



**THE IMPACT OF ASSOCIATION OF SOUTHEAST
ASIAN NATIONS (ASEAN) NON-INTERFERENCE
PRINCIPLE TOWARDS THE IMPLEMENTATION
OF ASEAN INTERGOVERNMENTAL COMMISSION
ON HUMAN RIGHTS (AICHR) IN ENFORCING
HUMAN RIGHTS: A STUDY ON ROHINGYA
HUMANITARIAN CRISIS**

By

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PANEL OF EXAMINER

APPROVAL SHEET

The Panel of Examiners declare that the thesis **“The Impact of Association of Southeast Asian Nations (ASEAN) Non-interference Principle towards The Implementation of ASEAN Intergovernmental Commission on Human Rights (AICHR) in Enforcing Human Rights: A Study on Rohingya Humanitarian Crisis”** that was submitted by Ulfah Nabilah Hasna majoring in International Relations from the Faculty of Humanities was assessed and approved to have passed the Oral Examinations on February 6th, 2018.

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Cikarang, Indonesia, January 25th 2018

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DECLARATION OF ORIGINALITY

I declare that this thesis, entitled “**The Impact of Association of Southeast Asian Nations (ASEAN) Non-interference Principle towards The Implementation of ASEAN Intergovernmental Commission on Human Rights (AICHR) in Enforcing Human Rights: A Study on Rohingya Humanitarian Crisis**” is, to the best of my knowledge and belief, an original piece of work that has not been submitted, either in whole or in part, to another university to obtain a degree.

Cikarang, Indonesia, January 25th 2018

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ABSTRACT

Title: The Impact of Association of Southeast Asian Nations (ASEAN) Non-interference Principle towards The Implementation of ASEAN Intergovernmental Commission on Human Rights (AICHR) in Enforcing Human Rights: A Study on Rohingya Humanitarian Crisis

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The Rohingya issue is a very prominent human rights issue at the moment. The Government of Myanmar has been accused of systematic human rights abuses against Rohingyas. The impact of the conflict was also felt by neighboring countries, due to the large-scale exodus of Rohingya refugees. Although the Burmese government denies allegations of genocide and ethnic cleansing, the facts on the ground and the stories brought by Rohingya refugees to the camp say otherwise. Criticism from the international communities flows towards the Myanmar government as well as ASEAN as a regional organization that overshadowed Myanmar. ASEAN is considered ignorant of the human rights issue that is happening in front of its door. The role of AICHR as a promoter and protector of human rights for the people of ASEAN is constrained by various limitations in carrying out its mandate. The non-interference principle adopted by ASEAN does not support regional conflict resolution; instead, it facilitates ASEAN members to act as if they 'see no evil, hear no evil' to cases of human rights violations against Rohingyas. Different responses and statements from ASEAN members on Rohingyas case also complicate ASEAN in determining its next step. By using qualitative analysis method, this research is aimed to know the impact of the principle of non-interference on the implementation of AICHR in enforcing human rights particularly in Rohingya case. The results of this study are expected to provide a clear picture of the non-interference principle relations to human rights enforcement especially in Southeast Asia.

Keywords: Rohingya Conflict, Non-Interference Principle, AICHR, Human Rights Enforcement

ABSTRAK

Judul: Dampak Prinsip Non-interferensi Perhimpunan Bangsa-Bangsa Asia Tenggara (ASEAN) terhadap Implementasi Penegakan HAM oleh Komisi Penegakan HAM ASEAN (AICHR): Studi Kasus Konflik Rohingya

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Isu Rohingya merupakan isu HAM yang paling menonjol saat ini. Pemerintah Myanmar dituduh telah melakukan pelanggaran HAM secara sistematis terhadap Rohingya. Dampak dari konflik tersebut turut dirasakan oleh negara-negara tetangga, karena terjadinya eksodus pengungsi Rohingya skala besar. Meskipun pemerintah Myanmar mengingkari tuduhan genosida dan ethnic cleansing, namun fakta di lapangan serta cerita-cerita yang dibawa oleh pengungsi Rohingya berkata lain. Kritik dari kalangan internasional deras mengalir terhadap pemerintah Myanmar juga ASEAN sebagai organisasi regional yang menaungi Myanmar. ASEAN dianggap abai terhadap permasalahan HAM yang sedang terjadi di depan pintunya. Peran AICHR sebagai promotor dan pelindung HAM bagi masyarakat ASEAN terbentur berbagai keterbatasan dalam melaksanakan mandatnya. Prinsip non-interferensi yang selama ini dianut oleh ASEAN tidak mendukung penyelesaian konflik secara regional, dan seolah memberikan kesempatan untuk anggota ASEAN menutup mata dan telinga terhadap kasus pelanggaran HAM terhadap rohingya. Perbedaan pendapat serta respon dari anggota ASEAN mengenai kasus Rohingya juga mempersulit ASEAN dalam menentukan langkah selanjutnya. Dengan menggunakan metode analisis kualitatif, penelitian ini ditujukan untuk mengetahui dampak dari dianutnya prinsip non-interferensi terhadap implementasi penegakan HAM oleh AICHR dalam menghadapi kasus Rohingya. Hasil penelitian diharapkan dapat memberikan gambaran jelas mengenai hubungan prinsip non-interferensi terhadap penegakan HAM khususnya di kawasan Asia Tenggara.

Kata kunci: Konflik Rohingya, Prinsip Non-interferensi, AICHR, Penegakan HAM

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LIST OF ABBREVIATIONS

ACHPR	African Commission for Human and People’s Rights
AICHR	ASEAN Intergovernmental Commission on Human Rights
AMMTC	ASEAN Ministerial Meeting on Transnational Crime Concerning Irregular Movement of Persons
ARSA	Arakan Rohingya Salvation Army
ASEAN	Association of Southeast Asian Nations
AU	African Union
BBC	British Broadcasting Corporation
CNN	Cable News Network
ECHR	European Court of Human Rights
EU	European Union
HRW	Human Right Watch
IACHR	Inter-American Commission on Human Rights
ICC	International Criminal Court
IO	International Organization
NSA	National Security Advisor
R2P	Responsibility to Protect
RtoP	Responsibility to Protect
SLORC	State Law and Order Restoration Council
SOP	Standard Operating Procedure
SPDLC	State Peace and Development Council
TOR	Terms of Reference
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

CHAPTER I

INTRODUCTION

I.1 Background of the study

Nowadays, Rohingya conflict has been a very prominent humanitarian crisis. Since the conflict erupted, it has gained great attention of the international community. The intense media coverage on this issue helps to widespread the news of catastrophe that is happening to Rohingya. As the result, The Government of Myanmar is being attacked by criticism regarding its ‘violent’ approach in treating the prolonged conflict (CNN, 2017). The United Nations (2017) claimed that what is happening towards Rohingya is a textbook example of ‘ethnic cleansing’. The Muslim identity that Rohingya mostly carry also play a significant part in making this issue flared. Moreover, the silence of Myanmar de facto leader, Aung San Suu Kyi—who ironically is a Nobel Peace Prize laureate—seems to worsen the situation and is tearing Myanmar reputation apart.

The issue of Rohingya—who always identified as ‘Bengali’ by the people of Myanmar— has been going on for centuries. The problem is very complex and entrenched. In addition to the absence of citizenship, Rohingya also involved in horizontal conflicts with the Arakanese, the majority ethnic in Rakhine State. The conflict culminated after the rapes and murders between the two ethnic groups in 2012 (Human Rights Watch, 2017). However, apart from ethnicity and religion issues, the conflict is also rooted in the problem of social and economy (Lichtfuss, 2016).

In fact, various ethnic conflicts have been persisted in Myanmar since its independence in 1948 (Jolliffe, 2014). As a country that just underway a process of democratic reforms, there are still a lot of homework for the government to do. The transition process within the Burmese government has not been fully

implemented (Wilson, 2016). The winner of the 2015 election, Aung San Suu Kyi, cannot carry out significant reforms because the military role in government remains strong (Tarabay, 2017). The military is still a part of parliament and has a veto—a very special privilege to veto any government policies that are deemed incompatible with the policy of "the real controller" of state security (Tarabay, 2017).

As a civil government leader, Aung San Suu Kyi does not yet have a competent instrument of security apparatus as in other democratic countries (Sumardi, 2017). It is the military which holds real power in Rakhine state as it is in charge of internal security. The repressive approach by the national army criticized as not in accordance with human right standards and the SOP of Conflict Handling for a democratize country (Sumardi, 2017). The conflict enlarged after the violent act allegedly performed by Myanmar national army exposed to the world.

The Rohingya conflicts in 2017 happened after series of interconnected events from 2012 (Human Rights Watch, 2017). After the Rakhine riots in 2012, in the midst of poverty and impuissance, a small group of people formed an insurgent group named the Arakan Rohingya Salvation Army (ARSA) and started to made radical moves by conducting series of attacks to the security apparatus by the end of 2016.

On October 2016, ARSA attacked police posts and killed several policemen; not so long after, the security forces responded the attacks (Human Rights Watch, 2017). The armed contact killed dozens of officers. After this incident, Myanmar military initiated a 'clearance operation' to maintain conduciveness (Human Rights Watch, 2017). This operation resulted in a high number of casualties from the Rohingya side; as the military attacked several villages that were allegedly used as a shield by radical groups (Sumardi, 2017). There are indications of human rights violations by the security apparatus of Myanmar during the military operation (UN, 2017). As the result of this conflict, once again after 2012, Rohingya massive refugee exodus occurs.

The incident in early October 2016 expelled and the Government of Myanmar took a stand to create a fact-finding team and set up an Advisory Committee led by Kofi Annan (CNN, 2017). The UN has separately paid attention to this issue and has established a fact-finding team. The government, however, did not welcome the team to enter Myanmar (The Guardian, 2017). Furthermore, the results of the UN fact finding team investigation were firmly rejected (CNN, 2017).

The rejection of the UN team's results by the government of Myanmar on the advice of the National Security Advisor (NSA) was agreed and followed by the attitude of Military Commander Min Aung Hlaing as well as by other community groups, including the religious groups (Sumardi, 2017). In fact, they support to deny Rohingya citizenship; even though Kofi Annan committee suggests to grants the Rohingya Burmese citizenship in order to reduce the conflict (UN, 2017).

As the debate over 'proper solution' rolls, the number of casualties and refugees rapidly grow. In the past four weeks after the conflict erupted, more than 430,000 Rohingya have arrived in Bangladesh's Cox's Bazar district (CNN, 2017), fleeing a military offensive inside Myanmar. Satellite data accessed by a rights body showed widespread fires burning in at least 10 areas in Myanmar's Rakhine state.

Figure I.1 Burned down villages as shown by satellite



Source: Human Rights Watch, 2017

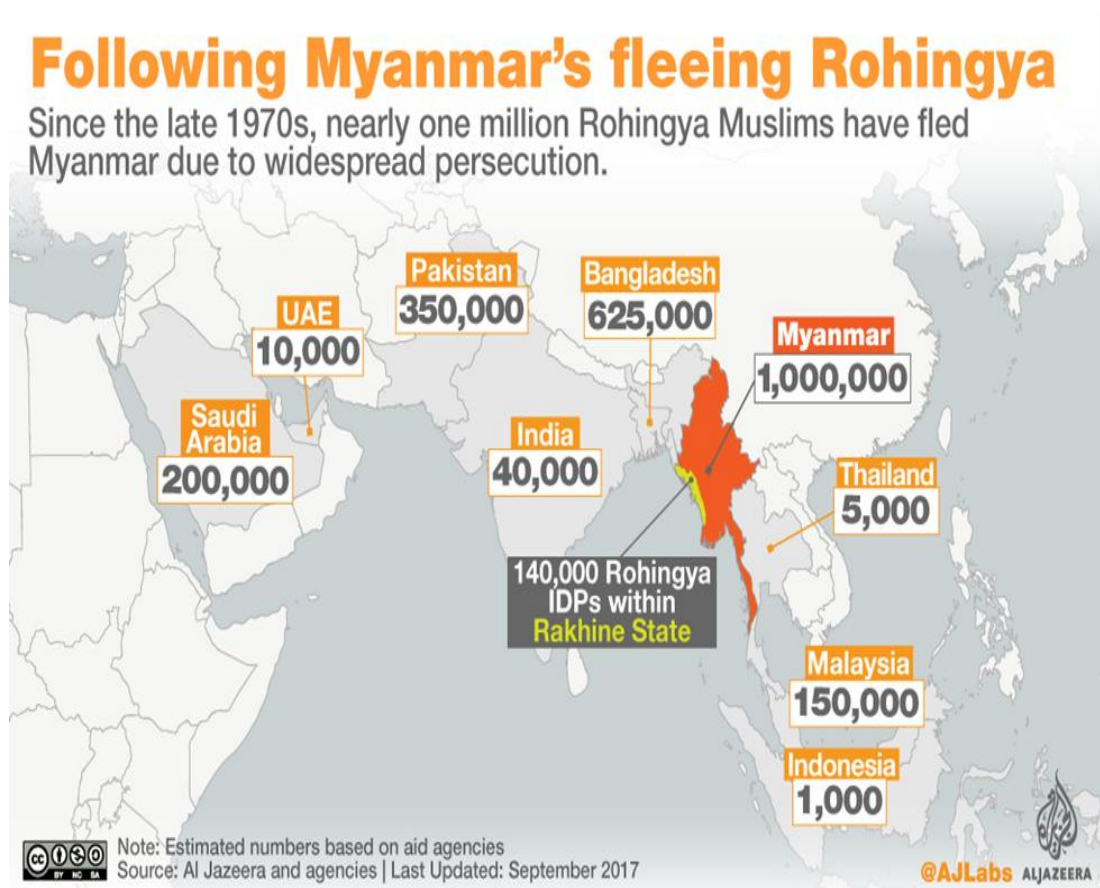
The United Nations High Commissioner for Refugees said that the exodus of Rohingya Muslims from Myanmar to Bangladesh is "the most urgent refugee emergency in the world" right now (HRW, 2017). The current exodus is unfolding much more swiftly. Although the rate has recently started to slow, on average, 120,000 people have crossed the border per week (Aljazeera, 2017). Aid agencies say they are overwhelmed and cannot provide enough basic needs such as food, water or shelter (CNN, 2017). Other refugee crises have involved a larger total number of refugees, but have stretched out over longer periods, sometimes lasting years, so the flow has been less intense than the exodus from Myanmar (Aljazeera, 2017). Henceforth, the international community must step up financial and material aid to help the refugees.

