

RIGHTS OF THE ROHINGYA: EFFECT OF THE GAMBIA VS MYANMAR ON ASEAN AND ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS' (AICHR) POLICY AND ACTION

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Abstract

The plight of the Muslim Rohingya in Rakhine State, Myanmar has received worldwide attention, but not so much from the ASEAN. The significant action to protect the Rohingya was done upon the initiative of the OIC when adopted a unanimous resolution to bring the case to ICJ and the Gambia voluntarily represented to initiate proceedings. If other countries or regions put so much effort, why are ASEAN and its member states relatively quiet? Are there any changes of the ASEAN especially the AICHR's policy and action after the lawsuit filed by the Gambia? This paper intends to investigate the effect of the Gambia vs. Myanmar Case on ASEAN especially the AICHR's policy and action on the human rights protection of the Rohingya. The study adopted in this paper is qualitative legal research. The paper focuses on human rights atrocities against Rohingya which were revealed by the Court, and its update in the field. Existing ASEAN policy and action relating to the issue are also examined. The study found that the lack of protection mandate as enshrined in the AICHR's TOR could not be claimed to justify their silence to protect Rohingya from any atrocities against them. The findings show that there was significant progress since the issuing of the ICJ's order on the Gambia vs. Myanmar case on the policy of ASEAN especially the AICHR. The AICHR found brave enough to stand and sound their thought on the Myanmar crisis including on Rohingya. This is very significant progress the AICHR has that needs to be maintained and developed. The ICJ's proceeding shall also be considered important in determining the future ASEAN policy towards Myanmar, especially on the issue of citizenship of the Rohingya people. In addition, it needs to influence the future human rights framework under the AICHR.

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

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A. INTRODUCTION

The tyranny against the ethnic Rohingya is not only a domestic human rights issue, it has great consequences regionally and global ramifications too.¹ The Rohingya issue is rather complicated as it entails various other issues such as statelessness, poverty, insurgencies, counterinsurgencies, security, human rights, and so on.² According to the United Nations (UN) and the United States (US), the way the Rohingya are treated by the Myanmar government is nothing short of ethnic cleansing.³ The act is also condemned by EU foreign ministers who refer to it as “extremely serious” considering the rampant military violence that entails the rape and murder of innocent Rohingya.⁴ This situation led the Republic of the Gambia to file a lawsuit against the Rohingya to the International Court of Justice (ICJ) with the support of the Organization of Islamic Cooperation (OIC).⁵

Unfortunately and strangely, there are no similar responses coming from ASEAN which is the regional body of the region. The action of the ASEAN and its member states is relatively weak, limited only to responding to the humanitarian aspect of the case such as donating food and health care to the affected area. According to the ASEAN Charter, ASEAN supposedly acts more than that.⁶ ASEAN and its member states have an obligation to make the ASEAN Charter a meaningful instrument for the region and its people.⁷

The lawsuit filed by the Gambia brings good news for the Rohingya people. It led the ASEAN in particular the ASEAN Intergovernmental Commission of Human Rights (AICHR) to act more actively and stout than before. This paper intends to investigate the effect of the Gambia vs. Myanmar Case on ASEAN especially the AICHR’s policy and action. The findings will help in figuring out the solutions for ASEAN especially AICHR in settling the human rights violations of the Rohingya people.

B. THE ROHINGYA ATROCITIES: BACKGROUND AND CURRENT SITUATION

Myanmar or Burma became members of ASEAN on July 23, 1997. Myanmar has a population of approximately 53 million as of March 2018.⁸ The country has 135 multiracial groups such

¹ Ahmad Rizky M. Umar, “ASEAN countries should find a solution to end the persecution of Rohingya,” The Conversation, <<http://theconversation.com/asean-countries-should-find-a-solution-to-end-the-persecution-of-rohingya-66919>> (accessed on 13 August, 2013)

² Zain Maulana, Interview by Author, Through Zoom Meeting, 30 April 2020.

³ Garrido, Carmen Romero. "The State-Sponsored Genocide of the Rohingya Community from a Constructivist Perspective." *Comillas Journal of International Relations* 24 (2022), 64.

Al Jazeera, “Nobel trio: Suu Kyi responsible for Rohingya ‘genocide’”, <<https://www.aljazeera.com/news/2018/02/stop-crime-nobel-laureates-visit-rohingya-call-suu-kyi-resign-180227081719019.html>> (accessed 3rd May 2013).

⁴ Dagba, Gershon, and Israel Nyaburi Nyadera. "Position of Responsibility: International Response to the Rohingya Refugee Crisis—The Case of Western Countries." In *Rohingya Refugee Crisis in Myanmar*, pp. 313-336. Palgrave Macmillan, Singapore, 2022. 313; *Channel News Asia*, “EU seeks sanctions on Myanmar military over Rohingya crisis”, <<https://www.channelnewsasia.com/news/asiapacific/eu-seeks-sanctions-on-myanmar-military-over-rohingya-crisis-9993160>> (accessed 18 August, 2018).

⁵ Garrido, Carmen Romero. "The State-Sponsored Genocide of the Rohingya Community from a Constructivist Perspective." *Comillas Journal of International Relations* 24 (2022):65.

⁶ See Article 1.4 and 1.7 of the ASEAN Charter

⁷ *The Phnom Penh Post*, “Dear world: Don’t expect so much from ASEAN on the refugee crisis”, <<http://www.phnompenhpost.com/opinion/dear-world-dont-expect-so-much-asean-refugee-crisis>> (accessed on 13 August, 2018)

⁸ *Worldometers*, “Myanmar Population”, <<http://www.worldometers.info/world-population/myanmar-population/>> (accessed 13 August, 2018).

as Kachin, Kayah, Kayin, Chin, Bamar, Mo , Rakhine and San.⁹ Most of the population are Buddhist of religion.¹⁰ The country has signed several international human rights treaties, including CEDAW and CRC.¹¹ However, other important human rights instruments such as ICCPR, ICESCR, CAT and CERD were not approved. At the regional level, Myanmar has signed and endorsed ASEAN Charter, which regulates the AICHR.¹² Myanmar's representative in the AICHR is H.E. Ambassador Kyaw Tint Swe.¹³ Myanmar has also signed other regional human rights treaties, including the Phnom Penh Declaration on the adoption of the ASEAN Declaration of Human Rights and the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers. In his country, Myanmar established the Myanmar National Human Rights Commission by Notification No. 34/2011. The 2012 Commission report highlighted activities addressing the treatment of prisoners and ethnic conflict.¹⁴ However, observers suggest that Myanmar is more inclined to pursue policies that violate international norms and has a poor record of protecting human rights.¹⁵ Myanmar was under the leadership of the military junta from 1962 to 2011; after two decades, the country finally held its first elections in 2010. The electoral process was intended to mark the country's transition from a military regime to a civilian democracy, as claimed by the military junta, but this has been riddled with corruption plagued of settlement disputes process.

The Rohingya have endured decades of discrimination and oppression in Myanmar of which majority are Buddhists.¹⁶ They are branded as illegal Bangladeshi immigrants; their legal rights have been systematically stripped along with their access to Rakhine i.e. their generational state.¹⁷ The Rohingya have faced decades of discrimination and repression under successive Myanmar governments. Effectively denied citizenship under the 1982 Citizenship Law, they are one of the largest stateless populations in the world.

After the burning of their homes in Myanmar in 2017, around 700,000 Rohingya had fled, more than 5,000 of whom lived on a narrow strip of land between the two nations. 4,444 According to the UN Refugee Agency, there are currently around 900,000 Rohingya living in Bangladesh, of whom 212,000 were in the country before last summer's crisis. There have been several refugee camps in southern Bangladesh since the early 1990s, suggesting that those

⁹ Bertil Lintner, "A Question of Race in Myanmar," Asia Times, <<http://www.atimes.com/article/question-race-myanmar/>> (accessed 15 August, 2018).

