem lies of the Rohingya crisis. There are multiple causes of the Rohingya crisis, both distant and proximate.²⁷ In one incident, Rohingya men, being accused of raping and killing a Buddhist woman in the Northern Rakhine State has triggered the Rohingya violence that broke out in 2012.²⁸ Perpetration of these violence emanated primarily from Buddhists of the Rakhine State and a mixture of the Myanmar security forces and civilian groups.²⁹ There are serious humanitarian consequences involved in the Rohingya crisis. Because of strict

²⁵ WorldAtlas. (n.d.). *Presidents of Myanmar (Burma)*. Retrieved 2017, from WorldAtlas: <http://www.worldatlas.com/articles/presidents-of-myanmar-burma.html>.

²⁶ Zarni, M., & Cowley, A. (2014). The Slow-Burning Genocide of Myanmar's Rohingyas. *Pacific Rim Law & Policy Journal Association*.

²⁷ Newland, K. (2015, July). *Irregular Maritime Migration in the Bay of Bengal: The Challenges of Protection, Management and Cooperation*. Retrieved May 2017 from International Organisation for Migration: http://publications.iom.int/system/files/pdf/mpi-iom_brief_no_13.pdf.

²⁸ See Albert, above n 16.; Nordin, R., Maliki, D., Marsur, D., & Hashemi, H. (2016). ASEAN Human Rights Dilemma: The Plight of the Rohingyas in Myanmar, p. 594. *The Law Review*.

²⁹ Equal Rights Trust. (2014, October). *Equal Only in Name: The Human Rights of Stateless Rohingyas in Malaysia*. Retrieved March 2017 from Equal Rights Trust: <http://www.equalrightstrust.org/ertdocumentbank/Equal%20Only%20in%20Name%20-%20Malaysia%20-%20Full%20Report.pdf>.

movement restrictions, the Rohingyas in Myanmar have very limited access to basic services and viable livelihood opportunities.³⁰

The Rohingyas were increasingly excluded from the nation-building process of Myanmar when it was developing its sovereign identity in 1948. It was also during this time that the Rohingya community became progressively persecuted and subjected to harsh state-sponsored abuses.³¹

In this section, allow me to establish the distinction between seeing the Rohingya crisis in the Rakhine State, as against how it appears to be seen from outside of Myanmar. By doing so, I believe that I am in a better position to present the Rohingya crisis in a more understandable manner. The Rohingya crisis is primarily focused in the Bay of Bengal and Andaman Sea while cutting across the regions of South Asia and Southeast Asia.³² Living predominantly in the Rakhine State, the Rohingyas are “*targets of systemic structural and cultural persecution*”.³³ To a greater extent, a crisis, as defined by Merriam-Webster Dictionary, “*is a difficult or dangerous situation that needs serious attention*”.³⁴ The Rohingyas are in dangerous situations because they are experiencing persecution, as such, they need serious attention. In this paper, for purposes of

³⁰ European Commission. (2017, May). *The Rohingya Crisis*. Retrieved May 2017 from European Commission: http://ec.europa.eu/echo/files/aid/countries/factsheets/rohingya_en.pdf.

³¹ Pugh, C. (2013). *Is Citizenship the Answer? Constructions of belonging and exclusion for the stateless Rohingya of Burma*. Retrieved May 2017 from COMPAS: https://www.compas.ox.ac.uk/media/WP-2013-107-Pugh_Stateless_Rohingya_Burma.pdf.

³² Chatterjee, A. (2016). Migrants at sea: Case studies of Syrians and Rohingyas . *Maritime Affairs: Journal of the National Maritime Foundation of India*, 12 (2).

³³ The Simon-Skjodt Center for the Prevention of Genocide . (2015). *Burma: A Bearing Witness Trip - "They Want Us To All Go Away"*. Retrieved 2017, from United States Holocaust Memorial Museum: The Simon-Skjodt Center for the Prevention of Genocide.; White, C. (2015, December). Protection for Whom? Violations of International Law in Myanmar's New 'Race and Religion Protection' Laws. *Georgetown Institute for Women, Peace and Security*.

³⁴ Directly quoted from Merriam-Webster Dictionary Online.; Merriam-Webster Dictionary. (n.d.). *Crisis*. Retrieved from Merriam-Webster Dictionary: <https://www.merriam-webster.com/dictionary/crisis>.

clarification, I will refer to the current situation of the Rohingyas in Myanmar – whenever I mention Rohingya crisis.

On the other hand, as I mention Rohingya refugee crisis, I will refer to the Rohingya crisis outside of Myanmar. “*Refugees are persons fleeing armed conflict or persecution*”,³⁵ according to the 1951 Refugee Convention.³⁶ In order to escape persecution by the GOM, Rohingyas are fleeing their country. As such, returning safely to their homeland would be quite impossible.³⁷ Other Rohingyas tried to enter neighbouring countries such as Bangladesh, Malaysia, Indonesia, and Thailand; while most Rohingyas are taking temporary shelter in displacement camps.³⁸ Furthermore, the dangerous and often deadly conditions at sea are being endured by the Rohingyas outside Myanmar³⁹, thus, I will refer to the situation as the Rohingya refugee crisis.

In this section, I aim to ravel out and look into the Rohingya crisis. This can be done initially by setting my discussion on a national level. Looking at the situation in the Rakhine State, what do we mean by the Rohingya crisis? Thereafter, on a macro position, I will explore the Rohingya refugee crisis – as it is seen from an international level perspective. But before I go into my thorough analysis of the Rohingya crisis, allow me to first give you a true picture as to who the Rohingyas are.

³⁵ Directly quoted from the UNHCR’s Website – Refugee.; United Nations High Commissioner for Refugees. (2016, July 11). *UNHCR viewpoint: ‘Refugee’ or ‘migrant’ – Which is right?* Retrieved from United Nations High Commissioner for Refugees: <http://www.unhcr.org/news/latest/2016/7/55df0e556/unhcr-viewpoint-refugee-migrant-right.html>.

³⁶ United Nations High Commissioner for Refugees. (n.d.). *The 1951 Convention Relating to the Status of Refugees*. Retrieved May 2017 from United Nations High Commissioner for Refugees: <http://www.unhcr.org/3b66c2aa10>.

³⁷ Sukumaran, A. (n.d.). *Forced Migration in the ASEAN*. Retrieved from ASEAN People's Forum: <http://aseanpeople.org/wp-content/uploads/2014/03/HR21-Forced-Migration-in-South-East-Asia-Presentation-1.pdf>; Ragland, T. (1994). Burma's Rohingyas in Crisis: Protection of "Humanitarian" Refugees Under International Law. *Boston College Third World Law Journal*, 14.

³⁸ Brooten, L., Ashraf, S. I., & Akinro, N. A. (2015). Traumatized victims and mutilated bodies: Human rights and the ‘politics of immediation’ in the Rohingya crisis of Burma/Myanmar. *The International Communication Gazette*, 77(8).

³⁹ Ibid.

1.1. THE ORIGIN OF THE ROHINGYA MUSLIMS

Who are the Rohingya? Where from did they originate? Amidst the largely Buddhist living in Myanmar, the Rohingyas are part of the Muslim population in the Rakhine State that is recognised as the most persecuted minority group according to the United Nations (UN).⁴⁰ Back in the fifteenth century, history of the Rohingyas can be traced back when Muslims originally migrated to the Arakan Kingdom known today as the *Rakhine State*, which is a part of Myanmar. Myanmar together with Bangladesh were both British colonies for a time. That being so, Muslims from Bangladesh migrated and made their journey to Myanmar.⁴¹ Majority of the Rohingyas live in the Rakhine State. They represent the largest percentage of Muslims in Myanmar.⁴² They claim a long-standing connection to the Rakhine State and identify themselves as a distinct ethnic group with their own language and culture. These claims were successively rejected by the GOM, excluding the Rohingyas from the list of recognised 135 ethnic groups of Myanmar.⁴³ Further, under Myanmar's 1982 Citizenship Law, they are denied citizenship. As such, Rohingyas are stateless.⁴⁴

The “*Maungdaw, Buthidaung, and Rathedaung*” are the three townships of Northern Rakhine State where majority of the population of the Rohingyas is situated.⁴⁵ Through government policies such as the *Operation Nagamin*, a large number of Rohingyas have

⁴⁰ Arifin, N. A. (2016, January - June). ASEAN's Role in Mitigating the Risks of Rohingya Radicalization, p. 75. *Jurnal Hubungan Internasional*.

⁴¹ Ibid.

⁴² United Nations High Commissioner for Human Rights. (2016, June 20). *Situation of human rights of Rohingya Muslims and other minorities in Myanmar*. Retrieved May 2017 from Global Centre for the Responsibility to Protect: <http://www.globalr2p.org/media/files/hchr-report-rohingya.pdf>.

⁴³ Ibid.

⁴⁴ Safdar, A. (2015, October). *Who are the Rohingyas?* Retrieved 2017, from Aljazeera: <http://www.aljazeera.com/indepth/features/2015/10/rohingya-151024202611276.html>.

⁴⁵ See Equal Rights Trust, above n 29.

been contained in the Rakhine State. However, in Yangon, the capital of Myanmar, a small number of Rohingyas have settled.⁴⁶

We can trace back the long historical, linguistic, and cultural affiliations of the Rohingyas with the local populations of Rakhine State as well as with the people across the border in Bangladesh, the Chittagonian.⁴⁷ The Rohingya people are Muslims. Back several centuries ago, way long before Myanmar came into existence as the clearly separated boundaries of post-colonial nation-state of today, the Rohingya trace their ancestral roots in the Rakhine region. Despite of this, lack of respect and contemptuous disregard of the history of the Rohingya and their Muslim ancestors is today largely persisting in Myanmar.⁴⁸ In 2016, thousands of Rohingyas claimed that Myanmar's soldiers, where villages had been burned down, have subjected them to attacks.⁴⁹

The following section tackles the Rohingya crisis affronting Myanmar and Southeast Asia. As a way to better understand the Rohingya crisis, first – we need to look into and discuss the plight of the Rohingyas, to clearly define the most pressing issues facing them. In so doing, we can better classify each one according to priority or urgency. On a macro perspective, we also need to discuss on the relevance of the Rohingya refugee crisis in the application of international law, and how said issue is regarded by the international community.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Kentish, B. (2016, December 16). *Burmese government is 'renewing attacks on Rohingya Muslims,' rights group claims*. Retrieved 2017, from The Independent: <http://www.independent.co.uk/news/world/asia/burma-government-attack-rohingya-muslims-minority-myanmar-islam-a7477741.html>.

2. INTERNAL PERSPECTIVES: THE ROHINGYA CRISIS IN THE RAKHINE STATE, MYANMAR

In 2013, then-president Thein Sein made public statements towards the Rohingya issue in the Rakhine State. He publicly announced that, “*outside elements are just exaggerating, fabricating news, there is no ethnic cleansing whatsoever*”, and that, there is “*a peaceful and harmonious society in Rakhine State*”.⁵⁰ These statements, however, voices out a different story when a violence occurred in June and October 2012, where at least 192 Rohingyas were killed.⁵¹

Since 1992, successive U.N. Special Rapporteurs have documented patterns of human rights violations against the Rohingyas.⁵² On account of their ethnicity, race or religion, Rohingyas are a perfect target of direct or through selective, discriminatory implementation. National, State and local laws, policies and practices are so designed to have this effect on the Rohingyas.⁵³

Both the treaty and customary law are the basis of the human rights obligations of the State.⁵⁴ Basically, it is important to note that Myanmar is one of the Member States of ASEAN and also a signatory to the ratification of three of international conventions on human rights. These three conventions are: the Convention on the Rights of the Child (CRC); Convention on the Elimination of all Forms of Discrimination against Women

⁵⁰ Directly quoted from then-President’s statements reported by Reuters and Washington Post.; Szep, J. (2015, May 15). *Special Report - In Myanmar, apartheid tactics against minority Muslims*. Retrieved from Reuters: <http://www.reuters.com/article/us-myanmar-rohingya-specialreport-idUSBRE94E00020130515>.; Taylor, A. (2016, December 8). *A British tabloid said a Burmese soldier tasered a toddler. But the story was wrong*. Retrieved from Washington Post: https://www.washingtonpost.com/news/worldviews/wp/2016/12/08/a-british-tabloid-stumbles-into-burmas-battle-over-fake-news/?utm_term=.24d6864eb9e1.

⁵¹ See Szep, above n 50.

⁵² See United Nations High Commissioner for Human Rights. (2016). *Situation of human rights of Rohingya Muslims and other minorities in Myanmar*, above n 42.

⁵³ Ibid.

⁵⁴ Ibid.

(CEDAW); and the Convention on the Rights of Persons with Disabilities (CRPD).⁵⁵ “*The Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime, and the Convention on the Prevention and Punishment of the Crime of Genocide*” – are other key international treaties that Myanmar is a party to.⁵⁶

The next section discusses the major human rights violations against the Rohingyas in the Rakhine State, committed by the GOM.

2.1. DISCRIMINATION

The Rohingyas were recognised as a legitimate ethnic group in the early years of Myanmar’s independence (1948).⁵⁷ As such, they deserved a homeland in the Rakhine State.⁵⁸

The “*Religious Conversion Law, Interfaith Marriage Law, Population Control, and Monogamy Law*”,⁵⁹ are the four laws that was signed into law by Myanmar’s then-

⁵⁵ United Nations High Commissioner for Refugees. (n.d.). *Myanmar*. Retrieved from United Nations High Commissioner for Refugees: <http://www.ohchr.org/EN/Countries/AsiaRegion/Pages/MMIndex.aspx>; Rathgeber, T. (2014). Human Rights and the Institutionalisation of ASEAN: An Ambiguous Relationship. *Journal of Current Journal of Current.*; Wahyuningrum, Y. (2014). The ASEAN Intergovernmental Commission on Human Rights: Origins, Evolution and the Way Forward. *International Institute for Democracy and Electoral Assistance*.

⁵⁶ See United Nations High Commissioner for Human Rights. (2016). *Situation of human rights of Rohingya Muslims and other minorities in Myanmar*, above n 42.

⁵⁷ Recognition of Rohingyas: 1948 – 1962.

⁵⁸ See Zarni, et al., above n 26.

⁵⁹ Rahman, S., & Zeldin, W. (2015, September 14). *Burma: Four “Race and Religion Protection Laws” Adopted*. Retrieved from Library of Congress : <http://www.loc.gov/law/foreign-news/article/burma-four-race-and-religion-protection-laws-adopted/>.

president Thein Sein governing protection of race and religion.⁶⁰ With that being said, the Monogamy Law that was last signed into law in 2015 prohibits unmarried couples to stay together other than the spouse, and marrying multiple spouses.⁶¹ Hence, non-compliance of the Monogamy Law set forth by the GOM, will result to a punishment.⁶² This, to many is viewed as an attack on the Muslim population in the country, seen as more of a restriction than it is a protection.⁶³ Furthermore, mothers are required under the Population Control Law to have their children three years apart.⁶⁴ For anyone wishing to change their religion, under the Religious Conversion Law and Interfaith Marriage Law, it is necessary to first file an application with the local board for approval.⁶⁵

A host of repressive measures were allowed to be imposed by local governments due to Myanmar's Race and Religion Protection Laws. Imposition of these laws came during the on-going racial and religious discrimination violence, believed to be part of an intentional sharp turn towards systemic Rohingya persecution.⁶⁶ It is important to note that Myanmar is a party to the CRC and CEDAW, as has been previously mentioned in this paper.⁶⁷

⁶⁰ Zaw, H. Y. (2015, August 31). *Myanmar's president signs off on law seen as targeting Muslims*. Retrieved from Reuters: <http://www.reuters.com/article/us-myanmar-politics-idUSKCN0R011W20150831>.

⁶¹ See Zaw, above n 60.

⁶² Perez, E. (2015, August 31). *Myanmar president signs final 'religious protection' law*. Retrieved from <http://www.jurist.org/paperchase/2015/08/myanmar-president-signs-final-religious-protection-law.php>.

⁶³ Ibid.

⁶⁴ Deutsche Welle. (2015). *Controversial population control bill becomes law in Myanmar*. Retrieved from Deutsche Welle: <http://www.dw.com/en/controversial-population-control-bill-becomes-law-in-myanmar/a-18472590>.

⁶⁵ See Rahman, et al., above n 59.; See Zaw, above n 60.

⁶⁶ Caster, M. (2015, August 26). *The Truth About Myanmar's New Discriminatory Laws*. Retrieved from The Diplomat: <http://thediplomat.com/2015/08/the-truth-about-myanmars-new-discriminatory-laws/>.

⁶⁷ See United Nations High Commissioner for Refugees. *Myanmar*, above n 55.

Provisions related to non-discrimination can be found in Article 2(1) of the CRC, stipulates that “*States shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status*”.⁶⁸ With this, we can say that the GOM has a legal obligation to respect Rohingyas and take into account Rohingyas’ culture, as the Four Laws of Myanmar is in contradictory to the practices of the Rohingya Muslims in the Rakhine State.

Further, Article 2(f) of the CEDAW provides that “*States shall take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women*”.⁶⁹ Arguably, this provision is violated by Myanmar’s Population Control Law, which is a flagrant discrimination against women.

