

Development of Regional Human Rights Regime: Prospects for and Implications to Asia

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Introduction

The world has seen the gradual evolution of regional human rights arrangements. The adoption by the UN General Assembly of the Universal Declaration of Human Rights on December 10, 1948, was followed by the creation of numerous regional instruments that address concerns of particular importance in the regional context. Three world regions, Africa, the Americas and Europe, have established their respective regional instruments together with the supporting machinery, such as multilateral commissions and courts.¹ Undoubtedly, a considerable number of statements and documents of the regional meetings demonstrate that Asian states have, in recent years, been trying to address the absence of a regional human rights instrument and to uphold the Vienna Declaration of 1993, which emphasized the fundamental role of the regional arrangements in the promotion and protection of human rights.² Along with the global trend to adopt a number of subject-specific instruments, ratification of the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women has risen significantly in recent years in Asia. Moreover, states have undertaken activities under the Teheran and Beijing framework for regional cooperation. However,

1 This includes 1) the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, 2) the 1969 American Convention on Human Rights, and 3) the 1981 African Charter on Human and People's Rights.

2 Article 37 of the Vienna Declaration and Plan of Action states, "Regional arrangements play a fundamental role in promoting and protecting human rights. They should reinforce universal human rights standards, as contained in international human rights instruments, and their protection. (...) The World Conference on Human Rights reiterates the need to consider the possibility of establishing regional and sub-regional arrangements for the promotion and protection of human rights where they do not already exist."

despite numerous multilateral talks in the region, a tangible outcome has not been produced so far.

Thus, the fundamental question of this paper is, “Will all these efforts lead to institutionalization of an Asian system?” Institutionalization is the process of making a structured organization. In social science, institutionalization involves the processes by which social process, obligations, or actualities come to take on a rule-like status in social thought and action.³ Thus, this paper tries to examine the possibility of an actual regional human rights regime in Asia. For this purpose, this paper will examine other regional human rights systems in Europe, America, and Africa. Although these three regional systems differ in the concept of human rights and in the implementation of treaties and protocols, lessons from an examination of these mechanisms might help us understand the desirable structure and function of the regional human rights system in Asia. Then, it will examine the past achievement for the establishment of the regional human rights system in Asia, and analyze the problems and implications for future cooperation. This paper assumes that any effort might have a spillover effect in terms of vertical and horizontal expansion and a synergy effect that involves multi-track cooperation. Thus, efforts in the establishment of the regional human rights system at various levels will be explored. It will examine regional and sub-regional meetings, declarations, domestic reforms, and other related Track I, II, and III (inter-government, inter-agency, and NGOs) activities.

It might be argued that Asia’s unique characteristics might delay the establishment of the regional human rights system. Asia is a huge region with the world’s largest continent and greatest population. It contains more than 60 percent of the world’s population.⁴ Most Asian states are heterogeneous societies in terms of ethnic and religious composition. Because of these geographic and ethical diversities, cultural relativism has been supported by Asian politicians who oppose Western bias and seek self-determination.⁵ However, this argument might be undermined by several facts: first, respect for human dignity cannot be altered according to the

3 John W. Meyer and Brian Rowman, “Institutionalized Organizations: Formal Structure as Myth and Ceremony,” *American Journal of Sociology* 83(1977): 341.

4 Jill McGivering, “Asia Strained by Ageing Population,” *BBC*, May 14, 2003 (accessed April 12, 2007); available at http://news.bbc.co.uk/1/low/world/south_asia/3025289.stm.

5 Bilahari Kausikan, “Asia’s Different Standard,” *Foreign Policy* 92 (Autumn, 1993): 24–41.

surrounding environment; second, cultures are constantly changing and evolving internally; and third, the spread of transnational problems and the growing interdependency of people through an exchange of people and goods in the world makes human rights issues into shared concerns.

Proponents of the “Asian values” also argue that collectivism is one of the core Confucian disciplines.⁶ Speaking of collectivism, however, the argument that an individual’s worth is found only in the group, and that people are content with subordination to the group, originates from misinterpretation of what is described in Confucianism. Such discourse has, rather, provided politicians in Asia with a theoretical foundation to legitimate their authoritarian regime and advocate the importance of Asian solidarity.⁷ In fact, efforts have been exerted to promote these ideas, which nonetheless do not represent all values in Asian countries, through deliberate efforts to distinguish Asia from other societies.⁸ It seems likely that politically charged debate often drives us away from human rights debate. Thus it might be meaningful to examine challenges ahead and opportunities for further engagement in the establishment of a regional human rights mechanism in Asia.