A UN report found human rights violations, including crimes against humanity against Rohingya by security forces. The global body documented mass gang rapes, killings—including of infants and children—brutal beatings and

disappearances (UN, 2017). Furthermore, the government of Myanmar has continually failed to adequately or effectively investigate abuses against the Rohingya, and did not act on recommendations to seek UN assistance for an investigation into the violence (HRW, 2017). As the result, The UN considers Rohingya one of the world's most persecuted, friendless minorities.

The oppression of the Rohingya can no longer be described as solely a domestic problem for Myanmar. Other countries in an otherwise stable region are becoming embroiled in the crisis; indeed, countries such as Bangladesh, Thailand, Indonesia and Malaysia are increasingly feeling the spillover effects, as Rohingya seek asylum within their borders.

Figure I.2 Following Myanmar's fleeing Rohingya



Source: Aljazeera, 2017

ASEAN has been criticized for addressing the Rohingya issue too cautiously, failing to recognize that the ongoing conflict could split the bloc along ethno-religious lines (Khasru, 2017). The region's population is 60 percent Muslim, 18 percent Buddhist and 17 percent Christian; the continued discrimination towards Rohingya has gained strong attention from Muslims within the region, flaring people's anger towards Myanmar atrocities. Series of rally have been done to protest and condemn Myanmar (BBC, 2017). This situation indeed encouraged the movement of Islamic extremist, particularly in Muslim majority country such as Indonesia and Malaysia.

Despite soaring criticism, the Rohingya crisis did not make its way to the 30th ASEAN Summit's official agenda. On April 26, leaders of the Association of Southeast Asian Nations (ASEAN) convened for the 30th ASEAN Summit, where they discussed "an integrated, peaceful, stable, and resilient ASEAN Community." Only one day prior to this summit, Reuters (2017) released a report documenting military operations by the government of Myanmar that killed hundreds of Rohingya and caused some 75,000 of them to flee to Bangladesh in November 2016.

ASEAN nations could help the situation in Myanmar by stepping in with preventive diplomacy (Subedi, 2017) – action taken to prevent disputes, conflicts and violence to address a problem that has both local and regional consequences. However, the non-interference principle that stated in ASEAN Charter 1976 lead the members to take a conservative approach (Subedi, 2017). ASEAN members remain divided on whether the Rohingya issue should be approached from a preventative diplomacy standpoint.

The "ASEAN Way", whereby member states adhere to non-interference principle, contributed the bloc well on the economic aspect in its first decades of existence. But as international criticism rises, it is now obvious that "see no evil, hear no evil" strategy in addressing such internal issues is far from effective.

Some ASEAN countries, such as Malaysia and Indonesia have started revolting from the principle of non-interference to comment on the Rohingya issue. At the recent ASEAN foreign ministers' meeting in Yangon, Malaysia called for the coordination of humanitarian aid and an investigation into alleged violence committed against Rohingya (CNN, 2017). Malaysian Foreign Minister Anifah Aman said that the situation of Rohingya Muslims was now “of a regional concern and should be resolved together.” Following the meeting, Myanmar showed willingness to grant humanitarian access and to keep the ASEAN members informed (CNN, 2017).

It is time for ASEAN to notice this call, shifting its mode of operation, so that mature democracies such as Singapore and Malaysia — which rank high in human-development indices — can become responsible global leaders, and expand their humanitarian problem-solving capacities. ASEAN needs to grow into a strong and politically liable community. To do that, it must find peaceful yet effective ways to alleviate what is now a regional humanitarian crisis.

The existence of The ASEAN Intergovernmental Commission on Human Rights (AICHR) as a regional human rights commission in addressing such issue is barely visible. Its mandates to promote and protect human rights within the region cannot be effectively achieved due to many limitations it encounters. In addition to AICHR unclear mechanism, the “ASEAN way” which consists of principle of no-ninterference also weakens the human rights body. Before the establishment of AICHR, human rights marked as sensitive issues that rarely reach ASEAN discussion panels (Sumule, 2016). However, even though the establishment of AICHR marked as one of the region significant accomplishment, it should also be noted that in practice, AICHR is deemed as toothless human rights body.

A change in perspective in other ASEAN members also needed, many of which see the issue as largely a national security issue, rather than a regional problem. With different views from each member, cracks appear in ASEAN over Rohingya crisis. However, if the Rohingya issue is not recognized as a

humanitarian crisis resulting from state-sponsored violence and social injustice, ASEAN members cannot approach the Myanmar government to address the rights violations it has prosecuted against the Rohingya.

I.2 Statement of Problem

The world cannot afford to ignore the Rohingya crisis no more. More or less, it has affected the international community. Thousands of Rohingya are seeking asylum outside the country, accelerated the influx of Rohingya refugees to the neighboring countries in just a month after the conflict erupted. Miserable stories about continuous rape, murder, hunger, discrimination, that the Rohingya bring to the camps spread by the media, inflame the world's anger towards Myanmar leaders. Myanmar government accused for its repressive approach in addressing the conflict, yet the leader, Aung San Suu Kyi seems to do nothing than 'political speech' to ease the chaos. This raise questions from international world regarding the capability of the Nobel peace laureate to actually promote peace in the country. Some ASEAN countries, such as Indonesia and Malaysia started to voice their opinion and carry out a real action regarding the conflict. However, the remaining 8 members of ASEAN seem to stick on conservative approach in addressing the issue. This situation raise dilemma inside the community. The non-interference principle that strongly adhered by ASEAN hampers the AICHR to actually take real and significant actions towards Rohingya conflicts. It is unable to optimally implement its mandates as given in its Term of References (ToR), which is the protection of human rights within the region. Moreover, each of members have different perspective in regards the issue, majority of them view the Rohingya conflict as a domestic affairs of Myanmar, that should be solve by Myanmar alone. However, the spillover effects of the conflict have raised another argument that as a humanitarian crisis, Rohingya conflict should be the concern of not only Myanmar, but all the member states of ASEAN.

I.3 Research Question

How did the non-interference principle of ASEAN impact the implementation of AICHR in enforcing human rights within ASEAN, particularly in the case of Rohingya conflict (2012-2017)?

I.4 Objective of Research

The objective of this research is to analyze the challenges that ASEAN non-interference principle brings towards the enforcement of human rights by AICHR in case of Rohingya conflict.

I.5 Significance of Research

This research will help to understand the dilemma between ASEAN non-interference principle and the enforcement of human rights within Southeast Asia region by AICHR, particularly in the case of Rohingya.

I.6 Scope and Limitation of the Study

This research will mainly focus on the impact of ASEAN non-interference principle towards the implementation of AICHR mandates as a promoter and protector of human rights in Southeast Asia. The case that will be analyzed is the prolonged Rohingya conflict. In order to make this research significant, the author will limit the case timeline and focus on AICHR response from the Rakhine riots in 2012 until the recent conflict that erupted in late 2016 till 2017.

I.7 Literature Review

In his article, Subedi (2017) stated that Rohingya issue is a local problem with regional consequences. It has greatly impacted the stability across the border of Myanmar and its neighboring country. Just like a cancer cell that contaminates the healthy cells, the long-term conflict triggers another conflict to happen not only in Myanmar, but also in another area. The violence in Rakhine state has begun to radicalize some sectors of Rohingya population, emerging links between Rohingya insurgent group and Middle East extremist (Subedi, 2017). Indeed, it

raises a potential threat to the national security of Myanmar. However, the statement cannot justify the state-sponsored violence and undermined peaceful solutions to the flared humanitarian crisis. Considering the severity of this conflict, the Rohingya humanitarian crisis should be a major human rights concern for ASEAN and international communities (Subedi, 2017).

In order to end the long-hold conflict, the state-sponsored violence must end, accompanied by respect to human rights, which seem to have deprived from Rohingya for decades. Most importantly, the Rohingya need legal acknowledgement by the Myanmar government in order to get public facilities and services. It is undeniable that all this time, the absence of Rohingya citizenship is fueling the run of Rohingya 'cycle of misery'. Furthermore, the need of government openness to International aid is also necessary, as they are unable to independently handle the problems caused by the conflicts (Subedi, 2017). In short, to resolve the geopolitical problem in long-term, changes in Myanmar policy, accompanied by the provision of social injustice, is essentially needed.

Furthermore, Subedi (2017) stated that support from Burmese military is necessary to end this conflict. Ever since the country's recent democratic transition, the military still holds great power in the country. The role and influence of military is decisive. If the military are willing to change its repressive approach to a more 'democratic' approach, the number of unnecessary casualties may decrease. However for now, Subedi (2017) argue that Burmese military seem to prefer using force over political solution. This strategy reflects the collective failure of hardline security policies for resolving the crisis (Subedi, 2017).

There are several significant actions that ASEAN can do to help resolving the issue. Firstly, regional support will require the countries to change its attitude and be ready to engage on the issue that the government has until now considered as an internal matter. Even though the ASEAN Charter underscores respect for sovereignty and territorial integrity, and non-interference in the internal affairs of

member states, the grouping has recently started to work on regional humanitarian issues, security promotion, conflict prevention and preventive diplomacy, as stated by the author (Subedi, 2017).

Secondly, Subedi (2017) argued that a change on ASEAN member perspective to view this issue as no longer a ‘national security issue’ is certainly necessary. In order to address the rights violations that Myanmar government has waged against Rohingya, Rohingya plight should be considered as a humanitarian crisis resulted from state-sponsored violence and social injustice.

Subedi (2017) suggests ASEAN to help the situation by stepping in with preventive diplomacy— action taken to prevent disputes, conflicts and violence to address a problem that has both local and regional consequences. Indonesia and Malaysia have started to breaking from the non-interference principle by directly comment on the issue. However, majority of the group tend to move on conservative approach. Considering the severity of the impacts of this conflict, it is inappropriate for ASEAN to remain its ‘silence’. ASEAN must move forward with preventive diplomacy; pushing the Myanmar government to stop political violence in Rakhine state while emphasizing local solutions that might finally allow the Rohingya to call Myanmar ‘home’.

In another journal, Tobing (2015) stated that ASEAN has always failed to deal with conflict occurring within the sovereign territory of its member states. The government of Myanmar accused of doing human rights abuses towards the Rohingya (Tobing, 2015). In the past, ASEAN members also have experienced several human rights violation cases, however, what differentiate Rohingya case from the other is the statelessness of this ethnic minority. The government still considers them as an outsider even though they have been living in the country for decades. Furthermore, the denial of Rohingya citizenship deprived any rights that they could achieve, even if it is only for basic rights. Due to inability, unwillingness and negligence of Myanmar government to take a proper solution, the issue perceived to exist and enlarged, compelling ASEAN to intervene (Tobing, 2015).

The ASEAN has its own mechanism in handling conflict—the so called “ASEAN Way”, which consists of 4 pillars; informality, non-interference, consultation and consensus building (Guan, 2004). The idea of non-interference and consensus building often be the topic that discussed the most by academics (Tobing, 2015). The non-interference principle prohibits foreign intervention in the domestic affairs of a sovereign country, and the consensus building tends to lead to the failure of a joint communique between ASEAN members (Tobing, 2015). An example case is the failure to produce a joint communique after discussing about South China Sea in 2012 (Tobing, 2015).

The principle upheld by the organization is perceived by the international community as an “emergency exit” for turning a blind eye on member states’ human rights abuses (Webb, 2015). The ASEAN has been criticized for using the nonintervention principle as a way to justify their silence in regards of Rohingya plight. Not even once the Rohingya issue reaches the ASEAN high level meeting. As a result of this principle, ASEAN Intergovernmental Commission on Human Rights (AICHR) hardly made significant progress on Myanmar issue. The adherence to this idea is indeed limiting ASEAN space and crippling its moral responsibility to adopt a significant measure in response to Myanmar crimes against humanity (Tobing, 2015).

The traditional approach of consensus-building also seen as the weakness of ASEAN that prevent them to have a resolution in regards of Rohingya (Tobing, 2015). Consensus-building is often very hard to reach when the emerging problem to be discussed involves one of the member states’ sovereignty. The ASEAN members are aware of the situation in Myanmar, but often, despite the urgency to address a problem, they are prevented from taking action by ASEAN’s rule by consensus.

Even before the establishment of AICHR, the mechanism of consensus-building and non-interference predicted to paralyze and weaken the regional human rights body (Tobing, 2015), thus prevent them to seriously address the human rights abuses that exist within the region (Amnesty International, n.d). As

the result, The AICHR remains a normative body with little significant action. It cannot act in accordance with its mandate to promote and protect human rights and ensure fundamental freedoms of the peoples of ASEAN (Tobing, 2015).

In his article, Tobing (2015) brings the concept of global norm of Responsibility to Protect which emphasize the well-being of people. It argues that sovereignty is not absolute, therefore permit the international community to take over the responsibility to protect human security, if the conflicted state fails to do so. The Responsibility to Protect was endorsed by the United Nations General Assembly in 2005 and reaffirmed by the UN Security Council in 2006, through Resolution 1674. Thereafter it has become an international norm applied by the international community as the working language for dealing with situations that involve humanitarian crisis.

Judging from the long-held Rohingya conflict in Myanmar, this concept seems tempting to be applied. However, then again, ASEAN member states tend to apply ASEAN norms to refuse any regional or international intervention in human rights issues (Nugroho, 2013).

With ASEAN moving towards greater integration of member states, the question raised is 'to what extent non-interference principles shall be maintained'. Article 50 of the ASEAN Charter which states: "This Charter may be reviewed five years after its entry into force or as otherwise determined by the ASEAN Summit.", supported the idea of ASEAN reform. It is imperative for ASEAN to take a huge step of change to maintain the regional community legitimacy and security (Tobing, 2015).

The third journal by Arendshorst (2009) stated that Myanmar has been accused for long track record of abysmal human right violations since its independence. The repressive approach of military junta in ruling the country has gained Myanmar criticism from International communities. It is apparent that the military has maintained its strong influence on all aspects of Myanmar society and politics. During the reign of SLORC (the State Law and Order Restoration

Council) and SPDLC (the State Peace and Development Council), horrific and extensive human rights abuse compiled.

“Violations committed by the armed forces, primarily against ethnic minorities, have included extrajudicial and arbitrary killings, rape, torture, arbitrary arrests for political reasons, forced labor, forced conscription into the military, denial of freedom of movement, and tight restrictions on press, religion, speech, and assembly” (UNHCR, 1988).

The deteriorating human rights abuse is not intended to isolate the act of individuals, but stems from policies set by the highest levels of the government. (Special Rapporteur, 1998). Therefore, according to Arendshorst (2009) in order to change the situation in Myanmar, reform of the government should firstly be done.