The laws mentioned above represent a clear violation of Myanmar’s obligations under the CRC and CEDAW, and are inconsistent with international norms and standards as well.⁷⁰

⁶⁸ Office of the United Nations High Commissioner for Human Rights. (n.d.). *Convention on the Rights of the Child*. Retrieved from Office of the United Nations High Commissioner for Human Rights: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>.; See Article 2(1) of the CRC.

⁶⁹ Directly quoted from Article 2(f) of CEDAW.; United Nations High Commissioner for Human Rights. (n.d.). *Convention on the Elimination of All Forms of Discrimination against Women*. Retrieved from United Nations High Commissioner for Human Rights: <http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf>.

⁷⁰ See Caster, above n 66.

2.2. RELIGIOUS RIGHTS VIOLATIONS

Racial and religious persecution of Rohingyas was participated by the GOM. In 2002, the GOM issued military orders demanding that unauthorised mosques be destroyed, according to Human Rights Watch reports.⁷¹ Mosques and Islamic schools were closed by the GOM to be used as government administrative offices.⁷²

Article 34 of the Myanmar's Constitution of 2008, which states that "*Every citizen is equally entitled to freedom of conscience and the right to freely profess and practice religion subject to public order, morality or health and to the other provisions of this Constitution*".⁷³ In addition, in August 2015, then-president Thein Sein signed the Religious Conversion Law, in which requiring citizens of Myanmar to acquire approval before converting to another religion from the religious conversion registration board.⁷⁴ This passing of Religious Conversion Law was believed to be targeting Rohingya Muslims in the Rakhine State according to many critics.⁷⁵ Furthermore, Rohingya

⁷¹ Human Rights Watch. (2002, July). *Crackdown on Burmese Muslims*. Retrieved May 2017 from Human Rights Watch: https://www.hrw.org/legacy/background/asia/burmese_muslims.pdf; Human Rights Watch. (1992, May). *Burma: Rape, Forced Labour and Religious Persecution in Northern Arakan*. Retrieved May 2017 from Human Rights Watch: <https://www.hrw.org/reports/pdfs/b/burma/burma925.pdf>.

⁷² International Federation of Human Rights Leagues. (2000, April). *Burma: Repression, Discrimination and Ethnic Cleansing in Arakan*. Retrieved May 2017 from International Federation of Human Rights Leagues: <https://www.fidh.org/IMG/pdf/arakbirm.pdf>.

⁷³ Union of Myanmar. (n.d.). *Constitution of the Republic of the Union of Myanmar (2008)*. Retrieved 2017 from World Intellectual Property Organisation: <http://www.wipo.int/edocs/lexdocs/laws/en/mm/mm009en.pdf>.

⁷⁴ Wai, K. (2016, May 24). *Residents critical of large-scale religious conversion in Meiktila*. Retrieved from The Myanmar Times: <http://www.mmtimes.com/index.php/national-news/mandalay-upper-myanmar/20465-residents-critical-of-large-scale-religious-conversion-in-meiktila.html>.

⁷⁵ See Zaw, above n 60.; Carroll, J. (2015, September 23). *Buddhist monks in Myanmar celebrate repressive laws*. Retrieved from Aljazeera: <http://www.aljazeera.com/indepth/features/2015/09/buddhist-monks-myanmar-celebrate-repressive-laws-150922111750765.html>.

Muslims were practically denied proper burial and prevented by the GOM from burying their dead as essential by Islam practice, while some were allegedly cremated.⁷⁶

To say again, Myanmar was a party to the undertaking of the 1989 CRC.⁷⁷ “A *child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language*”⁷⁸ is a description of Article 30 of the CRC. That being said, we can say that Article 30 of the CRC has been violated by the GOM.

2.3. DEPRIVATION OF NATIONALITY AND FORCED MIGRATION

Since the 1970’s, forced expulsion of Rohingya population has occurred on a large-scale volume.⁷⁹ It was during the military rule under General Ne Win⁸⁰ began the process of erasing the Rohingyas’ identity and rights as well as destroying them physically.⁸¹ The first large-scale campaign (*Operation Nagamin*) against the Rohingya in the Rakhine State was launched in 1978 under General Ne Win’s socialist military dictatorship. Consequently, its aims were to legalise the systemic erasure of Rohingya group identity and legitimise their physical destruction, after its initial intention of expelling them as a group from the Rakhine State.⁸² Throughout the *Operation*

⁷⁶ Human Rights Watch. (2012, August). *The Government Could Have Stopped This: Sectarian Violence and Ensuing Abuses in Burma’s Arakan State*. Retrieved May 2017 from Human Rights Watch: https://www.hrw.org/sites/default/files/reports/burma0812webwcover_0.pdf.

⁷⁷ See Rathgeber, above n 55.; See United Nations High Commissioner for Refugees. *Myanmar*, above n 55.; See Wahyuningrum (2014), above n 55.

⁷⁸ See Office of the United Nations High Commissioner for Human Rights. *Convention on the Rights of the Child*, above n 68.

⁷⁹ See Zarni, et al., above n 26

⁸⁰ General Ne Win’s Term of Office: 1962-1981.

⁸¹ See Zarni, et al., above n 26.

⁸² Ibid.

Nagamin, identification cards of Rohingyas were checked by the GOM saying that *Operation Nagamin* would be an approach confirming citizenship in Myanmar – as a way to justify its actions. Underneath that showy misrepresentation, the intention was to screen out non-nationals prior to a national consensus and to record and register citizens and check their identity cards.⁸³

For over a decade, since the launching of the *Operation Nagamin* in 1978, registration of almost the whole of Myanmar's population was completed, and correspondingly issued identity cards.⁸⁴ The citizenship status of the bearer is colour-coded for the purpose of easy identification. There are four colours identifying those who are legally residing in Myanmar, these are: "(1) *Pink – for full citizens; (2) Blue – for associate citizens; (3) Green – for naturalised citizens; and lastly, (4) White – for foreigners*".⁸⁵ Immediately, an advisory was issued to the Rohingyas that no cards will be issued to them as they do not fall under any of the four colour-coded citizenship status. No effort was made to recognise legitimate residency of the Rohingyas. Alternatively, a huge number of Rohingyas estimated to about 250,000 were forcible pushed into Bangladesh, a year after *Operation Nagamin* began.⁸⁶

A citizenship law was introduced in 1982 (The 1982 Citizenship Law) – strictly removing the Rohingyas access to full citizenship.⁸⁷ With this, more Rohingyas became

⁸³ Fahmida, F. (2016). Life along the Naf Border: Identity Politics of the Rohingya Refugees in Bangladesh. In O. Su-Ann (Ed.), *Myanmar's Mountain and Maritime Borderscapes: Local Practices, Boundary-Making and Figured Worlds*. ISEAS – Yusof Ishak Institute.

⁸⁴ Ahmed, I. (n.d.). The Rohingyas: From Stateless to Refugee. Retrieved from http://www.netipr.org/policy/downloads/20100101_FromStatelessToRefugees_ImtiazAhmed.pdf.

⁸⁵ Directly quoted from Imtiaz Ahmed's Article - The Rohingyas: From Stateless to Refugee.; Ibid.

⁸⁶ Ibid.; *Operation Nagamin* (1978-1979).

⁸⁷ See Albert, above n 16.

internally displaced and were forced to flee the country because the GOM has confiscated Rohingya lands.⁸⁸

Article 8 of the CRC provides that, “*States ... undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference*”.⁸⁹ This would mean that nationality laws of Myanmar must not discriminate persons on the basis of “*gender, religion ethnic origin or other status*”,⁹⁰ and active measures should be undertaken by the GOM “*to ensure that such is enforced*”.⁹¹

Further, Article 7(1) of the CRC states that, “*The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality...*”.⁹² Based from the actions of the GOM mentioned-above, it is evident that by not registering Rohingyas after birth, is a clear indication that the GOM has violated Article 7 provision of the CRC.

⁸⁸ Irish Centre for Human Rights. (2010). *Crimes against Humanity in Western Burma: The Situation of the Rohingyas*. Retrieved May 2017 from Burma Action Ireland: http://burmaactionireland.org/images/uploads/ICHR_Rohingya_Report_2010.pdf.

⁸⁹ Directly quoted from Article 8 of the Convention on the Rights of the Child.; See Office of the United Nations High Commissioner for Human Rights. *Article 8 of the Convention on the Rights of the Child*, above n 68.

⁹⁰ Ibid.

⁹¹ Ibid.; United Nations High Commissioner for Refugees. (n.d.). *Convention on the Rights of the Child: Quick Reference Guide - Statelessness and Human Rights Treaties*. Retrieved from United Nations High Commissioner for Refugees: <http://www.unhcr.org/ibelong/wp-content/uploads/UNHCR-CRC-02-UNHCR-UNICEF.pdf>.

⁹² Directly quoted from Article 7 of the Convention on the Rights of the Child.; See Office of the United Nations High Commissioner for Human Rights. *Article 7(1) of the Convention on the Rights of the Child*, above n 68.

2.4. USE OF FORCE

On a regular basis, Rohingyas were beaten and mistreated by the Myanmar's security forces, resulting in deaths.⁹³ It has also been reported that during patrols and the enforcement of restriction on movement, excessive use of force were applied in the context of demonstrations and law enforcement activities. Arbitrarily, deprivation of the right to life is constituted by the deaths resulting from excessive, unnecessary or disproportionate use of force by law enforcement officials.⁹⁴ With reference to *Operation Nagamin*, the processes of illegalisation of the Rohingyas further intensified its aim to impose conditions of life on the Rohingyas that would cause serious bodily and mental harm and eventually destroy the Rohingyas as a group.⁹⁵ Even in the civilian-military rule of then-president Thein Sein's administration, this process has continued to exist. With the intent to destroy the Rohingyas in the Rakhine State was the first movement towards ethnic cleansing.⁹⁶

A recent incident reported in February 2017, where an entire family, including elderly and disabled people were locked inside a house by the army of Rakhine villagers, during the crackdown in the Rakhine State – and was on fire for all of them to die.⁹⁷ In addition, brutal beatings and disappearances are among other attacks inflicted by Myanmar's security forces against Rohingyas.⁹⁸

⁹³ Abdelkader, E. (2013). The Rohingya Muslims in Myanmar: Past, Present, and Future. *Oregon Review of International Law*, 15.

⁹⁴ See United Nations High Commissioner for Human Rights (2016). *Situation of human rights of Rohingya Muslims and other minorities in Myanmar*, above n 42.

⁹⁵ See Zarni, et al., above n 26.

⁹⁶ Ibid.

⁹⁷ Bulman, M. (2017, February 3). *Burma: Rohingya Muslim babies and children 'being slaughtered with knives'*, UN warns. Retrieved from The Independent: <http://www.independent.co.uk/news/world/asia/burma-rohingya-muslim-babies-children-slaughtered-knives-massacre-genocide-un-warns-a7561711.html>.

⁹⁸ Ibid.

On the above, there is a mandatory obligation required of Myanmar to prevent and punish individuals responsible for the crime of genocide because as earlier mentioned in this paper, Myanmar is a party to the Genocide Convention.⁹⁹ The following acts, if committed, constitutes an act of genocide, according to Article 2, these are: “(a) *“killing members of the group”*; (b) *“Causing serious bodily or mental harm to members of the group”*; (c) *“Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part”*”.¹⁰⁰ *“The physical and mental harm and destruction of the group”*¹⁰¹ is closely linked with the destruction of a culture and identity of a target group – these are the devastation involving the Rohingyas.¹⁰²

Even though it is against their will, the Rohingyas were left with no other choice but to flee to other neighbouring countries like Indonesia, Malaysia, and Thailand, to escape being persecuted in the Rakhine State, Myanmar.¹⁰³ In the next section, I will be discussing Rohingyas who fled the Rakhine State from persecution by the GOM.

⁹⁹ United Nations High Commissioner for Human Rights. (n.d.). *1948 Convention on the Prevention and Punishment of the Crime of Genocide*. Retrieved from United Nations High Commissioner for Human Rights: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CrimeOfGenocide.aspx>.; Ullah, A. A. (2016). Rohingya Crisis in Myanmar: Seeking Justice for the “Stateless”. *Journal of Contemporary Criminal Justice*, 32(3).

¹⁰⁰ Directly quoted from Article 2 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.; See United Nations High Commissioner for Human Rights. *1948 Convention on the Prevention and Punishment of the Crime of Genocide*, above n 99.

¹⁰¹ Directly quoted from the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.; Ibid – Article 2(b) (c) of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

¹⁰² See Zarni, et al., above n 26.

¹⁰³ See Ullah, above n 99.

3. EXTERNAL PERSPECTIVES: THE ROHINGYA REFUGEE CRISIS

The previous section has depicted mental images of the situations of Rohingyas in the Rakhine State. Let us now gear ourselves to look into the situations affronting the Rohingya refugees. Since the late 1970s, the discriminatory policies of the GOM in the Rakhine State, Myanmar have prompted the latest surge in refugees, causing hundreds of thousands of Rohingyas to flee to other neighbouring countries, such as: Indonesia, Malaysia, and Thailand.¹⁰⁴ With this, Rohingyas ventured out into the sea.¹⁰⁵ These activities were facilitated by trafficking and smuggling networks.¹⁰⁶

Oftentimes, our television screens parade gruesome images of desperate men, women and children pushed out of their own countries by forces entirely beyond their control.¹⁰⁷ Undeniably, the Rohingya refugee crisis problem exists. It is a pervasive condition because they are a by-product of military coups and massive human rights violations.¹⁰⁸

In international law, by structure, it is absolutely essential that an asylum seeker should be on the territory of the State in which he or she wants to seek asylum.¹⁰⁹ The weak context of refugee protection in Southeast Asia is one of the contributing factors for

¹⁰⁴ See Albert, above n 16.

¹⁰⁵ See United Nations High Commissioner for Human Rights. (2016). *Situation of human rights of Rohingya Muslims and other minorities in Myanmar*, above n 42.

¹⁰⁶ Ibid.; United Nations Office on Drugs and Crime. (2016, February). Protecting peace and prosperity in Southeast Asia: synchronizing economic and security agendas. Retrieved from https://www.unodc.org/documents/southeastasiaandpacific/Publications/2016/Protecting_peace_and_prosperity_in_SEA.pdf.

¹⁰⁷ Loescher, G. (1996). *Beyond Charity: International Cooperation and the Global Refugee Crisis*, p. 3. Oxford University Press.

¹⁰⁸ Ibid.

¹⁰⁹ See United Nations High Commissioner for Refugees. *The 1951 Convention Relating to the Status of Refugees*, above n 36.

Rohingyas' sufferings.¹¹⁰ The primary countries like Thailand, Indonesia, and Malaysia are not parties to the 1951 Refugee Convention. That being so, receiving Rohingya refugees can be hard to control as they do not have a specific legal framework to grant protection for refugees and asylum-seekers. This condition has caused Rohingya refugees to live constantly in fear of being arrested, detained, and prosecuted, not to mention being sent back to the country where they are liable to be subjected to persecution.¹¹¹ Rohingya refugees face the following human rights concerns.

3.1. HUMAN TRAFFICKING OF ROHINGYAS

In the ASEAN region, human trafficking and smuggling is an issue of concern.¹¹² Tens of thousands of Rohingyas were pushed to flee the country by boat to escape the horrendous situation in the Rakhine State, Myanmar.¹¹³ The journeys of all Rohingyas started out with getting on very small boats that can accommodate a few to a couple dozen passengers, and eventually transported to larger vessels accommodating several hundreds of passengers waiting further out to sea.¹¹⁴

Since 2014, refugees and migrants estimated at 94,000 according to the Office of the United Nations Commissioner for Refugees (UNHCR) have left from Rakhine State and its border areas for Bangladesh.¹¹⁵ Seeking shelter in Malaysia, Thailand,

¹¹⁰ Shetty, S. (2016, October). Tackling the Global Refugee Crisis: From Shirking to Sharing Responsibility.

¹¹¹ Ibid.

¹¹² See Equal Rights Trust, above n 29

¹¹³ See Shetty, above n 110.; ReliefWeb. (2016). *Humanitarian Needs Overview: Myanmar*. Retrieved 2017 from ReliefWeb:

http://reliefweb.int/sites/reliefweb.int/files/resources/Ref_Doc_Humanitarian_Needs_Overview_HCT_2016.pdf.

¹¹⁴ Amnesty International. (2015, October). *Deadly journeys: The refugee and trafficking crisis in Southeast Asia*. Retrieved 2017 from Amnesty International: https://www.amnesty.be/IMG/pdf/2015_deadly_journeys_the-refugee-and-trafficking-crisis-in-southeast-asia.pdf.

¹¹⁵ See ReliefWeb (2016). *Humanitarian Needs Overview: Myanmar*, above n 113.

Indonesia, and escaping persecutions in Myanmar, notwithstanding the precarious living conditions and threat of *refoulement* in Bangladesh, Rohingyas are left with no choice but to rely on human traffickers to take part in “*dangerous and weeks-long maritime crossings in small, poorly constructed boats under treacherous conditions*”.¹¹⁶ “*Thousands have fallen prey to the abusive and extortionate practices of people smugglers and human traffickers*”¹¹⁷ during their journeys out of Myanmar and Bangladesh.¹¹⁸ The smugglers are being paid large sum of money by the Rohingya refugees, normally with their life’s savings, “*sometimes even promising money while having non, as they expect to be absorbed eventually into the illegal labour market, and repay the money on instalments*”^{119, 120}.