Regional Human Rights System: Background and Progress

Origin

Each regional system has originated from shared interest and demand for establishing a framework for human rights protection. The European system came into being as a natural reaction to a gross human rights violation during WWII and a defense against all forms of totalitarianism.⁹

6 Seung Hwan Lee, “Asian Values and the Future of the Confucian Culture,” *East Asian Review* 12, no. 1 (Spring 2000).

7 It was not until the 1990s when the government specified “Asian Values” in the White Paper on Shared Values: Five “Shared Values” are 1) nation before community and social above self, 2) family as the basis unit of society, 3) regard and community support for the individual, 4) consensus instead of contention, and 5) racial and religious harmony. Government of Singapore, *White Paper on Shared Values* (Singapore: Ministry of Information, Communication and the Arts, 1991).

8 Lee Kwan Yew, prime minister of Singapore, and Mahathir Mohamad of Malaysia had been forerunners of Asian values. M. Hill and K.F. Lian, *The Politics of National Building and Citizenship in Singapore* (London: Routledge, 1995). p. 214.

9 It was believed by European states that human rights need to be respected so as to secure democracy and avoid dictatorship, and conflict between East and West Europe enabled countries in the West to make an exclusive human rights system. A.H. Robertson, *Human Rights in the World* (Manchester: Manchester University Press, 1982). p.81.

The Inter-American system was designed to be an ideological framework to make a coalition against communist threats.¹⁰ The Inter-American regional human rights system was thought to be a springboard to defend effective political democracy in this region. The African system was also created by common interests shared among states: These were safeguarding independence, collective security, territory integrity and promoting solidarity.¹¹ It is obvious that regional cooperation originates from shared sociopolitical interests and similar cultural heritage, which are scarcely to be found in Asia. A wide variety of languages, religions, political systems, ethnic compositions, conflicting memories and economic performances hinders cooperation based on mutual interests among states.¹² Furthermore, Asia lacks the experience of collective conflict management. In Asia, in fact, the primary concern of many political leaders has been maintaining political stability under state control, and thus, human rights has been on the lower rung of the agenda.¹³ Other obstacles might be: 1) denial of human rights discourse, 2) sacrifice of the rights of workers for high-speed economic development, 3) a patriarchic social system that values loyalty to the state authority over individual rights, and 4) cultural relativism and an extreme emphasis on Asian values. It should be noted that proximity of location does not merely guarantee a coalition among states. Thus, finding a common interest rather than hurriedly agreeing on a grand framework among all sub-regions should be preceded.

Regional Idiosyncrasies

Regional characteristics are found in legal arrangements. The rights in

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- 10 States in the 10th Inter-American Conference at Caracas expressed serious concern about the solidarity for the preservation of the political integrity of the American states against communist intervention. Odeen Ishmael, Statement in the Permanent Council of the OAS during Discussions on the Inter-American Democratic Charter, OAS, June 20, 2001; OAS, *The Declaration of Solidarity for the Preservation of the Political Integrity of the American States Against the Intervention of International Communism*, Tenth Inter-American Conference, March 1–28, 1954.
- 11 Thus the African concept of people is as a rather integral member of a group animated by a spirit of solidarity, and thus, rights are exercised with regard to the rights of others. Andrew Moravcsik, “The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe,” *International Organization* 54, no. 2 (2000): 217–252; Makau W. Mutua, “The African Human Rights System in a Comparative Perspective: the Need for Urgent Reformation,” *The Nairobi Law Monthly*, no. 44 (1993), p.28.
- 12 Gi Wook Shin, “Conflicting Memories Hinder Unity in Asia,” *Korea Herald*, March 27, 2007.
- 13 Information Office of the State Council of the People’s Republic of China, “The Progress of Human Rights in China,” *White Paper*, December 1995.