Myanmar also claimed to use a “four cut” strategy in order to quell insurgency (Genocide Intervention Network, 2009). Such strategy—which aim to cutting off foods, funds, intelligence and recruits to the insurgents— leads to severe violations of economic, social and cultural rights of affected people. Thus, it has emerged a prolonged poverty within the society, where people are incapable to develop themselves due to the atrocities performed by their own government. Furthermore, Myanmar has committed violations of numerous international treaties that it has ratified or accessed, created a perception of Myanmar as rogue nation (Arendshorst, 2009).

Despite the severe human rights abuse that perpetrated by Myanmar government, the ASEAN refuse to address this decades-long exodus (Mathienson 2009). Though, the problem creates destabilizing effects that threaten the peace, security, and prosperity of all of Southeast Asia country. However, the mechanism of non-interference that ASEAN uphold impedes the nations to give an assertive action towards the issue. Therefore, ASEAN has manifested itself to a ‘constructive engagement’, which aims to gradually change the human rights situation of Myanmar through cooperation between ASEAN and Myanmar on a variety of issues. However, the effectiveness of such approach remains questionable (Arendshorst, 2009).

The establishment of ASEAN Charter as a firm foundation to provide ASEAN legal status and institutional framework is big step to create a more integrated and committed ASEAN. Yet, concerns lingered about whether its focus on human rights was sufficiently comprehensive (Williamson, 2009). The ASEAN Intergovernmental Commission on Human Rights (AICHR) as a regional human rights institution intended to promote and protect the rights of the peoples of ASEAN, however, its Terms of Reference (ToR) did not mention the enforcement power or ability to address country-specific human rights crises. In fact, one of the AICHR's guiding principles is a continuation of ASEAN's long-standing respect for non-interference in the internal affairs of ASEAN member states. This has rose the quotation of AICHR being "toothless," "outrageous," and having "little value" (Wall, 2009), as it is incapable to truly address the human rights violations that is happening in front of its eyes.

There are several options for ASEAN to address the human rights violations in Myanmar as suggested by Arendshorst (2009). First, it can stays on its comfort zone by maintaining the constructive engagement with Myanmar. As ASEAN has always been reluctant to interfering each other members, this method will be the most 'suitable' as it is virtually frictionless. However, the disadvantages of continuing the constructive engagement approach are significant. For the Charter to be anything more than an empty promise to the rest of the world.

Secondly, the ASEAN could modify the AICHR by establishing a human rights court which will overcome the historical weakness of constructive engagement. Such a court would provide a neutral forum to interpret the human rights standards defined in the Charter, investigate alleged abuses, and litigate charges of violations, Similar to the European Court of Human Rights (ECHR), the Inter-American Commission on Human Rights (IACHR), and the African Commission for Human and People's Rights (ACHPR). If agreed upon, an ASEAN human rights court would have the capability to firmly and definitively address the situation in Myanmar (Arendshorst, 2009).

Thirdly, the ASEAN members could impose economic or political sanction towards Myanmar. This is the fastest and most efficient way if they would like to assertively show their concern in regards the issue. The sanction, however, will not be permanently implemented and depend on the Myanmar government response. Such sanction would prove to the world that ASEAN is a powerful, modern regional organization and still allow flexibility in the future. Although eliminating the unwritten policy of non-interference may be uncomfortable for the members of ASEAN, turning a blind eye to Myanmar by maintaining “constructive engagement” is no longer an option (Arendshorst, 2009).

The forth journal by Kaewjullakarn (2015) emphasize that the impact of the Burma Citizenship Law of 1982 and the Rohingya plight was not only limited to the national sphere. Firstly, the term “stateless person” under Article 1(1) of the 1954 Convention relating to the Status of Stateless Person (the UN Convention 1954) refers to “a person who is not considered as a national by any state under the operation of its law”.(UNHCR, 1954) .This definition binds Myanmar as it recognized as customary International law. (UNHCR, 2014) In the Rohingya situation, it is clear that the Rohingya are de jure stateless. Secondly, the massacre of Rohingya amounts to a crime against humanity, in which the international law would consider as an ethnic cleansing campaign (Human Right Watch, 2016). According to the Rome Statute of the International Criminal Court (ICC) Article 7, a crime against humanity includes murder, torture and persecution committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of said attack. In this case, it should be noted that Myanmar is not a party to the ICC, but the Rome Statute is considered to reflect customary international law. For these reasons, those groups who commit violence against the Rohingya in Myanmar may be responsible under the ICC (ICC, 1998).

If it is clear that the Rohingya are not considered as a Burmese nationality, then, can we consider Rohingya as people of ASEAN? The ASEAN Charter mentions ‘peoples of ASEAN’ in a number of provisions, but it is unclear on the

specific terminology (ASEAN Charter, 2007). The Preamble of the ASEAN Charter, which refers to “the peoples of the member states of the ASEAN”, hints that to be considered an ASEAN person; one must be a national in one of the ASEAN member states. Hence, even though the Rohingya has been living in an ASEAN member state for generations, the group are not entitled to be, nor can they claim to be ASEAN peoples,. However, this does not mean that they are not protected under the ASEAN regime. Human rights protection has always been essential to the ASEAN community, for it is one of the reasons ASEAN was formed in the first place (ASEAN Charter, 2007).

One of the purposes of the Association of Southeast Asian Nations (ASEAN) is to promote and protect human rights. For years, ASEAN has developed and adopted number of human rights instruments and other organs responsible for human rights protection. The ASEAN Human Rights Declaration (AHRD) clearly mentions that the protection of human rights is applicable to every person, meaning every individual regardless of their nationality. Accordingly, the Rohingya should have their human rights protected under ASEAN law.

However, there are drawbacks in protecting human rights under ASEAN law. The first is the adherence to principle of non-interference as enshrined in the ASEAN Charter, and the second is the functioning of the AICHR. The principle of non-interference also mentioned and recognized in the UN charter as customary international law (United Nations, 1945), however, there is an exception to this principle, as stated in Chapter VII of the UN Charter, concerning actions associated with threats to the peace, breaches of the peace and act of aggression. Yet, nothing similar is found in the ASEAN Charter. Furthermore, this principle of non-interference without any doubt leads to states disregarding human rights violations at the domestic level in other member state territories, and this is particularly the case with the Rohingya in Myanmar.

The lack of an independent judicial institution is one of the main obstacles to the development of human rights in ASEAN, in contrast to Europe, which has

the European Court of Human Rights. As stated in Article 1.4 and Article 1.6 of its Term of Reference (TOR), The ASEAN Intergovernmental Commission on Human Rights (AICHR) main mandate is to promote human rights, rather than to protect it. Moreover, under Article 6.1 of the TOR, decision-making under AICHR should be based on consultation and consensus. As the result, The AICHR unable to cope with disputes among ASEAN Countries effectively. Therefore, Kaewjullakarn (2015) suggests to establish a Southeast Asian Court of Human Rights (SEACHR). However, the SEACHR need to be setting up in different treaty and outside ASEAN scope as the ASEAN charter contains principles that may weaken a legal mechanism and productive court.

The ASEAN could take an example from the Africa Union (AU) and its Constitutive Act, which respect sovereignty but allow intervention in respect of crimes against humanity (Constitutive Act of AU). Decisions within the AU on interventions can be initiated either by member states or by the Assembly. Member states are entitled to request intervention subject to a decision of the Assembly. The Assembly's decision is by consensus or, failing that, based on a two-thirds majority among member states eligible to vote.

If the Rohingya case were under the auspices of the AU, the result would have almost certainly been different by now, for based on the right of intervention the AU would have been able to take action; as the Rohingya case undoubtedly meets the AU criteria on crimes against humanity.

The foundation to legally conduct a humanitarian intervention in another state is one of the most debated issues in international law, due to the principle of the sovereign equality of states. In 2000, the UN Secretary-General Kofi Annan pointed out that:

“.. if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica-to gross and systematic violations of human rights that affect very precept of our common humanity?”

This statement implies that humanitarian intervention is acceptable in order to protect gross violations of human rights. The Responsibility to Protect Principle (RtoP) which binds sovereign states, can be applied when the legitimate goal of a state intervention is to protect individuals' human rights. The RtoP includes a concept about the responsibility of other states to react against a state that fails to protect its population.

The RtoP is consist of two basic principles. The first one is that state sovereignty implies responsibility, and as a consequence, the primary responsibility for protection of the people in a state lies with the state itself. The other principle is that if people are suffering from serious harm as a result of civil war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect (Kioka, 2015).

In the Rohingya case, the RtoP obliges the international community to protect this ethnic Muslim group from all crimes, including ethnic cleansing. According to the International Coalition for the Responsibility to Protect (ICRtoP), there are several measures that exist to address this problem; for example, 23 General Assembly resolutions since 1991, the Security Council's resolution 1612 in 2005, and 22 Human Rights Council resolutions. (RtoP, 2015)

Kaewjullakarn (2015) view the adherence to RtoP principles as the best solution, because ASEAN member states could not object to this principle at the international level. Regionally, adherence to the RtoP principle is supported by the UN, and this UN support might help implement the principle within ASEAN, without the need to amend the ASEAN Charter. As an intergovernmental commission on human rights, AICHR's activities under the TOR should be in line with the RtoP principle. Also, the AICHR could play a role in promoting the RtoP among member states.

Ibrahim and Nordin (2015) in their writing stated that under the principle of R2P, the government of Myanmar and the international community has the responsibility to protect the Rohingya who are on the edge of genocide, ethnic

cleansing and crimes against humanity. The R2P, which emerged due to the alleged failure of the world community to respond accordingly to humanitarian crisis and civil conflicts in 1990s, underlying premise that sovereignty entails a responsibility to protect all populations from mass atrocity crimes and human rights violations (United Nations, 2012).

The R2P was unanimously endorsed by 191 Head of States in the World Summit 2005 (United Nations, 2005). In The World Summit Outcome Document 2005, paragraph 138 states that individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity, and the international community should encourage and help States to exercise this responsibility. Paragraph 139 underlines the international community's responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the UN Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. Should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from the four specific crimes of mass atrocities, the international communities are prepared to take collective action through the Security Council (SC) in a timely and decisive manner. R2P also includes responsibility to prevent, in situation where it is not bravely conscience shocking but has the possibility of reaching it and responsibility to rebuild the society damaged by the mass atrocities (ICISS Report, 2001).

Although R2P is received with mixed feelings, it does not mean that the principle itself is wrong. This article argues that despite the critics, in reality, R2P is still relevant that it has been affirmed in various General Assembly and the Security Council's resolutions. It was adopted by the consensus of UN members in one of its largest gathering of Head of States in history, the World Summit 2005

The World Summit 2005 Outcome Document implies that UN action is privileged over unilateralism and peaceful means are privileged over violent

means. An individual State or any regional or sub regional mechanism must explore all avenues through the UN before acting unilaterally. R2P emphasizes on the important role of the UN partners, the regional arrangements. UN must not act alone and should move with regional organization (ASEAN) and the private actors within the UN system. It must be a tri-partite action involving the government of Myanmar, ASEAN and UN.

According to the principle of R2P, the government of Myanmar carries the primary responsibility to provide security to each and everyone in the country, and disregard their creed, ethnicity or religion. Despite the government's stern policy denying the Rohingya with the right of citizenship, they are living within territorial jurisdiction of Myanmar, thus entitles them for protection from mass atrocities. The government must uphold the rule of law and hold accountable those who incite and complicit in the violence, identify the precursors of mass killing and prevent it from ever occurring. The most pivotal step is for the government to review some provisions in the Citizenship Act 1982, which are discriminatory against the Rohingya and contrary to the standard of international human rights law. The government must embrace the multi-ethnic character of the country.

Smith deliberates the advantages of the working of regional mechanism as it involves fewer States, thus the political consensus is easier to be achieved. Besides, States in the same region are relatively close with respect to tradition and culture (Smith, 2012). ASEAN is in the perfect position to act critically on Myanmar; however, it has so far failed to take a strong political stand in the Rohingya crisis. The application of R2P in the case of Rohingya has not been seriously considered by ASEAN member states. The doctrine of non-intervention in domestic affairs is the practical consequences of the principle of State sovereignty and it is considered by Keling et al. (2011) as the original core foundation that shapes the regional relations between the ASEAN member-states.

Myanmar has continuously undermined ASEAN's credibility and competency as a dynamic regional body, and unless ASEAN acknowledges its

responsibility, Myanmar will continue to drag down its ability to work for regional security and prosperity. ASEAN must draw international attention to the issue of Rohingya and strongly condemn the rampant violations of human rights committed by the police, army, security forces, monks and the laymen. It is very important for the ASEAN members to draw a boundary that where there are violations of human rights, the ‘non-interference in other’s ‘domestic affairs’ should not remain.

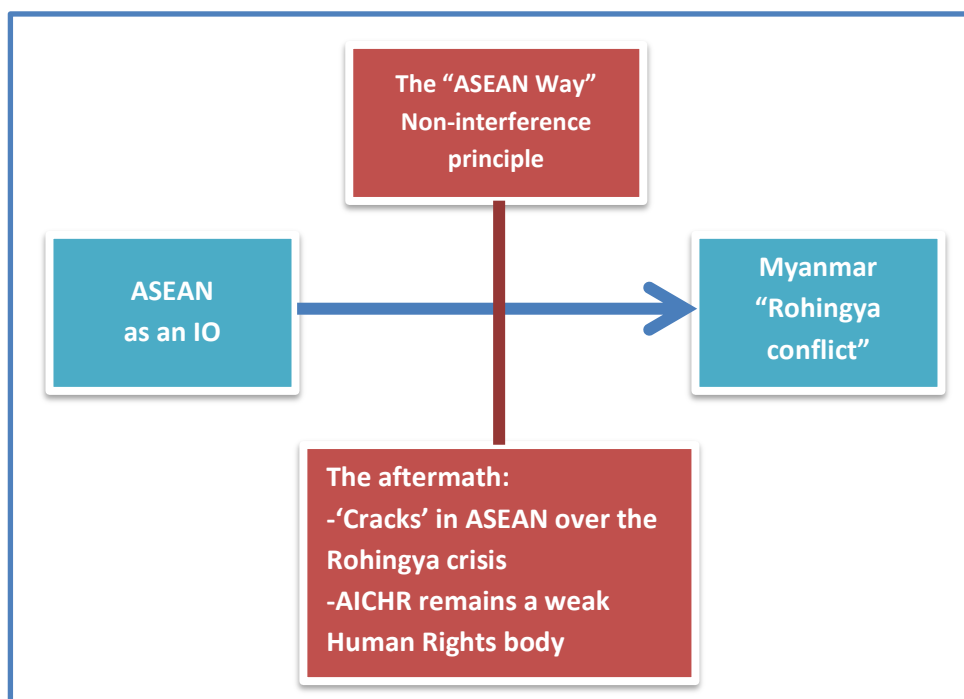
ASEAN already has mechanisms promoting the protection of human rights which should be effectively utilized to promote R2P. Rather than expressing concern and appeal for the government of Myanmar to take necessary measures to handle the conflict, ASEAN must take one bold step forward, i.e., to bring the issue to the UN General Assembly. Reference to R2P made at international level will increase pressure on the government to become more responsive to international concern. At the same time, ASEAN members must discuss the issue openly at ASEAN forum since the effect of Rohingya issue has spilled out to other neighboring countries, which is a strong indication that the case is not merely an internal affairs.