¹¹⁶ Mahmood, S., Wroe, E., Fuller, A., & Leaning, J. (2016, December). The Rohingya people of Myanmar: health, human rights, and identity. *The Lancet*.

¹¹⁷ See Shetty, above n 110.

¹¹⁸ Ibid.; United Nations High Commissioner for Refugees. (n.d.). *Mixed Maritime Movements in South-East Asia in 2015*. From United Nations High Commissioner for Refugees: <http://reporting.unhcr.org/sites/default/files/UNHCR%20-%20Mixed%20Maritime%20Movements%20in%20South-East%20Asia%20-%202015.pdf>.

¹¹⁹ Directly quoted from Abhiruchi Chatterjee’s Article –Migrants at sea: Case studies of Syrians and Rohingyas.

¹²⁰ See Chatterjee, above n 32.

4. THE INTERNATIONAL LEGAL FRAMEWORK

In this section of this paper, I will discuss different international legal framework relating to the rescue of Rohingya refugees at sea. Discussion of legal frameworks is important as to better understand States' obligation in rescuing the Rohingya refugees.

4.1. INTERNATIONAL MARITIME LAW

“*The 1982 United Nations Convention on the Law of the Sea (UNCLOS), and 1974 Safety of Life at Sea Convention (SOLAS),*”¹²¹ are international conventions that enshrines the code of conduct for rescue operations at sea.¹²² The obligations of States to help and rescue persons who are found in danger at sea, is the focus of Article 98 of the 1982 UNCLOS and 1974 SOLAS.¹²³

It is important to note that UNCLOS and SOLAS were duly signed and ratified by Thailand, Indonesia, and Malaysia. These countries are the main destinations of the Rohingya refugees.¹²⁴ Practices of the said countries will be discussed in the next section.

¹²¹ Ibid, Chatterjee – Under ‘International Maritime Law’.

¹²² Ibid, pp. 60-61.

¹²³ United Nations. (n.d.). *United Nations Convention on the Law of the Sea of 10 December 1982*. Retrieved from United Nations:

http://www.un.org/depts/los/convention_agreements/texts/unclos/part7.htm.; Cacciaguidi-Fahy, S. (2007). *The Law of the Sea and Human Rights. Panoptica*.

¹²⁴ Kaur, R. (2016, February 16). An Assessment of the International Legal Obligations Owed to the Rohingya Refugees. *Institute of South Asian Studies*, 229.

4.2. INTERNATIONAL REFUGEE LAW

The 1951 Refugee Convention is the most important instrument to address the plight of refugees.¹²⁵ This Convention was established on the principle of *non-refoulement*, focusing on protecting refugees from forceful return to their country of origin where they face persecution.¹²⁶ A principal obligation of States towards refugees, among others, is the policy of *non-refoulement*.¹²⁷

As for the case of the Rohingya refugees, we have seen their plight at sea, discussed in this paper. It was declared by the UNHCR that Rohingyas are one of “*the most persecuted communities in the world*”.¹²⁸ Hence, Rohingyas fleeing Myanmar by sea fall under the category of refugees.

¹²⁵ See Ragland, above n 37.; See United Nations High Commissioner for Refugees. *The 1951 Convention Relating to the Status of Refugees*, above n 36.

¹²⁶ *Ibid.*

¹²⁷ See Chatterjee, above n 32.; United Nations High Commissioner for Refugees. (n.d.). *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*. Retrieved 2017 from United Nations High Commissioner for Refugees: <http://www.unhcr.org/4d9486929.pdf>.

¹²⁸ See Kiragu, above n 19.

5. INDIVIDUAL STATES' RESPONSE TO THE ROHINGYA REFUGEES

In this section, I will draw your attention to the reaction of individual States on the issue of Rohingya refugees. Correspondingly, in this paper, Thailand, Malaysia, and Indonesia will be the three main destination countries to which my discussion will be focused on. These are the destination countries of the Rohingya refugees who avoided being continuously persecuted by the GOM. In this discussion, we will be able to have a clear picture of the reality practice of these destination countries. In this paper, the AICHR was brought about by the failed response from the destination countries. That being said, discussions on the AICHR as a human rights body in the ASEAN region will be further elaborated in the next section.

Since the protection of human rights is the primary responsibility of the States, the rescue boats in distress at sea is the obligation of the destination countries.¹²⁹ The following are the responses from Malaysia, Thailand, and Indonesia.

5.1. THAILAND'S RESPONSE TOWARDS ROHINGYA REFUGEES

On admission of asylum seekers, Thailand, do not have any national legislation to address this issue because it is not a party to the 1951 Refugee Convention.¹³⁰ As a result, the Royal Thai Government (RTG) does not carry out proper refugee status

¹²⁹ See Kaur, above n 124.

¹³⁰ Petcharamesree, S. (2016). ASEAN and its approach to forced migration issues. *The International Journal of Human Rights*, 20 (2).

determination (RSD), since it does not have an explicit law with reference “*to the rights and obligations of refugees and asylum-seekers*”.¹³¹

Having said that, there are other human rights agreements in which Thailand is a party to, this includes the International Covenant on Civil and Political Rights (ICCPR), which can be shown by argument that these agreements contains the rights of stateless Rohingya in Thailand.¹³² For instance, in Article 2 and Article 26 of the ICCPR, we can find the Convention that are directly relevant in the protection of statelessness.¹³³ Provisions of Article 2 emphasises, “*to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind...*”.¹³⁴ Furthermore, Article 26 is also relevant to the protection of statelessness, stating that, “*the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground...*”.¹³⁵

However, the above-mentioned provisions of the ICCPR¹³⁶ were rendered ineffective because of lack of enforcement. An example of this, when Thai police spokesperson, Lieutenant General Prawut Thawornsiri in May 2015, whose public statement divulged

¹³¹ Directly quoted from UNHCR – Universal Periodic Review.; United Nations High Commissioner for Refugees. (n.d.). For the Office of the High Commissioner for Human Rights’ Compilation Report: Universal Periodic Review - 2nd Cycle, 25th Session Thailand. Retrieved from https://www.upr-info.org/sites/default/files/document/thailand/session_25_-_may_2016/unhcr_upr25_tha_e_main.pdf.

¹³² Chambers, P. (2015, October 23). Retrieved from The Diplomat: Thailand Must End Its Own Rohingya Atrocity.

¹³³ See Article 2 & 26 of the ICCPR.; United Nations High Commissioner for Refugees. (n.d.). *ICCPR International Covenant on Civil And Political Rights: Quick Reference Guide - Statelessness and Human Rights Treaties*. Retrieved 2017, from Refworld: <http://www.refworld.org/docid/58c25e3a4.html>.

¹³⁴ See Article 2 of the ICCPR.; United Nations High Commissioner for Human Rights. (n.d.). *International Covenant on Civil and Political Rights*. Retrieved from United Nations High Commissioner for Human Rights: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>.

¹³⁵ Directly quoted from Article 26 of the International Covenant on Civil and Political Rights.; Ibid, Article 26 of the ICCPR.

¹³⁶ Referring to Article 2 and Article 26 of the ICCPR.

their official orientation towards how Rohingya refugees at sea were treated, to that effect, he said, “*Our job is to block the boats and not let them land on our shores*”.¹³⁷ The Thai military initiated a new “*pushing out*” policy, where ignoring deliberately to any international obligations to respect refugee rights. With that being said, Rohingyas were detained on a remote and isolated island for two days after surviving the horrifying experience of reaching Thailand across the sea.¹³⁸

On the above, the “*push out*” policy of Thailand can be regarded as a violation on the prohibition on discrimination and respecting the rights of the Rohingya refugees, in which Article 2 and Article 26 of the ICCPR clearly stipulates these provisions.

5.2. MALAYSIA’S RESPONSE TOWARDS ROHIGNYA REFUGEES

Since the 1980s, the Rohingyas have been seeking refuge in Malaysia.¹³⁹ Records show that UNCHR in Malaysia registers about 150, 662 refugees and asylum-seekers as of end of April 2017.¹⁴⁰

In addressing refugee matters, Malaysia does not have any law for the protection of refugees because it is also not a party to the 1951 Refugee Convention.¹⁴¹

¹³⁷ Bintang, R., & Hamzah, A.-Z. A. (2015, May 11). *Hundreds of refugees arrive in Malaysia and Indonesia after Thai crackdown*. Retrieved from Reuters: <http://www.reuters.com/article/us-indonesia-rohingya-idUSKBN0NV0PC20150511?mod=alcms.>; Directly quoted from Thai police spokesperson, Lieutenant General Prawut Thawornsiri – See Reuters.

¹³⁸ See Chambers, above n 132.

¹³⁹ Letchamanan, H. (2013). Myanmar's Rohingya Refugees in Malaysia: Education and the Way Forward. *Journal of International and Comparative Education*, 2(2).

¹⁴⁰ United Nations High Commissioner for Refugees. (n.d.). *Figures At a Glance*. Retrieved from United Nations High Commissioner for Refugees: https://www.unhcr.org/my/About_Us-@-Figures_At_A_Glance.aspx.

¹⁴¹ See Petcharamesree (2016), above n 130.

In 2015, it was declared publicly by Malaysia's Deputy Home Affairs Minister Wan Junaidi Tuanku Jaafar that boats will be turned back to where it came from, and deport those who enters Malaysia.¹⁴² He also added that tough measures will be used by his country in order to send the right message, even if it means turning back asylum-seekers boats and deporting them, should they even get the chance to land on Malaysian territory.¹⁴³ After Malaysia pushed back two boats in the same year, thousands of Rohingya refugees were left abandoned at sea by human traffickers with nowhere to go.¹⁴⁴

5.3. INDONESIA'S RESPONSE TOWARDS ROHINGYA REFUGEES

Like the two other destination countries mentioned above, Indonesia is also not a signatory to the 1951 Refugee Convention. However, since 1979, Indonesia has officially allowed UNCHR to manage and hold an office in the country.¹⁴⁵ Furthermore, Indonesia is also a party to the ICCPR like Thailand.¹⁴⁶

¹⁴² Lee, H. (2015, May). *Help Rohingya and Bangladeshi migrants and asylum seekers: HRW*. Retrieved from The Online Citizen: <https://www.theonlinecitizen.com/2015/05/14/help-rohingya-and-bangladeshi-migrants-and-asylum-seekers-hrw/>.

¹⁴³ Yi, B. L. (2015, May). *Malaysia tells thousands of Rohingya refugees to 'go back to your country'*. Retrieved 2017, from The Guardian: <https://www.theguardian.com/world/2015/may/13/malaysia-tells-thousands-of-rohingya-refugees-to-go-back-to-your-country>.

¹⁴⁴ The Guardian. (2015, May 14). *Malaysia and Thailand turn away hundreds on migrant boats*. Retrieved 2017, from The Guardian: <https://www.theguardian.com/world/2015/may/14/malaysia-turns-back-migrant-boat-with-more-than-500-aboard>.

¹⁴⁵ Nethery, A., & Gordyn, C. (2014). Australia–Indonesia cooperation on asylum-seekers: A Case of 'incentivised policy transfer'. *Australian Journal of International Affairs*, 68(2); Taylor, S., & Raferty-Brown, B. (2010). Difficult Journeys: Accessing Refugee Protection in Indonesia. *Monash University Law Review*. Retrieved from <http://www.austlii.edu.au/au/journals/MonashULawRw/2010/29.html>.

¹⁴⁶ See United Nations High Commissioner for Refugees. For the Office of the High Commissioner for Human Rights' Compilation Report: Universal Periodic Review - 2nd Cycle, 25th Session Thailand, above n 130.

There are provisions of the ICCPR that are directly relevant to protecting stateless persons like the Rohingya refugees.¹⁴⁷ The ICCPR, in its Article 10 relates to, “*All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person*”.¹⁴⁸ With this provisions, it means that ensuring that whether individuals possess a nationality or not, and “*individuals who are deprived of their liberty should be treated with dignity and respect*”.¹⁴⁹

Indonesian authorities have similar response to the Rohingya refugees like the Thai police¹⁵⁰, both have responded in the same manner by pushing back a boat and directing it to Malaysia – while carrying approximately 500 refugees in May 2015.¹⁵¹ There was an instance when a boat “*full of people in dire conditions, smelling bad, some were screaming*”¹⁵² were pulled back to shore according to an Indonesian military spokesperson, Faud Basya.¹⁵³

For Rohingya refugees, Indonesia is an attractive destination country, being a Muslim country. However, Indonesian authorities made it clear that it is not welcoming illegal immigrants.¹⁵⁴ On this, we can say that Indonesia’s obligation as stated in Article 10 of the ICCPR is violated.

¹⁴⁷ See United Nations High Commissioner for Refugees. *ICCPR International Covenant on Civil And Political Rights: Quick Reference Guide - Statelessness and Human Rights Treaties*, above n 133.

¹⁴⁸ See United Nations High Commissioner for Human Rights. *Article 10 of the International Covenant on Civil and Political Rights*, above n 134.

¹⁴⁹ See United Nations High Commissioner for Refugees. *ICCPR International Covenant on Civil And Political Rights: Quick Reference Guide - Statelessness and Human Rights Treaties*, above n 133.

¹⁵⁰ With reference to Thai police spokesman Lieutenant General Prawut Thawornsiri – See Thailand’s response towards Rohingya refugees.

¹⁵¹ See Kaur, above n 124.

¹⁵² Directly quoted from Faud Basya (Indonesian military spokesperson) – Aljazeera.

¹⁵³ Aljazeera. (2015, May 12). *Indonesia to 'turn back Rohingya' boats*. Retrieved from Aljazeera: <http://www.aljazeera.com/news/2015/05/150512045951738.html>.

¹⁵⁴ Fuller, T., & Lyons, P. (2015, May 14). *How Myanmar and Its Neighbors Are Responding to the Rohingya Crisis*. Retrieved from The New York Times: https://www.nytimes.com/interactive/2015/05/13/world/asia/15rohingya-explainer.html?_r=1.

Apparently, the international legal framework for the protection of refugees mentioned earlier are violated by these destination countries. Based on the responses of the destination countries, one can conclude that the treatment received by the Rohingya refugees, for which they are either prohibited to enter these destination countries or had been taken into custody are not in conformity with the Conventions to which they are a signatory to.¹⁵⁵ Furthermore, the above-stated provisions of UNCLOS and SOLAS, were also violated by the destination countries on the basis of their individual responses towards the Rohingya refugees.¹⁵⁶

¹⁵⁵ See Petchamesree (2016), above n 130.

¹⁵⁶ See Kaur, above n 124.

CHAPTER 2

1. HISTORICAL DEVELOPMENT OF THE HUMAN RIGHTS REGIONAL INSTITUTION IN THE ASEAN REGION: THE ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS

Since 08 August 1967, the origin and evolution of ASEAN makes it “*the most prominent regional cooperation group in [South] East Asia*”.¹⁵⁷ In this section, understanding why ASEAN prompted the creation of the AICHR is important in looking at the human rights in the Southeast Asian region. Let us explore how the AICHR came into being, leading to the historical overview of ASEAN.

1.1. THE ASSOCIATION OF SOUTHEAST ASIAN NATIONS (ASEAN) AND THE ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS (AICHR)

With a goal intended in building a successful and peaceful community of Southeast Asian nations, the ASEAN was established in August 1967.¹⁵⁸ Indonesia, Malaysia, the Philippines, Singapore, and Thailand were the first five Southeast Asian States to create ASEAN.¹⁵⁹ With the inclusion of Brunei, Cambodia, Laos, Myanmar, and Vietnam, its membership has expanded through years.¹⁶⁰ With its establishment in 1967, the

¹⁵⁷ Frost, F. (2013, November 08). *ASEAN and Regional Cooperation: Recent Developments and Australia's Interests*, p. 1. Retrieved February 2017 from Parliament of Australia: http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/2829406/upload_binary/2829406.pdf;fileType=application%2Fpdf.

¹⁵⁸ Kneebone, S. (2014). ASEAN and the Conceptualisation of Refugee Protection in Southeastern Asian Studies. In A. Abass, & F. Ippolito (Eds.), *Regional Approaches to the Protection of Asylum Seekers: An International Legal Perspective*, p. 301. Ashgate.

¹⁵⁹ Jetschke, A. (2012). ASEAN. In M. Beeson, & R. Stubbs (Eds.), *Routledge Handbook of Asian Regionalism*, p. 328. Routledge.

¹⁶⁰ See Quane, above n 23.

founding document of the ASEAN is the *Bangkok Declaration*.¹⁶¹ The main objective of the Bangkok Declaration was, to

*“Accelerate economic growth, social progress and cultural development in the region through joint endeavours in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community... ”*¹⁶²

More specifically, providing a unified protection against external intrusion or strong influence, *“to insulate the region from superpower competition, and to provide stability by supporting the needs of its members so that they could politically survive and make a steady progress economically”*¹⁶³ is an essential aim of the ASEAN.¹⁶⁴

The ASEAN was a regional organisation built on Asian norms with a distinctive feature of *“non-interference, non-alignment and the principle to avoid the public discussion of contentious issues”*.¹⁶⁵ Article 2 of the ASEAN Charter specifies more on this matter: *“(e) Non-interference in the internal affairs of ASEAN Member States”*¹⁶⁶ and *“(f) respecting the right of every Member State lead it national existence free from external*

¹⁶¹ See Jetschke. ASEAN, above n 159.; Association of Southeast Asian Nations. (n.d.). *History: The Founding of ASEAN*. Retrieved from Association of Southeast Asian Nations: <http://asean.org/asean/about-asean/history/>.