¹⁰ Charis Chang and AP, "Violence in Myanmar shows the world needs to stop romanticising Buddhism," News.com, <<http://www.news.com.au/world/asia/violence-in-myanmar-shows-the-world-needs-to-stop-romanticising-buddhism/news-story/37bf65e55ec59eb1922f82942576161a>> (accessed 15 August, 2018).

¹¹ Jefferson R. Plantilla, "ASEAN and Human Right," Asia-Pacific Human Rights Information Center, <<https://www.hurights.or.jp/archives/focus/section2/2008/09/asean-and-human-rights.html>> (accessed 16 August, 2018)

¹² The ASEAN Charter (adopted 2007 (AC), Art 14.

¹³ The ASEAN Secretariat, *AICHR The ASEAN Intergovernmental Commission on Human Rights What You Need To Know*, (Jakarta: ASEAN Secretariat, 2012)

¹⁴ *Myanmar National Human Rights Commission*, "Activities of the Myanmar National Human Rights Commission (5 September 2011 to 31 January 2012)", <<http://mnhrc.org.mm/assets/uploads/2013/02/Report-from-Myanmar-Commission.pdf>> (accessed 16 August, 2018), 7-12.

¹⁵ BBC News Editor, "Myanmar Country Profile," BBC News, <<http://www.bbc.com/news/world-asia-pacific-12990563>> (accessed 2 February, 2019).

¹⁶ *The Globe and Mail*, "The Rohingya Crisis, Living in Limbo", <<https://www.theglobeandmail.com/news/world/the-rohingya-crisis-inside-the-camps-where-thousands-of-refugees-still-live-in-limbo/article38193463/>> (accessed 2 February, 2019).

¹⁷ Ruma Paul and Shoon Naing, "Thousands of Rohingya flee 'no man's land' after resettlement talks," Reuters, <<https://www.reuters.com/article/us-myanmar-rohingya-nomansland/thousands-of-rohingya-flee-no-mans-land-after-resettlement-talks-idUSKCN1GC0EE>> (accessed 2 February, 2019)

under the age of 25 never left the camp.¹⁸ The Rohingya's children have been deprived of many basic necessities including proper nutrition and education. Making things worse are the issues of human trafficking and sexual assault.¹⁹ Rohingyas continue to be annihilated by Myanmar via the deprivation of food and healthcare.²⁰ The Rohingya's lack of citizenship lies at the heart of why they fled to other countries and why they cannot return to Burma.

The United Nations branded this massacre as nothing short of ethnic cleansing.²¹ Myanmar's de facto leader, Aung San Suu Kyi, refutes the claim and rejected the UN's inquiries into the crime. In September, she claimed that while others have lived in peace in the country, many Rohingya Muslims had chosen to flee; she even called the Rohingyas as "troublemakers".²² Despite clear indications that the ethnic cleansing of Muslim Rohingyas is taking place,²³ Aung San Suu Kyi continue to ignore the matter.²⁴ Warnings of the occurrence of a genocide in Myanmar have been suggested by scholars at Yale University and the US Holocaust Museum as well as the UN human rights chief, Zeid Ra'ad al-Hussein. Genocide is often in the form of violent physical attacks, but in this case it is in the form of food or medical care deprivation.²⁵ Myanmar has violated countless international and regional treaties that it has signed. The massacre carried out by the State Council for Peace and Development (SPDC) violated countless international laws, portraying Myanmar as a rogue nation.²⁶ In fact, Myanmar is currently committing the most egregious human rights abuses in all of Southeast Asia.²⁷ Myanmar continues to assert that the Rohingya crisis is an internal affair and is best addressed bilaterally with partners. Foreigners are prohibited from entering Rohingya areas.²⁸ Cooperation with the UN have been dismissed by Myanmar; now it seems that the nation is only comfortable cooperating with ASEAN on the matter.

The situation persists today as reported by the UN Special Rapporteur in Myanmar,

¹⁸ Holly Watt, "'Lives will be lost': Bangladesh rains promise further misery for Rohingya," *The Guardian*, <<https://www.theguardian.com/global-development/2018/mar/01/bangladesh-monsoon-rains-further-misery-rohingya-myanmar>> (accessed 2 February, 2019).

¹⁹ Plan International, "Rohingya children live in fear of human trafficking and sexual assault: Report," *SBS News*, <<https://www.sbs.com.au/news/rohingya-children-live-in-fear-of-human-trafficking-and-sexual-assault-report>> (accessed 9 February, 2019).

²⁰ Nicholas Kristof, "I Saw a Genocide in Slow Motion," *The New York Times*, <<https://www.nytimes.com/2018/03/02/opinion/i-saw-a-genocide-in-slow-motion.html>> (accessed 20 February, 2019)

²¹ Charlotte Bellis, "Rohingya reflect: Six months since Myanmar exodus," *Al Jazeera*, <<https://www.aljazeera.com/news/2018/02/rohingya-reflect-months-myanmar-exodus-180225103914874.html>> (accessed February 2nd, 2019); Holly Watt, "'Lives will be lost': Bangladesh rains promise further misery for Rohingya," *The Guardian*, <<https://www.theguardian.com/global-development/2018/mar/01/bangladesh-monsoon-rains-further-misery-rohingya-myanmar>> (accessed 2 February, 2019).

²² Pavin Chachavalpongpan, "Is Promoting Human Rights in ASEAN an Impossible Task?," *The Diplomat*, <<https://thediplomat.com/2018/01/is-promoting-human-rights-in-asean-an-impossible-task/>> (accessed 20 February, 2019)

²³ Steve Redisch, "Brownback: Myanmar Conducting 'Religious Cleansing' of Rohingya," *VOA News*, <<https://www.voanews.com/a/brownback-myanmar-conducting-religious-cleansing-of-rohingya/4278699.html>> (accessed 20 February, 2019).

²⁴ Ruma Paul, "Nobel peace laureates to Suu Kyi: 'End Rohingya genocide or face prosecution'," *Reuters*, <<https://www.reuters.com/article/us-myanmar-rohingya-nobellaureates/nobel-peace-laureates-to-suu-kyi-end-rohingya-genocide-or-face-prosecution-idUSKCN1GC1S6>> (accessed 20 February, 2019).

²⁵ Nicholas Kristof, "I Saw a Genocide in Slow Motion,".

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

²⁷ Pavin Chachavalpongpan, "Is Promoting Human Rights in ASEAN an Impossible Task?," *The Diplomat*, <<https://thediplomat.com/2018/01/is-promoting-human-rights-in-asean-an-impossible-task/>> (accessed February 20th, 2019).

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

Thomas Andrews.²⁹ Yet, ASEAN continues to be silent despite calls for it to address the Rohingya and boat crises which require expedient human action.

