

# The Power Limitation of ASEAN Inter-Governmental Human Rights Commission Under the Perspective of ASEAN Charter in Case of the Rohingya Issue

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## Abstract

The ASEAN Inter-governmental Human Rights Commission (AICHR) was established in 2009 by the Association of Southeast Asian Nations (ASEAN) as their human rights commitment under Article 14 of the ASEAN Charter. This article is written under the perspective of ASEAN Charter to explain the power limitation of AICHR in case of Rohingya issue. It briefly explains the introduction of Rohingya issue, ASEAN, ASEAN Charter, Terms of reference (TOR) of AICHR, and AICHR through the hierarchy of AICHR as the inter-governmental body of ASEAN as well as the relationship between the AICHR and the Rohingya issue through the ASEAN Charter. It found that the Rohingya issue is overpowered of the AICHR to protect human rights due to the restriction empowered by the TOR. Hence the author suggests the ASEAN to revise the TOR by giving more powers on the human rights protection to the AICHR.

**Keywords:** AICHR, ASEAN Charter, ASEAN, TOR, Rohingya

## Introduction

Since the ASEAN ratified the ASEAN Charter in 2007, the issue of human rights becomes the main commitment of ASEAN. Article 1(7) of the ASEAN Charter stipulated that “[the] purpose of ASEAN are ...[to] strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of [ASEAN]”. (ASEAN, 2016: 4) This would say that the ASEAN has obligated to promote and protect human rights in Southeast Asia region. In order to fulfill this ASEAN’s commitment on human rights, the ASEAN in 2009 established the ASEAN Inter-governmental Human Rights Commission (AICHR) to develop the cooperation on human rights in ASEAN. The Rohingya issue is apparently happened in the state of Rakhine, Myanmar which is a member state of ASEAN. With the direct authority on ASEAN human rights mission, the AICHR in theory is respected to take some actions on this situation. However the AICHR in reality disregard and kept silence to respond with this Rohingya issue instead of acting strictly under their commitment on human rights. This circumstance makes the doubt and question on the failure of AICHR to protect their human rights commitment in ASEAN. Hence this journal explains the power limitation of AICHR to act on the Rohingya issue from the perspective of ASEAN Charter.

## **Rohingya Issue, ASEAN, AICHR, ASEAN Charter and TOR**

**Rohingya Issue:** The Rohingya is the Muslim minority living in the Rakhine state, Myanmar. The 2012 report on the Rohingya issue by the Human Rights Watch was issued and asked Myanmar government to pay responsibility for the rejection of citizenship, degrading of human rights, forced relocations, use of force against the minority, and many accuses on human rights issues. (Human Rights Watch, 2012) All of these accuses are referred under the International Covenant on Economic, Social and Cultural Rights 1976 (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women 1981 (CEDAW), the Convention on the Right of the Child 1990 (CRC), and the Convention on the Rights of Persons with Disabilities 2008 (CRPD) which Myanmar is a party to. (OHCHR, 2017; SHAPE-SEA, 2016:40) Moreover the fact shows that until now more than 500,000 Rohingyas have fled Myanmar to Bangladesh. (Time, 2017; SHAPE-SEA, 2016: 52-53) Many of human rights international organizations and NGOs such as the UN High Commissioner for Human Rights, Amnesty International, the European Commission, the Human Rights Watch, and others, undeniably mentioned the Rohingya as the most victimized minority in the world (Amnesty International, 2017; ECHO, 2017; OHCHR, 2017; Human Rights Watch, 2012) This situation also makes Myanmar government to be questioned on doing ethnic cleansing against the Rohingya as well as the AICHR which is established to be directly responsible and protect human rights in ASEAN, completely fails to act on the Rohingya issue. (Time, 2017)