¹⁶² Directly quoted from the Bangkok Declaration.; Associations of Southeast Asian Nations. (n.d.). *Article 1 - The Asean Declaration (Bangkok Declaration) Bangkok, 8 August 1967*. Retrieved March 2017 from <http://asean.org/the-asean-declaration-bangkok-declaration-bangkok-8-august-1967/>.

¹⁶³ Directly quoted from Anja Jetschke’s Article – ASEAN, see below.

¹⁶⁴ See Jetschke. ASEAN, above n 159.

¹⁶⁵ Ibid.

¹⁶⁶ Directly quoted from Article 2 of the ASEAN Charter.; See Association of Southeast Asian Nations. *Article 2 of the ASEAN Charter*, above n 10.

interference, subversion, and coercion".¹⁶⁷ Further, having cultural diversity within the ASEAN region – is another significant characteristics of the ASEAN.¹⁶⁸

Since the 1970s, the United Nations (UN) in general has promoted regional human rights arrangements, and made specific calls in the Asian region to take up this challenge in the 1980s.¹⁶⁹ Responding to this challenge, it was only during the 1993 Vienna World Conference on Human Rights that ASEAN's foreign ministers seriously considered setting up an appropriate human rights regional mechanism.¹⁷⁰ In addition, refugees and displaced persons were explicitly mentioned for setting up a human rights body.¹⁷¹ Later that year, the statement of ASEAN Inter-Parliamentary Organisation (AIPO) that "*it is the task and responsibility of member states to establish an appropriate regional mechanism on human rights*"¹⁷², became the stimulating factor to this motivation.¹⁷³ Thereafter, the creation of the Working Group for an ASEAN Human Rights Mechanism was a succeeding development.¹⁷⁴ The Working Group included a range of participants who came together from the national working groups of ASEAN Member States "*starting with Indonesia, Malaysia, the Philippines, and*

¹⁶⁷ Ibid.

¹⁶⁸ See Quane, above n 23, p. 286.

¹⁶⁹ Phan, H. D. (2008). The Evolution Towards an ASEAN Human Rights Body. *Asia-Pacific Journal on Human Rights and the Law*.; Kabir, A. H. (2001). Establishing National Human Rights Commissions in South Asia: A Critical Analysis of the Processes and the Prospects. *Asia-Pacific Journal on Human Rights and the Law*, 2 (1).; Mohamad, M. (2002). Towards a Human Rights Regime in Southeast Asia: Charting the Course of State Commitment. *Contemporary Southeast Asia*, 24 (2).; Langlois, A. (2012). Asian Regionalism and Human Rights, p. 216. In M. Beeson, & R. Stubbs (Eds.), *Routledge Handbook of Asian Regionalism*. Routledge.

¹⁷⁰ See Phan, above n 169.

¹⁷¹ See Kneebone, above n 158, p. 303.

¹⁷² Directly quoted from Vitit Muntarbhorn – A Roadmap for an ASEAN Human Rights Mechanism.

¹⁷³ Muntarbhorn, V. (2003, May). *A Roadmap for an ASEAN Human Rights Mechanism*. From Friedrich Naumann Foundation: <http://www.fnf.org.ph/liberallibrary/roadmap-for-asean-human-rights.htm>.; See Langlois, above n 169.

¹⁷⁴ Santiago, R. P. (2009, December). *Developments on the ASEAN Intergovernmental Commission on Human Rights*. Retrieved 2017 from Asia-Pacific Human Rights Information Center (HURIGHTS OSAKA): <http://www.hurights.or.jp/archives/focus/section2/2009/12/developments-on-the-asean-intergovernmental-commission-on-human-rights.html>.; See Langlois, above n 169.

Thailand and subsequently being joined by Cambodia”¹⁷⁵ – was established under the guidance and protection of the Human Rights Committee of LAWASIA. The selection of members came from national parliaments and governments in the region as well as from civil society and the academy. A proposal to create a human rights mechanism came from the Working Group in 2000.¹⁷⁶

In December 2005, a change was observed when the decision to draft ASEAN’s Charter, was made at the 11th ASEAN Summit held in Kuala Lumpur, Malaysia.¹⁷⁷ A collection of senior statesmen from the ASEAN region, called the Eminent Persons Group (EPG), have influenced the decisive outcome of the ASEAN Charter by voicing their guidance on its drafting. An ASEAN human rights mechanism, according to the EPG’s report in 2006, was a right idea and worth pursuing in “*ensuring the respect and protection of human rights of all individuals in every Member State*”¹⁷⁸.¹⁷⁹ The recommendation of the EPG that there should be an ASEAN human rights body was endorsed in January 2007, otherwise known as the *Cebu Declaration on the Blueprint of the ASEAN Charter*.¹⁸⁰ Debates on the form and how it should be articulated within the ASEAN Charter continued throughout 2007. Views of EPG members were divided into two factions: “*foreign ministers of Malaysia, Indonesia, Singapore and Thailand and those of Myanmar, Laos, Cambodia and Vietnam*”¹⁸¹. A small provision creating

¹⁷⁵ Directly quoted from Anthony J. Langlois – Asian Regionalism and Human Rights: The Case of the ASEAN Intergovernmental Commission on Human Rights.

¹⁷⁶ See Muntarhorn (2003). A Roadmap for an ASEAN Human Rights Mechanism, above n 173.; See Langlois, above n 169.

¹⁷⁷ Munro, J. (2009). Why States Create International Human Rights Mechanism: The ASEAN Intergovernmental Commission on Human Rights and Democratic Lock-in Theory, p. 4. *Asia-Pacific Journal on Human Rights and Law*, 10 (1).

¹⁷⁸ Directly quoted from Durbach, et al., - A tongue but no teeth?: The emergence of a regional human rights mechanism in the Asia Pacific region.

¹⁷⁹ Durbach, et al., (2009). A tongue but no teeth?: The emergence of a regional human rights mechanism in the Asia Pacific region. *Sydney Law Review*, 31.

¹⁸⁰ See Langlois, above n 169.

¹⁸¹ Directly quoted from Anthony J. Langlois – Asian Regionalism and Human Rights: The Case of the ASEAN Intergovernmental Commission on Human Rights.

the human rights body within the ASEAN Charter was reached upon the persuasion of the former group, and acceptance of the latter group. In November 2007, the said provision was adopted together with the adoption of the ASEAN Charter at the 13th ASEAN Summit in Singapore.¹⁸² A year after, in 2008, the ASEAN Charter was signed.¹⁸³ Words from ASEAN and state government officials insinuates that to keep ASEAN relevant while catching up with human rights developments in the international community – was partly the driving influence why ASEAN decided to create the AICHR.¹⁸⁴

At the 15th ASEAN Summit in October 2009, the long-awaited ASEAN human rights body was officially established under the Cha-am Hua Hin Declaration.¹⁸⁵ As such, in 2009, the AICHR was duly created.¹⁸⁶ Upon the collective effort of Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam, AICHR was formed pursuant to the Article 14 of the 2007 ASEAN Charter.¹⁸⁷ Embodiments of Article 14 of the 2007 ASEAN Charter are as follows:

1. *“In conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and*

¹⁸² See Phan, above n 169.; See Langlois, above n 169.

¹⁸³ See Kneebone, above n 158.

¹⁸⁴ Saul, B., Mowbray, J., & Baghoomians, I. (2011). The Last Frontier of Human Rights Protection: Interrogating Resistance to Regional Cooperation in the Asia-Pacific. *Australian International Law Journal*, 18 (1).

¹⁸⁵ Association of Southeast Asian Nations. (n.d.). *Cha-am Hua Hin Declaration on the Intergovernmental Commission on Human Rights*. Retrieved 2017 from [http://hrlibrary.umn.edu/research/Philippines/Cha-](http://hrlibrary.umn.edu/research/Philippines/Cha-Am%20Hua%20Hin%20Declaration%20of%20the%20AICHR.pdf)

[Am%20Hua%20Hin%20Declaration%20of%20the%20AICHR.pdf](http://hrlibrary.umn.edu/research/Philippines/Cha-Am%20Hua%20Hin%20Declaration%20of%20the%20AICHR.pdf).; See Jetschke, above n 159.

¹⁸⁶ Chesterman, S. (2015). *From Community to Compliance? The Evolution of Monitoring Obligations in ASEAN*, pp. 45-46. Cambridge University Press.

¹⁸⁷ Hsien-Li. (2012). The ASEAN Intergovernmental Commission on Human Rights as a Tool for Social Justice, p. 35. In I. Lintel, A. Buyse, & B. M. Leyh (Eds.), *Defending Human Rights: Tools for Social Justice*. Intersentia.; See Kneebone, above n 158, p. 302.; See Langlois, above n 169.

fundamental freedoms, ASEAN shall establish an ASEAN human rights body”.

2. *“This ASEAN human rights body shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers meeting”.*¹⁸⁸

1.2. A BRIEF OVERVIEW OF THE COMPETENCES AND COMPOSITION OF THE ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS (AICHR)

It was only at the turn of the twenty-first century did the approach of ASEAN towards human rights took recognition.¹⁸⁹ In Southeast Asia, the AICHR is the main human rights institution whose major responsibility is to promote and protect human rights.¹⁹⁰ Assisting ASEAN Member States, was the primary intention when the AICHR was established in 2009. It was established to adhere *“to the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms”*^{191, 192}.

As indicated in Article 14 of the ASEAN Charter, the AICHR was formed on the basis of a TOR.¹⁹³ Article 3 of the TOR stipulates that the commission is referred to as a

¹⁸⁸ Directly quoted from Article 14 of the ASEAN Charter.; *See* Association of Southeast Asian Nations. *Article 14 of the ASEAN Charter*, above n 10.

¹⁸⁹ Hsien-Li, T. (2011). *The ASEAN Intergovernmental Commission on Human Rights: Institutionalising Human Rights in Southeast Asia*, p. 60-61. USA: Cambridge University Press.

¹⁹⁰ Inazumi, M. (2012). Towards the Establishment of a Regional Human Rights Mechanism in Asia, p. 81. In I. Lintel, A. Buyse, & B. M. Leyh (Eds.), *Defending Human Rights: Tools for Social Justice*. Intersentia.

¹⁹¹ Directly quoted from Susan Kneebone - ASEAN and the Conceptualisation of Refugee Protection in Southeastern Asian Studies

¹⁹² *See* Kneebone, above n 158, p. 302.

¹⁹³ Duxbury, A., & Hsien-Li, T. (2014). Human Rights Systems in the Asia-Pacific. In A. Mihr, & M. Gibney (Eds.), *The SAGE Handbook of Human Rights: Two Volume Set*. SAGE Publications Ltd.

‘Consultative Intergovernmental Body’.¹⁹⁴ As a consultative body, the commission has the authority to advise and recommend. However, there is no power to make binding decisions within the AICHR.¹⁹⁵ Existing without a binding authority, the AICHR, does not also have the power to investigate in countries in Southeast Asia where there are human rights issues.¹⁹⁶

Instead of having independent experts, the AICHR was set to have government appointed representatives, as provided in Article 5.2 of the TOR.¹⁹⁷ Each AICHR representatives comprises of government appointees of their respective countries. They are held accountable for all representations undertaken in behalf of their government.¹⁹⁸ Further, the AICHR may act as mediator with civil society organisations (CSOs), formulate strategies that would promote confirmation of international legal instruments, build up capacities of Member States, offer consultative services, and participate in conferences, discussions and consultations. However, to conduct independent fact-finding activities in Member States such as on-site visits, is not included in TOR’s mandate. Likewise, no procedural guidelines are available for States to submit state reports to AICHR. That being said, State reports that ASEAN Member States have to submit to the United Nations Human Rights Council (UNHRC) are

¹⁹⁴ See Association of Southeast Asian Nations – Article 3 of the Terms of Reference, above n 6.

¹⁹⁵ Muntarbhorn, V. (2013). Chapter Three - Developing Regional Mechanisms: Process and Progress, pp. 135-136. In V. Muntarbhorn, *Unity in Connectivity? Evolving Human Rights Mechanisms in the ASEAN Region*. Martinus Nijhoff.

¹⁹⁶ Roberts, C. (2012). *ASEAN Regionalism: Cooperation, Values and Institutionalisation*, pp. 180-181. Routledge.

¹⁹⁷ Ramcharan, R. (2010). ASEAN's Human Rights Commission: Policy Considerations for Enhancing Its Capacity to Protect Human Rights. *UCL Human Rights Review*.; See Association of Southeast Asian Nations – Article 5.2 of the Terms of Reference, above n 6.

¹⁹⁸ Jetschke, A. (2015). Why Create a Regional Human Rights Regime? The ASEAN Intergovernmental Commission for Human Rights, p. 111. In T. Borzel, & V. Van Hullen (Eds.), *Governance Transfer by Regional Organisations: Patching Together a Global Script*. Palgrave Macmillan.

accessed by the AICHR for purposes of monitoring.¹⁹⁹ In the next section, the TOR of the AICHR will be further discussed.

¹⁹⁹ Ibid.

2. THE HUMAN RIGHTS IN THE ASEAN REGION: THE TERMS OF REFERENCE OF THE AICHR

In the previous section, a brief historical background on the general background of the AICHR as a human rights consultative body were provided. In this section, I will further discuss the TOR of the AICHR. To better understand how the AICHR as an ASEAN human rights body operate, it is important to discuss its TOR in detail.

2.1. TERMS OF REFERENCE (TOR)

*“A realistic, credible, and effective mechanism”*²⁰⁰ was visualised in setting up a regional human rights body in the ASEAN region.²⁰¹ As such, when the High Level Panel (HLP) was created for the drafting of AICHR’s TOR,²⁰² there were debates and discussions whether the TOR should be *“a political, legal or technical document, or a combination of these aspects”*²⁰³. Afterwards, as agreed upon, the set up of the AICHR’s TOR is on the basis of the ASEAN Charter.²⁰⁴ That being so, the TOR has to be read together with the ASEAN Charter, a strong point that should be perpetually remembered.²⁰⁵

In the TOR, the “Purposes” and “Guiding Principles” of the AICHR is the most fundamental part that includes *“promotion and protection of human rights and*

²⁰⁰ Directly quoted from Vitit Muntarbhorn – Developing Regional Mechanisms: Process and Progress.

²⁰¹ See Muntarbhorn, V. (2013). Chapter Three - Developing Regional Mechanisms: Process and Progress, above n 195, pp. 126-127.

²⁰² ASEAN Intergovernmental Commission on Human Rights. (n.d.). *About: A Brief History of the ASEAN Intergovernmental Commission on Human Rights (AICHR)*. Retrieved 2017, from ASEAN Intergovernmental Commission on Human Rights: <http://aichr.org/about/>.

²⁰³ Directly quoted from Vitit Muntarbhorn – Developing Regional Mechanisms: Process and Progress.

²⁰⁴ See Muntarbhorn, V. (2013). Chapter Three - Developing Regional Mechanisms: Process and Progress, above n 195, pp. 127-128.

²⁰⁵ Ibid, pp. 128-129.

fundamental freedoms in conformity with the ASEAN Charter, and consistent with international standards such as the Universal Declaration on Human Rights, protection of special groups such as women, children, and migrant workers^{206,207}

A. THE PURPOSES OF THE AICHR

Protecting and promoting human rights in the ASEAN region – is the foremost essential purpose of the AICHR that is stated in Article 1.1 of the TOR.²⁰⁸ Furthermore, it is intended towards preserving international human rights standards.²⁰⁹

In looking at the TOR, there are several points that made an impressionable mark. First, generally, the word *protection* means human rights monitoring, on-site visits, related investigations, and a procedure to take complaints from the victims, most especially, after local remedies are already spent. However, these *protection* elements were not preferred by the majority of the HLP to be included in the text of the TOR. In the act of finalising the TOR, HLP members were more willing to state that what remains silent in its provisions is not forbidden. In the final text of the TOR, it was made clear that they did not wish to have an expressed reference to the components such as complaints and investigative procedure and more so, monitoring.²¹⁰

Second, there was a proposal that there should be a direct reference when it comes to the rights of the peoples. Article 1.2 provides for this, but discussions on the right to

²⁰⁶ Directly quoted from Vitit Muntarbhorn – Developing Regional Mechanisms: Process and Progress.

²⁰⁷ See Muntarbhorn, V. (2013). Chapter Three - Developing Regional Mechanisms: Process and Progress, above n 195, p. 127.

²⁰⁸ See Association of Southeast Asian Nations – Article 1.1 of the Terms of Reference, above n 6.

²⁰⁹ Ibid, Article 1.6 of the Terms of Reference, above n 6.