It is crucial that there must be partnership between UN and ASEAN human right machinery to work with the government to build-up the State capacity and provide humanitarian assistance. Nordin Sopiee reminded ASEAN to be idealistic; “we have to be idealistic to live in this imperfect world. ASEAN and United Nations are all we’ve got. We must make the best of them” (Khoo, 1992). In conflict prevention, UN and ASEAN must find avenue to open up opportunities for interfaith and inter communal dialogues. The most critical and challenging task is to promote tolerance and respect in this most ethnically diverse country. Elimination of prejudice and nurturing respects to each other is an arduous work that requires long-term commitment. ASEAN and UN must collaborate with the NGOs and private institutions within Myanmar to build state capacity, manage resentments among the public and establish the rule of law.

I.8 Theoretical Framework

In forming analysis to answer the research question, the author will use the theory of Institutional Liberalism in International Relations, as it will emphasize the vital role of International Organization (IO) in handling conflicts (in this case ASEAN with its AICHR). To support the author analysis, the concept of International Organization (IO) will also be discussed. Furthermore, the concepts Human Rights will also be essential in this writing.

Figure I.3 The research framework



I.8.1 Institutional Liberalism

Liberals believe that international institutions have a significant role in cooperation among states. (Shirayev and Zubok, 2014 p86). States have the opportunity to reduce conflict with the proper international institutions and increasing interdependence (Shirayev and Zubok, 2014 p88). Liberals also argue that in order to support nonviolent solutions to problem, international diplomacy can be a very effective way (Shirayev and Zubok, 2014 p90). With the proper

institutions and diplomacy, Liberals believe that states can cooperate together to maximize welfare and minimize conflict. (Shirayev et al, 2014).

Internationalism and institutionalism have developed as key concepts in the Liberal school of international relations theory (Bull and Watson, 1984). By the second half of the 20th century, it had become the dominant challenge to realist analysis of international affairs (Bull and Watson, 1984).

Internationalism focuses to the role of international organizations and international society in world affairs. According to Hedley Bull, International society exists when ‘a group of states, aware of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions.’ (Bulmer, 1993 p351). The idea of cooperation between states for common goals and interests underlies the formation of International society.

In order for there to be peace in international affairs, Liberal institutionalism claims that states must cooperate together. Thus yield some of their sovereignty to create ‘integrated communities’ to promote economic development and respond to regional and international security issues (Caporaso et al, 1999 p429).

1.8.2 International Organization

The international organizations and international regimes that are based on rules, norms and principles help govern the interaction of state and non-state actors on issues such as human rights (Devitt, 2011). What makes it more compelling is that, the institutionalism argument allows for non-state actors and those that would be marginalized by the modernist project to be brought back into world affairs (Devitt, 2011).

The development of norms and principles such as the Responsibility to Protect (RtoP) and humanitarian intervention question the validity and sanctity of state sovereignty whilst advocacy networks and domestic politics have a major

impact on how states act on the world stage (Thakur and Weiss, 2009 p22). These developments suggest that the role international organizations hold in international relations is transforming and becoming more significant.

International Organization (IO) allows states to build technical cooperation in the areas that are vital to the modern societies and economies, which further challenge the way international relations work (Barkin, 2006 p5). In his book, *International Organizations, Theories and Institutions*, Barkin argues that to build an effective partnership, IO encourages dialogue and communication. However, despite its limitations, at some points IO could challenge states sovereignty as it tend to contribute more on international level rather than on domestic level. Therefore, as ASEAN belong to the realm of international organizations, this theory will be essential in forming further the arguments regarding the non-interference principle.

I.8.3 Human Rights

The other key concept that will be discussed in this topic is Human Rights, particularly from liberals view. Liberals see human rights as its fundamental part of its structure. They declare that human rights are given to people on account of their “humanity” instead of membership of narrower categories such as state, nation or class (Douzinas, 2014). This idea will be useful in forming the analysis of the human rights violations and protection in Rohingya, as Rohingya have been suffering from human rights deprivation since they are considered as an outsider by the government of Myanmar.

Human rights are universal and inherent to all human being (Weston, 2014). They establish that all human beings, irrespective of country, culture and context, are born free and equal in dignity and rights (United Nations, 2014). The doctrine of human rights has been highly influential within international law, global and regional institutions (United Nations, 2014). According to United Nations, one of the aims of human rights instruments is the protection of those vulnerable to violations of their fundamental human rights. There are particular groups who, for various reasons, are weak and vulnerable or have traditionally

been victims of violations and consequently require special protection for the equal and effective enjoyment of their human rights.

There are three different conceptions that underlie the contemporary practice of human rights (Karp, 2015 p137). The first conception has come out of international-level work on the right to food in the 1980s, and has crystallized in the form of the trichotomy of the respect–protect–fulfill (Eide et al., 1984; Shue, 1996 p52–53; Koch, 2005; Donnelly, 2008 p124; Pogge, 2011 p5–6). The trichotomy defines the responsibility to protect human rights in terms of a duty, which usually falls on states, to stop third parties from depriving individuals of access to the objects of their human rights. The paradigm of this first conception is the protection of government towards harmful things from non-state actors in domestic context (Karp, 2015).

The second conception is coming out of the International Committee on Intervention and State Sovereignty in the 1990s, and becoming further developed in the 2000s in the form of the ‘Responsibility to Protect’ policy doctrine (ICISS, 2001). It defines the responsibility to protect human rights in terms of a cosmopolitan and specifically international duty of all states to all of the people in the world. This duty is thought to exist irrespective of a Westphalian understanding of sovereignty according to which a state’s responsibility stops at its own borders. The paradigm of this second conception is intervention, usually taking a military form, by some states in the affairs of others, when civilians are being subjected to atrocities at the hands of their own governments. These two conceptions are very different. The first focuses on a very broad range of human rights and views states at the domestic level as the main protectors of insiders. The second, by contrast, focuses on mass atrocities only, and views the responsibility to protect as importantly international in the sense that it falls on outside states.

A third conception of the meaning of the duty to protect human rights rejects the mass atrocity focus of the RtoP, and views the duty to protect as a fundamental rather than derivative kind of responsibility for human rights (Karp,

2015). It is most directly associated with the systemization and institutionalization of the conditions of human rights, rather than with an agent's reaction to 'violations' of other (non-'protection') human-rights-based duties (Karp, 2015).

For this research, the author will focus on the Responsibility to Protect conception, considering the fact that human rights violations in Rohingya allegedly is the result of state-sponsored atrocity. Furthermore, as the variable on 'non-interference' will be highly essential to be discussed to, the author suggests that R2P will be the most suitable concept in this writing.

I.9 Research Methodology

The qualitative method will be the best to form this research. The process will be a library research, which include analyzing the historical records, literature and documents available regarding the issue. The process of collecting data will require a substantial and critical process of prioritizing what to include and what to exclude. The author will further use secondary source e.g. journals of the topic to consider how experts view this case. It will be extremely useful to compare theories and analytical observations of different scholars.

This research will use descriptive and analytical approach in order to answer the research question. The purpose of descriptive method is to provide facts and information, e.g. summary of article, report or book. While by being analytical means that the author will further analyze and evaluate the existing reliable materials to provide a grounded argument.

This research use several sources to get data : (1) Internet, (2) Reports – Report from any official entity such as the government and International Organization (ASEAN, UN, etc.) and (3) Publications – Fact sheet, news, press release, journal, books.

I.10 Thesis Structure

This thesis is structured as follows:

Chapter 1 provides the background of the study, statement of problem, research question, objective of research, significance of research, scope and limitation, literature review, theoretical frameworks and research methodology. This chapter is aimed to give a glimpse of the main discussion of this research to the reader.

Chapter II provides the complete information regarding the Rohingya plight, including its history, the actors, the progress of the conflict, also providing facts that happen during the long-lasting conflict. It will describe the reason why this conflict remains unresolved until now.

Chapter III analyzes the ASEAN non-interference principle dilemma in regards the Rohingya plight. It aims to explain further to the root of ASEAN non-intervention principle, and provide arguments in regards to what extend this principle should be adhered. This section also sets it focus on different perspective of ASEAN members regarding the Rohingya plight.

Chapter IV analyzes the role of AICHR as human rights body in ASEAN. It will also analyze the impact of ASEAN non-interference principle towards the enforcement of human rights by AICHR in the region, particularly in the case of Rohingya conflict. The 'Responsibility to Protect' doctrine will also be discussed in this chapter.

Finally, Chapter V will conclude the author' findings in a concise manner.

CHAPTER II

ROHINGYA CONFLICT: WHY IT EMERGES AND LASTS

Tensions between the Buddhists and Bengali-speaking Muslims in Rakhine state have existed for decades, but the most significant turning point came in 1982 when Burma's junta passed a law that identified eight ethnicities entitled to citizenship. The Government of Myanmar considers the Rohingya people as "illegal immigrants" whose origins are unclear. Since then, the Rohingya have been living in systemic misery. Their lives were at stake; roughly, their option is to leave, or to stay and die.

However, is it true that the Rohingya are 'Illegal immigrants' in Rakhine? In this section the author would like to explain the history of Rohingya and the causes of the long lasting conflicts.

II.1 The History of Rohingya

According to historical records, the Muslim community has inhabited the Arakan region (the ancient name of Rakhine) since the reign of a Buddhist king named Naramekhla or Min Saw Mun (1430-1434) in the Mrauk U kingdom (Yunus, 1994). After being exiled for 24 years in the Bengal Sultanate, Naramekhla gained the throne in Arakan with the help of the Sultan of Bengal at that time (Yunus, 1994). Then he took the Bengali people to live in Arakan and to help administer his kingdom. Therefore, it was the first Muslim community formed in the region.

At that time the Mrauk U kingdom was a subordinate kingdom of the sultanate of Bengal (Tin, 1905 p25), so the King of Naramekhla and his royal officials used their title in Arabic. As their currency, they used Bengal coins inscribed with Arabic Persian script on one side and Burmese characters on the other. After they gained independence from the Bengal sultanate, the

Narameikhla descendants continued to use the Arabic title and regarded themselves as sultans and dressed to emulate the Mughal sultan (Yunus, 1994). They continue to employ Muslims in the palace. Although they were Buddhists, the Muslim customs of Bengal remain in use.

In the seventeenth century the Muslim population increased because they were employed in various areas. The Kamein ethnic, one of the Muslims ethnic in Rakhine who is recognized by the current government of Myanmar, is a descendant of Muslims who migrated to Arakan at this time. However this harmony did not last long. In 1785 the kingdom of Burma from the south attacked and captured Arakan; they applied a policy of discrimination by expelling and executing the Arakan Muslims (Yunus, 1994). In 1799 as many as 35,000 people from Arakan fled to the Chittagong area of Bengal—which was then occupied by British—to seek for asylum (Yunus, 1994).

The Arakan people call themselves Rooinga (the native of Arakan), which is then spelled into Rohingya today (Yunus, 1994). In addition, the Burmese royal official at that time also transferred large numbers of Arakan population to the central Burma area, thus making the population of Arakan territory very little when the British colonialized it.

In 1826, the Arakan region was occupied by the British colonial after war of Anglo-Burmese I (1824-1826). The British government implemented a policy of moving farmers from adjacent areas to the abandoned Arakan, including previously displaced Rohingya and native Bengalis from Chittagong (Yunus, 1994). At that time the Arakan territory was included in the administrative area of Bengal so that there was no international boundary between the two areas and the migration of the population in both areas was easy (Yunus, 1994).

In the early nineteenth century, the wave of immigration from Bengal to Arakan increased as it was driven by the need for a cheaper wage of workers imported from India to Burma. Over time, the population of migrants outnumbered indigenous peoples so often cause ethnic tensions.

II.1.1 Not a political product

In ancient times, Rakhine State was known as Rohang. Meanwhile, the people who inhabit the land are called "Rooinga" or "Rohingya". Thus, Rohingya is an ethnic group that emerges through a long historical event. They were not the political prologue that suddenly emerged when Britain stuck its power in Arakan and Burma between 1824-1948.

Scottish researcher Francis Buchanan says the Mohammedans (literally 'followers of Muhammad' or Muslims) have long settled in Arakan. The men call themselves Rooinga which means the native indigenous Arakanese (Buchanan, 1799). Meanwhile, the census conducted by the British colonial government in Burma in 1826, 1872, 1911, and 1941 also mentions, the Rohingya community identified as Arakan Muslims is one of the original breeds in Burma.

According to the documentation of International SIL (a world language institute which has a special consultative status with the UN), Rohingya Myanmar is included in the Indo-Aryan dialect family. This language is registered with the "rhg" code in the ISO 639-3 table. Although the dialects spoken by the Rohingyas differ from those of Burmese in Rakhine today, the facts of history prove that Rohingyas have similarities to the language of ancient Vesali society (between 327-818).

In addition, the results of the Oxford University study throughout 1935-1942 concluded that Rohingya culture is as old as the Ananda Sandra Stone Monument that was founded in Arakan in the eighth century. All of the above notes may illustrate that the Rohingyas have a strong historical roots as one of the original indigenous races of Rakhine.

Thus, regardless of whether Rohingya is an ethnic or not, and whether it belongs to Myanmar's ethnicity or not, It is clear that Rohingya is a migrant community from Bangladesh that has lived for hundreds of years in Arakan, Rakhine, Myanmar.

II.1.2 Immigration Issues

In 1939 the ethnic conflict in Arakan mounted so that the British government established a special commission that investigated the immigration issue in Arakan, but before the commission could realize its work, the British had to leave the Arakan at the end of World War II (Yunus, 1994). During World War II the Japanese attacked Burma and expelled Britain from Arakan which came to be known as Rakhine (Yunus, 1994).

In the days of power vacuum at the time, the violence between the Buddhist Rakhine and the Muslim Rohingya increased. In addition, the Rohingya were armed by the British to assist the Allies to defend the Arakan region from the Japanese occupation (Yunus, 1994). This was eventually discovered by the Japanese government which later carried out torture, murder and rape of the Rohingya (Yunus, 1994). During this time, tens of thousands of Rohingya fled from Arakan to Bengal. The protracted violence also forced thousands of Burmese, Indians and Britons to flee from Arakan during this period (Yunus, 1994). The British, however, reoccupied Burma in 1945 and the Rohingya were again allowed to settle back into Rakhine, although in virulent circumstances (Ibrahim, 2015).