Making things worse is the current coup by the Myanmar Military. Ethnic Rohingyas are living in fear more than any other citizens in Myanmar. Myanmar has no rule of law and no human rights protection.³⁰ The crisis in Myanmar is deemed as a significant test of ASEAN's reliability. The situation is a glaring demonstration of ASEAN's inability to uphold its principle of non-interference while avoiding its reputational damage. Amongst the ASEAN member states, Indonesia has been the most active in finding solutions for the crisis in Myanmar.³¹

C. ASEAN'S POLICY AND ACTION (INACTION) PERTAINING TO ROHINGYA'S ISSUE BEFORE THE ICJ CASE ON GAMBIA VS. MYANMAR

Despite calls for its accountability regarding the human rights violation of the Rohingya, ASEAN continues to remain silent. Malaysia's Prime Minister, Najib Razak, was the only ASEAN member state leader who had spoke out against the crisis in Myanmar, describing the military actions as a "genocide".³² Indonesia, on the other hand, offered humanitarian aid to the Rohingya refugees amidst pressures from human rights groups and Muslim groups in the country.³³ Singapore facilitated humanitarian aid via the ASEAN Humanitarian Assistance (AHA) center.³⁴ The governments of Indonesia and Laos have also agreed to cooperate in solving the crisis in Myanmar.³⁵ Meanwhile, Brunei sent more of its NGOs to carry out humanitarian efforts in the Rohingya's refugee camps.³⁶ Cambodia decides to remain as a bystander as they believe that the crisis is an internal matter to be solved by the Myanmar government.³⁷ Thailand had donated numerous necessities to aid the Rohingya refugees in Bangladesh. Yet, the government does not acknowledge the Rohingya as refugees.³⁸ Meanwhile, the Vietnamese President extends aid to Bangladesh in an effort to resolve the

²⁹ *United Nation General Assembly*, "Situation of human rights in Myanmar", <<http://undocs.org/A/75/335>> (accessed October 9th, 2020)

³⁰ Esther Wah, "For some the nightmare has returned, but for ethnic people the nightmare never stopped," Myanmar Now, <<https://www.myanmar-now.org/en/news/for-some-the-nightmare-has-returned-but-for-ethnic-people-the-nightmare-never-stopped>> (accessed 15 March, 2021)

³¹ Mennecke, Martin, and Ellen E. Stensrud. "The failure of the international community to apply R2P and atrocity prevention in Myanmar." *Global Responsibility to Protect* 13, no. 2-3 (2021). 127.

Dr. Pattharapong Rattanaseevee, "Myanmar crisis could be a final test for Asean reliability," Manila Times, <<https://www.manilatimes.net/2021/03/14/opinion/analysis/myanmar-crisis-could-be-a-final-test-for-asean-reliability/850949/>> (accessed 15 March, 2021)

³² Ahmad Rizky M. Umar, "ASEAN countries should find a solution to end the persecution of Rohingya," The Conversation, <<https://theconversation.com/asean-countries-should-find-a-solution-to-end-the-persecution-of-rohingya-66919>> (accessed 13 August, 2018)

³³ *Ibid*

³⁴ Lydia Lam, "Singapore pledges \$100,000 in humanitarian aid to help in Myanmar's Rakhine crisis," The Straits Times, <<http://www.straitstimes.com/singapore/singapore-pledges-100000-in-humanitarian-aid-to-help-in-myanmars-rakhine-crisis>> (accessed 20 August, 2018).

³⁵ Sheany, "Indonesia, Laos Agree to Help Solve Myanmar Crisis," Jakarta Globe, <<http://jakartaglobe.id/news/indonesia-laos-agree-help-solve-myanmar-crisis/>> (accessed 20 August, 2018)

³⁶ Ain Bandial, "As humanitarian crisis mounts, more Brunei NGOs step up to help Rohingya refugees," The Scoop, <<https://thescoop.co/2017/10/16/humanitarian-crisis-mounts-brunei-ngos-step-help-rohingya-refugees/>> (accessed 20 August, 2018)

³⁷ Sao Phal Niseiy, "Cambodia's Prime Minister Is Wrong About Myanmar's Rohingya Issue," The Diplomat, <<https://thediplomat.com/2017/02/cambodias-prime-minister-is-wrong-about-myanmars-rohingya-issue/>> (accessed 20 August, 2018)

³⁸ Supalak Ganjanakhundee, "Thailand's refusal to recognise Rohingya as refugees leaves them in illegal limbo," The Nation, <<http://www.nationmultimedia.com/detail/asean-plus/30340157>> (accessed 20 August, 2018).

Rohingya crisis yet turns a blind eye to the atrocities in Myanmar.³⁹ The AICHR's chairing state i.e. the Philippines has also remained silent on the Rohingya crisis.⁴⁰

Past reactions from the individual Member States show that most of them have avoided making official comments on the crisis. Most opinions and actions tend to be more humanitarian. The main question remains: what is the collective response of ASEAN on this issue as an institution? There are still clear guidelines or statements from ASEAN and AICHR on this issue. The ASEAN website includes "Speeches and Statements" by the ASEAN Secretary General, the former ASEAN Secretary General and other leaders; It is believed that there would be an explicit response to the crisis, but the truth is that very few have done so. In the last speech uploaded to the site, i. H. the comments of H.E. Dato Lim Jock Hoi, ASEAN Secretary General (2018-2022) at the handover ceremony of the ASEAN Secretary General in Jakarta on January 5, 2018, no mention was made of the Myanmar or Rohingya crisis.⁴¹

In this study, research by the Forum Asia is also referred to. The finding revealed that the AICHR has never had any significant contribution in alleviating the crisis in Myanmar since its establishment in 2009/2010 up to 2016.⁴² The AICHR failed to play any role in easing the conflict in Myanmar where thousands were imprisoned for exercising their political rights.⁴³ Activists in the country had forwarded many human rights violation cases to AICHR but received no response. The inaction demonstrated by the organization contradicts its statement of being "people-oriented".⁴⁴ The meager performance shown by AICHR is a reflection of ASEAN's poor commitment in championing human rights despite the establishment of its common regional human rights body.

In 2011, Indonesia chaired the AICHR and was largely deemed as a strong proponent in advancing human rights matters in ASEAN. Yet, ASEAN as the main institution had constantly employed the "ASEAN way" to veto AICHR's policies.⁴⁵ AICHR failed to publish any document during the year being under harsh political restrictions at the time.⁴⁶ Consequently, the Rohingya crisis was overlooked although the Arakan Rohingya Refugee Committee (ARRC) was one of the contributors of the report.⁴⁷ The AICHR continued its

³⁹ Nguyen Quoc Huy, "What do people from Vietnam think about Rohingya refugees?," Quora, <<https://www.quora.com/What-do-people-from-Vietnam-think-about-Rohingya-refugees>> (accessed ...)

⁴⁰ Raul Dancel, "Philippines 'respects' Malaysia's dissent on Asean's Rakhine crisis statement," The Straits Times, <<http://www.straitstimes.com/asia/se-asia/philippines-respects-malaysias-dissent-on-aseans-rakhine-crisis-statement>> (accessed 20 August, 2018).

⁴¹ H.E. Dato Lim Jock Hoi, "Remarks by H.E. Dato Lim Jock Hoi Secretary-General of ASEAN (2018 – 2022) Handover Ceremony for the Transfer of Office of the Secretary-General of ASEAN," Asean Secretariat, <http://asean.org/storage/2018/01/ASEAN-SG-Dato-Lim-Remarks-for-the-Handover-Ceremony-5-Jan-2018_FINAL-II.pdf> (accessed 8 February, 2019)

⁴² Solidarity for Asian People's Advocacy Task Force on ASEAN and Human Rights (SAPA TFAHR), *Four Years On and Still Treading Water: A Report on the Performance of the ASEAN Human Rights Mechanism in 2013*, (2014).

⁴³ Solidarity for Asian People's Advocacy Task Force on ASEAN and Human Rights (SAPA TFAHR), *Hiding Behind Its Limits, A Performance Report on the first year of the ASEAN Intergovernmental Commission on Human Rights (AICHR) 2009-2010*, (2010), 142.