²¹⁰ See Muntarbhorn, V. (2013). Chapter Three - Developing Regional Mechanisms: Process and Progress, above n 195, p. 130.

peace are not specifically offered in the TOR's text. Further, a clear and precise statement referring to ASEAN values was also proposed. However, making a reference to *ASEAN values* was excluded because the majority did not support this in the end. In the eyes of the international community, the TOR would have become less credible if the concept of ASEAN values had been included in the TOR.²¹¹

Third, the words "*stability*" and "*harmony*" are referred to in Article 1.3 of the TOR.²¹² Article 1.3 of the TOR provides that one of the purposes of the AICHR is, "*To contribute to the realisation of the purposes of ASEAN as set out in the ASEAN Charter in order to promote stability and harmony in the region...*".²¹³ Referring to Article 1.3 of the TOR, if the words *stability* and *harmony* were used to suppress human rights, both terms are open to scrutiny. There are major human rights issues that are being dealt with by several stable and harmonious nations today, which contradicts the need for majority of groups and ideas, and for participants of the people. Further, there were no discussions and consultations on the negative side of *stability* and *harmony*.²¹⁴

Lastly, Article 1.6 of the TOR specifies that, "*Upholding international human rights standards as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and international human rights instruments to which ASEAN Member States are parties*"²¹⁵ – is another purpose of the AICHR. In the final words of Article 1.6, "*taking into account not only the human rights treaties*

²¹¹ See Muntarbhorn, V. (2013). Chapter Three - Developing Regional Mechanisms: Process and Progress, above n 195.; See Association of Southeast Asian Nations – Article 5 of the Terms of Reference, above n 6.

²¹² Ibid.

²¹³ See Association of Southeast Asian Nations – Article 1.3 of the Terms of Reference, above n 6.

²¹⁴ See Muntarbhorn, V. (2013). Chapter Three - Developing Regional Mechanisms: Process and Progress, above n 195.

²¹⁵ Directly quoted from AICHR's TOR – Article 1.6.; See Association of Southeast Asian Nations – Article 1.6 of the Terms of Reference, above n 6.

to which all ASEAN countries are parties to, but also others to which some ASEAN countries are parties to”²¹⁶. That being so, such has opened the door to wider views.²¹⁷

B. THE GUIDING PRINCIPLES OF THE AICHR

There are provisions found on the ASEAN Charter that is a repetition in the TOR. An example of this can be found under the guiding principles of the TOR. A concern was raised in the final phase of discussions during the drafting of the TOR, that repetition of the principles found in the ASEAN Charter should not be the same as with the TOR. However, others see no wrong on this. Indeed, having realised that copying the same principles to the TOR is not wrong, in the end they have agreed to make use of the same principles in the text of the TOR.²¹⁸

Furthermore, throughout the drafting process of the TOR, there were no detailed and thorough discussions on the principle of non-interference and sovereignty, in which it plays an important role when dealing with other ASEAN Member States.²¹⁹

In Article 2.3 of the TOR, it stipulates that the protecting human rights within the country are the main responsibility of the ASEAN Member States. However, there were no discussions should the State fails to protect its people, there remains a difficult problem as to what would happen if countries fails to carry out its responsibility.²²⁰

In addition, the traditional ASEAN doctrine that deliberately avoids the “*name and*

²¹⁶ Directly quoted from Vitit Muntarbhorn – Developing Regional Mechanisms: Process and Progress.

²¹⁷ See Muntarbhorn, V. (2013). Chapter Three - Developing Regional Mechanisms: Process and Progress, above n 195.

²¹⁸ Ibid.

²¹⁹ Ibid.

²²⁰ Ibid, pp. 134-135.

shame” approach is the constructive and non-confrontational approach set forth in Article 2.4 of the TOR.²²¹ Keeping in mind that when settling disputes peacefully, it should be on the basis of negotiation, reconciliation and consensus, and not with the help of a third-party adjudication – which is incompatible to Asian culture.²²²

C. THE MANDATES AND FUNCTIONS OF THE AICHR

Promoting and protecting human rights in ASEAN is an essential function of the AICHR as stipulated in Article 4.1 of the TOR.²²³ As such, when implementing this mandate, it must operate within regional setting, always taking into consideration the mutual respect for different backgrounds on culture and religion.²²⁴ When the HLP was discussing the mandate and functions of the TOR, most of the time was spent drafting on this part. This is so, because the mandate and functions are important in the AICHR’s operation.²²⁵ Details specifying what the AICHR can officially do, are set out in Article 4 of the TOR.²²⁶

Promotion activities such as awareness raising and capacity building are all embodied Articles 4.3, 4.4, 4.5 and 4.7 of the TOR.²²⁷ However, provisions for monitoring human

²²¹ Ibid, p. 135.

²²² Naldi, G. (2010). The ASEAN Intergovernmental Commission on Human Rights: A "Damp Squib"?. *Sri Lanka Journal of International Law*, 22 (10).; Eyffinger, A. (1996). *The International Court of Justice 1946-1996*. The Hague; Kluwer Law International.

²²³ See Association of Southeast Asian Nations – Article 4.1 of the Terms of Reference, above n 6. See Naldi, above n 222.; See Pisano, above n 22, p. 400.

²²⁴ See Association of Southeast Asian Nations – Article 1.4 of the Terms of Reference, above n 6.

²²⁵ See Muntarbhorn, V. (2013). Chapter Three - Developing Regional Mechanisms: Process and Progress, above n 195, pp. 136-137.

²²⁶ Beyer, W. (2011). *Assessing an ASEAN Human Rights Regime*, p. 61. Retrieved 2017 from Lund University:

<http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1979974&fileId=1981167>.

²²⁷ See Association of Southeast Asian Nations – Article 4 of the Terms of Reference, above n 6.; See Muntarbhorn, V. (2013). Chapter Three - Developing Regional Mechanisms: Process and Progress, above n 195.

rights issues and situations are not directly presented in the TOR.²²⁸ Furthermore, the issuance of binding decisions, receiving complaints, considering cases or conducting investigative visits – these protective functions to protect human rights are apparently not included in the TOR.²²⁹ In the TOR's mandate and functions, there is no provision for country visits. However, in the drafting process, a provision was later added to hold meetings within ASEAN, this provision can be found in Article 6.4 of the TOR. This may not be the same as to the country visits, but listening to the perspectives where human rights issue is a concern may offer avenues for a deeper discussion.²³⁰

Furthermore, during the first part in the drafting process of the TOR, there was a proposal to incorporate protective functions in the text. However, majority of the States negated this proposal.²³¹ That being said, the final text of the TOR concerning the protective function is limited to an advisory and non-binding recommendatory function, according to study conducted by the Office of Human Rights Studies and Social Development (OHRSD) in June 2008.²³²

A similar proposal was taken up in the last part of the negotiations in the drafting process of the TOR proposing to strengthen the protection role of the AICHR, then again, it was met with strong opposition. The purpose of the proposal was to have an explicit statement of a monitoring role for the AICHR. Furthermore, it also aspires to have the authority to address human rights violations, make recommendations and

²²⁸ See Muntarborn, V. (2013). Chapter Three - Developing Regional Mechanisms: Process and Progress, above n 195, p. 137.

²²⁹ See Beyer, above n 226.

²³⁰ See Muntarborn, V. (2013). Chapter Three - Developing Regional Mechanisms: Process and Progress, above n 195.

²³¹ Ibid.

²³² The Office of Human Rights Studies and Social Development - Mahidol University, Thailand. (2008). *Towards an ASEAN Commission on the Promotion and Protection of the Rights of Women and Children*.

make country visits and undertake investigations. However, in 2009, there was a negative response on the proposal. Afterwards, the issue of gross human rights violations, proposal to undertake investigations, country visits that it be included in the mandate of the AICHR was also rejected – as influenced by the principle of interference.²³³ ASEAN Member States have denied the proposals for a human rights body that constituted comprehensive human rights protection and reporting mechanism.²³⁴

Programmes and activities of a five-year Work Plan 2010-2015 shall be prepared by the AICHR, in compliance to Article 8 of the TOR.²³⁵ The first work plan of the AICHR prioritises migration in Southeast Asia, broadly encompassing “*refugees, trafficking of persons, asylum seekers, displaced persons*”, and more.²³⁶

²³³ See Muntarhorn, V. (2013). Chapter Three - Developing Regional Mechanisms: Process and Progress, above n 195, pp. 138-139.

²³⁴ Aguirre, D., & Pietropaoli, I. (2012). Human Rights Protection the ASEAN Way: Non-Intervention and the Newest Regional Human Rights System, p. 295. *International Human Rights Law Review*.

²³⁵ See Jetschke, Why Create a Regional Human Rights Regime? The ASEAN Intergovernmental Commission for Human Rights, above n 198.

²³⁶ Caballero-Anthony, M. (2012). Non-Traditional Security Challenges, Regional Governance, and The ASEAN Political Security Community (APSC), p. 39. In R. Emmers (Ed.), *ASEAN and the Institutionalisation*. Routledge.

3. THE FIRST THREE YEARS OF THE AICHR

In this section, I will briefly discuss the programmes and activities of the AICHR with regards to human rights. It is worth knowing about the programmes and activities of the AICHR, in order to better understand its performance in human rights since the time it was established in 2009.

Promotion of human rights has been the focus of most AICHR programmes since it was formed. This was done by way of regional workshops, seminars, discussions of human rights obligations to students, government officials in the ASEAN region.²³⁷

Furthermore, the AICHR has organised three seminars, four workshops, two trainings, and one publication on its first three years. In most cases, human rights development in Southeast Asia, and priority programmes and work plan were mostly discussed in the entire AICHR event.²³⁸ Moreover, a number of press releases related to its official activities and its official response to human rights situation in the region have been issued by the AICHR in its first three years. According to Nugroho, these regional workshops, trainings and seminars that was arranged and organised by the AICHR are promotion efforts on human rights.²³⁹

²³⁷ ASEAN Intergovernmental Commission on Human Rights. (n.d.). *Archive for the 'AICHR' Category*. Retrieved from ASEAN Intergovernmental Commission on Human Rights: <http://aichr.org/category/activities/aichr/>; See Olivia, above n 3.

²³⁸ ASEAN Intergovernmental Commission on Human Rights. (2010, September). *Press Release of the Third ASEAN Intergovernmental Commission on Human Right*. Retrieved from ASEAN Intergovernmental Commission on Human Rights: <http://aichr.org/press-release/asean-intergovernmental-commission-on-human-rights-meets-visit-to-the-united-states/>; See Nugroho, above n 2.

²³⁹ See Nugroho, above n 2.

4. THE ASEAN WAY OF ORGANISING COOPERATION

In this section, I will be discussing and explaining the ASEAN Way of organising cooperation in the ASEAN region. Likewise, a general overview of the ASEAN Way will be defined as well. That being so, I believe that discussion on ASEAN Way can be provided to better understand AICHR's approach towards Rohingya crisis in the Rakhine State, which is discussed later in the analysis part of this paper.

The ASEAN Way is a set of diplomatic norms shared by the ASEAN Member States, identified as a significant component of ASEAN's method of working in dealing with conflict situations.²⁴⁰ For better understanding, according to Leviter, there are two main factors that make up the ASEAN Way. The first being based on *consultation and consensus*, and the principles stipulated in the Treaty of Amity and Cooperation (TAC) – as the second factor.²⁴¹

The first factor is based on *consultation and consensus*, it is a strategy – in which diplomatic officials at the beginning engages in informal discussion subsequently following to facilitate a consensus-based decision at official meetings.²⁴² In this process, disputes within ASEAN region do not delay the whole agreements because such would enable ASEAN Member States to decide and categorise whether a certain

²⁴⁰ Katsumata. (2003). Reconstruction of Diplomatic Norms in Southeast Asia: The Case for Strict Adherence to the "ASEAN Way", p. 104. *Contemporary Southeast Asia: A Journal of International and Strategic Affairs*, 25 (1).; Tamaki, T. (n.d.). *Making Sense of 'ASEAN Way': A Constructivist Approach*. From International Political Science Association: http://paperroom.ipsa.org/papers/paper_5293.pdf.; Busse, N. (1999). Constructivism and Southeast Asian security. *The Pacific Review*, 12.

²⁴¹ Leviter, L. The ASEAN Charter: ASEAN Failure or Member Failure?. *NYU Journal of International Law and Politics*, 43.

²⁴² Ibid.; Davidson, P. J. (2009). The Role of Law in Governing Regionalism in Asia, p. 228. In N. Thomas (Ed.), *Governance and Regionalism in Asia*. London: Routledge.

issue needs to be discussed at official meetings.²⁴³ Hence, only policies or issues to which all ASEAN Member States agree will be adopted by ASEAN. This is so, either because of its modification, or because of the convergence of positions of ASEAN Member States. As such, controversial issues are generally set aside by the ASEAN Member States.²⁴⁴

The second factor of the ASEAN Way is the fundamental principles set forth under Article 2 of the TAC in 1976,²⁴⁵ they are: (a) Respect of sovereignty between ASEAN Members States; (b) Freedom of ASEAN Member States from external interference or coercion; (c) Respect for the principle of non-interference in State's internal affairs; (d) Settling disputes peacefully; and (e) Renounce all use of force.²⁴⁶ In order to emphasise the primacy of domestic interests above regional interests, instruments of regional integration as well as the member states themselves, have invoked the principle of non-interference for the past few years.²⁴⁷ When dealing on matters within ASEAN, Member States act with non-confrontational engagement, non-formality and in a discreet way.²⁴⁸

The ASEAN decision-making framework requires drawing upon the history of the region and its foundation, if one aims to understand the ASEAN Way. Diplomacy in

²⁴³ See Leviter, above n 241.; Narine, S. (2002). *Explaining ASEAN: Regionalism in Southeast Asia*, p. 31. Lynne Rienner Publishers.

²⁴⁴ See Leviter, above n 241.; Loke, B. (2005). The 'ASEAN Way': Towards Regional Order and Security Cooperation? *Melbourne Journal of Politics*.; Acharya, A. (2001). *Constructing a Security Community in Southeast Asia: ASEAN and the Problem of Regional Order*, pp. 54-98. Routledge.

²⁴⁵ See Leviter, above n 241.

²⁴⁶ Association of Southeast Asian Nations. (n.d.). *Treaty of Amity and Cooperation in Southeast Asia Indonesia, 24 February 1976*. Retrieved 2017, from Association of Southeast Asian Nations: <http://asean.org/treaty-amity-cooperation-southeast-asia-indonesia-24-february-1976/>.

²⁴⁷ See Leviter, above n 241.

²⁴⁸ Tripathi, M. (2015). European Union and ASEAN: A Comparison, p.378 . *International Journal of Research*, 2 (1).; Acharya, A. (1997). Ideas, Identity, and Institution - Building: Making Sense of the "Asia Pacific Way". *The Pacific Review*.; Wong, J. (2011). *The ASEAN Way of Regional Cooperation and Vision 2015*, pp. 4-5. Retrieved April 2017 from Association of Southeast Asian Nations: <http://www.aseancenter.org.tw/upload/files/S1-1-JohnWong.pdf>.

the ASEAN region was considered “*personalistic, informal and non-contractual*” prior to colonisation.²⁴⁹ When colonisation ended, this diplomatic practice by ASEAN was continued.²⁵⁰

Why ASEAN’s engagement on human rights has been limited over its 43-year history, is explained in some way that can be seen in the ASEAN Way of conducting business.²⁵¹ Parallel to this, I argue that the ASEAN Way plays a similar role that is applicable to the unresolved crisis of Rohingya in the Rakhine State. This topic will be discussed further in the next section of this paper.

²⁴⁹ The South Centre. (2007). *The ASEAN Experience: Insights for Regional Political Cooperation Analytical Note*, p. 53.; Goh, G. (2003). The ‘ASEAN Way’ Non-Intervention and ASEAN’s Role in Conflict Management, pp. 114-115. *Stanford Journal of East Asian Affairs*.

²⁵⁰ See The South Centre, above n 247, p. 53.

²⁵¹ The Office of the United Nations High Commissioner for Human Rights. (n.d.). *Frequently Asked Questions on ASEAN and Human Rights*. Retrieved April 2017 from The Office of the United Nations High Commissioner for Human Rights: http://bangkok.ohchr.org/files/Regional_Dialogue_ASEAN_Background_Paper.pdf.

CHAPTER 3

ANALYSIS

1. THE AICHR'S APPROACH TO THE ROHINGYA CRISIS

In the first chapter of this paper, reasons why Rohingyas had to flee the Rakhine State of Myanmar were shown. With them facing an inhumane treatment from the GOM led to what is now call the Rohingya crisis in Myanmar, and the plight of the Rohingyas at sea regarded as the Rohingya refugee crisis. How the AICHR has approached the Rohingya crisis in both Myanmar and at sea is thoroughly examined in this section. As to how the AICHR can be improved in the ASEAN region, it is imperative to discuss the manner by which the Rohingya crisis and the Rohingya refugee crisis are being handled by the AICHR.

1.1. HOW HAS THE AICHR APPROACHED THE ROHINGYAS CRISIS IN MYANMAR?

Any solution to the unresolved problem of the Rohingya need not only come from the GOM, it can do well with the help of the regional human rights body, such as the AICHR.²⁵² With the establishment of the AICHR in 2009 by the ASEAN, its silence in the Rohingya crisis is proof enough that when dealing with human rights issues, it also faces incapacity.²⁵³ According to Rafendi Djamin, a representative of Indonesia's AICHR in an interview with Brunei Times in January 2013; regarding the Rohingya people, has said that "*protection of religious and ethnic minorities has to be seriously*

²⁵² Kaewjullakarn, S., & Kovudhikulrungsri, L. (2015). What Legal Measures Should ASEAN Apply to Help the Rohingya. *Kuala Lumpur International Business, Economics and Law Conference*. Kuala Lumpur.