II.2. Government of Myanmar on the Rohingya

The praise of the international community on Myanmar's reform should be thoroughly scrutinized. Apparently, the reform in the country that was previously called Burma does not significantly affect the condition of minorities such as ethnic Rohingya. This minority Muslim group remains a victim of discrimination and extortion in Myanmar. The discrimination against Muslims is evident by the rejection of President Thein Sein's government over its ethnic status. Until now, The Burmese government has yet to recognize Rohingya as its citizen.

Myanmar Foreign Minister Wunna Maung Lwi in a press conference attended by UN Special Rapporteur Tomas Ojea Quintana said, the Burmese government applied maximum measures to stop ethnic violence in Rakhine; the

infighting of Rakhine between the Rohingyas and the ethnic or indigenous tribes of Myanmar. Lwi denied allegations that the security forces were torturing and arresting Rohingya Muslim refugees. Instead, they claimed such action as attempt to defuse violence and conflict in the Rakhine region.

However, The Myanmar policy was assessed by human rights activists as ethnic cleansing (Amnesty International, 2012). There were evidences of acts of violence, murder and rape, by Myanmar's security forces against Rohingya Muslims in the Rakhine state of the Bangladesh-Myanmar border.

Rohingya ethnic issues often become the focus of international media; ranging from the massive refugees exodus to Bangladesh to the brutal murder and torture allegedly performed by the military. As they are considered as stateless, the Rohingya people are particularly vulnerable to discrimination and extortion. Moreover, the anti-Muslim sentiment in Myanmar has been going on for centuries. The physical and cultural differences become prominent issues within society, as the Rohingya are indeed much likely to resemble the Bengali people with their dark skin tone.

During World War II, the Rohingyas were loyal to the British who promised them a Muslim country on their own. That is why the Rohingyas are regarded as enemies of General Aung San, Aung San Suu Kyi's father (Lintner, 1994 p34). The Panglong Conference 1947, a meeting on the eve of independence between Burmese nationalist hero Aung San and representatives of several of the largest minority groups in Burma, namely the Chin, Shan, and Kachin, generated The 1947 Panglong Agreement as its outcome. These groups agreed in principle to the formation of the Union of Burma, which became the first post-colonial government. However, other ethnic groups, most prominently the Karen and Rohingya, did not participate in this conference. The Karen began their civil war against the central government in 1949, the year after Burma attained independence. The Rohingyas were not recognized by the Panglong agreement and, even to this day, are not seen as a legitimate minority group by the government.

A systematic Rohingya genocide began in earnest from 1962, as General Ne Win came to power through a military coup. The Rohingyas were denied the right to vote and lost their status as citizens. That was when the exodus of Rohingyas to Bangladesh started. An estimated 207,172 refugees sought shelter in Bangladesh in 1978 (Ibrahim, 2015).

In March 2014, the Myanmar government banned the word ‘Rohingya’ and insisted that the Muslim community register as ‘Bengali’ (Ibrahim, 2015). The Constitution of Myanmar states that any ethnic group that has lived within Burmese territory before 1823 are natives. It is questionable, then, for Rohingyas to not be included in this definition.

Myanmar's former president, Thein Sein threw a controversial remark to displace Rohingya Muslims as a solution to the ethnic and religious conflict in the country. According to the presidential office’s statement, Thein Sein also said the government was prepared to hand over the Rohingyas to the UNHCR and then resettle the ethnic group in any third country “that are willing to take them”.

Until now, the Rohingyas have no valid identity card. They cannot buy land or houses and their place of residence can be taken over at any time. Aung San Suu Kyi remains a disappointing response on this topic while communal hatred spurs on in Rakhine. In one of the most obvious instances of genocide in recent history, the government of Myanmar has decided to turn a blind eye to the fate of its people.

II.3 Root causes of conflict

In order to clarify the root causes of the conflict, the author sort out the root of the conflict into three parts as below.

II.3.1 Systemic cause

Firstly, the cause of conflict can be explained by the weakness of state authority, both in domestic and foreign affairs, to prevent the occurrence of ethnic conflicts. According to RJ May (2005 p152), weak countries with weak

legitimacy (especially characterized by Corruption, Nepotism and mismanagement) are vulnerable to internal conflicts.

The 680,000 km² country has been ruled by the military government since the 1988 coup. Following the coup, there was a big wave of protests against the junta's government; calling for a transition to democracy and an end to military rule (Fogarty, 2008). This wave of demonstrations ended in violent acts by soldiers against demonstrators. More than 3000 people were killed (BBC, 2008).

In the 1990 election, pro-democracy party leader Aung San Suu Kyi won 82 percent of the vote but the election result was not recognized by the ruling military regime (Central Intelligence Agency, 2012).

The political turmoil continued with a large protest wave of Buddhist monks in 2007. The protests were spearheaded by Buddhist monks in Myanmar. At first the monks rejected the food donations of the ruling generals and their families, to symbolize their refusal to the conduct of Myanmar's military rulers. Demonstration also triggered by rising fuel prices several hundred percent due to the removal of subsidies (BBC, 2008). The demo involving thousands of monks then erupted in various cities in Myanmar, eventually, the civilians also followed the demonstration.

The Military Junta government took violent action in dissolving these big demos; Pagoda-pagoda sealed, protesters detained, and violence used to disperse the masses (BBC, 2008). Many monks were arrested, some believed to be tortured and died. Throughout a wave of protests dozens of people are believed to be victims, including a Japanese reporter, Kenji Nagai, who was shot by soldiers from close range while covering the demonstrations.

The protests also strongly related to the conflicts between ethnics in Myanmar. Ethnic Burma, originally from Tibet, is the majority ethnic group in Myanmar. Burma, however, is a group that came later in Myanmar, which was already inhabited by Shan ethnic (Siamese in Thai). Ethnic Shan generally occupies territory along the Thai-Myanmar border. Before ethnic Burma came,

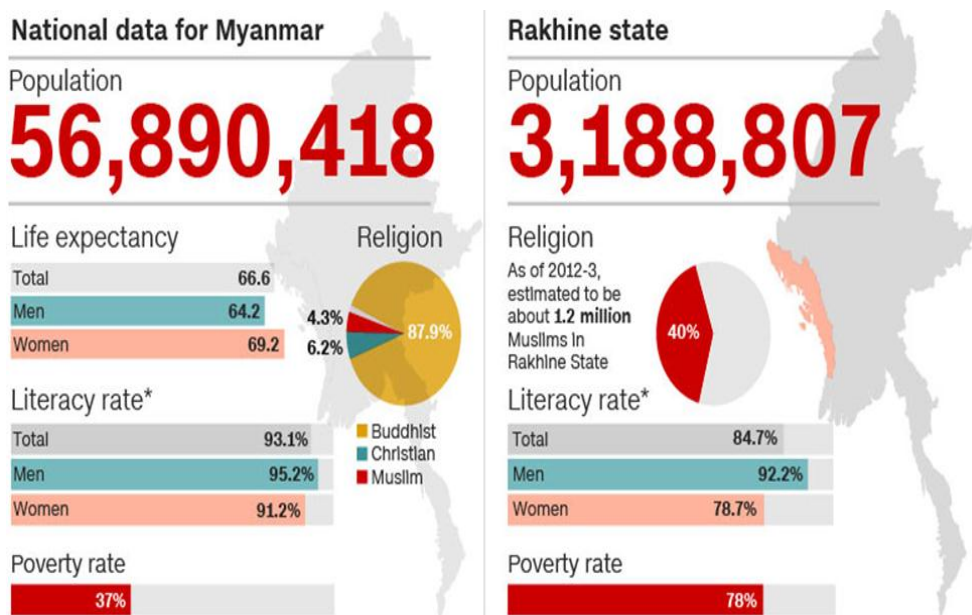
besides ethnic Shan, there was already ethnic Mon, who inhabits the south, also near the border with Thailand. As is the case in many countries, among the three main ethnic groups in Myanmar there were wars. One another succeeded in becoming a ruler in an area called Burma, now known as Myanmar.

The weakness of existing authorities thus unable to guarantee the safety of individuals within the group. "... in a system where there is no ruler," Brown (1998) writes, "that is, where anarchy prevails, all groups must provide their own self-defense ...". Every group is restless from the attack and threats from other groups.

II.3.2 Domestic level causes

According to Brown, this domestic level is related to the ability of the government to fulfill the will of its people, the influence of nationalism and the relations between ethnic groups in society, and the influence of the democratization process in the context of relations among ethnic groups (Brown, 1998 p.85).

Figure II.1 Percentage of population over 15 years of age can read and write.



Source : CIA World Factbook, World Bank, November 2014, United Nation Population Fund 2014, Harvard University Kennedy School, UN Population Fund 2014

The majority, about 53 million, Myanmar's population is Buddhist, and the rest are Christian (2.9 million), Muslims (2.27 million), and about 300,000 are Hindus (The 2014 Myanmar Population and Housing Census, 2016). However, Rohingya Muslims are repeatedly abused during Burmese history. Observers consider the killings to have been systematic and institutionalized throughout Burma's history.

The Rohingyas themselves composed of various ethnicities; Indians, Bangladesh, Chinese, Arabs, Persians and Burmese (Yunus, 1994). The never-ending persecution towards this minority group has claimed many lives. According to historical records, the Rohingyas suffered since 1978; that was when 300,000 Rohingyas were forced to flee their country to Bangladesh with uncertain fate for years. From 1991 to 1992, the next wave of exodus took place. Not only to Bangladesh, exodus waves spread to other ASEAN countries. The UN itself calls Rohingya Muslims one of the most persecuted minorities in the world (UN, 2017).

The most obvious discrimination is the refusal of Myanmar government to recognize the Rohingya citizenship and classifies them as illegal immigrants, even though they have lived in the country for generations. Out of 135 recognized ethnics in Myanmar, Rohingya did not make it way to enter the list.

In addition, the relations between Rohingya ethnic and its neighbor, Rakhine ethnic has always been in bad tension. From the geographical side, the Rakhine state divided into two parts, the north and west. The north part lived by a group of about a million Muslims Rohingya as minority, meanwhile the west part lived by the majority Buddhist Rakhine. Despite the religious and historical factor, conflict involving these two ethnic groups also cannot be separated from economic and political factors.

Contrast with the existence of its rich natural resources, the poverty rate in Rakhine state is high. The people of Rakhine feels culturally discriminated, also economically exploited and politically dismantled by the central government, which dominated by Burmese ethnic groups. In this special context, Rohingyas

are regarded by the Rakhine people as additional rivals and threats to their own identity. This could be said as the main cause of tensions, which has resulted in a number of armed conflicts between the two groups.

II.3.3 Perception Level Cause

The other cause is an inaccurate historical understanding of the relationship between two or more ethnic groups. (Brown, p.90) The history they believe in usually is not the result of research that has a methodical and objective basis, but from rumors, gossips, and legends that usually passed from one generation to another. The stories then become part of the customs. With the passage of time, these stories are further away from reality, and more and more parts are exaggerated. These stories will then create different perceptions of one ethnic to another.

What is seen in the international eye as a human rights issue is seen in Myanmar as a national sovereignty, and there is widespread support for military operations in northern Rakhine.

Most Burmese view international media coverage is too biased toward Rohingya, and do not adequately cover the suffering of non-Rohingyas in Rakhine who escaped violence in their village (BBC, 2017). However, media access in the affected areas of Rakhine is very limited, foreign journalists cannot freely cover the situation in the conflict areas to verify their stories.

Meanwhile, the local media focus on 'terrorist attacks' and on the evacuation of non-Rohingyas who were also excluded due to the conflict. A headline in Myawaddy Daily reads: "The Bengali terrorist ARSA will attack big cities". The other, on the Eleven news website, is similar: "The Bengali terrorist ARSA extremists attacked the security forces in the small town of Maungdaw".

Reports indicate that it was militant groups who burned villages, not soldiers, and did not mention the number of Rohingya asylum seekers who fled to Bangladesh (BBC, 2017). The use of the word 'terrorist' is imposed by the Myanmar Information Committee, which warns media to obey them. The

situation worsened by the widespread hoax or false news and pictures in social media regarding the issue.

Hostilities against the Rohingyas are nothing new in Myanmar, but born out of long-standing prejudices against the minority. Nationalists blow a rumor that Rohingyas are a threat, partly because Muslim men have the right to have four wives and many children (BBC, 2017). Anti-Muslim sentiment in Myanmar has also been going on for centuries. Physically and culturally, they are indeed more like Bengali people rather than the majority of Burmese. Hence, the perception of the Rohingyas as 'illegal immigrant' will continue to cling to the minds of the people of Myanmar. This tension then creates a situation in which a slight misunderstanding could trigger a major conflict.

CHAPTER III

ASEAN ON ROHINGYA: TO INTERVENE OR NOT TO INTERVENE

III.1 The principle of non-interference within ASEAN

The main principles of ASEAN cooperation are equality, without prejudice to the sovereignty of each member country (Adolf, 1990 p99-110). ASEAN member countries remain full sovereignty, while consensus and consultation, common interest, and mutual assistance with the spirit of ASEAN are the hallmark of this cooperation.

Amitav Acharya, a notable observer of ASEAN, has qualified the principle of non-interference as being “the most important principle underpinning ASEAN regionalism.” (Acharya, 2001). However, a gap between rhetoric and reality seem to be exists (Acharya, 2001). ASEAN members have sometimes interfered in the affairs of their regional neighbors or endorsed interference by fellow members or other States, although non-interference is often considered a cherished regional principle. The former ASEAN Secretary-General Rodolfo Severino claimed that “...essentially arising from pragmatic considerations, ASEAN’s practice of non-interference has not been absolute.”(Severino, 2006). This reality raises the question of the nature of the doctrine of non-interference; whether it is merely a political doctrine, *or* it does reflect the *opinio juris* of the ASEAN members.

Moreover, non-interference is not only an ASEAN doctrine; it is also a fundamental principle of international law, better known as the principle of non-intervention (Corthay, 2016). This principle reflects the international customary law and as such is binding upon members of the international community, including ASEAN member states.