⁴⁴ Solidarity for Asian People's Advocacy Task Force on ASEAN and Human Rights (SAPA TFAHR), *Hiding Behind Its Limits, A Performance Report on the first year of the ASEAN Intergovernmental Commission on Human Rights (AICHR) 2009-2010*, (2010),

⁴⁵ Solidarity for Asian People's Advocacy Task Force on ASEAN and Human Rights (SAPA TFAHR), *A Commission Shrouded in Secrecy, A Performance Report on the ASEAN Intergovernmental Commission on Human Rights 2010-2011*, (2012), 35.

⁴⁶ Solidarity for Asian People's Advocacy Task Force on ASEAN and Human Rights (SAPA TFAHR), *A Commission Shrouded in Secrecy, A Performance Report on the ASEAN Intergovernmental Commission on Human Rights 2010-2011*, (2012).

⁴⁷ Solidarity for Asian People's Advocacy Task Force on ASEAN and Human Rights (SAPA TFAHR), *A Commission Shrouded in Secrecy, A Performance Report on the ASEAN Intergovernmental Commission on Human Rights 2010-2011*, (2012).

silence in 2012 regarding the ethnic minority crisis in the Kachin and Arakan States in Myanmar⁴⁸ due to ASEAN's non-support. The only way AICHR can address the crisis is by getting ASEAN to improve the human rights protection mandate. The AICHR is at risk of losing its credibility if it does not tackle severe human rights violation like the crisis in Myanmar.⁴⁹ The Rohingya crisis would not have escalated if it had been tackled earlier on. The Rohingya issue was largely ignored in 2013.⁵⁰

The AICHR inaugurated its five years of work in 2014. The report asserted that the AICHR had been solely focusing on promoting, and not protecting, human rights. The members of AICHR failed to reach a consensus in submitting the proposal to the AMM to revise the TOR.⁵¹ This rendered AICHR powerless and voiceless in addressing severe regional human rights violation such as that of the Rohingya crisis.⁵² The AICHR continued its focus in promoting human rights endeavors by conducting debates, workshops, training, and dialogues in 2015.⁵³ However, the body continued to ignore several other main regional human rights issues such as disappearance cases in ASEAN.⁵⁴

A number of initiatives were rolled out to drive the adoption of the aligned guidelines for the AICHR and ASEAN Sectoral Bodies in tackling human rights issues.⁵⁵ This was a positive drive for the institution in realizing its human rights commitment. Yet, the report mentioned nothing about the efforts of ASEAN's and the AICHR in addressing the Rohingya crisis. Additionally, the interview showed that the term "Rohingya" was not cited at all in the official ASEAN document. Any mention of the term in the chairman's statement is not essentially associated with the AICHR.

The AICHR remained silent even when the Rohingya crisis escalated in 2016. Considering the massive spillover impact of the crisis on other countries and the significant casualties suffered by the victims, the AICHR's failure to act violates its own TOR as well as the ASEAN Charter. ASEAN as the key institution is accountable for AICHR's lack of action. From an institutional standpoint, the body's inability to make statements on cases associated with the civil and political pillars of the ASEAN Community had hindered it from taking accountability, including in the Rohingya case.⁵⁶

As the Rohingya case was not the priority of ASEAN and the AICHR, no discussions were held regarding the enactment of the AICHR mandate throughout the year.⁵⁷ The matter of the Rohingya crisis never made it to the summit meeting, and it was only addressed in the chairman statement as mentioned before. The response of the AICHR was made not in the

⁴⁸ Solidarity for Asian People's Advocacy Task Force on ASEAN and Human Rights (SAPA TFAHR), *Still Window-Dressing, A Performance Report on the Third Year of the ASEAN Intergovernmental Commission on Human Rights (AICHR) 2011-2012*, (2013), 43.

⁴⁹ *Ibid.*

⁵⁰ Solidarity for Asian People's Advocacy Task Force on ASEAN and Human Rights (SAPA TFAHR), *Four Years On and Still Treading Water, A Report on the Performance of the ASEAN Human Rights Mechanism in 2013*, (2014).

⁵¹ Solidarity for Asian People's Advocacy Task Force on ASEAN and Human Rights (SAPA TFAHR), *The Future of Human Rights in ASEAN Public Call for Independence and Protection Mandates, A Report on the Performance of the ASEAN Human Rights Mechanism in 2014*, (2014), 6.

⁵² Burma Partnership, *Human rights situation in Burma/Myanmar*, (Bangkok,Thailand : Forum- Asia), 17.

⁵³ Solidarity for Asian People's Advocacy Task Force on ASEAN and Human Rights (SAPA TFAHR), *Breaking the Silence and Unlocking Barriers for Human Rights Protection in ASEAN, A report on the Performance of the ASEAN Human Rights Mechanisms in 2015*, (2016), 31.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, 82.

⁵⁶ Asian Forum For Human Rights And Development (Forum-Asia) Solidarity for Asian People's Advocacy (SAPA) Task Force on ASEAN and Human Rights Working Groups On ASEAN (SAPA TFAHR & WGA), *Have They Passed The Litmus Test?, A Report on the Performance of the ASEAN Human Rights Mechanism in 2016* (2016), 30.

⁵⁷ *Ibid.*, 20.

capacity of an institution; instead, it was made personally by the likes of Dinna Wisnu and Edmund Bon Tai Soon via the press conference.⁵⁸ Indeed, and individual act does not represent the act of the institution as a whole. Hence, no policies were made on the Rohingya crisis at the institutional level.

The human rights condition in Myanmar was analyzed in one study, but the findings indicate the non-involvement of ASEAN and the AICHR.⁵⁹ Instead, the study only revealed the UN's involvement in the matter. This is logical as the data or policies of ASEAN and the AICHR as well as their meetings are kept confidential. Yet, it is obvious that ASEAN has been largely inactive in helping the victims. The involvement of the UN is a diplomatic way of showing its distrust towards ASEAN for its reluctance and failure in solving the crisis.⁶⁰

Finally, ASEAN demonstrated its response on September 24, 2017 i.e. a month following the assault on Rakhine State which caused the Rohingya to flee to Bangladesh. The response came in the form of a statement by the President in which ASEAN Foreign Ministers expressed concern about the crisis in northern Myanmar's Rakhine State. In addition to offering their condolences to the victims, they condemned the attacks on the Myanmar security forces on August 25, 2017, as well as all forms of violence that resulted in the death of civilians, the destruction of homes and the displacement of many persons.⁶¹ On August 25, Rohingya militants attacked the police and killed 12 members of the security forces, prompting a crackdown by the security forces. Myanmar's army claimed they were fighting the rebels, but the fleeing group said troops and Rakhine Buddhists launched a fierce campaign to drive them away.⁶² The ASEAN Chairman's Statement on The Humanitarian Situation in Rakhine State shows its stand for the Myanmar government. This is an unfair standing as ASEAN had failed to initiate any investigations prior to issuing the statement. Malaysia made a separate statement indicating its disagreement with the one made by ASEAN. The Malaysian government expressed its anger for the omission of the term "Rohingya" in the ASEAN statement which refers to a group of stateless Muslim minority who became the target of the attacks on Rakhine state.⁶³ The ASEAN Foreign Minister stated that the situation in Rakhine State was a complex inter-municipal problem that was deeply rooted in history. Therefore, they advise against the adoption of measures by the interested parties so as not to aggravate the situation. An agreement was reached to find viable and long-term solutions to resolve the conflict and foster a closer dialogue between Myanmar and Bangladesh so that the victims can rebuild their lives. The Foreign Ministers welcomed Myanmar's commitment to ensure the safety of civilians, to take immediate action to end the violence in Rakhine, restore the socio-economic situation and address the refugee problem through a screening process. Yet, no monitoring mechanism is in place to ascertain the extent to which Myanmar has followed through with this commitment.