²⁵³ Umar, A. (n.d.). *Making ASEAN Works in Rohingya: A Southeast Asian Perspective*. Retrieved April 2017 from Universitas Gadjah Mada: <http://asc.fisipol.ugm.ac.id/news-making-asean-works/>.

discussed within AICHR, no matter how sensitive the issue is. When matters implicate several member states, this is when a regional approach is needed to address the challenges. That's my personal position no matter how sensitive it is you have to discuss these matters".²⁵⁴ Hearing this statement from Indonesia's AICHR representative gives a spark of hope in the dark for the Rohingya crisis. However, in the same year, communications from different non-governmental organisations (NGOs) about the plight of the Rohingyas and human rights violations committed against them – was received by Rafendi Djamin. Although behind closed doors, he saw the benefit of raising the issue as a discussion point in order for the AICHR to have an opportunity to respond to the complaints. Despite support by two representatives of the AICHR, his attempt failed completely due to strong opposition by some other representatives who considered it to be an internal issue which should be dealt with at the national level.²⁵⁵

A meeting in Jakarta, Indonesia was held by the AICHR in May 2013. They managed to have two hours of retreat to discuss the Rohingya crisis. Considered as a milestone, it was the first time since the AICHR was established that AICHR has agreed to take a country's human rights issue to their official meeting, even though no resolution came out of this retreat.²⁵⁶

²⁵⁴ Directly quoted from Bloed, et al., Chapter Thirteen: ASEAN: Background and Human Rights Mechanisms.; Bloed, A., & Girard, N. (2015). Chapter Thirteen: ASEAN: Background and Human Rights Mechanisms. In U. Caruso, & R. Hofmann (Eds.), *The United Nations Declaration on Minorities An Academic Account on the Occasion of its 20th Anniversary (1992-2012)* p. 318. Brill | Nijhoff.; ASEAN Trade Union Council. (2013, January 31). *ASEAN Must Address HR Violations*. Retrieved April 2017 from ASEAN Trade Union Council: <http://aseantuc.org/2013/01/asean-must-address-hr-violations/>.

²⁵⁵ See Petcharamesree (2016), above n 130 p. 181.

²⁵⁶ See Wahyuningrum (2014), above n 55.; Wahyuningrum, Y. (n.d.). *Fourth Anniversary of the AICHR. Yuyun Wahyuningrum Highlight the Association's Efforts to Institutionalize Human Rights in the Region*. Retrieved April 2017 from Diplomacy Training Program - UNSW Sydney: <http://www.dtp.unsw.edu.au/sites/default/files/FOURTH%20ANNIVERSARY%20OF%20THE%20AICHR.docx>.

Civil society groups have submitted for review to the AICHR, the case of the plight of Rohingyas. So far, no response has been received.²⁵⁷ The reason for this is because according to the statement of the AICHR Chair in 2011, it does not have such a mechanism to receive complaints; thus, complaints cannot be received.²⁵⁸ In November 2016, Indonesian Representative to the AICHR, Dinna Wisnu, said that on the matter of Rohingya crisis, she was intensely watching and have started communicating with relevant actors in Indonesia and in AICHR. She further acknowledged that in the AICHR mandate, they can ask for information on matters of this nature.²⁵⁹ However, according to AICHR, its operating guidelines had not yet been adopted. As such, receiving cases of human rights violations could not be undertaken initially.²⁶⁰ Moreover, as previously mentioned in this paper, the TOR of the AICHR does not include powers to receive and investigate complaints of human rights violations and undertake investigations.²⁶¹ With that being said, it can be argued that resolution of the Rohingya crisis may not come very soon or at a time that it is most expected.

On 13 – 15 February in Boracay, Philippines, the first meeting of the AICHR was convened under the Chairmanship of the Philippines. Priority Programmes of the AICHR for 2017 were extensively discussed during its three-day meeting. Expanding to new areas, these programmes include: “*Sustainable Development Goals (SDGs), access to education, judiciary and human rights, and right to safe drinking water and*

²⁵⁷ Petcharamee (2016), above n 130; Petcharamee, S. (2013). The ASEAN Human Rights Architecture: Its Development and Challenges. *The Equal Rights Review*, 11.

²⁵⁸ See Bloed, et al., above n 254.

²⁵⁹ Salim, T., & Anya, A. (2016, November 26). *No ASEAN meeting to discuss Rohingya*. Retrieved April 2017 from The Jakarta Post: <http://www.thejakartapost.com/news/2016/11/26/no-asean-meeting-to-discuss-rohingya.html>.

²⁶⁰ See Bloed, et al., above n 254.

²⁶¹ See Chapter 2 - Section ‘Functions and Mandates of the AICHR’; See Olivia, above n 3.; See Muntarhorn, V. (2013). Chapter Three - Developing Regional Mechanisms: Process and Progress, above n 195.

sanitation”.²⁶² Developments of several on-going thematic studies on women affected by natural disasters and the right to education, which were expected to be, launch this year, were also highlighted during the meeting.²⁶³ Apparently, examining the response of the AICHR mentioned-above, the Rohingya crisis has never been properly discussed.

²⁶² The ASEAN Intergovernmental Commission on Human Rights. (2017, February 15). *Press Release: 23rd Meeting of the AICHR, 13-15 February 2017, Boracay, the Philippines*. Retrieved April 2017 from The ASEAN Intergovernmental Commission on Human Rights: <http://aichr.org/press-release/press-release-23rd-meeting-of-the-aichr-13-15-february-2017-boracay-the-philippines/>.

²⁶³ Ibid.

1.2. HOW HAS THE AICHR APPROACHED THE ROHINGYA REFUGEE CRISIS?

From the national level, where no remedy can be found, it is only natural to look for a resolution at the regional level.²⁶⁴ It is a complex and long-standing situation relating to the Rohingya refugee crisis, but it happened so quickly because of the actions of people smugglers who abandoned their human cargo at sea.²⁶⁵ As what I have previously mentioned in this paper, Thailand, Malaysia and Indonesia are the main hosting countries within Southeast Asia for Rohingya refugees.²⁶⁶

An initial work plan emphasising key priority areas has been prepared by the AICHR since it was established in 2009. One of the priority areas in focus is human trafficking and migration.²⁶⁷ Indeed, human trafficking, as identified by AICHR, is one of the most relevant topics of discourse to be undertaken within the first five years of AICHR.²⁶⁸ The development of an ASEAN Convention on Trafficking in Persons (ACTIP) was suggested by the ASEAN leaders in their Joint Communiqué in 2007.²⁶⁹ However, adoption of a legally binding ACTIP and a Regional Plan of Action to Combat Trafficking in Persons was discussed in the Workshop of the AICHR. The need to

²⁶⁴ Muntarbhorn, V. (2013). Chapter Four: Concerns and Challenges. In V. Muntarbhorn, *Unity in Connectivity? Evolving Human Rights Mechanisms in the ASEAN Region*, p. 172. Brill | Nijhoff.

²⁶⁵ Kneebone, S. (2016). Comparative Regional Protection Frameworks for Refugees: Norms and Norm Entrepreneurs, p. 1. *Melbourne Legal Studies Research Paper*.

²⁶⁶ See Fuller, et al., (2015), above n 154.; See Bintang, et al., (2015), above n 137.; Kneebone, S. (2014). The Bali Process and Global Refugee Policy in the Asia-Pacific Region. *Journal of Refugee Studies*.

²⁶⁷ Muntarbhorn, V. (2013). The South East Asian System for Human Rights Protection, p. 476. In S. Sheeran, & S. N. Rodley (Eds.), *Routledge Handbook of International Human Rights Law* (1st ed.). Routledge.

²⁶⁸ Renshaw, C. (2016). Human Trafficking in Southeast Asia: Uncovering the Dynamics of State Commitment and Compliance, pp. 643-644. *Michigan Journal of International Law*, 37.; ASEAN Intergovernmental Commission on Human Rights. (n.d.). Five-Year Work Plan of the ASEAN Intergovernmental Commission on Human Rights.

²⁶⁹ See Renshaw. Human Trafficking in Southeast Asia, above n 268.; Association of South East Asian Nations. (2007, November). *Joint Communiqué of the 6th AMMTC Bandar Seri Begawan, 6 November 2007*. Retrieved 2017 from Association of South East Asian Nations: http://asean.org/?static_post=joint-communication-of-the-6th-ammtc-bandar-seri-begawan-6-november-2007.

supply the ACTIP with a human rights-based approach was also the focus of the Workshop by the AICHR.²⁷⁰

Another forum for interaction between different actors around the problem of trafficking was provided by the AICHR since 2009.²⁷¹ On 02 December 2011 during its 17th meeting, the AICHR shared their work plans, mandates and functions in a meeting with ACWC.²⁷² Apparently, these two human rights bodies, despite their division, are capable of convening a meeting. This meeting was intended to address “*human trafficking, transnational crime affecting men, women, and children*”.²⁷³ In addition, a Regional Workshop on a Human Rights-Based Approach to Combat Trafficking in Persons, Especially Women and Children was hosted by the AICHR in November 2013.²⁷⁴

Seeking to develop a human rights-based approach in the implementation of the ACTIP and a Regional Plan of Action against Trafficking In Persons, a two-day event in Jakarta was held in September 2016. Dinna Wisnu, an AICHR’s representative from Indonesia stressed that it is of great significance to view human trafficking from the perspective of the people who are at risk of being vulnerable to falling victims to traffickers, in order to be thoroughly effective.²⁷⁵ She reiterated further, that the prevention of human

²⁷⁰ Department of Foreign Affairs. (2013, November). *Philippines Promotes Human Rights-Based Approach to Combat Trafficking in Persons, Especially Women and Children, in ASEAN*. Retrieved 2017 from Department of Foreign Affairs: <https://www.dfa.gov.ph/index.php/2013-06-27-21-50-36/dfa-releases/1501-philippines-%20promotes-human-rights-based-approach-to-combat-trafficking-in-persons-especially-women-%20and-children-in-asean>.

²⁷¹ See Renshaw. Human Trafficking in Southeast Asia, above n 268, p. 655.

²⁷² Association of South East Asian Nations. (2011, December 02). *Press Release of the Seventh Meeting of the ASEAN Intergovernmental Commission in Human Rights (AICHR)*. From Association of South East Asian Nations: <http://asean.org/press-release-of-the-seventh-meeting-of-the-asean-intergovernmental-commission-in-human-rights-aichr/>.

²⁷³ Kranrattanasuit, N. (2014). *ASEAN and human trafficking: case studies of Cambodia, Thailand and Vietnam*. Brill Nijhoff.

²⁷⁴ See Department of Foreign Affairs (2013), above n 270.

²⁷⁵ Yosephine, L. (2016, September 29). *AICHR seeks human rights-based approach against human trafficking*. Retrieved 2017 from Human Rights in ASEAN Online Platform:

trafficking, protection of victims, as well as the elimination of trafficking in persons across the region, requires a human-rights-based approach.²⁷⁶

The ACTIP was signed by ten ASEAN Member States on 21 November 2015, following the 27th ASEAN Summit.²⁷⁷ The aims of the Convention is listed as being: (a) to ensure just effective punishment of traffickers while preventing and combatting trafficking in persons, especially against women and children; (b) victims of trafficking in persons should be protected and assisted with full respect for their human rights; and (c) in order to meet these objectives, cooperation among parties should be promoted.²⁷⁸

Just recently, the issue of trafficking in persons has not been considered within the wider context of general migration until only in March 2017.²⁷⁹ On 21 November 2015 in Kuala Lumpur, the ACTIP was signed, and was accordingly implemented on 08 March 2017, in the six ASEAN Member States that have ratified the Convention. Thirtieth day following the deposit of the sixth instrument of ratification with the ASEAN Secretariat, the ACTIP is designed to come into force.²⁸⁰ On 6 February 2017, the sixth Member State to ratify the Convention, the Philippines, submitted its instrument to the ASEAN Secretariat. The continued resolve to combat heinous crimes, which is established in the ACTIP, will provide effective safeguards and protection to victims of trafficking as well as further strengthening enforcement measures. Member

<https://humanrightsinasean.info/article/aichr-seeks-human-rights-based-approach-against-human-trafficking.html>.

²⁷⁶ Ibid.

²⁷⁷ Association of Southeast Asian Nations. (2015, November). *ASEAN Convention Against Trafficking in Persons, Especially Women and Children*. From Association of Southeast Asian Nations: <http://www.asean.org/wp-content/uploads/2015/12/ACTIP.pdf>.

²⁷⁸ Ibid.

²⁷⁹ See Petcharamesree (2016), above n 130.

²⁸⁰ Association of Southeast Asian Nations. (2017, March 8). *ASEAN Welcomes Entry into Force of ACTIP*. Retrieved May 2017 from Association of Southeast Asian Nations: <http://asean.org/asean-welcomes-entry-into-force-of-actip/>.

States are also enjoined through this Convention, to promote closer cooperation and collaboration in the fight against trafficking.²⁸¹

On the basis of my thorough research on this paper and from the activities of the AICHR in the past years, there was no reference to the Rohingya refugee crisis about human trafficking during regional workshops conducted by the AICHR and by the ASEAN.

²⁸¹ Ibid.

2. WHAT DOES THE RESPONSE TELL US?

The AICHR is a human rights body designed for human rights violations in the Asian region, which was established by the ASEAN in the regional level.²⁸² Further, the AICHR was established to be a potential forum that provides the ASEAN with a mechanism where the case of the Rohingya crisis and the refugee crisis could be addressed.²⁸³ So far, the Rohingya crisis have not been touched by the AICHR even since its birth in 2009, but instead, environmental rights issue have been focus of seminars and workshops conducted in Myanmar in 2014.²⁸⁴

We now centre our discussion on the analysis of AICHR's response towards Rohingya crisis. I will probe deeper into the AICHR's institutional design in order to examine the AICHR's response towards Rohingya refugees. By this, I will argue that in resolving the case of the Rohingya crisis in Myanmar as well as the Rohingya crisis outside Myanmar, there are obstacles to the AICHR that are created by (i) *strictly* adhering to the ASEAN Way of cooperating and (ii) the lack of authority within the AICHR. As previously mentioned in this paper, it is imperative that the principles of the ASEAN Charter are complied with by the AICHR.²⁸⁵

²⁸² See Association of Southeast Asian Nations. *Article 14(1) of the ASEAN Charter*, above n 10.

²⁸³ Kraft, H. J. (2011). Driving East Asian Regionalism. In R. Emmers (Ed.), *ASEAN and the Institutionalisation of East Asia*, p. 72. Routledge.

²⁸⁴ See Arifin, above n 40.; The ASEAN Intergovernmental Commission on Human Rights. (2014, September). *Human rights and environmental protection interlinked*. Retrieved April 2017 from The ASEAN Intergovernmental Commission on Human Rights: <http://aichr.org/category/activities/myanmar/>.

²⁸⁵ See Kaewjullakarn, et al., above n 252.; See Muntarhorn, V. (2013). Chapter Three - Developing Regional Mechanisms: Process and Progress, above n 195.

1. ANALYSIS OF THE AICHR'S RESPONSE IN MYANMAR'S ROHINGYA CRISIS

On the Rohingya crisis in the Rakhine State, Myanmar, an analysis of AICHR's approach will be discussed below:

A. AVOIDANCE

Avoidance is veered towards filtering out of certain kinds of disputes through the use of conflict management procedures.²⁸⁶ The TOR of the AICHR explicitly includes the principle of non-interference in states' domestic affairs.²⁸⁷ Section 2.1 of the AICHR's TOR further specifies on this matter: “(b) *Non-intervention principle in internal affairs of ASEAN Member States and (c) Respect the rights of each Member States to lead its national existence from external interference, subversion and coercion*”.²⁸⁸ Furthermore, the principle of non-confrontational is declared by AICHR in its Article 2.4.²⁸⁹ Within the ASEAN context, interpretation of these principles by some representatives of AICHR Member States signifies that Member States are prohibited from commenting on the domestic affairs of other Member States.²⁹⁰ As Bloed, et al., argues, in order to explain weak responses to human rights violations occurring in Member States, these AICHR principles are used, particularly that of non-

²⁸⁶ von Feigenblatt, O. (2012). *The Association of Southeast Asian Nations (ASEAN): Conflict and Development*, p. 14. New Century Publications.

²⁸⁷ See Association of Southeast Asian Nations – Article 2 of the Terms of Reference, above n 6.; Wang, Y. X. (2015). Contextualising Universal Human Rights: An Integrated Human Rights Framework for ASEAN, p. 387. *Duke Journal of Comparative and International Law*, 25.

²⁸⁸ Directly quoted from Article 2 of the Terms of Reference.; See Association of Southeast Asian Nations – Article 2.1(b)(c) of the Terms of Reference, above n 6.

²⁸⁹ Ibid, Article 1.4 of the Terms of Reference.; See Wang, above n 287.