The non-interference principle is enshrined in ASEAN's fundamental documents, and particularly in legally binding instruments. For example, the Bangkok Declaration of 1967 states that Southeast Asian countries are "determined to ensure their stability and security from external interference in any form or manifestation." (Bangkok Declaration, 1967). Also, Article 2(c) of the 1976 Treaty of Amity and Cooperation in Southeast Asia provides that "...in their relations with one another, the High Contracting Parties shall be guided by the following fundamental principles: [...] Non-interference in the internal affairs of one another." (Treaty of Amity and Cooperation in Southeast Asia, 1976). In addition, Article 2(2)(e) of the 2007 ASEAN Charter calls upon the Association and its Member States to act in accordance with the principle of "non-interference in the internal affairs of" other Members (ASEAN Charter, 2007). Foreign Ministers and chairmen of ASEAN have also issued official statements on many occasions repeating the importance of the 'principle' of non-interference (Corthay, 2016).

Several distinct explanations are given to explain why the practice and policy of non-interference is so notable for ASEAN States. One reason is related to domestic security concerns. Sources of threat to the national security of the States in the region may come from diversity among the Southeast Asian nations (e.g. race, religion, culture), which combined with the weak State structures and lack of stable regime legitimacy (Corthay, 2016). Therefore, the policy of non-interference aims at preventing the aggravation of domestic conflicts by foreign factors (Acharya, 2001). Former ASEAN Secretary-General Rodolfo Severino explained:

"With such a complex mixture of races, tribes, religions and cultures transcending national boundaries, and the sensitivity of certain aspects of history, Southeast Asian countries are extraordinarily wary of the very possibility of interference by neighbours in one's internal affairs, and the possible use, deliberate or inadvertent, of the explosive amalgam of race, religion and culture in their interaction with their neighbours and in their internal politics. Indeed, one of the reasons why Southeast Asian states value ASEAN is precisely the mutual commitment of its members to non-interference, which, to some extent, assures them that the incendiary elements of race, religion and culture will not be used in the disputes

between them and that no country will seek to promote its own value system to influence those of its neighbours. It is a mutual commitment that contributes a significant measure of stability to the relations among the Southeast Asian states and thus to that of the region as a whole, considerations that are at the heart of ASEAN's core purposes.” (Severino, 2006)

Severino also stated that the Southeast Asian countries' experience of interference from outside the region, primarily during the colonial and post-colonial era, underlie the non-interference as a central tenet of intra-regional relations. The policy and practice of non-interference has been a way to keep major power rivalries, both during and after the Cold War, out of the ASEAN internal and regional affairs (Wu, 2000).

On the other side, Lee Jones provides a more critical explanation, rather different from the ASEAN official line. Jones argues that when ASEAN was established, non-interference emerged as a 'technology of power' used to sustain domestic orders (social, political and economic) and beat the threat of communist subversion:

“‘Non-interference’ was [...] not a neutral principle designed to further some abstract desire for peace and international stability. It certainly sought to transcend intra-ASEAN conflicts, but this was to permit ruling elites to consolidate their own grip over society and achieve the economic growth necessary to undercut the appeal of communism, within an international context of waning Western guarantees to defend anti-communist regimes from opposition forces within their own societies.” (Jones, 2012)

The reasons mentioned above represent a very broad comprehension of the principle of non-interference for ASEAN member states, disallowing even “public challenges, comments or criticisms of other regimes' legitimacy, domestic systems, conduct, policies, or style.”(Antolik, 1990).

Amitav Acharya emphasizes that from an operational point of view, the ASEAN doctrine of non-interference imposes the following conduct on its members:

1. Refraining from criticizing the actions of a member government towards its own people, including violations of human rights, and from

making the domestic political systems of States and the political styles of governments a basis for deciding their membership in ASEAN;

2. Criticizing the actions of States which were deemed to have breached the non-interference principle;

3. Denying recognition, sanctuary, or other forms of support to any rebel group seeking to destabilize or overthrow the government of a neighboring State;

4. Providing political support and material assistance to member States in their campaign against subversive and destabilising activities. (Acharya, 2001)

Michael Leifer, the doyen of British scholars specializing in ASEAN studies, described non-interference as a ‘cherished principle’ that was broken only twice in ASEAN’s history: once in 1986 when ASEAN called for the peaceful resolution of political unrest in the Philippines, and once in 1997 when ASEAN set entrance conditions for Cambodia following a coup there (Leifer, 1999). Leifer argued that ASEAN’s international prominence was built on its long confrontation of Vietnam following its 1978 invasion of Cambodia, and thus on upholding ‘the sanctity of sovereignty’ (Leifer, 1989). Leifer claimed that that ‘the only “institutional principle” to which ASEAN adheres is that of non-interference’.

There is general agreement that despite some ‘intra-mural challenges’ to the norm, non-interference has been ‘maintained’ with catastrophic results (Haacke, 1999; Ramcharan, 2000; Haacke, 2005). Non-interference is blamed for ‘arresting’ regionalism (Acharya, 2007), by making ASEAN unable to deal with important issues like the military regime in Myanmar, the humanitarian crisis in East Timor, and transnational problems like piracy and environmental degradation (Rahim, 2008; Huxley, 2002). Yet non-interference supposedly remains absolute, despite dreadful warnings that ‘either interference becomes legitimate, or the Association will become increasingly meaningless. The ASEAN Way ends here’ (Moller, 1998). Thus, the continuing capacity of non-interference principle to bind the conduct of ASEAN member is still believed, even by the

scholars who profoundly disagree with the norm and call for its revision. (James, 2009).

III.2 ASEAN regional response on the issue of Rohingya

For ASEAN member countries, the original non-intervention principle has two normative objectives. First, it became a balancing mechanism between the Western Bloc and the Eastern Bloc in the Cold War (Dosch, 2012). Second, as a guarantee of security, sovereignty, and freedom in dealing with neighboring countries (Keling et al. 2011).

However, in its development, the principle of non-intervention transform so rigidly and thus sabotages the collective efforts of human rights enforcement in ASEAN countries (Arendshorst 2009). Rohingya's case in Myanmar is a concrete example (Arendshorst 2009).

United Nations officials have described the exodus of more than 600,000 Rohingya Muslims from Myanmar as ethnic cleansing (UN, 2017). The United States has withdrawn assistance from Myanmar army units it blames for driving members of the ethnic and religious minority from their homes (BBC,2017).

Yet ASEAN, which maintains a policy of non-interference in members' domestic affairs, has remained mostly silent (Aljazeera, 2017). The summit website has posted condolences to victims of bombings in Iraq and hurricanes in the Caribbean — but nothing on what international aid agencies describe as the world's most urgent humanitarian crisis (Los Angeles Times, 2017; Human Right Watch, 2017).

As violence against the Rohingya Muslim community in Rakhine has increased since 2012 and became an international news item, ASEAN 2012 Secretary-General Surin Pitsuwan proposes to hold tripartite talks between ASEAN, the UN and the government of Myanmar to prevent widespread violence (GULF News, 2012). Myanmar chose to reject the proposed dialogue and stated that ASEAN should not get involved in their internal matters (GULF News, 2012).

Myanmar's rejection is legitimate because of the principle of non-interference. Using this option, pressure from ASEAN collided with non-interventionist walls so that Rohingya problems failed to be discussed together in the ASEAN context.

The regional response to the Rohingya conflict has often come in the form of discussions at conferences and meetings, with little to no significant result (Ha and Htut, 2016). While relevant statements emphasize the necessity to address the root causes of the problem, the non-interference principle that bounds ASEAN has refrained the organization to openly criticized Myanmar or proactively solving the problem head-on. Furthermore, framing the problem itself for a regional approach is a big challenge due to Myanmar's denunciation of the term 'Rohingya'. ASEAN's approach has thus far focused on addressing the issue of irregular migration (Ha & Htut, 2016).

At the 2009 ASEAN Summit meeting, ASEAN leaders mentioned the Rohingya issue, expressed their concern of the long-held conflicts and urged Myanmar to cooperate. They assigned the ASEAN Secretariat to observe the issue of future humanitarian efforts in the region. However, it is important to note that the Rohingya people were referred as "illegal migrants" in the Chairman's Statement of the 2009 ASEAN summit (ASEAN, 2009). Afterwards, the Rohingya issue was agreed to be referred to the Bali Process (IRIN, 2009). This coincided with bilateral efforts between Thailand and Indonesia, which also agreed to tackle the Rohingya issue at the Bali Process.

After a long interval of six years, the Bali Process concluded with a final statement detailing the challenges faced by the international community in addressing irregular movements of people. However, the Rohingya issue was not "discussed at the plenary session, nor was it explicitly mentioned in the concluding statement" (IRIN, 2009). Since the Rohingya are stateless and no one has claimed them, it also remains unclear what an international forum could do for the Rohingya (Asia News Monitor, 2009). The Bali Process did not

adequately cover situations in Rohingya since its focus primarily on the human trafficking, whereas some Rohingya may not have been trafficked.

On a separate note, former Thailand Prime Minister Abhisit Vejjajiva in February 2009 asserted that the Rohingya issue should be jointly solved between Indonesia, Malaysia, Thailand and Myanmar, stating it was the common problem between these nations, and not Thailand's alone (Relief Web, 2009).

In 2012, efforts to organize an ASEAN meeting on Rohingya refugees at sea collapsed in August 2012 after being rejected outright by Myanmar's Foreign Ministry (Kassim, 2012). Former Association of Southeast Asian Nations (ASEAN) Secretary-General Surin Pitsuwan reports that the government of Burma/Myanmar has rejected an offer by ASEAN to open tripartite talks between ASEAN, the UN, and the government aimed at quelling the violence in Arakan/Rakhine state. Pitsuwan acknowledged that ASEAN cannot press the government to grant citizenship to the Rohingya (Hindstrom, 2012). A commentator has noted that "this is another reflection of ASEAN's ineffectual cohesion" (Tharoor, 2015).

On November the same year, UN General Assembly adopts a resolution on the human rights situation in Burma/Myanmar, expressing concern about ongoing violations, and calling upon the government "to address the continuing armed conflict in Kachin State and the outbreak of deadly violence in Rakhine State, and the discrimination and human rights violations affecting ethnic minorities, especially the Rohingya." (UNGA, 2012)

In early 2014, the Rohingya crisis drew wide international criticism when the government banned the organization Doctors Without Borders from operating in the Rakhine State (Fan, 2014). Rights activists criticized the government's handling of the Rohingya issue, challenging the credibility of the government's reforms and its legitimacy to chair ASEAN. During the January 2014 ASEAN Foreign Ministers meeting, the Myanmar government asked ASEAN not to discuss the Myanmar's ethnic issues, despite growing concerns about its treatment of Muslim minorities (Tay, 2014).

In 2015, a humanitarian crisis unfolded as tens of thousands of Rohingya and Bangladeshi migrants were stranded at sea, and mass graves were founded in southern Thailand and northern Malaysia, thus the trafficking in persons became a top ASEAN priority (Ha & Htut, 2016). ASEAN made an emergency ASEAN Ministerial Meeting on Transnational Crime Concerning Irregular Movement of Persons (AMMTC) in Southeast Asia held in KL, pledging to respond to the irregular movement of refugees and migrants in the region by set up a task force and trust fund. (Ha & Htut, 2016). Most regional governments have argued that they cannot shoulder the burden alone (Ha & Htut, 2016). When asked about Malaysia's boat turn-pack policy, Malaysian Deputy Home Minister Wan Junaidi Jaafar said, "if we continue to accept them, then hundreds of thousands will come from (Burma) and Bangladesh" (Popham, 2015).

These developments encourage the signing of the ASEAN Convention Against Trafficking in Persons, Especially Women and Children (ACTIP) in November 2015. Three ASEAN member countries have ratified the Convention, including Thailand, a major transit point for maritime migration from Myanmar and Bangladesh.

In 2016, Indonesia took the path of quiet diplomacy, with a meeting between its Foreign Minister Retno Marsudi and Aung San Suu Kyi on 6 December. Following this, Myanmar called for an ASEAN foreign ministers retreat in Yangon on 19 December 2016 to discuss recent developments in Rakhine. This retreat, the first of its kind, failed to reach any agreement that would present ASEAN with an effective role to play (Ha & Htut, 2016). Suggestions such as establishing an ASEAN eminent persons group to lead a fact-finding mission or utilizing ASEAN disaster relief mechanisms to address humanitarian needs were brushed aside (Ha & Htut, 2016).

While Myanmar promised to grant necessary humanitarian access, it remained ambivalent about when and how ASEAN could participate.¹

By holding the retreat, Myanmar intended to keep ASEAN foreign ministers apprised of the situation and urged ASEAN countries to give Myanmar time and space to address the problem (Ha & Htut, 2016). It had no desire to build any new mechanism involving ASEAN at this time, pending the work of the Advisory Commission on Rakhine State led by former UN Secretary-General Kofi Annan, which is due to submit its final report and recommendations in the second half of 2017.

III.3 Cracks within ASEAN over the Rohingya crisis

The crisis has split Southeast Asia largely along religious lines (Los Angeles Times, 2017). The varied response of ASEAN member states regarding Rohingya conflict apparently is adding the complexity of this issue. As a regional institution of 10 members with different history and background, it is a common thing to have different perception and understanding over problems. However, as the Rohingya conflict is inseparable to religious factors, the sensitivity of the issue increase to a whole new level.

Large anti-Myanmar protests have erupted in Indonesia, the world's largest Muslim-majority country, and Malaysia, the second predominantly Muslim country in ASEAN. Pro-Rohingya sentiments are also energizing extremist elements in Indonesia and Malaysia at a time when religious tensions and the trend towards Islamic orthodoxy are running high in these countries (Los Angeles Times, 2017). Since 2012, there have been protest marches and demonstrations in Indonesia in support of the Rohingya, as well as calls for revenge. In May 2013 and November 2016, police foiled two attempts by Indonesian Muslim militants to bomb the Myanmar Embassy in Jakarta (The Jakarta Post, 2017). Malaysian Prime Minister Najib Razak's rousing speech condemning Myanmar's apathetic response to the plight of the Rohingya people

¹ Press release: State Counsellor briefed ASEAN Foreign Ministers on Recent Developments in Rakhine State, 19 December 2016.

at the Solidarity Assembly for Rohingya on 4 December may also have the unintended consequence of raising jihadist sentiments in Malaysia (Los Angeles Times, 2017).

At the 72nd United Nations General Assembly in New York this year, Malaysia distanced itself from ASEAN statement which expressing support for Myanmar's government and even omitting the term Rohingya. (Reuters, 2017). Malaysia has criticized the stance taken by the Association of Southeast Asian Nations on the Rohingya refugees crisis, saying the reality on the ground is being misrepresented (Reuters, 2017). The Philippines government issued the chairman's statement to reflect the general views of ASEAN. However, Malaysia's foreign minister, Anifah Aman, stated that the ASEAN chairman's statement released on the 72nd UNGA was one-sided and lacked substance (Reuters, 2017).