With the non-mention of the Rohingya's plight in the ASEAN Foreign Ministers' statement, it is obvious that the institution is making a mockery of human rights. This indicates a blatant disregard for the Rohingya who are in fact citizens of ASEAN despite Myanmar's

⁵⁸ Dinna Prapto Raharja, Interview by Author, Through Google Hangout, 22 April 2020.

⁵⁹ Burma Partnership, *Human rights situation in Burma/Myanmar* (Bangkok, Thailand : Forum- Asia).

⁶⁰ Dinna Wisnu, "Rohingya dan ASEAN," Sindo News, <<https://nasional.sindonews.com/read/1241228/18/rohingya-dan-asean-1505832567>> (accessed 4 January, 2019).

⁶¹ Asean Secretariat, "ASEAN Chairman's Statement on The Humanitarian Situation in Rakhine State," Asean Secretariat, <<http://asean.org/asean-chairmans-statement-on-the-humanitarian-situation-in-rakhine-state/>> (accessed 2 March, 2019).

⁶² *BBC News*, "Myanmar: What sparked latest violence in Rakhine?," <<http://www.bbc.com/news/world-asia-41082689>> (accessed 15 August, 2018).

⁶³ *Radio Free Asia*, "Malaysia Rejects ASEAN's Latest Statement on Rakhine Crisis in Myanmar," <<https://www.rfa.org/english/news/myanmar/asean-rohingya-09252017165325.html>> (accessed 15 August, 2018).

non-recognition of such. Rather than calling for prompt measures to resolve the dispute, ASEAN calls for the member states to take no action.

ASEAN should shame the policies and actions of EU countries. EU countries called for sanctions against Myanmar's senior military for "gross and systematic" human rights violations against the country's troubled Rohingya.⁶⁴ Blacklisting senior military officials, freezing their EU assets and preventing them from traveling to the bloc would be the most difficult step Brussels has taken so far to end the Rohingya crisis and bring the perpetrators to justice.⁶⁵ A strong response also came from Turkey's President Tayyip Erdogan. He was pressing world leaders to do more to help Myanmar's Rohingya Muslims, who face what he has described as genocide. Erdogan said "You watched the situation that Myanmar and Muslims are in You saw how villages have been burnt... Humanity remained silent to the massacre in Myanmar". As the head of the OIC, Erdogan had discussed the violence with around 20 world leaders and was continuing to deliver aid to the region. Turkey also raise the issue at the United Nations General Assembly in New York.⁶⁶

Of course, the ASEAN political situation is quite different from the EU or the OIC, but at least ASEAN has the opportunity to think about the creation of an interim measures policy that would minimize the conflict and reduce the number of victims.

The Rohingya crisis is a test case for the AICHR to determine the extent of their involvement in solving the human rights problem. Unfortunately, according to Wahyuningrum, the AICHR was not mentioned anywhere in the talk on Rohingya at ASEAN's high-level meeting. The ASEAN member states attempted to frame it as a humanitarian action and humanitarian aid, and therefore the ASEAN Humanitarian Center is the one that was mobilized.⁶⁷ The framing of this case as a humanitarian case is not adequate. However, Wahyuningrum argues that the ASEAN Humanitarian Center (AH Center) is indeed a very important institution to mobilize the case as they have the capacity, volunteers, warehouses, and logistics to mobilize the refugees. However, human rights can also be one of the options to make sure that the situation would be adequately addressed by applying the human rights principle and approach particularly in the repatriation phases. Therefore, the AICHR has to play a role.⁶⁸

Wahyuningrum believes that a certain level of fear exists among the member states if the AICHR is involved in settling the Rohingya case. The member states often argue that human rights movements would name and shame their action or inaction to the cases. In addition, the member states are afraid that the foreign institution or foreign countries will use the AICHR to impose their own values. In this case, Wahyuningrum initially presents some of the positive examples of how the norm changes the sectoral bodies' attitude in ASEAN. However, at the same time, there is a certain reluctance from the members and trust issues regarding the AICHR's way of addressing the problem.⁶⁹ Wahyuningrum believes that the Member States' fear of the involvement of the AICHR will put them in hot seat.⁷⁰

Zain, in the interview, said that the Rohingya case is primarily a human rights case. Hence, since ASEAN already has a human rights body i.e. the AICHR, ASEAN and its member states should significantly use the AICHR thus giving it a more prominent role in addressing

⁶⁴ *Channel New Asia*, "EU seeks sanctions on Myanmar military over Rohingya crisis", <<https://www.channelnewsasia.com/news/asiapacific/eu-seeks-sanctions-on-myanmar-military-over-rohingya-crisis-9993160>> (accessed 18 August, 2018)

⁶⁵ *Ibid.*

⁶⁶ Reuters Staff, "Turkey's Erdogan presses world leaders to help Myanmar's Rohingya", <<https://www.reuters.com/article/us-myanmar-rohingya-turkey-idUSKCN1BF1PE>> (accessed 20 May 2022)

⁶⁷ Miller, Hannah. "JUSTICE FOR ROHINGYA PEOPLE." (2022).6.

⁶⁸ Wahyuningrum, Interview by Author, Through Zoom Meeting, 15 April 2020.

⁶⁹ Wahyuningrum, Interview by Author, Through Zoom Meeting, 15 April 2020.

⁷⁰ Wahyuningrum, Interview by Author, Through Zoom Meeting, 15 April 2020.

or responding to the Rohingya issue. Furthermore, the AICHR could not use the excuse that they do not have any authority to be involved in or settle the human rights issues of Rohingya. Their status as the only overarching human rights body in ASEAN should justify their active role in protecting people in need, including the Rohingya.⁷¹ Basically, the ASEAN Charter and the TOR open an opportunity for the AICHR to expand its mandate. Zain suggests that the AICHR should ask the ASEAN member states' governments to be more responsible in curbing the violation on the Rohingya. Besides that, they should also provide assistance to Myanmar in the form of basic needs including schools and health facilities.⁷² Zain also strongly argues that the case of Rohingya is indeed the responsibility of ASEAN as a regional organization. However, the AICHR should be at the forefront in addressing this problem.⁷³

The ASEAN governments may have described this case as a humanitarian case, learning from the European region. But what happened to the Rohingya is different from other "refugees" in Europe. ASEAN must watch the European Union deal with its own migration crisis. In the EU, people are fleeing throughout the region. Meanwhile, ASEAN people are fleeing within the region. The EU response "provides a framework for a solution and that framework is a regional solution of equitable burden sharing for a regional problem". Here too, ASEAN should be able to find workable solutions.⁷⁴ They provided help, support and certainty for their own people, since the Rohingya belong and are staying in the region. However, since the ASEAN leaders avoid discussing the case with Myanmar's government, finding a solution is unforeseeable. The ASEAN and the AICHR only calls Myanmar for their own obligation on the ratification of the Convention on the Prevention and Punishment of the Crime of Genocide, which Myanmar ratified on March 14, 1956.

D. THE IMPACT OF ICJ'S ORDER ON THE CASE OF THE GAMBIA VS. MYANMAR ON ASEAN'S POLICY AND ACTION TOWARD THE ROHINGYA ISSUE

The lawsuit by Gambia under the ICJ, also support from other states such as Canada, Netherlands, and Maldives give new hope for AICHR to act more independently as an ASEAN human rights body. The jurisdiction of the Court is based on the fact that both states are parties to the Convention, without entering reservations for Article IX's reference to the Convention to the ICJ. The Gambia alleged that in its application to the ICJ, Myanmar committed genocide against the Rohingya through its policy and violated the Genocide Convention in a variety of ways, including failure to prevent and punish genocide. The Gambia specifically referred to Article 9 of the Genocide Convention. This allows all parties to the Convention to hold genocide accountable to another state. This is because all member states have an active obligation to prevent and punish genocide. Importantly, this case concerns a proceeding between the member states of the United Nations, which is subject to the Charter of the United Nations, the ICJ Statute, and the Genocide Convention. Rather than criminally detaining a particular individual responsible for coordinating, performing, and / or approving certain actions of Genocide, the proceedings ask Myanmar's responsibility. The ICJ proceedings are the first official to hold Myanmar as a state to legally liable for international crime under major international treaties.