**ASEAN:** On 8 August 1967, the Association of Southeast Asian Nations (ASEAN) was lawfully established through the founding document which is called the ASEAN Declaration (Bangkok Declaration) (ASEAN, 2017). Then after launching the ASEAN Charter in 2008, the ASEAN was reconstrued its organization and created the ASEAN Community (AC) which are ASEAN Economic Community (AEC), ASEAN Political-Security Community (APSC), and ASEAN Socio-cultural Community (ASC). (ASEAN, 2013) Based on Article 7(2)(a) of the ASEAN Charter, the ASEAN Summit is the highest policy-making body of ASEAN with the main supportive of ASEAN Coordinating Council, ASEAN Community Councils, ASEAN Sectoral Ministerial Bodies, and ASEAN Secretariat. (ASEAN, 2016: 10) In October 2009 at the 15<sup>th</sup> ASEAN Summit, the ASEAN first time established the AICHR as the inter-governmental body and the integral part of ASEAN which stated under Article 3 of the TOR. (ASEAN Secretariat, 2009: 6)

**ASEAN Charter:** The ASEAN Charter was entered into force on 15 December 2008 by the adoption of 13<sup>th</sup> ASEAN Summit. (ASEAN, 2007) The ASEAN Charter mainly restructured legal and institutional framework for ASEAN. (Wong, 2012: 671-672; Koh, Manalo & Woon, 2009) The ASEAN Charter consisted of 13 chapters and 55 articles which are; the purposes and principles of Charter in Chapter 1 (Article 1-2), Legal personality in Chapter 2 (Article 3), Membership in Chapter 3 (Article 4-6), Organization organs in Chapter 4 (Article 7-15), Entities associated with ASEAN in Chapter 5 (Article 16), Immunities and privileges in Chapter 6 (Article 17-19), Decision making in Chapter 7 (Article 20-21), Settlement of disputes in Chapter 8 (Article 22-28), Budget and finance in Chapter 9 (Article 29-30), Administration and procedure in Chapter 10 (Article 31-34), Identity and symbols in Chapter 11 (Article 35-40), External relations in Chapter 12 (Article 41-46), General and final provision in Chapter 13 (Article 47-55). (ASEAN, 2016) The principles of human rights promotion and protection are also referred in many articles of ASEAN Charter such as; the Preamble of the ASEAN Charter stated that “[ADHERING] to...[respect] for and protection of [human rights] ...”, Article 1(7) stipulated that “[the] purposes of ASEAN are: ...[to] promote and protect human rights and fundamental [freedoms] ...” (ASEAN, 2016:4), Article 2(2)(i) stated that “[ASEAN] and its Member States shall act in accordance with the following Principles... [respect] for fundamental

*freedoms, the promotion and protection of human rights, and the promotion of social [justice]" (ASEAN, 2016: 7), Article 14(1) stipulated that "[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]", as well as Article 14(2) stated that "[This] ASEAN human rights body shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers [Meeting]" . (ASEAN, 2016: 19) As aforesaid articles, the principles of human rights promotion and protection are obviously claimed on the purpose of ASEAN Charter under Article 1(7), the principle of ASEAN Charter under Article 2(2)(i), and the establishment of the ASEAN human rights body under Article 14.*

**Terms of reference (TOR) of AICHR:** In the interpretation under Article 14(2) of the ASEAN Charter, the ASEAN set up the High-Level Panel to draft the TOR to establish ASEAN Human Rights Body which is now the AICHR. In July 2009, the TOR was adopted by the ASEAN Foreign Minister Meeting (AMM). (ASEAN Secretariat, 2017: 6) The TOR consisted of 9 articles which are; the purposes of AICHR in Article 1, the principles of AICHR in Article 2, the consultative inter-governmental body of AICHR in Article 3, the mandate and functions of AICHR in Article 4, the composition of AICHR in Article 5, the modalities of AICHR in Article 6, the role of the secretary-general and ASEAN secretariat to the AICHR in Article 7, the work plan and funding of AICHR in Article 8, and general and final provisions in Article 9. (AICHR, 2017) Hence the TOR is considered as the look-alike constitutional of AICHR.