Shahriman Lockman, a senior analyst with the Institute of Strategic and International Studies in the country's capital stated that Malaysia's dissent, however, only reflects strained ties in ASEAN. He claimed that Philippines has failed to attempt to reflect the views of all ASEAN member states (Reuters, 2017).

It becomes crystal clear that religion plays a dominant role in driving countries to respond towards the Rohingya issue within ASEAN. In the latest United Nations (UN) resolution which urging Myanmar to end its military campaign to Rohingya Muslims living in the Rakhine state, only Malaysia, Brunei and Indonesia – which are all Muslim-majority countries – voted in favor of the resolution. Singapore was one of two ASEAN countries, along with Thailand, that abstained from the vote. Joining Myanmar in the “no” vote were fellow ASEAN member-states the Philippines, Cambodia, Laos and Vietnam.

The UN General Assembly's human rights committee adopted on Thursday the measure presented by Muslim countries by a vote of 135 to 10, with 26 countries abstaining. Philippine ambassador to the United Nations, Locsin said that a 'yes' is decisive and will kill ASEAN (The Philippine Star, 2017). Even so,

he still addressed the ongoing conflict in Rohingya as a genocide, and there is nothing ASEAN can do to stop it as the organization adhered to unanimity and non-intervention (The Philippine Star, 2017).

CHAPTER IV

AICHR ROLE AND ASEAN NON-INTERFERENCE

PRINCIPLE: A BAD MATCH

IV.1 ASEAN Mechanism for the protection of human rights

In Southeast Asia, the enforcement and protection of human rights has been undertaken and sought by The ASEAN Intergovernmental Commission on Human Rights (AICHR). AICHR serves as an organization engaged in human rights issues under the auspices of ASEAN since 2009.

The establishment of the ASEAN Intergovernmental Commission on Human Rights (AICHR) is motivated by cases of human rights violations that occurred within Southeast Asia. ASEAN countries have been involved in various international instruments related to human rights either in the form of declarations or conventions. The ASEAN member states also participated in the 1993 World Conference on Human Rights in Vienna, which resulted in the Vienna Declaration that emphasized the need for the establishment of a regional body in charge of human rights. Subsequently to the ratification of the ASEAN Charter in 2007, Article 14 stated that in order to achieve the objectives and principles of the ASEAN Charter on the promotion and protection of Human Rights, ASEAN shall establish an ASEAN human rights body. The ASEAN Charter later became the basis for the establishment of the ASEAN Intergovernmental Commission on Human Rights.

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

Before AICHR was inaugurated, the Terms of Reference (TOR) as the basis for AICHR implementation was adopted at the 14th ASEAN Summit in Phuket, Thailand on July 20, 2009. There are 14 mandates underlying the implementation of the AICHR, which are:

1. *Develop strategies for the promotion and protection of human rights and fundamental freedoms;*
2. *Develop an ASEAN Human Rights Declaration;*
3. *Enhance public awareness of human rights through education, research, and dissemination of information;*
4. *Undertake capacity building for the effective implementation of ASEAN Member States' inter- national human rights treaty obligations and ASEAN human rights instruments;*
5. *Encourage ASEAN Member States to ratify international human rights instruments;*
6. *Provide ASEAN with advisory services and technical assistance on human rights matters upon request;*
7. *Engage in dialogue and consultation with other ASEAN bodies and entities associated with ASEAN, including civil society organizations and other stakeholders;*
8. *Obtain information from ASEAN Member States on the promotion and protection of human rights;*
9. *Develop common approaches and positions on human rights matters of interest to ASEAN;*
10. *Prepare thematic human rights studies;*
11. *Perform any other tasks assigned by the ASEAN Foreign Ministers Meeting.*
12. *To prepare studies on thematic issues of human rights in ASEAN;*
13. *To submit an annual report on its activities, or other reports if deemed necessary, to the ASEAN Foreign Ministers Meeting; and*
14. *To perform any other tasks as may be assigned to it by the ASEAN Foreign Ministers Meeting. (AICHR Terms of Reference)*

In accordance with the mandate given to AICHR through the Terms of Reference (TOR), there are two main tasks of AICHR in upholding human rights, which are promotion and protection functions. In practice, however, AICHR only capable to effectively implement the promotion function rather than protection (Drummond, 2011). The protection function is less effective due to the limitations of the mandate given in the TOR.

IV.2 The role of AICHR as a regional human rights body in Southeast Asia

First, AICHR as an Instrument. In accordance with one of the roles of international organizations according to Clive Archer, AICHR holds the role as an instrument that is being used by its members for particular goals (Archer, 1983). AICHR fulfill this role by carry out the interest of its members—particularly in the field of human rights—by the implementation of preventive human rights provisions in order to avoid coercion and hold conventions on human rights.

Essentially, human rights conventions run by states are non-binding and non-coercive (Mechlem, 2009). According to Singapore's Minister of Foreign Affairs George Yeo, The 13th ASEAN Summit of 2009 on human rights issues is a further effort for a higher level regional integration, without having to impose any will on its member states.

There is a holistic mechanism of human rights application that acts as an learning momentum, as well as a distinction between the application of human rights mechanisms in ASEAN with other countries or regions (Amin, 2012). One form of holistic human rights application is the ratification of ASEAN human rights instruments, namely the ASEAN Human Rights Declaration by all ASEAN member countries at the 21st ASEAN Summit in Cambodia.

As for some important points in this declaration are:

- a) Reaffirming ASEAN's commitment to the promotion and protection of human rights and the principles set forth in the ASEAN Charter;
- b) Reaffirming the commitment of ASEAN and its member states to the UN Charter, the Universal Declaration of Human Rights, the Vienna Declaration and Program of Action, and other international human rights instruments in which ASEAN states are parties; as

well as relevant ASEAN declarations and instruments relating to human rights;

- c) The importance of AICHR's role as the principal institution responsible for the promotion and protection of human rights in ASEAN, which contributes to the establishment of a community-oriented ASEAN Community; and as a vehicle for progressive social development and justice, the fulfillment of human dignity and the achievement of a better quality of life for ASEAN;
- d) Appreciate AICHR which has developed a comprehensive declaration of human rights in consultation with ASEAN sectoral bodies and other relevant stakeholders;
- e) The importance of the contribution of ASEAN sectoral bodies and other relevant stakeholders in the promotion and protection of human rights in ASEAN, and encouraging sustainable dialogue with AICHR.

Second, AICHR as a communication tool of ASEAN countries to discuss human rights issues. Based on existing experiences, human rights enforcement is often seen as a double-edged knife. On the one side, the enforcement of human rights can be a threat to a leadership, but on the other side, human rights can support the development of a nation, as it emphasizes civil supremacy in its ideology principles.

As a communicator, AICHR also convey correct information on thematic human rights issues to member states in order to promote the promotion and protection of human rights in their respective countries. In addition, AICHR also receives information from ASEAN member countries on the promotion and protection of human rights activities in each country. Members are required to submit annual reports at the annual ASEAN Foreign Ministers Meeting.

In conveying information related to human rights issues and raising public awareness in respect of human rights, AICHR is obliged to provide regular

information to the people about its work and activities in open platforms, such as seminars and workshops.

Third, AICHR as an arena for the exchange of information, discussion and decision making (Underdal, 1994). AICHR act as human rights institution with overall responsibility for the promotion and protection of human rights in ASEAN and utilized by member countries as a forum to discuss human rights issues. AICHR held its first meeting at the ASEAN Secretariat in Jakarta to conduct extensive discussions and with relevant ASEAN bodies to discuss more effective AICHR operations as a comprehensive human rights body in the ASEAN region. The meeting discussed, among other things, the formulation of procedural rules that would lay down operational guidelines for the implementation of AICHR work in all aspects. The meeting also discussed the development of the Five Year Work Plan to provide comprehensive steps with programs and activities to be undertaken by AICHR within the next five years.

Other work plans to be undertaken by AICHR in order to carry out its mandate to promote capacity building for the implementation of human rights obligations under international treaties signed by ASEAN member countries, AICHR has held series of regional workshop throughout the years.

IV.3 The implementation of AICHR in enforcing its mandates

As a consequence of the adoption of the ASEAN Charter and the birth of human rights bodies, ASEAN faces high expectation of delivering on its human rights commitments. Those commitments are set against the subregional context of continued widespread poverty, growing income inequality, impacts of climate change and greater subregional integration. The political stability in Southeast Asian countries remains uncertain and even volatile. National turbulence can spill over borders and limit the ability of Southeast Asian countries or ASEAN as an institution to support human rights and democracy.

During the last five years, AICHR has failed to build its capacity to adjust to the changing context and structural challenges to protecting human rights. This

is partly reflected in AICHR's work priorities, which do not appear to be guided by the need to strengthen the subregional system but to showcase its plans. Similarly, since its inception, AICHR has faced major problems regarding capacity, independence, ability to balance its role as a political body and as a human rights commission, ability to engage its stakeholders, work priority-setting and self-perception. It is significant to note that the lack of technical and financial support from ASEAN member- states contributes to the slow progress in the work of AICHR.

IV.3.1 AICHR limited function and authorities

According to Pattihua, Organizations require a hierarchical and functional structure (Pattihua, 2017). An adequate structure will boost the effectiveness of an organization, and vice versa (Pattihua, 2017). The best structure for an organization is the one that supports effective work and able to minimizes complexity. In most cases, organizational structure is a pyramid-shaped; it reflects on how the holder of power should delegate the authority within a large scale organization; only an exceptional decision that must return to the upper hierarchy to be decided. Further, the organizational structure determines how the work will be divided, who reports to whom, and the formal coordination mechanisms and also created patterns of interaction.

Based on the above explanation, structure of organization can be used to analyze the factors that influence the effectiveness of AICHR in performing their duties and functions as human rights commission in Southeast Asia. In order for ASEAN to effectively implement human rights within its region, ASEAN should form a strong, accountable, well-structured and legal entity in addition to AICHR. Judging from the legal perspective, what needed the most for ASEAN today is the existence of a strong legal body that able to authorize AICHR to carry out its duties as a humanitarian authority in Southeast Asia (Kaewjullakarn & Kovudhikulrungsri, 2015).

In other regional areas, conventional human rights violations are resolved through international mechanisms as set out in regional international human

rights conventions. Those that already existed are The European Convention on the Protection of Human Rights and Fundamental Freedoms 1950, American Convention on Human Rights 1969, and the African Charter on Human and Peoples Rights, 1981.

Contrary to AICHR lacks supporting instruments and documents, regional human rights systems in America and Europe are independent and well equipped. Council of Europe, for instance, has two main bodies in promoting and protecting human rights which are Commissioner for Human Rights and the European Court of Human Rights. The Commissioner for Human Rights is given the mandate “*to promote the awareness of and respect for human rights in 47 Council of Europe member states*” as stated in Resolution (99) 50 on the Council of Europe Commissioner for Human Rights (Council of Europe, 1999). Meanwhile, the European Court of Human Rights, which was built in 1959, is responsible in taking the case submitted by individual or State on the matter of “*violations of the civil and political rights set out in the European Convention on Human Rights.*” (European Court of Human Rights, n.d.). The number of judges serve in the Court is 47, representing the number of states parties to the European Convention on Human Rights. Despite the judges’ election process begins with state’s proposing a number of judges, judges of the Court do not represent their states. They are “independent and cannot engage in any activity that would be incompatible with their duty of independence and impartiality.”(European Court of Human Rights, n.d.).

In addition, Organization of American States (OAS) also has two main human rights bodies; Inter-American Commission on Human Rights (IACHR) and Inter-American Court of Human. According to the Charter of the Organisation of American States (OAS), the principal function of the IACHR “*shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters.*” (Charter of the Organization of American States, 1948). IACHR based its work on three pillars: the individual petition system, monitoring of the human rights situation in the Member States, and the attention devoted to priority thematic areas (Inter-

American Commission on Human Rights Strategic Plan 2011-2015). Several rapporteurs and unit are assigned to take care the thematic areas that include: indigenous people rights, women's rights, freedom of expression, unit on LGBT rights, and economic, social and cultural rights (Inter-American Commission on Human Rights Strategic Plan 2011-2015). The Inter-American Court of Human Rights, which was established in 1979, is responsible to enforce and interpret the provision of the American Convention on Human Rights and providing adjudicatory and advisory duties. Based on the Statute of the Inter-American Court of Human Rights, the Court consists of seven judges with six years of serving term. They are elected based on their capacities and competencies in human rights. In this Court, individuals cannot take the case directly to the Court and that the Court is only served as the last resort (Organization of American States, 2010).

Among these three regional conventions, the most effective in its implementation is The European Convention on the Protection of Human Rights and Fundamental Freedoms 1950 (Pattihua, 2017). In this system of the European Convention, the eligible case of human rights violations allegedly committed by a state to person(s) may be brought to the European Court of Human Rights, through a mechanism established in the Convention. The Court will examine the case and issued a verdict which has a definite binding force; subsequently, the court decision will be executed. For example, if it is proven that the country concerned has violated the human rights, the country (in accordance with the content of its verdict) is required to rehabilitate or compensate for the loss of the victims.

However, in practice, the regional human rights convention meets its own challenges. Its effectiveness is highly depending on the situation and condition of each region (Parthiana, 2004). In particular, the impact of each regional system relies in large part on the domestic and transnational actors of the system; crucially, the responses of national governments, as there is significant variation amongst different states within the same regional system (Engstrom, 2010). Yet,

still, it is better to have legal basis of clear mechanism of the human right body to execute its work rather than to have none.

The establishment of AICHR is based solely on one (1) principle of the ASEAN Charter, therefore it definitely needs other regulations to regulate the mechanisms of specific/technical instruments of AICHR. Meanwhile, unlike the establishment of Human Rights Committee in Europe, America and Africa, the ASEAN Foreign Ministers have the authority to formulate AICHR ToR as stated in Article 14 of the ASEAN Charter. In order to enhance AICHR authority over human rights enforcement in ASEAN, The ASEAN Member States shall make the ASEAN Human Rights Convention as the legal basis for AICHR.

Presently, AICHR does not have the competence to receive individual complaints against member states that commit human rights violations (European Parliament, 2012). Hence, if established, the ASEAN human rights court main task is to receive complaints from victims of human rights violations (individual and/or groups). Some humanitarian cases within ASEAN indicate the lack of AICHR response and/or effort. Meanwhile, vigorous attempt is needed to realize the mandate of human rights protection within ASEAN. By ratifying an ASEAN Convention on ASEAN human rights courts as a legal entity, AICHR will be one step closer to a more prominent human rights body.