⁷¹ Zain Maulana, Interview by Author, Through Zoom Meeting, 30 April 2020.

⁷² Zain Maulana, Interview by Author, Through Zoom Meeting, 30 April 2020.

⁷³ Zain Maulana, Interview by Author, Through Zoom Meeting, 30 April 2020.

⁷⁴ *The Phom Penh Post*, "Dear world: Don't expect so much from ASEAN on the refugee crisis," <<http://www.phnompenhpost.com/opinion/dear-world-dont-expect-so-much-asean-refugee-crisis>> (accessed 13 August, 2018)

Interestingly, Canada and the Netherlands are ready to publicly praise the ICJ in The Gambia and support its efforts. In addition, the Republic of Maldives has indicated its intention to submit its own intervention to the International Court of Justice to protect the Rohingya.

Despite the issue of legal standing and court's jurisdiction, article 41 of the ICJ Statute empowers Court to "order interim measures necessary to protect the rights of either party". The hearing is "called immediately to make an urgent decision on the application." With respect to genocide, The Gambia relied heavily on the work of the United Nations Fact Finding mission, broadly citing mission reports and testimony given to the mission. Gambia concludes the application with an application for interim measures, arguing that the Rohingya and the right to apply require urgent court protection to prevent further irreparable damage. The Gambia has requested the court to stop all violations of the Genocide Convention and order Myanmar to report to the court on the implementation of interim measures four months after its adoption.

This part of the procedure does not provide a written response from the responding country, Burma. Instead, both states are given the opportunity to express themselves in oral trials in court, where they respond to the other's allegations. The hearing was held on the 10th-12th. December 2019.

ICJ Order issued on January 23, 2020 in *The Gambia v. Myanmar*, "There is a realistic and imminent risk of irreparable damages to the rights claimed by Gambia " In determining the risk of irreparable damage, the ICJ said that the extraordinary significance of allegations at this stage of the proceedings justified the discovery that had genocide intent. The ICJ acknowledges Gambia's request and does not need to determine if Myanmar has violated the Genocide Convention for the purpose of interim measures, only to determine if there are situations that require preliminary measures for enactment. In the court's view, all the facts and circumstances presented were protected from the genocide, thereby protecting the rights of the Rohingya and its members in Myanmar, which the Gambia claimed and sought protection. It was enough to conclude that it was done. The mentioned in Article III and Gambia's right to require Myanmar to comply with the obligation not to violate genocide and to prevent and punish genocide under the Convention are "plausible".

"The product" of this necessity and practice places the individual at the top priority of international human rights law. Necessity and practice could save thousands of lives by rewriting the procedure for issuing emergency measures, focusing only on the urgency, seriousness, and irreparability of personal injury. The ICJ has a vital role in the development of the Responsibility to Protect (R2P) Framework. More than 26 years have passed since Bosnia and Herzegovina filed an application under the Genocide Convention, on November 11, 2019, The Gambia has filed a proceeding against Myanmar in front of the International Court of Justice for violations of the UN Genocide Convention.

This may indicate a lack of relevance and suggest that the role of the court under R2P is fairly theoretical, but it may also be revealed by the ICJ over time – Like other R2P actors in depends on the state's willingness to activate it. Long before the situation in Myanmar's deteriorated, the ICJ was able to act in other situations where there was a serious risk of genocide, such as 2003-2005 in Darfur, Sudan. Below, is a brief explanation of the case and the role of the ICJ in terms of R2P,

There is a key judgement in the ICJ case-law on atrocity prevention, namely the Bosnia Genocide case. The case shows us how the ICJ fits into the R2P framework as defined by its four atrocity crimes, three pillars, and its focus on prevention. Hence, this discussion is relevant to the current case on Myanmar.

The Key Judgement of the ICJ regarding the Prevention of Atrocity Crimes: *Bosnia and Herzegovina v. Serbia and Montenegro* (2007) in its case-law the International Court of Justice has to date seen very few proceedings that have dealt directly with the atrocity crimes that R2P

seeks to prevent. States accused of committing atrocity crimes may not consent to an ICJ case, and states that could initiate such a case may fear the political costs of suing such a state. Witnessing widespread atrocities against its Bosnia population, Bosnia and Herzegovina instituted in 1993 a case under the UN Genocide Convention against the Federal Republic of Yugoslavia (which later was replaced by Serbia and Montenegro). Fourteen years later, the Court issued a merit judgement on 26 February 2007 which has direct relevance to the responsibility to protect. The ICJ does not follow a strict doctrine of precedent, but this was the Court's first opportunity to address in a contentious case a number of legal questions under the Genocide convention. The Court's finding on a legal duty to prevent genocide was historic, as it empowered the Article I of the Genocide Convention.

As the ICJ case progresses, we can begin assessing the potential role of the International Court of Justice in the R2P framework. The concept of "responsibility to protect" has never appeared in an application to the International Court of Justice in The Gambia, a court hearing, or a court order, but there is an element that makes stand out from an R2P perspective. There are three notable elements. First, there is the fact that the case is being pursued by The Gambia. The Gambia has nothing to do with allegations of violations of the United Nations Genocide Convention recognizing it as a "particularly affected" condition. Second, statement a Gambian agent said the proceedings were initiated "to awaken the conscience of the world and raise the voice of the international community." In the opening debate of the UN General Assembly, Gambia "calls on all stakeholders to support this process. As a global community of conscience, we can no longer ignore the Rohingya plight. " This ambition is very similar to the idea behind R2P and its creation in response to the genocide in Rwanda and Srebrenica. The international community needed to recognize its responsibilities and act to protect the vulnerable groups from atrocities.

Third, considering the content of the interim measures ordered by the court, it is striking that the order concerns not taking genocide, preventing genocide, and punishing genocide. All these steps follow the logic of preliminary measures aimed at protecting the rights associated at this stage of the process from irreparable harm. However, these steps are also consistent with what Myanmar should do if is responsible under the framework of R2P. In addition, the ICJ has taken interim measures by requiring Myanmar to report to the ICJ (and Gambia) on a regular basis, not just once, for all steps taken to implement the court order. Added a clear preventive element.

These first observations emphasize that the state should be seen as a tool that can help carry out its responsibility to protect. Therefore, Canada and the Netherlands, two major supporters of R2P, in a joint announcement of intervening in the Gambia-initiated case, "we support these efforts to affect all humanity. It reflects the acceptance of the obligation of the Netherlands."

The proceedings currently running under the ICJ is significantly important for several reasons in particular to protect Rohingya people. As the first formal intervention on behalf of the Rohingya people on the world stage, the proceeding also highlight the dramatic consequences of global Islamophobia without meaningful intervention by sister countries to protect the vulnerable Islamic population.