**ASEAN Inter-governmental Human Rights Commission (AICHR):** According to Article 14(1) of the ASEAN Charter, the ASEAN established the AICHR as the ASEAN human rights body after the adoption of ASEAN Foreign Minister Meeting. In October 2009, the AICHR was adopted at the 15<sup>th</sup> ASEAN Summit and the ten AICHR Representatives were appointed. (AICHR, 2017; Sharom, Purnama, Mullen, Asuncion & Hayes, 2015: 92) The establishment of AICHR determines ASEAN's commitment to develop regional cooperation on human rights. And the main purposes of AICHR is to promote and protect human rights in ASEAN. (ASEAN Secretariat, 2017: 18) However it seems to the author that most of AICHR achievement is focused more on the human rights promotion approaches such as seminar, workshop, training and report, not the protection approach. (Gamez, 2017: 55-56) Consequently the AICHR sometimes is criticized as the tootles tiger due to their limitation of power to protect the human rights in ASEAN. (Sharom, Purnama, Mullen, Asuncion & Hayes, 2015: 93)

**The Limitation of Power of AICHR under the ASEAN Charter in the Rohingya Issue:** To explain the limitation of power of AICHR under the ASEAN Charter to act in the Rohingya issue, there are two main matters to be considered such as (1) the hierarchy of AICHR as the inter-governmental body of ASEAN, and (2) the relationships between the AICHR and the Rohingya Case through the ASEAN Charter.

## The Hierarchy of AICHR as the Inter-Governmental Body of ASEAN

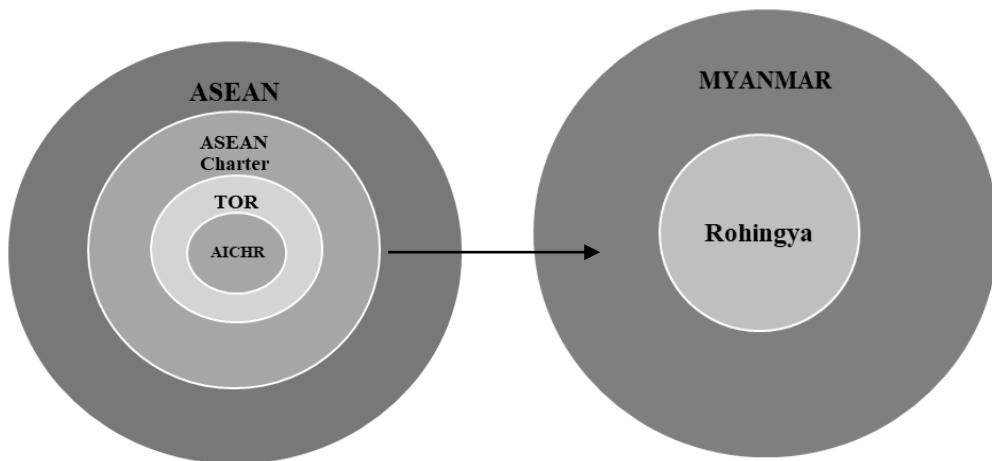


**Figure 1:** The hierarchy of AICHR as the inter-governmental body of ASEAN

As shown on Figure 1, according to Article 7(1)(a) of the ASEAN Charter stated that “[*The ASEAN Summit shall comprise the Heads of State or Government of the Member [States.]* ]”, the ASEAN Summit is consisted of the ASEAN Heads of State and is also the highest policy-making body in ASEAN. According to Article 8 of the ASEAN Charter, the ASEAN Summit are supported by their respective Foreign Ministers who meet in the ASEAN Foreign Minister’ Meeting (AMM). (ASEAN Secretariat, 2017: 12) The AICHR works as the inter-governmental body of ASEAN and stays in the lowest level of pyramid. In practice the ASEAN was established with the ideal of Top Down power organization. (Limsiritong, 2016a: 18) Therefore due to figure 1, the ASEAN Summit is considered as the center of power of ASEAN and the top level of pyramid.

The AMM is considered as the second level rank as well as the AICHR is considered as the lowest level rank. This would mean that the AICHR is in the lower level than the ASEAN Summit and the AMM. In both of theory and practice the AMM and the AICHR are absolutely under the power of the ASEAN Summit. According to Article 7 of the ASEAN Charter, it would interpret that the AICHR is designed to protect the human rights in ASEAN with a limitation of checking and balancing against the ASEAN Summit’s order in all matters included the Rohingya issue. (ASEAN, 2016: 10) And even the ASEAN Summit itself also balances their powers between the ASEAN Member States by the ASEAN Way through the consensus decision making mode under Article 20 of the ASEAN Charter. (Limsiritong, 2017: 76-77) Hence it is impossible for the AICHR as the lowest ASEAN body to break this hierarchy and have power over the ASEAN Summit due to their lower level rank of ASEAN structure.