the European Convention for the Protection of Human Rights and Fundamental Freedom (ECHR) and its Protocols focus primarily on civil and political rights.¹⁴ The Social Charter, on the other hand, guarantees social and economic rights, but lacks an efficient implementation system.¹⁵ The American Convention on Human Rights (ACHR) deals with civil and political rights, except in Article 2 and in one general provision on economic, social and cultural rights. However, its two Protocols have a very weak protection mechanism, reserving the individual petition system only for the violations of the right to education and trade union rights.¹⁶ The fact that the American system does not offer the same juridical protection to all economic, social and cultural rights as it does to civil and political rights hints that the influence of the ideological hegemony has been more powerful than any practical demand.¹⁷ Instead, new provisions are recognized in the American Convention on Human Rights.¹⁸ The African Charter on Human and People’s Rights (ACHPR) distinctively recognizes collective rights and its clearly spelled legal obligations of the community, family, society and

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- 14 “They do not contain provisions relating to self-determination and to the rights of minority groups, children, refugees and aliens.” Hurst Hannum, “Minorities, Indigenous Peoples, and Self-Determination,” in *Human Rights: An Agenda for the Next Century*, eds., Louis Henkin and John Lawrence Hargrove (Washington, D.C.: The American Society of International Law, 1994), pp. 1–16.
- 15 Unlike ECHR, it depends on a monitoring procedure based on national reports, indicating how European states implement the Charter in practice. For those who ratified the protocol, which came into force in 1998, collective complaints of any violation of the Charter may be lodged with the European Committee of Social Rights. It might be argued that the relatively less binding influence of the Charter shows the lack of commitment of the Council of Europe. Manfred Nowak, “Future Strategies for the International Protection and Realization of Human Rights,” in *The Future of Human Rights Protection in a Changing World*, eds., Asbjorn Eide and Jan Helgesen (Oslo: Norwegian University Press, 1991), 81; Department of Foreign Affairs, Government of Ireland, “Revised European Social Charter Collective Complaint Mechanism,” *International Law*, July 20, 2006 (accessed March 12, 2007); available at <http://foreignaffairs.gov.ie/home/index.aspx?id=5604>.
- 16 The American Convention has two Protocols, namely on economic, social and cultural rights, and on the abolition of the death penalty. A. Glenn Mower, Jr., *Human Rights and American Foreign Policy* (New York: Greenwood Press, 1987), pp. 46–48.
- 17 For example, the ACHR stipulates that state parties should ensure to all persons subject to their jurisdiction the “free and full exercise of those rights and freedoms” (Article 1.1) but the additional protocol states state parties should “adopt the necessary measures” to achieving the full observance of the rights (Article 1).
- 18 **Right of reply (Article 14), right to property (Article 21), prohibition of expulsion from territory (Article 22.5) right of political asylum (Article 22.7), and prohibition of collective expulsion of aliens (Article 22.9),** are not in the ICCPR. Provisions such as the right to name, rights of the child, right to nationality, and the lawful recovery and adequate compensation to the dispossessed people are not found in the European Convention. The Convention is also complemented by treaties against torture, the forced disappearance of persons, gender violence, and discrimination against persons with disabilities. Interestingly, religious background—Catholic heritage—is reflected in the right to life (Article 4.1), which is protected from the moment of conception.

nation.¹⁹ Its broad recognition of rights includes the right to development and the so-called third generation rights.²⁰ However, it does not specify the right of privacy, which can be found in the ECHR (Article 8) and ACHR (Article 5). The ACHR also mentions the relationship between duties and rights (Article 32), but the ACHPR describes more comprehensive rights and corresponding duties.²¹ This might be because the African system defines personhood—slightly different from the Western concept of “individualism”—in a large community, and thus duties and respects for the family and community are uniquely found in the ACHPR.²² It is obvious that the African system has made strenuous efforts to respect the universality of human rights in many respects²³ while it meets regional needs.²⁴ This might be a valuable lesson to Asian states that seek to preserve indigenous distinctiveness. Thus, it might be desirable for Asia to incorporate regional characteristics along with pursuing universal human rights.

19 The African Commission ensures the protection of people's right laid out in the law.

20 This includes the rights to peace, solidarity, a healthy environment and development.

21 Article 32.1 states “Every person has responsibilities to his family, his community, and mankind.”

22 It should be noted that the harmonious development of the family (Article 29.1), national solidarity and independence (Article 29.4, 5) and African values and unity (29.7, 8) are highlighted. Article 29 states, “The individual shall also have the duty: 1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need; 2. To serve his national community by placing his physical and intellectual abilities at its service; 3. Not to compromise the security of the State whose national or resident he is; 4. To preserve and strengthen social and national solidarity, particularly when the latter is threatened; 5. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defense in accordance with the law; 6. To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society; 7. To preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society; 8. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.”