After the ruling case, there is indeed progress with the AICHR now. For the past ten years, there had been many complaints sent to the AICHR including the Rohingya case especially from human rights activists. Unfortunately, there was no response from the AICHR both personally and institutionally. Progress was made in 2019 and 2020 when the AICHR through several of its representatives carried out relevant efforts; after six meetings, the AICHR agreed on the correspondence guideline.⁷⁵

⁷⁵ Eric Paulsen, Interview by Author, Through Whatsapp Video, 20 April 2020

Wahyuningrum is one prominent supporter of the idea. Although this is a fundamental mechanism, the guideline was not available before and hence was projected to have a good impact on the AICHR. Unlike the commissions in Africa, South America and Europe, this mechanism goes beyond mere correspondence. Once the complaint is sent, the complaint will be acknowledged, and the complainant will be sent to the countries concerned. If the AICHR had a similar mechanism, for instance with the Rohingya case, certain people may send a complaint to the AICHR who will then send it to the government of Myanmar. Although the government of Myanmar will unlikely respond to it positively, and the AICHR might not do any follow-up, at the very least the mechanism is already in place.⁷⁶

The implementation of this mechanism is a test particularly for Indonesia, which is known for its strong support for the development of human rights mechanisms in the region. Of course, it is also a test for all ASEAN member states. The country's reaction to this mechanism could be different, since any agreement in the AICHR is voluntary and must be consensual.⁷⁷

Currently, in terms of institutional support, the AICHR has been invited to a number of work plan developments of the case; however, in the case of addressing the repatriation of the Rohingya from Bangladesh, the AICHR was not mentioned anywhere despite the fact that the base of that approach is on human rights as explained previously.

Being responsible for one's own crisis or crime must be known in the ASEAN region. There are at least two types of mechanisms in this region: the Extraordinary Chambers of the Cambodian Courts to try the crimes of the Khmer Rouge and the United Nations Special Panel on Crimes in East Timor. In addition, there are special human rights courts in Indonesia that deal with human rights violations. Therefore, such a mechanism can also be built to redress Rohingya human rights cases, particularly boat cases.⁷⁸

According to Amara in her reply to the interview questionnaires, based on past performance, the ASEAN member states' role in responding to human rights situations vary from case to case. The case relating to civil and political rights tends to take a cautious strategy because it usually involves state action. To that end, ASEAN institutions could not go beyond the state's sovereignty as the non-interference principle applies in this case, including on that of the Rohingya Khmer Rouge, Sombath Samphone, and Wamena riots. Cases relating to economic, social, and cultural rights tend to be more proactive, although remain very slow.⁷⁹

ASEAN as an institution has the opportunity to prove itself following the establishment of the ASEAN Charter by ideally developing mechanisms that are funded and fully supported by ASEAN institutions. Furthermore, according to the ASEAN Charter, the ASEAN member states have a collective responsibility to enhance peace and security. For the AICHR, the boat crisis also opens up more possibilities to demand for a more robust mandate from ASEAN institutions and member states to protect the Rohingya and in a more far-reaching aim to protect the human rights of all ASEAN citizens. The support and action from the civil society in several Rohingya boat cases, such as in Indonesia, is one modality for ASEAN institutions especially for the AICHR to act beyond their limited mandate. Who knows that through this case, AICHR may find the momentum to become an independent human rights commission? The AICHR can prove that what has been legally written and agreed in the Charter can be effectively implemented in this case if there is an action to stop the crisis.

⁷⁶ Wahyuningrum, Interview by Author, Through Zoom Meeting, 15 April 2020.

⁷⁷ Eric Paulsen, Interview by Author, Through Whatsapp Video, 20 April 2020

⁷⁸ Sangeetha Yogendran, "Responsibility for boat crises in ASEAN: Potential means and methods for accountability," Kaldor Centre <https://www.kaldorcentre.unsw.edu.au/publication/responsibility-boat-crises-asean-potential-means-and-methods-accountability?mc_cid=e467489f57&mc_eid=92fa64572f> (accessed 10 November, 2020).

⁷⁹ Amara Pongsapich, Interview by Author, Through E-mail, 16 April 2020.

Another recent Rohingya case is the detention of 300 Rohingya by the government of Bangladesh in November 2020. They were detained and isolated after the government of Bangladesh rescued them from a ship stranded at sea in May 2020. This action was claimed as improper. Responding to this, ASEAN Parliamentarians urged the Bangladeshi government to allow other actors to monitor the Rohingya situation in the camp. Fortify Rights, an NGO, previously reported human rights violations and mental health concerns for those detained on the island. Many Rohingya question their detention, but they assume that they are detained merely because they are Rohingya.⁸⁰

Recently, on November 11, 2020, ahead of the 37th ASEAN Summit, the ASEAN Parliamentarians submitted an open letter urging ASEAN institutions to act proactively to end the violence and displacement of Rohingya in Rakhine. The Rohingya case is not only a humanitarian case, but also one that needs to be addressed from all aspects by all countries particularly those in ASEAN. ASEAN MPs also urged ASEAN to strengthen the capacities of their institution, including the AICHR. The summit changed course and used its political influence over the Myanmar government to promote measures that will bring significant change to the state of Rakhine.⁸¹

After the Court's order, Myanmar takes all steps to prevent genocide. This is of course a positive impact. ASEAN or AICHR can refer to the work of the UN fact-finding mission to Rakhine State that was cited by the Gambia in their proceedings that the irreparable damage against Rohingya is clear. Hence, ASEAN via AICHR can do a country visit to assure Myanmar stops all the atrocities as soon as possible and to make sure that the Rohingya people are now more protected than before. It could be a test for whether ASEAN human rights mechanisms works or not in the field. Seeing the case as a humanitarian disaster by assigning the AHA center to help Rohingya people with humanitarian aid is considered inappropriate. Hopefully, after the Courts' order, the ASEAN and AICHR will use a more legal approach to seek the solution. They can use the AICHR as a human rights body or they can apply their dispute settlement mechanisms under the ASEAN Charter by involving the AICHR in that regard.

Another effort ASEAN should try is to give an opportunity for the Myanmar government and the Rohingya's representatives to meet to express themselves in a dialogue or meeting. ASEAN or AICHR can continue to lobby Myanmar to take more action to return back Rohingya to the Rakhine state to which they belong. In sum, ASEAN or AICHR policy towards Rohingya should support the ICJ's order to stop atrocities against Rohingya.

Furthermore, many said that the ICJ's order indicates that Myanmar had genocide intent toward Rohingya, these are enough proof for ASEAN or AICHR to ask Myanmar to be legally liable for the Rohingya people. Supposedly, after the Court's order on the case, there is no more hesitation among member states of ASEAN to talk and decide their future action towards Myanmar. If the ICJ can only deliver the order for interim measures, ASEAN can go further to seek a merit solution to the case.

The Court's order is legally binding to Myanmar. Myanmar has to comply with the obligation not to violate genocide and to prevent and punish genocide under the convention. ASEAN or AICHR shall support this decision by making a policy to monitor the implementation of the order by Myanmar. Presumably, the compliance of Myanmar will influence a lot by the policy and action of ASEAN or AICHR.

There is an interesting novelty from the case. The ICJ's order can be said as a product of necessity that is successfully issued and in practice, places the individual at the top priority.

⁸⁰ *Fortify rights (FR)*, "Bangladesh: Free Rohingya Refugees Detained on Isolated Island", <<https://www.fortifyrights.org/>>

⁸¹ *ASEAN Parliamentarians for Human Rights (APHR)*, "**Parliamentarians urge ASEAN to take greater action to resolve Rakhine crisis**", <<http://aseanmp.org/2020/11/11/parliamentarians-urge-asean-rakhine/>>

Something that is rarely implemented in other fields of international law. It is a new approach and gains a positive opportunity for the development of an intergovernmental human rights framework including for ASEAN.