## The Relationships between the AICHR and the Rohingya Case through the ASEAN Charter



**Figure 2:** The relationships between the AICHR and the Rohingya Case through the ASEAN Charter

As shown on Figure 2, on the left cycle, the AICHR is legitimately empowered by the TOR. The TOR regulates all regulations related to the AICHR such as the structure, purposes, principles, mandate, functions, funding, and especially decision-making mode of AICHR. The decision-making mode of AICHR under Article 6 of the TOR is referred to be based on consultation and consensus accordance with Article 20 of the ASEAN Charter. (ASEAN Secretariat, 2009: 10) Interestingly one big question came to the author that one of AICHR representatives who represented for Myanmar, will give his vote against Myanmar for the Rohingya issue or not. Moreover the TOR was empowered by the Article 14 of the ASEAN Charter which is created by the ASEAN. (ASEAN, 2016: 19) Hence it can interpret in the way that all powers of AICHR is originated from the ASEAN which is controlled by the ASEAN Summit as the supreme decision maker of ASEAN.

On the right cycle, the issue of Rohingya is fully under the sovereignty of Myanmar in one hand. In the other hands, Myanmar takes place as one of ASEAN Member State as well as one of member of ASEAN Summit which is also the supreme decision maker of ASEAN. Based on the ASEAN Way especially the ASEAN principle of non-interference in the internal affairs of ASEAN Member States under Article 2(e) of ASEAN Charter, this would mean the AICHR in practice always needs to get permission from the ASEAN Summit if the AICHR would like to act in the Rohingya issue. (ASEAN, 2016: 6)

Furthermore the decision-making mode of ASEAN Summit is referred to Article 20 (1) of the ASEAN Charter which is totally based on consultation and consensus method. This would mean to get permission on the Rohingya crisis, it requires all ASEAN Member States included Myanmar itself to agree on this matter. Hence the resolution in this situation is impossible to be solved in practice because Myanmar will not vote against himself for sure. (Limsiritong, 2016a: 21) In conclusion the limitation of power of AICHR is limited by the TOR which is totally regulated by the ASEAN and the Rohingya issue is the subject related to Myanmar which is one of the ASEAN Summit.

## Conclusion and Recommendation

To summarize, as mentioned above, the power limitation of AICHR is based on (1) the hierarchy of AICHR as the inter-governmental body of ASEAN and (2) the TOR which is administered by the ASEAN. Hence it is impossible in practice that the AICHR as the inter-governmental body of ASEAN and the lowest level rank of ASEAN body, will takes power over the issue of ASEAN Member State such as the Rohingya issue. Because the power of AICHR is blocked by the hierarchy of AICHR itself due to Figure 1 and by the TOR as the fundamental instrument of AICHR due to Figure 2. Therefore the Rohingya issue in this case is more bigger than the power of AICHR under the TOR.

For recommendation, to resolve the power limitation of AICHR for human rights protection, it needs to revise the TOR and giving the power of investigation to the AICHR even the party is the ASEAN Member State. As the option, Article 20(2) of the ASEAN Charter stated that *“where consensus cannot be achieved, the ASEAN Summit may decide how a specific decision can be made”*, This would mean that the ASEAN can apply other way of decision-making modes such as a majority vote or reverse consensus in case of the human rights issues. (Limsiritong, 2016b: 11; Van Damme, 2010)

## New Challenging in Future

As long as ASEAN would like to be accepted and recognized in a level of international organization, the human right issues in ASEAN such as the Rohingya issue are undeniable issue and the ASEAN needs to fulfill their human rights commitments as they gave their promises and binding themselves under the ASEAN Charter. However the Rohingya issue makes the hard position to the ASEAN as the whole. This is because on one side ASEAN is facing the pressures from the world and on the other hands the ASEAN felt their country's sovereignty are threatened by human rights as well as ASEAN also need to keep balance among the ASEAN Member States such as Myanmar in this situation through the ASEAN Way or Asian values. (Gamez, 2017: 7; Khotsananan, 2016: 552; Southeast Asian Human Rights and Peace Studies Network, 2016: 17)

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