23 Article 60 states that the African Commission shall draw inspiration from international law, including the Charter of the UN, UDHR and other instruments adopted by the UN. Article 61 stipulates a comprehensive consideration of international instruments in determining the principles of law. Article 64 of the ACHR also expresses its intention to regard other treaties. All these demonstrate efforts to integrate international instruments in the regional human rights system with due regard to them.

24 Although some are vaguely defined, duties of the states to promote and ensure the respect of rights and freedoms through education and publication (Article 25) to guarantee the independence of the Courts and to establish national institutions (Article 26) are described. Another unique characteristic of the ACHPR might be the prohibition of mass expulsion of non-nationals (Article 12), encroachment upon the right to property in the “interest of public need” or in the “general interest of the community” (Article 14), elimination of every discrimination against women and children (Article 17.3). In addition, the African system expresses regional concerns such as special concerns for the rights and welfare of children. The African Charter on the Rights and Welfare of the Child, ratified in 1999, calls for special mention of persons with disabilities, and for special protection, participation and access for handicapped children.

Reporting System

The Organization for Security and Cooperation in Europe (OSCE) has established various tools to monitor a state's commitments in human rights and democracy.²⁵ Reporting is one of the standard functions of the field operation of the OSCE through which a country report is sent to the Chairman-in-Office and the Secretariat.²⁶ In particular, active inspection and reporting systems, including unfettered visits, empirical study, and ad-hoc visits, are a far advanced measure in that they are preventive in nature.²⁷ Although the Inter-American Commission does not have a coercive power to intervene in domestic affairs, its activity to investigate and issue a country report has contributed in mobilizing international public opinion.²⁸ Thorough investigation is not widely operated by the African Commission.²⁹ Although the Commission has set up various special reporting systems for human rights records, the lack of financial assistance, resources and time strains efforts to conduct a comprehensive on-site investigation of the reporters.³⁰ In addition, Rule

25 OSCE Office for Democratic Institutions and Human Rights, *Human Dimension Mechanisms* (accessed April 9, 2007); available at <http://www.osce.org/odihr/13483.html>.

26 This includes regular periodic reports, spot reports and confidential reports on human rights information and individual complaints. OSCE Office for Democratic Institutions and Human Rights, *A Handbook for OSCE Field Personnel* (Warsaw: OSCE, 2003), p.73.

27 The active inspection and reporting system of the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment is an innovative measure. Unfettered visits to examine any place and any person and empirical study open a new phase in international human rights intervention. Ad-hoc visits, in particular, are a far advanced measure in that they are preventive in nature, while a complaint mechanism is a follow-up measure after the violation of human rights occurs.

28 The Inter-American Commission has the power to ask state parties to submit an annual report to the General Assembly of the Organization of American States (Article 41), and the Court can submit a report on its work and the cases in which a state has not complied with its judgments. In dealing with a number of petitions to the Commission related to human rights violations under the government of General Pinochet in Chile and carrying out an on-site observation on torture and disappearance in the Republic of Argentina under militia in the 1970s and 1980s, the report of the Commission on the situation of human rights has contributed in raising public awareness. Robert Pastor, *Condemned to Repetition: The United States and Nicaragua* (Princeton: Princeton University Press, 1987), pp. 149–151.

29 In fact, Article 58 of the ACPHR requests an in-depth study of special cases that reveal the existence of serious violations of human rights. Article 58.2 states “The Assembly of Heads of State and Government may then request the Commission to undertake an in-depth study of these cases and make a factual report, accompanied by its findings and recommendations.”

30 This includes Special Rapporteur on Prisons and Conditions of Detentions in Africa, Special Rapporteur on Rights of Women in Africa, Special Rapporteur on Human Rights Defenders in Africa, Chairperson of the Follow-up Committee on the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, Refugees and Internally Displaced Persons in Africa, Working Group on Indigenous Populations and Communities. However, the Charter does not include any guideline defining appropriate methods of investigation. The African Committee of Experts on the Rights and the Welfare of the Child (ACERWC) is mandated to monitor the compliance of each state, but an independent monitoring fails to function due to financial difficulties. United Nations, *International Norms and Standards Relating to Disability, Part III. The Regional Human Rights System* (accessed February 10); available at <http://www.un.org/esa/socdev/enable/comp303.htm>.