Currently, Myanmar facing a hard time due to the coup de tat. The atrocities against Rohingya even get worst after it. The violence spread across the country. There are more uncertainties as to whom the Rohingya case must be held liable. Fortunately, both the ASEAN and the AICHR respond to the Myanmar crisis very quickly and can be considered effective compared with The Rohingya crisis. Here are the ASEAN responses to the Myanmar coup de tat crisis: ASEAN Chairman's Statement on 1 February; Shuttle Diplomacy, lobbies; ASEAN chairman's statement (informal ASEAN foreign minister meeting, 2 March 2021) the agendas are: stop violence, open dialogue with ASEAN, ASEAN readiness to assist Myanmar; Chairman statement (ASEAN leaders meeting, ASEAN Secretariat Jakarta, 24 April 2021); Communication and coordination with the UN and other international systems as well as individual countries; Before and after 24 April 2021 individual ASEAN member states connected to CRPH and NUG; On 4 June 2021: visit Myanmar. FM Brunei and the ASEAN Secretariat General met Sen Gen Ming Aung Hlai (MAH); AHA Center is in coordination with relevant institutions to prepare for humanitarian assistance; FM Brunei (Dati Eryawan) was appointed as the ASEAN Special Envoy. Among those responses, unfortunately, the ASEAN did not involve AICHR to act.

However, the AICHR took its own initiative to respond to the situation. Below are the AICHR responses to Myanmar Crisis: 5 February 2021, press statement expressing concerns about the Myanmar coup, signed by Indonesia, Malaysia, Thailand, and Singapore; 8 April 2021 - include AGENDA ITEM 15 on human rights development in ASEAN; 6 countries made an oral intervention on Myanmar: Indonesia, Malaysia, Philippines, Thailand, Singapore, and Vietnam; 9 April 2021 - press release: highlighted concerns over the escalation of violence, expressed AICHR readiness to support Myanmar on any task assigned by AMM; 26 April - include AGENDA ITEM 4: updates from AICHR representative: Indonesia highlighted issues on refugees (Rohingya); 2 August 2021 interface meeting with AMM: 2 out of 6 AICHR representatives highlighted on Myanmar in front of AMM. Indonesia highlighted issues on the rights of detainees and demand the release of political prisoners; September 2021 - ASEAN Human Rights Dialogue.

The ICJ's order also opens an opportunity for ASEAN or the AICHR to deal with Myanmar on the issue of Rohingya's statelessness. Citizenship, or nationality, is a fundamental human right that facilitates the ability to exercise other human rights. The right to a nationality is extremely important because of its implications for the daily lives of individuals in every country. Being a recognised citizen of a country has many legal benefits, which may include – depending on the country – the rights to vote, to hold public office, to social security, to health services, to public education, to permanent residency, to own land, or to engage in employment, amongst others. Although each country can determine who its nationals and citizens are, and what rights and obligations they have, international human rights instruments pose some limitations on state sovereignty over citizenship regulation. Specifically, the universal human rights principle of non-discrimination and the principle that statelessness should be avoided constrain state discretion on citizenship.

While issues of nationality are primarily within each state's jurisdiction, a state's laws must be in accord with general principles of international law. Article 15 of the Universal Declaration of Human Rights recognises the right to a nationality, a right to change one's nationality, and the right not to be deprived of nationality. According to Article 15 of the Universal Declaration of Human Rights, "[e]veryone has the right to a nationality," and "[n]o one shall be arbitrarily deprived of his nationality." The right to a nationality is confirmed in

many other international instruments, including the European Convention on Nationality of the Council of Europe (1997).

Nationality, according to the International Court of Justice, is "a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments." The right to nationality without arbitrary deprivation is now recognized as a basic human right under international law, which, through legal instruments and the practice of many states, imposes the general duty on states not to create statelessness.⁸²

All Rohingya born in Myanmar and their children have a right to Myanmar citizenship. By denying them citizenship, Burma is violating international law especially the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. While Burma is not a party to these conventions, the general principles embodied in the conventions are drawn from the basic provisions found in nationality legislation and practice of the majority of states. The conventions, therefore, reflect an international consensus on the minimum legal standards of nationality. In addition, provisions in other conventions support the principles underlying the instruments on statelessness. Giving the Rohingya a citizenship will faster the reconciliation process of the conflict.⁸³

The future of the conflict in Myanmar, and the protection of the Rohingya population, is still very much in question. An ICJ Order is a significant decision under international law and should play a critical role in protecting a group under serious threat. However, it is only as significant as the political will of the international community, a longtime challenge regarding human rights under international law. The international community should continue to put pressure on Myanmar to provide full citizenship and accompanying rights to its Rohingya population. Until Myanmar does so, the Rohingya who flee human rights abuses and ill-treatment in Myanmar should be provided with asylum and international refugee protection. The significant impact of the Order will can only be seen in the months and years to come.

If the ICJ has successfully "resolved" the issue of legal standing and jurisdiction by issuing an order of the case on the interim measures, the AICHR should also find out the way can also to waive or compromise the ASEAN ways or any other hindrances resulting from their TOR. Any drawbacks especially its weak mandate to protect people could not be claimed as the reason for the AICHR for their inaction. Not only the AICHR but the ASEAN and its elites of leaders have to take a strong effort to end the atrocities against Rohingya in Myanmar. The appointment of the AHA Center is not enough to help Rohingya out of this situation. AHA center must act beyond its humanitarian mandate. Ideally, the mandate to give human rights protection to Rohingya people lies with the AICHR.

⁸² The primary international legal instruments addressing the issue of statelessness are: the 1954 Convention Relating to the Status of Stateless Persons and; the 1961 Convention on the Reduction of Statelessness. These conventions provide for the acquisition or retention of nationality by those who would otherwise be stateless and who have an effective link with the state through factors of birth, descent, or residency. The 1954 Convention Relating to the Status of Stateless Persons defines a "stateless person" as someone "who is not considered a national by any State under the operation of its law."

Under Article 1 of the 1961 Convention on the Reduction of Statelessness, a state "shall grant its nationality to a person born in its territory who would otherwise be stateless."

⁸³ Garrido, Carmen Romero. "The State-Sponsored Genocide of the Rohingya Community from a Constructivist Perspective." *Comillas Journal of International Relations* 24 (2022).57.

E. CONCLUSION

The lack of protection mandate as enshrined in the TOR could not be claimed to justify their silence to protect Rohingya from any atrocities against them. The findings show that there was significant progress since the issuing of the ICJ's order on the Gambia vs. Myanmar case on the policy of ASEAN especially the AICHR.

The ICJ's proceeding shall also be considered important in determining the future ASEAN policy towards Myanmar, especially on the issue of citizenship of the Rohingya people. In addition, it will also influence the future human rights framework under the AICHR. The AICHR can ask member states to be more active in protecting people's rights especially vulnerable groups within the region. Member states' obligation relies on many-core human rights treaties to which they are parties to it.

ASEAN can help Myanmar to comply with the Court's order by giving them technical assistance for all steps taken to implement the court order. In this context, not only Myanmar can be seen as a tool that can help carry out its R2P, but ASEAN too.⁸⁴ If the court's order that indicates R2P successfully enforces Myanmar to compliance and stops the atrocities, this would be a good lesson for ASEAN in the future to use such a framework in any similar case.

The AICHR's responses to the Myanmar crisis show that the AICHR's actions are unnecessary to have a full agreement from each of state's representative. The AICHR, in this case, was brave enough to stand and sound their thought on the Myanmar crisis including on Rohingya. This is very significant progress the AICHR has that needs to be maintained and developed. If ASEAN succeeds in dealing with this crisis, it will be a good example to other parts of the world in handling similar crises. It will also confirm that they create the AICHR for the sake of their citizen's interests i.e. to promote, protect, and fulfill their rights.

⁸⁴ Zahed, Iqthyer Uddin Md. "RESPONSIBILITY TO PROTECT? THE INTERNATIONAL COMMUNITY'S FAILURE TO PROTECT THE ROHINGYA." *Asian Affairs* 52, no. 4 (2021).940.

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