Therefore, a special mechanism is required to realize the better role and function of AICHR without violating the principles, provisions and shared values that serve as ASEAN guidelines. This idea can be manifested through the formulation of AICHR ad hoc sub commissions that work simultaneously which are; the establishment of (1) a sub commission whose duties to oversee the implementation of humanitarian activities within the region (protection and promotion); and (2) an ad hoc commission adjudicating cases of human rights violations (Pattihua, 2017). Through a clear mechanism, AICHR is expected to be able to provide a relevant, effective solution for the settlement of humanitarian cases in Southeast Asia (Kaewjullakarn & Kovudhikulrungsri, 2015). Nevertheless, the emphasis remains on the participation of ASEAN member

states in cooperating with each other —also with third parties—in supporting and realizing a human security for the ASEAN community.

IV.4 Impact of ASEAN Non-Interference Principle on the enforcement of human rights by AICHR

Basically, the success of AICHR in performing its role and function is determined by ASEAN members themselves. However, the participation of ASEAN members is hampered by the principles and norms governing the mechanism among its member countries, in this case the principle of non-interference (Acharya, 2001). The principles that religiously adhered by ASEAN members firmly stated that no state has the rights to interfere in the affairs or problems of another country (ASEAN Charter, 2007). This principle is one of the five principles of peaceful coexistence listed in UN Charter, which was adopted by the ASEAN founding fathers to adjust with the regional norms. Each ASEAN member country also agrees to reject any form of state intervention from within the organization or outside in regards of domestic affairs.

The principle of non-interference that values and respect territorial integrity and sovereignty of each country—as well as the settlement of any political issues through discussion, and enhancement of cooperation in the aspects of regional defense and security—are based on the objective of ASEAN establishment which is "to promote peace in the region".

Unfortunately, the partisanship of ASEAN members in entrusting the principle of non-interference as its strong foundation is followed by serious human rights violations cases within the region (Amnesty, 2017). ASEAN members are often criticized for their ‘silence’ in regards of some humanitarian issues (Reuters, 2015). The principle of non-interference accused for supporting ASEAN members to ‘see no evil and hear no evil’ on their surroundings. Indeed, the maximum adherence of such principle with the effort to enforce human rights—in reality—is not a very favorable combination.

The interpretation and implementation of the principle of non-interference in ASEAN is in conformity with the principles of international law, since the instruments of international law state explicitly that the principle of non-interference is one of the fundamental principles of international law (Corthay, 2015).

However, from the functional side, there are obligations that should be obeyed by ASEAN members as the consequences of non-interference principle. Simply put, they are prohibited to interfere with any action done by any members in respect of domestic affairs, sometimes including ill treatment of authorities towards its people that could be considered as human rights violations (Corthay, 2015). Hence, the commitment of ASEAN member countries in defending human rights of its citizen becomes even more questionable. The principle of non-interference supports the members to ‘ignore’ the action of, for example, repressive approach of Myanmar military towards the Rohingya. In other cases, ignored repressive actions from the Indonesian military against the people of Papua in 2014 (Soetjipto, 2015).

In addition, both ASEAN Charter and AICHR’s ToR do not set out the limitation of the non-interference principle in regards of gross human rights violations, or to what extent the principle should be adhered to (Nordin et al, 2016).

The principle that contained in the Article 2 paragraph (2) letter e and f of the ASEAN Charter raise another concern regarding the implementation of AICHR in enforcing human rights within Southeast Asia region. Terminologically, there is contradiction between the principle of non-interference with the necessity of interference from outside parties, such as NGOs, and other human rights observers (Pattihua, 2017). This is what causes AICHR to focus more on negotiation than to jump directly in solving the problem.

IV.5 Case of Rohingya Humanitarian Crisis

IV.5.1 The severity of humanitarian crisis in Rohingya

As many as 1.2 million ethnic Rohingya, predominantly Muslim, continue to face rampant and systemic human rights violations (Human Rights Watch, 2017). Four years after the ethnic cleansing campaign carried out in June and October 2012, Rohingya once again experience widespread violence, allegedly supported by the government. The United Nations' top human rights official has referred to the violence against the minority Muslim Rohingya as "a textbook example of ethnic cleansing" (UN, 2017).

Outbreaks of violence in Maungdaw district in northern Rakhine State intensify following an October 9, 2016 attack on three border outposts that left nine police officers dead (HRW, 2017). Rohingya insurgent group, now known as Arakan Rohingya Salvation Army (ARSA), claims responsibility for the border post attack (CNN, 2016). The attacks spark an intense crackdown by the Myanmar military and trigger an exodus of 87,000 Rohingya to Bangladesh (CNN, 2016). The government asserts that the attacks were carried out by armed Rohingya militants. They later initiated "clearance operations" to locate the alleged attackers while locking down the area, denying access to humanitarian aid groups, independent media, and rights monitors (HRW, 2017).

The operations by government security forces led to numerous reports of serious abuses against Rohingya villagers, including summary killings, rape and other sexual violence, torture and ill-treatment, arbitrary arrests, and arson (HRW, 2017). Local groups reported the use of torture and a number of deaths in custody. The UN's special rapporteur for human rights in Myanmar, Yanghee Lee, claimed that "crimes against humanity" are being committed by the military and police against Myanmar's Rohingya Muslim minority (BBC, 2017). However, the government has denied the allegations of abuses (BBC, 2017).

The denial of Rohingya citizenship—who are not recognized as Myanmar ethnic groups under the 1982 Citizenship Law—has facilitated rights abuses,

including restrictions on movement; limitations on access to health care, livelihood, shelter, and education; arbitrary arrests and detention; and forced labor (HRW, 2017). According to Human Rights Watch report, travel is severely constrained by authorization requirements, security checkpoints, curfews, and strict control of IDP camp access. Such barriers compound the health crisis caused by poor living conditions, severe overcrowding, and limited health facilities.

Throughout the years, the government has continually failed to adequately or effectively investigate abuses against the Rohingya, and did not act on recommendations to seek UN assistance for an investigation into the violence (HRW, 2017).

Reported by Human Rights Watch, the new Burmese government established two bodies to address sectarian tensions in Rakhine State—a government committee and a nine-member national/international advisory commission led by former UN Secretary-General Kofi Annan, which initiated its year-long research mandate in September.

The commission led by Kofi Annan has submitted its work in August 2017. In the report titled ‘Towards A Peaceful, Fair and Prosperous Future For The People of Rakhine State’, the advisory committees suggest that there has been development crisis marked by chronic poverty and lags behind the national average in almost every area. Apart from a development crisis, Rakhine also represents a human right crisis and security crisis. The government of Myanmar encouraged to be cautious in addressing the insurgency in Rakhine state and avoiding the use of excessive force in handling the armed movement to prevent further radical movement, either from Muslims or Buddhists community.

Furthermore, the commission provides recommendations for the government of Myanmar, those are: (1) to be accountable for human rights abuses against Rohingya; (2) to verify and restore the citizenship of Rohingya; (3) guarantee the freedom of movement of Rakhine citizens without exception; (4) closing the isolation camps for Rohingya; (5) open humanitarian access to

Rakhine extensively; (6) open media access in Rakhine extensively; (7) guaranteeing access to education and health of Rakhine residents without exception; (8) holding an inter-communal dialogue; and (9) seek to improve the economy of the local community of Rakhine without exception.

The Myanmar government has embraced these recommendations, but there is little sign of rapid progress (ReliefWeb, 2018). The subsequent appointment of an Implementation Committee for the recommendations, and recently an advisory board to the Implementation Committee that includes several eminent international figures, suggests an administration focused on diplomatic strategy instead of the much more difficult practical steps needed to change the situation on the ground.

IV.5.2 AICHR response

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 (Kaewjullakarn & Kovudhikulrungsri, 2015). 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 (Umar, 2017).

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 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”*. (bloed & Girard, 2014)

Hearing the 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 (Petcharamesree, 2016).

Secretary General of ASEAN, Surin Pitsuwan, reminded that the Rohingya issue could disrupt regional stability if the international community, including ASEAN, fails to respond to the crisis appropriately and effectively (Asia Pacific Center for R2P, 2012). Pitsuwan also acknowledged that ASEAN cannot pressure Myanmar government to grant citizenship to the Rohingyas. Particularly in the case of Myanmar; the principle of non-intervention in the internal affairs of ASEAN member states contained in the ASEAN Charter restricts the ASEAN space to act to uphold and protect human rights on a regional scale. ASEAN is unable to enforce law against Myanmar's government because it has no legal legitimacy on a regional scale that has authority over national law of its member states (Suncoko, n.d.)

The AICHR receives reports regarding the abuse but unable to perform any significant actions. Hence all reports related to Rohingya conflict discussed under the ASEAN Foreign Minister Meeting (AMM). The recent discussion on the Rohingya conflict was conducted by the ASEAN Foreign Ministers at the sidelines of a session of the UN general assembly in New York, September 2017 with little to no significant result. As there is no clear mechanism of human rights protection for AICHR in its mandate, AICHR is unable to perform its protection means.

In addition, the non-transparency as well as uncooperative attitude of the Burmese government to other countries and international organizations such as AICHR also becomes an obstacle to AICHR in effectively addressing Rohingya conflict. Such attitude inhibits the ability of AICHR to observe the actual situation in the conflicting area; preventing a direct interaction with both the

officials and victims. Hence, the strategy undertaken by AICHR on Rohingya conflict tends to be passive; which is limited to the procurement of workshops and meetings. It is also underpinned by AICHR's mandate that is still very limited to the promotion and protection of human rights; and not as a decision making body.

IV.6 Responsibility to Protect (R2P) and the non-interference principle

ASEAN as a regional organization has the responsibility to handle cases of human rights violations that occurred in Myanmar in accordance with the re-enactment of the Responsibility to Protect (R2P) adopted by UN member states at the World Summit in 2005. This R2P doctrine emerged in response to the case of human rights violations that occurred in Rwanda. The three fundamental principles of R2P doctrine are (Robinson and Rahman, 2012) :

1. The State has the primary responsibility to protect the population from genocide, war crimes, crimes against humanity and ethnic cleansing;
2. The international community has the responsibility to assist countries in fulfilling their responsibilities;
3. The international community must use diplomatic means and other peaceful means to protect the population from war crimes.

If state fails to protect its people, the international community should be prepared to take more assertive action including the use of collective power through the UN Security Council (UN, 2005).

Although the R2P doctrine has been adopted by ASEAN member countries, this doctrine has not been fully accepted in Asia and its implementation has not been taken seriously yet (Wibisono, 2013). Particularly in the case of Myanmar; the principle of non-interference, coupled with the reluctance of Government of Myanmar restricts the ASEAN movement to uphold and protect

human rights on a regional scale. Moreover, the absence of legal legitimacy caused ASEAN to be unable to enforce any law against Myanmar.

It appears that in situations of contradiction between the policy of non-interference and R2P, ASEAN tends to lean towards the non-interference policy rather than the protection of human rights (Kaewjullakarn & Kovudhikulrungsri, 2015). The plight of the Rohingyas may turn out to be a convincing reason for a change of heart towards the implementation of R2P by ASEAN. The mass killing of Rohingyas has turned the international spotlight on Southeast Asia; and if ASEAN strongly desired to protect and promote human rights in the region, then there is no better time than the present to introduce the principle of R2P into the reality.

Moreover, despite the limitations, ASEAN has a mechanism called the ASEAN Regional Forum (ARF) and the ASEAN Intergovernmental Commission on Human Rights (AICHR), which is linked and can be used as a mechanism for implementing R2P principles (Wibisono, 2015). Majority of Muslim countries such as Indonesia and Malaysia should be able to take a significant role through ASEAN in advocating the Rohingyas case. ASEAN should step out of its comfort zone to affirm its commitment in upholding human rights.

CHAPTER V

CONCLUSION

So far, the existence of AICHR refers more to the concept of ‘ASEAN Way’ which contains non-interference principle. The adherence to such principle impedes the implementation of AICHR as a human rights body as it leads AICHR to emphasize more on promotion function rather than protection and real case investigation. The principle of non-interference meets its challenge in the case of Rohingya crisis. There are criticisms over ASEAN reluctant response on the rampant and systemic human rights violations allegedly done by Myanmar government. Cracks within ASEAN appear as each member has different statement regarding the conflict. As religious factor plays strong role in determining Rohingya conflict, countries with high Muslim population such as Indonesia and Malaysia openly condemn the violations and actively involved in conflict resolution effort by doing any diplomatic means with the Government of Myanmar. Meanwhile, the other members of ASEAN tend to stick to conservative ways by keeping their hands off the conflict. Such different views regarding the conflict further complicate ASEAN to give significant regional response.

As the result, ASEAN's reputation as a regional organization is at stake. Its commitment in establishing a peaceful region is disgraced by the soaring conflict in Myanmar. The conflict has impacted not only Myanmar, but also its neighboring countries. Moreover, there are indications that the crime—which include summary killings, rape and other sexual violence, torture and ill-treatment, arbitrary arrests, and arson—is being done by the government. Therefore, it is not surprising that the international community demand for ASEAN response.

ASEAN itself is not a regional body that completely denies human rights enforcement. It already made progress in such field by the establishment of the

ASEAN Intergovernmental Commission on Human Rights (AICHR). The main focus that AICHR has to accomplish as an ASEAN human rights commission is to address various human rights abuses in Southeast Asia. The purpose of AICHR establishment is none other than to promote human rights and limit human rights abuses within the region. However, from the above discussion and analysis, there are aspects of AICHR's incapacity in handling cases of human rights violations. Among other things, the limitations of the protection function due to the mandate given in the AICHR Term of References. Furthermore, the practice of non-interference principle is evident to contribute to the weakness of AICHR in pressuring the member states to upholding human rights.

AICHR deemed as another toothless tiger human rights body. It is no exaggeration considering there is little to no significant progress done by AICHR towards what UN said as the most catastrophic humanitarian crisis in present. Instead of carrying a real protection function, AICHR only able to give recommendations that are unclear in the implementation. Unlike human rights body in EU, for instance, ASEAN has no human rights court or an ad hoc commission that able to administer human rights violation case. It is unable to drag the Government of Myanmar to account for its actions towards the Rohingya and impose any sanctions if the government is proven to be guilty. Moreover, the performance of AICHR also determined by the body limited resources and weak independency. The responsibilities that imposed to AICHR are not compatible with their abilities. It is clear that the AICHR's current role has not shown the earnestness of ASEAN member countries in solving the case of human rights violations within the region. Therefore, in order to be able to implement human rights in Southeast Asia, ASEAN should step out of its comfort zone and started to arrange a clear and well-structured human rights protection mechanism.

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APPENDIX

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