²⁹⁰ International Commission of Jurists. (2014). *Memorandum on the Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights (AICHR)*, p. 1. Retrieved April 2017 from International Commission of Jurists: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/06/Memorandum-on-TOR-of-AICHR.pdf>.

interference.²⁹¹ Discussions on Rohingya crisis in the Rakhine State, Myanmar would be one example of this.

In this paper, I argue that on the Rohingya crisis, the principles of non-interference and non-confrontational has been strongly practiced within the AICHR up to this day. Posing as a deterrent – which is also the reason why the AICHR is having difficulties in addressing the Rohingya crisis. This is so, when the Brunei representative to the AICHR attempted to discuss the Rohingya issue at a meeting, with majority of the AICHR representatives opposing to discuss the issue on the grounds that it was considered to be an internal issue which should be dealt with at the national level. Therefore, the organisation is not equipped to address serious abuses of human rights in a timely manner due to the opposition of some member states who opt to comply with AICHR's TOR by applying the principle of non-interference.²⁹² AICHR's protective function is interpreted as being weak because AICHR representatives strongly adhere to the principle of non-interference.²⁹³ Further, a strict adherence to the ASEAN Way by the AICHR was reiterated, and to pursue a non-confrontational agenda.²⁹⁴ The major hindrances of the AICHR is the non-interference principle in domestic affairs and unconditional engagement, this was explained by Sriprapha Petcharamesree, AICHR's former representative of Thailand.²⁹⁵

Coming from the outside looking in, we can see that Southeast Asia was separated by the Rohingya crisis between those states who wish to maintain a strong custom of the

²⁹¹ See Bloed, et al., above n 254, pp. 308-309.

²⁹² See von Feigenblatt, above n 286.; See AICHR's approach to the Rohingya crisis section.; Analysis on the AICHR's approach.

²⁹³ See Hsien-Li (2012), above n 187.

²⁹⁴ See Hsien-Li (2011), above n 189.

²⁹⁵ See Aguirre, et al., above n 234.; Sharom, A., Petcharamesree, S., Sumarlan, Y., Boontinand, V., & Baysa-Barredo, J. M. (Eds.). (2016, August). Human Rights and Peace in Southeast Asia Series 5: Pushing the Boundaries.

principle of non-interference, and those who tried to force Myanmar to accede to international norms of good governance for the protection of human rights.²⁹⁶ With the lack of institutional strength necessary to resolve major regional crisis, the failures of the latter group has seriously exposed the ASEAN and AICHR as an organisation that is incapable of functioning usefully.²⁹⁷

Even when gross human rights violations are committed, it is of great importance to note that the non-interference is a fundamental principle of the AICHR (Article 2.1(b), which should at all times be upheld without mention of any exception.²⁹⁸ According to Article 2.1(c) provision of the TOR, freedom from external interference and coercion shall be respected by every Member States.²⁹⁹ In the AICHR meeting of May 2013,³⁰⁰ the adherence to the principle of non-interference of most Member States posted as the main hindrance to the discussion on how to have a plan in addressing the Rohingya crisis.

B. THE CONSENSUS-BASED DECISION-MAKING

Article 6.1 of the TOR is also in accordance with Article 20 of the ASEAN Charter, where we can find the provisions on decision-making in the AICHR.³⁰¹ In this paper, I argue that the practice of consensus-based decision is one of the obstacles that the AICHR is experiencing in addressing the Rohingya crisis. Such was considered by

²⁹⁶ See Leviter, above n 241.

²⁹⁷ Ibid.

²⁹⁸ Phan, H. D. (2012). Chapter 4 - The Case for a Strong AICHR. In H. D. Phan, *A Selective Approach to Establishing a Human Rights Mechanism in Southeast Asia: The Case for a Southeast Asian Court of Human Rights*. Brill / Nijhoff.; See Association of Southeast Asian Nations – Article 2.1(b) of the Terms of Reference, above n 6.

²⁹⁹ See Association of Southeast Asian Nations – Article 2.1(c) of the Terms of Reference, above n 6.

³⁰⁰ Referring to the AICHR's meeting in May 2013 in Indonesia – See Analysis Section.

³⁰¹ See Association of Southeast Asian Nations – Article 6.1 of the Terms of Reference, above n 6.; See Association of Southeast Asian Nations. *Article 20 of the ASEAN Charter*, above n 10.

many due to its inability to impose strong enforcement power over the States violating human rights.³⁰² Different from the majority vote rule, the TOR repeats the ASEAN Way of decision-making by consensus.³⁰³ As such, all Member States are required to accept agreements, since all Member States has the potential to vote against the proposal at hand.³⁰⁴ Since the agreement of every Member States is necessary to reach a consensus, a single Member State can hinder the process by its veto power. Since Myanmar is a member of ASEAN and AICHR, several times, Myanmar has used this strategy to force the avoidance of certain sensitive issues such as the Rohingya crisis.³⁰⁵

In the case of the Rohingya crisis, the effort made by the AICHR representative of Brunei to discuss the Rohingya crisis at the AICHR meeting failed because some AICHR representatives disapproved to tackle the Rohingya crisis.³⁰⁶ This scenario is so indicative of AICHR's approach to the Rohingya crisis in Myanmar. In addressing the Rohingya crisis that was initiated by the AICHR's Brunei representative, I argue that it is clear from the afore-cited scenario that the consensus-based decision-making of the AICHR is an obstruction to the opportunity to at least discuss on the Rohingya crisis. As highlighted in this case, we can see that the ASEAN Way of resolving disputes is strictly adhered to – decisions made by consensus. From the time that the Rohingya crisis has been negated by some representatives to be up for discussion, no

³⁰² See Inazumi, above n 189, p. 81.

³⁰³ See Phan (2012), above n 298.; See Association of Southeast Asian Nations – Article 6.1 of the Terms of Reference, above n 6.

³⁰⁴ See von Feigenblatt, above n 286.; See International Commission of Jurists, above, above n 289.

³⁰⁵ Ibid.; Perria, S. (2017, April 04). *UN convenes Rohingya abuse investigation, but Myanmar says it won't cooperate*. Retrieved 2017 from IRIN News: <https://www.irinnews.org/analysis/2017/04/04/un-convenes-rohingya-abuse-investigation-myanmar-says-it-won%E2%80%99t-cooperate.>; Hunt, L. (2015, June 22). *ASEAN Move on Rohingya, Slow But Forward*. From *The Diplomat*: <http://thediplomat.com/2015/06/asean-move-on-rohingya-slow-but-forward/>.; IRIN News. (2009, April). *Key Asian meeting fails to resolve Rohingya issue*. From IRIN News: <http://www.irinnews.org/fr/node/245533>.

³⁰⁶ See Bloed, et al., above n 254.; See Petcharamesree, above n 130.

plan to resolve the issue has been put in place up to this day.³⁰⁷ On the foregoing discussions, I argue that one of the weak points of AICHR in dealing with human rights violations of the Rohingya crisis in the Rakhine State – is the emphasis on consensus-based decision-making.³⁰⁸

C. LACK OF POWER WITHIN THE AICHR

In this paper, I argue that the lack of power of the AICHR within its TOR, to be the reason why the AICHR had not made any significant contribution for the Rohingya crisis in the Rakhine State. Article 1.1 of the TOR provides that promoting and protecting human rights in the ASEAN region, is one of the main purposes of the AICHR.³⁰⁹

In practice, a regional human rights body should have the power to undertake country visits, conduct investigations, monitoring mechanisms, in the performance of its protection powers.³¹⁰ The differences are formidably emphasised, as the TOR of the AICHR embodies none of these powers. While the possibility of protective powers, such as undertaking investigations, on-site visits, and monitoring functions was voiced by various representatives of the more progressive countries, in the preparation of the TOR, they were rejected by the majority opinion within AICHR.³¹¹ The ability of the AICHR to undertake an effective monitoring and protection role within the ASEAN

³⁰⁷ See Petcharamesree, above n 130.; Based on the Analysis of the AICHR's approach to the Rohingya crisis.

³⁰⁸ See Phan (2012), above n 298.; Based on the Analysis of the AICHR's approach to the Rohingya crisis.

³⁰⁹ See Association of Southeast Asian Nations – Article 1.1 of the Terms of Reference, above n 6.

³¹⁰ Muntarbhorn, V. (2012). *Development of the ASEAN Human Rights Mechanism*, p. 10. Retrieved April 2017 from Human Rights Integration: <http://hrintegration.be/sites/default/files/attachment/V.%20MUNTARBHORN%20-%20Development%20of%20the%20ASEAN%20Human%20Rights%20Mechanism%20%282012%29.pdf>.

³¹¹ Ibid.

region is extremely limited on the basis of its TOR.³¹² It is clear that the activities and programs of the AICHR has drawn together towards promoting human rights rather than protecting human rights in Southeast Asia.³¹³

That being said, we now turn to the next section of the analysis of AICHR's response to the Rohingya crisis outside Myanmar, which is known to be the Rohingya refugee crisis. It is important to discuss the aforementioned topic in order to determine whether such human rights body in the Asian region has responded the same towards the crisis.

³¹² See Quane, above n 23, above n 287.

³¹³ Ibid.

2. ANALYSIS OF THE AICHR'S RESPONSE TOWARDS THE ROHINGYA REFUGEE CRISIS

Concerning the acceptance of human rights in ASEAN, in concept and in principle, is no longer a major question.³¹⁴ Earlier in this paper, I have discussed the reasons why the Rohingyas fled Myanmar. This is so, because of the inhumane treatment they have experienced by the GOM since the 1970s. As such, the Rohingya refugee crisis has occurred. How the Rohingya refugee crisis at sea is approached by the AICHR, will be analysed in this section.

As what was previously stated in this paper, Article 1.1 of the TOR states that one of the main purposes of the AICHR is the promotion and protection of human rights.³¹⁵ Based from the activities, seminars, workshops, and responses of the AICHR towards the Rohingya crisis and refugee crisis, we can somewhat expect the Work Plans of the AICHR is more towards promoting human rights. However, still the protection function of the human rights body remains weak. Astounding as it may sound, we should keep in mind that the TOR of the AICHR provides no protective mechanism, such as undertaking investigations, monitoring function of the human rights issues within ASEAN, and receiving complaints from individuals and groups.³¹⁶

³¹⁴ See Muntarbhorn, V. (2013). Chapter Four: Concerns and Challenge, above n 264.

³¹⁵ See Association of Southeast Asian Nations – Article 1.1 of the Terms of Reference, above n 6.

³¹⁶ See Muntarbhorn, V. (2013). Chapter Four: Concerns and Challenge, above n 264.

A. COMBATTING AND PREVENTING HUMAN TRAFFICKING

Today, one of the gravest human rights abuses confronting the international community is human trafficking. Desperate to flee persecution, thousands of stateless Rohingya end up in refugee camps in Bangladesh or become human trafficking victims.³¹⁷

From the previous section of this paper, we can deduct that both ASEAN states and the AICHR, the emergence of a shared understanding of the problem of international trafficking gives rise to the need for a shared principle in addressing the problem.³¹⁸ However, I cannot help but argue, that since it has just been so recently that the ACTIP was entered into force, I am doubtful if it will be effective in protecting the Rohingya refugees at sea who fall victims to human traffickers. This is so, because: (1) considering that the protection mechanism of the ACTIP is still at its infancy, and (2) there is no explicit reference and discussions about the Rohingya refugees during Regional Workshops and seminars conducted by the AICHR – which requires nurturing. But then again, the enforcement of this ACTIP can be considered a milestone, at least we can say that on an international law perspective, a giant leap of progress has been made towards the Rohingya refugee crisis.

³¹⁷ Umar, A. (2017, January 20). *ASEAN countries should find a solution to end the persecution of Rohingya*. Retrieved May 2017 from The Conversation: <http://theconversation.com/asean-countries-should-find-a-solution-to-end-the-persecution-of-rohingya-66919>.

³¹⁸ See Renshaw, above n 268.; See Section: How has the AICHR approached the Rohingya refugee crisis.

3. SUMMARY OF THE ANALYSIS

In this paper, with the principles, mandates and functions as stated in the TOR, we have seen how the Rohingya crisis and refugee crisis was approached by the AICHR. Also, figuratively, we can see the AICHR's strengths and weaknesses relative to its TOR. On the approach of the AICHR towards the Rohingya crisis, I strongly argue that the crisis management of AICHR in Myanmar is seemingly different from that outside of Myanmar. This is so, based on the following: Firstly, it was my keen observation that AICHR's approach to the egregious abuses of the GOM to the Rohingyas, is hindered by several factors: (1) the strict adherence to so-called ASEAN Way, more pertinently, the "*non-interference, non-confrontational, and consensus-based decision-making*".³¹⁹ It is of importance to know that the ASEAN Way was enacted by a legislative body that is imbedded in the ASEAN Charter and AICHR's TOR;³²⁰ (2) Absence of power within the AICHR. As what we have seen in the mandates and functions of the AICHR, it does not have any protective functions, such as: monitoring, investigating, receiving complaints, and is not empowered to function according to its mandates as these would directly obstruct with the internal affairs of the ASEAN Member States.³²¹ In addition, in the outlined protective mandate of the AICHR is confined to an advisory and recommendatory function.³²²

Secondly, the apparently different response of AICHR towards Rohingya refugee crisis is unmistakable, while, still adhering to international law and protection mechanism – which should be strengthened. However, I also argue that even when the

³¹⁹ The ASEAN Way of organising cooperation.; See 'Section: Chapter 2'.

³²⁰ See Aguirre, et al., above n 234.

³²¹ Ibid.

³²² Ibid.; See Association of Southeast Asian Nations – Article 4.7 of the Terms of Reference, above n 6.

ACTIP has been entered into force, the AICHR still has a lot of work to do. This is so, as has been presented in this paper, the international law framework for the protection of Rohingya refugees at sea is not being practiced by States receiving Rohingyas, particularly, on the principle of *non-refoulement*.³²³ As what is stipulated in the AICHR's TOR, strict adherence to international law must be observed.³²⁴

³²³ This is based on the response of the destination countries towards the Rohingya refugees presented in first chapter of this paper.

³²⁴ See Association of Southeast Asian Nations – Article 2.1(f) of the Terms of Reference, above n 6.

CHAPTER 4

CONCLUSIONS

In this paper, I have used the Rohingya crisis as a case study to explore the competence of the AICHR's mandate. According to many, it is said that with the establishment of the AICHR in 2009, there was a significant development for human rights in the ASEAN region.³²⁵ From the above-stated discussions, we can conclude that the protective functions of the AICHR, such as: receiving complaints, undertaking investigations, monitoring human rights issues within the ASEAN region – needs to be improved and strengthened. Further, the AICHR more focused on the promotion mechanism, such as giving seminars, trainings, and regional workshops more than the protection function mentioned above, which undermines the AICHR.³²⁶

In addition, one of the limiting factors that the AICHR faces, is the ASEAN Way of conducting business – *strict* adherence to the principle of non-interference and consensus-based decision-making.³²⁷ The ASEAN Way has been essential in order to attain any level of regional cooperation in the Southeast Asian region.³²⁸ As what has been presented in this paper, the behaviour of the AICHR is dependent on the ASEAN Charter. Therefore, it is reflective of the AICHR's TOR.³²⁹

³²⁵ See Aguirre, et al., above n 234.

³²⁶ See 'Chapter 2 of this paper'; Muntarbhorn, V. (2013). Chapter Five: ASEAN Inter-Connection. In V. Muntarbhorn, *Unity in Connectivity? Evolving Human Rights Mechanisms in the ASEAN Region*. Martinus Nijhoff Publishers.

³²⁷ See 'Chapter 3 – Analysis'.

³²⁸ See Aguirre, et al., above n 234.

³²⁹ See Association of Southeast Asian Nations – Terms of Reference, above n 6.; See Association of Southeast Asian Nations. *The ASEAN Charter*, above n 10.; See Chapter 2 of this paper for the discussion.

In order to strengthen the mandates and functions of the AICHR, a review and assessment of the TOR shall be performed every five years.³³⁰ That being so, we can say that there can be a functional protecting mechanisms within the AICHR if only human rights body is creative and eager to protecting human rights in the ASEAN region, though how limited the TOR's mandates are with regards to the protection of human rights.³³¹ That being said, having limited mandates should not close the door to creative ways of covering human rights protection more actively.³³²

Undoubtedly, a regional response to the Rohingya crisis in the Rakhine State and outside Myanmar is required. This can only be achieved by a strong regional cooperation within ASEAN and AICHR. Only then we can say that the established human rights body is true to its word of keeping up with its main goals, which is to protect and promote human rights, and keeping up with international standards.

³³⁰ See Association of Southeast Asian Nations. *Cha-am Hua Hin Declaration on the Intergovernmental Commission on Human Rights*, above n 185.

³³¹ See Muntarbhorn, V. (2013). Chapter Five: ASEAN Inter-Connection, above n 326.

³³² Ibid.

RECOMMENDATIONS

A REALISTIC AND EFFECTIVE AICHR IN THE ASEAN REGION?

On the analysis of the response of the AICHR's approach towards Rohingya crisis and the refugee crisis, below are the recommendations I came up with to strengthen the AICHR as a regional human rights body in Southeast Asia:

1. STRENGTHENING THE TOR OF THE AICHR

Going through the AICHR's TOR, there is no mention of the power to address human rights violations with Southeast Asian countries.³³³ Being the main human rights body in Southeast Asia, the AICHR should take a bolder stance in responding to human rights concerns such as the Rohingya crisis presented in this paper. After analysing the AICHR's performance towards the Rohingya crisis in the Asian region, I believe that the protective function of the AICHR, in order to effectively respond to the Rohingya crisis, the scope of its TOR should be expanded. The AICHR should be given a free hand by the ASEAN to investigate human rights issues in Myanmar and the Rohingya refugees in the Andaman Sea and Bay of Bengal.³³⁴

The AICHR is not authorised to receive complaints, undertake investigations and monitor human rights issues in Southeast Asia. In the same manner, its TOR does not express that it is forbidden from doing so. Over a dozen cases have been submitted to the AICHR by CSOs and victims of human rights violations, but no formal

³³³ Arendshorst, J. (2009). The Dilemma of Non-Interference: Myanmar, Human Rights, and the ASEAN Charter, p. 113. *Northwestern Journal of International Human Rights*, 8 (1).

³³⁴ See Arifin, above n 40.

acknowledgement or response have been received from the AICHR.³³⁵ With that being said, Article 4.10 provides that the AICHR is allowed to ‘*obtain information from ASEAN Member States on the promotion and protection of human rights*’.³³⁶ However, in practice there has been no information that was made public to suggest that this function was ever exercised by the AICHR. It is highly imaginative but unlikely that this AICHR could interpret the TOR progressively to be able to formally receive, consider or act on any cases of human rights violations, due to its lack of independence, consensus approach, and constraints imposed by the current TOR.³³⁷

A. INDEPENDENCE AND IMPARTIALITY

When revisiting the TOR of the AICHR, the independence and impartiality of its commissioners should also be considered.³³⁸ Looking at the human rights body by its structure, the AICHR is not independent. Under Article 5 of the TOR, the AICHR comprises of ASEAN Member States.³³⁹ As such, instead of having independent and qualified experts in the field of human rights, the AICHR consists of government appointed representatives of each ASEAN Member States.³⁴⁰

³³⁵ International Federation of Human Rights Leagues. (2012, September). *FIDH submission to the European Parliament Sub-committee on Human Rights (DROI) on AICHR*. Retrieved from International Federation of Human Rights Leagues: <https://www.fidh.org/en/international-advocacy/other-regional-organisations/asean/FIDH-submission-to-the-European-12186>.

³³⁶ Directly quoted from Article 4.10 of the Terms of Reference.; See Association of Southeast Asian Nations – Article 4.10 of the Terms of Reference, above n 6.

³³⁷ See International Federation of Human Rights Leagues (2012), above n 335.

³³⁸ Matt. (2012, February). *Our Virak Interview, Part III*. Retrieved April 2017 from The Harvard Human Rights Journal: <http://harvardhrj.com/2012/02/ou-virak-interview-part-iii/>; Asian Forum for Human Rights and Development. (2015, April 1). *ASEAN: Actions of the AICHR’s Current Chair Demonstrate Need for AICHR’s Terms of Reference to Ensure Independence and Impartiality of its Commissioners*. Retrieved April 2017 from Asian Forum for Human Rights and Development: <https://www.forum-asia.org/?p=18725>.

³³⁹ See Association of Southeast Asian Nations – Article 5 of the Terms of Reference, above n 6.

³⁴⁰ See Matt, above n 338.; See International Federation of Human Rights Leagues (2012), above n 335.

To become an independent human rights body in the ASEAN region, the AICHR should undergo a process of development. Responding to human rights challenges in the region can be put to work by having a group of independent representatives and experts as members of the AICHR. It is essential that government's control over the functioning of the AICHR be limited to a certain extent. In order to be credible and effective human rights mechanism, it must be able to act and perform independently from their own governments.³⁴¹

B. BINDING DECISIONS AND JUDGEMENTS WITHIN THE TOR OF THE AICHR

The TOR of the AICHR could be modified by the ASEAN to include a human rights court with the power to issue binding decisions and judgements.³⁴² If such were to be enforced, such a court would provide a judicial, unbiased body, while human rights abuses in Southeast Asia can be effectively remedied. From this, we can see the commitment to a more serious approach in addressing the blatant human rights abuses within the AICHR.³⁴³

C. AN INCLUSION OF MONITORING AND COMPLAINTS MECHANISM FOR THE PROTECTION OF HUMAN RIGHTS ABUSES

As what we have seen in the analysis part of this paper, based from the performance of the AICHR with regards to human rights violations and abuses in Southeast Asia, regrettably, the AICHR does not have any monitoring function, and power to receive

³⁴¹ See Wahyuningrum (2014), above n 55.

³⁴² See Arendshorst, above n 333.

³⁴³ Ibid.; See Muntarborn (2012). *Development of the ASEAN Human Rights Mechanism*, above n 310.

any complaints from individuals or groups.³⁴⁴ To support this statement, in 2015, an interview with Dr. Muhammad Shafee Abdullah (former chair of the AICHR) was conducted.³⁴⁵ Where there are complaints against human rights abuses, the AICHR addresses them by sending and directing complainants back to their respective countries. In the interview, he stated that, “*We ask them to go back to their countries or whoever can help them such as individual lawyers, legal institutions, human rights organisations... But we cannot even interfere. That’s why we feel very inadequate. We are not independent enough*”.³⁴⁶

2. ENCOURAGING ALL ASEAN MEMBER STATES FOR THE RATIFICATION OF INTERNATIONAL HUMAN TREATIES

Article 4.5 of the AICHR’s TOR clearly states that ASEAN Member States are encouraged to accede and ratify international human rights instruments.³⁴⁷ In this paper, I recommend that all ASEAN Member States should participate in the ratification of international human rights treaties as well. Facilitating the ratification of international treaties on human rights should be a priority, since it is part of the TOR of the AICHR’s mandate. While some core treaties have been signed by some ASEAN states, implementation remains poor.³⁴⁸ A joint cooperation between AICHR, CSOs and National Human Rights Institutions (NHRIs) is needed to ensure that NRIs conducts its operation in accordance with international standards. With this, there will

³⁴⁴ See ‘Chapter 3 of this paper’; See Muntarbhorn, V. (2013). Chapter Three - Developing Regional Mechanisms: Process and Progress, above n 195.

³⁴⁵ Interview made in 2015.

³⁴⁶ Directly quoted from Dr. Abdullah’s interview.; Mendoza, D. (2015, November 2). *Interview: “We’re Not Independent Enough,” says ASEAN Rights Commission Chair*. Retrieved from Inter Press Service News Agency: <http://www.ipsnews.net/2015/11/interview-were-not-independent-enough-says-asean-rights-commission-chair/>.

³⁴⁷ See Association of Southeast Asian Nations – Article 4.5 of the Terms of Reference, above n 6.

³⁴⁸ See Aguirre, et al., above n 234.

be certainty that all ASEAN Member States complies with the implementation of human rights treaties.³⁴⁹

³⁴⁹ See Aguirre, et al., above n 234.; Petersen, C. (2011). Bridging the Gap?: The Role of Regional and National Human Rights Institutions in the Asia Pacific. *Asian-Pacific Law and Policy Journal*.

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APPENDIX I

**TERMS OF REFERENCE OF ASEAN INTERGOVERNMENTAL
COMMISSION ON HUMAN RIGHTS**

“Pursuant to Article 14 of the ASEAN Charter, the ASEAN Intergovernmental Commission on Human Rights (AICHR) shall operate in accordance with the following Terms of Reference (TOR):

1. PURPOSES

The purposes of the AICHR are:

1.1 To promote and protect human rights and fundamental freedoms of the peoples of ASEAN;

1.2 To uphold the right of the peoples of ASEAN to live in peace, dignity and prosperity;

1.3 To contribute to the realisation of the purposes of ASEAN as set out in the ASEAN Charter in order to promote stability and harmony in the region, friendship and cooperation among ASEAN Member States, as well as the well-being, livelihood, welfare and participation of ASEAN peoples in the ASEAN Community building process;

1.4 To promote human rights within the regional context, bearing in mind national and regional particularities and mutual respect for different historical, cultural and religious backgrounds, and taking into account the balance between rights and responsibilities;

1.5 To enhance regional cooperation with a view to complementing national and international efforts on the promotion and protection of human rights; and

1.6 To uphold international human rights standards as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and international human rights instruments to which ASEAN Member States are parties.

2. PRINCIPLES

The AICHR shall be guided by the following principles:

2.1 Respect for principles of ASEAN as embodied in Article 2 of the ASEAN Charter, in particular:

- a) Respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States;
- b) Non-interference in the internal affairs of ASEAN Member States;
- c) Respect for the right of every Member State to lead its national existence free from external interference, subversion and coercion;
- d) Adherence to the rule of law, good governance, the principles of democracy and constitutional government;
- e) Respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice;
- f) Upholding the Charter of the United Nations and international law, including international humanitarian law, subscribed to by ASEAN Member States; and
- g) Respect for different cultures, languages and religions of the peoples of ASEAN, while emphasising their common values in the spirit of unity in diversity.

2.2 Respect for international human rights principles, including universality, indivisibility, interdependence and interrelatedness of all human rights and

fundamental freedoms, as well as impartiality, objectivity, non-selectivity, non-discrimination, and avoidance of double standards and politicisation;

2.3 Recognition that the primary responsibility to promote and protect human rights and fundamental freedoms rests with each Member State;

2.4 Pursuance of a constructive and non-confrontational approach and cooperation to enhance promotion and protection of human rights; and

2.5 Adoption of an evolutionary approach that would contribute to the development of human rights norms and standards in ASEAN.

3. CONSULTATIVE INTER-GOVERNMENTAL BODY

The AICHR is an inter-governmental body and an integral part of the ASEAN organisational structure. It is a consultative body.

4. MANDATE AND FUNCTIONS

4.1. To develop strategies for the promotion and protection of human rights and fundamental freedoms to complement the building of the ASEAN Community;

4.2. To develop an ASEAN Human Rights Declaration with a view to establishing a framework for human rights cooperation through various ASEAN conventions and other instruments dealing with human rights;

4.3. To enhance public awareness of human rights among the peoples of ASEAN through education, research and dissemination of information;

4.4. To promote capacity building for the effective implementation of international human rights treaty obligations undertaken by ASEAN Member States;

4.5. To encourage ASEAN Member States to consider acceding to and ratifying international human rights instruments;

- 4.6. To promote the full implementation of ASEAN instruments related to human rights;
- 4.7. To provide advisory services and technical assistance on human rights matters to ASEAN sectoral bodies upon request;
- 4.8. To engage in dialogue and consultation with other ASEAN bodies and entities associated with ASEAN, including civil society organisations and other stakeholders, as provided for in Chapter V of the ASEAN Charter;
- 4.9. To consult, as may be appropriate, with other national, regional and international institutions and entities concerned with the promotion and protection of human rights;
- 4.10. To obtain information from ASEAN Member States on the promotion and protection of human rights;
- 4.11. To develop common approaches and positions on human rights matters of interest to ASEAN;
- 4.12. To prepare studies on thematic issues of human rights in ASEAN; 4.13. To submit an annual report on its activities, or other reports if deemed necessary, to the ASEAN Foreign Ministers Meeting; and
- 4.14. To perform any other tasks as may be assigned to it by the ASEAN Foreign Ministers Meeting.

5. COMPOSITION MEMBERSHIP

5.1 The AICHR shall consist of the Member States of ASEAN.

5.2 Each ASEAN Member State shall appoint a Representative to the AICHR who shall be accountable to the appointing Government.

QUALIFICATIONS

5.3 When appointing their Representatives to the AICHR, Member States shall give due consideration to gender equality, integrity and competence in the field of human rights.

5.4 Member States should consult, if required by their respective internal processes, with appropriate stakeholders in the appointment of their Representatives to the AICHR.

TERM OF OFFICE

5.5 Each Representative serves a term of three years and may be consecutively re-appointed for only one more term.

5.6 Notwithstanding paragraph 5.5, the appointing Government may decide, at its discretion, to replace its Representative.

RESPONSIBILITY

5.7 Each Representative, in the discharge of his or her duties, shall act impartially in accordance with the ASEAN Charter and this TOR.

5.8 Representatives shall have the obligation to attend AICHR meetings. If a Representative is unable to attend a meeting due to exceptional circumstances, the Government concerned shall formally notify the Chair of the AICHR of the appointment of a temporary representative with a full mandate to represent the Member State concerned.

CHAIR OF THE AICHR

5.9 The Chair of the AICHR shall be the Representative of the Member State holding the Chairmanship of ASEAN.

5.10 The Chair of the AICHR shall exercise his or her role in accordance with this TOR, which shall include:

- a) Leading in the preparation of reports of the AICHR and presenting such reports to the ASEAN Foreign Ministers Meeting;
- b) Coordinating with the AICHR's Representatives in between meetings of the AICHR and with the relevant ASEAN bodies;
- c) Representing the AICHR at regional and international events pertaining to the promotion and protection of human rights as entrusted by the AICHR; and
- d) Undertaking other specific functions entrusted by the AICHR in accordance with this TOR.

IMMUNITIES AND PRIVILEGES

5.11 In accordance with Article 19 of the ASEAN Charter, Representatives participating in official activities of the AICHR shall enjoy such immunities and privileges as are necessary for the exercise of their functions.

6. MODALITIES DECISION-MAKING

6.1 Decision-making in the AICHR shall be based on consultation and consensus in accordance with Article 20 of the ASEAN Charter.

NUMBER OF MEETINGS

6.2 The AICHR shall convene two regular meetings per year. Each meeting shall normally be not more than five days.

6.3 Regular meetings of the AICHR shall be held alternately at the ASEAN Secretariat and the Member State holding the Chair of ASEAN.

6.4 As and when appropriate, the AICHR may hold additional meetings at the ASEAN Secretariat or at a venue to be agreed upon by the Representatives.

6.5 When necessary, the ASEAN Foreign Ministers may instruct the AICHR to meet.

LINE OF REPORTING

6.6 The AICHR shall submit an annual report and other appropriate reports to the ASEAN Foreign Ministers Meeting for its consideration.

PUBLIC INFORMATION

6.7 The AICHR shall keep the public periodically informed of its work and activities through appropriate public information materials produced by the AICHR.

RELATIONSHIP WITH OTHER HUMAN RIGHTS BODIES WITHIN ASEAN

6.8 The AICHR is the overarching human rights institution in ASEAN with overall responsibility for the promotion and protection of human rights in ASEAN.

6.9 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.

7. ROLE OF THE SECRETARY-GENERAL AND ASEAN SECRETARIAT

7.1 The Secretary-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.

7.2 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, second their officials to the ASEAN Secretariat.

8. WORK PLAN AND FUNDING

8.1 The AICHR shall prepare and submit a Work Plan of programmes and activities with indicative budget for a cycle of five years to be approved by the ASEAN Foreign Ministers Meeting, upon the recommendation of the Committee of Permanent Representatives to ASEAN.

8.2 The AICHR shall also prepare and submit an annual budget to support high priority programmes and activities, which shall be approved by the ASEAN Foreign Ministers Meeting, upon the recommendation of the Committee of Permanent Representatives to ASEAN.

8.3 The annual budget shall be funded on equal sharing basis by ASEAN Member States.

8.4 The AICHR may also receive resources from any ASEAN Member States for specific extra-budgetary programmes from the Work Plan.

8.5 The AICHR shall also establish an endowment fund, which consists of voluntary contributions from ASEAN Member States and other sources.

8.6. Funding and other resources from non-ASEAN Member States shall be solely for human rights promotion, capacity building and education.

8.7 All funds used by the AICHR shall be managed and disbursed in conformity with the general financial rules of ASEAN.

8.8 Secretarial support for the AICHR shall be funded by the ASEAN Secretariat's annual operational budget.

9. GENERAL AND FINAL PROVISIONS

9.1. This TOR shall come into force upon the approval of the ASEAN Foreign Ministers Meeting.

AMENDMENTS

9.2. Any Member State may submit a formal request for an amendment of this TOR.

9.3. The request for amendment shall be considered by the Committee of Permanent Representatives to ASEAN in consultation with the AICHR, and presented to the ASEAN Foreign Ministers Meeting for approval.

9.4. Such amendments shall enter into force upon the approval of the ASEAN Foreign Ministers Meeting.

9.5. Such amendments shall not prejudice the rights and obligations arising from or based on this TOR before or up to the date of such amendments.

REVIEW

9.6. This TOR shall be initially reviewed five years after its entry into force. This review and subsequent reviews shall be undertaken by the ASEAN Foreign Ministers Meeting, with a view to further enhancing the promotion and protection of human rights within ASEAN.

9.7. In this connection, the AICHR shall assess its work and submit recommendations for the consideration of the ASEAN Foreign Ministers Meeting on future efforts that could be undertaken in the promotion and protection of human rights within ASEAN consistent with the principles and purposes of the ASEAN Charter and this TOR.

INTERPRETATION

9.8. Any difference concerning the interpretation of this TOR which cannot be resolved shall be referred to the ASEAN Foreign Ministers Meeting for a decision.”

(Source: This section is directly taken from the ASEAN Intergovernmental Commission on Human Rights’ Website – *About: Terms of Reference of ASEAN Intergovernmental Commission on Human Rights*: aichr.org/?dl_name=TOR-of-AICHR.pdf)