91³¹ and Rule 98³² of the Rules of Procedure of the African Commission on Human and Peoples' Rights (1995) advises African states to settle cases through amicable solutions. Thus, it is understandable that African states prefer informal procedures as opposed to legal processes. It is highly likely that many Asian states will view the reporting system as an infringement of their sovereignty because it is a means to oversee the observance of their obligations. It is not at all impossible that Asian states with dismal human rights records might delay submission of the report, divert sensitive issues or omit what they refuse to reveal. It should be also noted that submission of a report can be a means of defending themselves, bypassing what can otherwise be a long and extensive investigation.

Petitions and Communications

Although individual petitions are critical components of the European system, the admissibility of the individual communication is rather restrictive.³³ In fact, more or less ten percent of the communications go past the admissibility stage because of either an increased awareness of Europeans of their rights or a backlog that imposes severe strain on the receptiveness of the European system. The inter-state complaint is politically sensitive in the Inter-American system. The Inter-American Commission has the authority to listen to individual complaints, and the petition may be submitted by either the victim or a third party, with or without the victim's knowledge.³⁴ However, the competence of the Commission to receive and examine communications can be recognized

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- 31 Rule 91.1 states, "If within three (3) months from the date the notification of the original communication is received by the addressee State, the issue has not been settled to the satisfaction of the two interested parties, through the selected channel of negotiation or through any other peaceful procedure selected by common consent of the parties, the issue shall be referred to the Commission, in accordance with the provisions of Article 48 of the Charter."
- 32 Rule 98 states, "Except the provisions of the present Rules of Procedure, the Commission shall place its good offices at the disposal of the interested States parties to the Charter so as to reach an amicable solution on the issue based on the respect of human rights and fundamental liberties, as recognized by the Charter."
- 33 Petitions and communications from individuals or groups claiming to be the "victims" of a violation are admitted after all domestic remedies have been exhausted (Article 34). Compatible with the provisions of the Convention, not manifestly ill-founded or has already been submitted to another procedure of international investigation, not anonymous (Article 35).
- 34 Nowhere is an "actio popularis" admitted in the European system. However, the final decision of whether the case should be brought to the Court is made by the Commission (Article 48). Human Rights Education Association, *The Inter-American Human Rights System* (accessed February 25, 2007); available at <http://www.hrea.org/learn/guides/OAS.html>; P. Van Dyk, *Judicial Review of Government Action and the Requirement of an Interest to Sue* (Maryland: Sithoff and Nordhoff, 1980).

after any state party declares it (Article 45).³⁵ In fact, individual complaint is not a core activity of the Commission. Although it has the mandate to handle hundreds of petitions a year, the number of cases where final decisions are respected at the domestic level is very minimal.³⁶ Nonetheless, the Inter-American system is far more advanced than other regional systems because it allows exceptions to the exhaustion of domestic remedies for the Commission's admission of a petition.³⁷ It might be partly due to unstable political conditions of Latin America, which might also be found in Asian states where a democratic system has not been institutionalized. Thus, these specific provisions might need to be taken into consideration for the Asian system.³⁸ Individuals or groups can submit written communications to the African Commission, alleging violation of the provisions of the African Charter by a state.³⁹ However, the number of communications brought to the Commission is relatively low compared to the infringement of human rights in this region.⁴⁰ This might be partly because of the lack of public awareness and the lack of means to bring the case to the regional system. The African Commission possesses substantial discretion in dealing with the petitions. Individual communications are deposited with the African commission until it deliberates on special cases that reveal the existence of a "series of serious or massive violations."⁴¹ It is

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- 35 However, the exercise of the power of the Inter-American Commission to accept petitions is not bounded by declarations of the state parties. Article 44 states "Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party."
- 36 Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca, N.Y.: Cornell University Press, 1989), pp. 140–141.
- 37 It applies if 1) the domestic legislation of the concerned state does not afford due process, 2) people are denied access to the remedies under domestic law or has been prevented from exhausting them, or 3) there is an unwarranted delay in rendering a final judgment. See Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46 (2)(b) of the American Convention on Human Rights), Advisory Opinion OC-11/90, August 10, 1990, Inter-Am. Ct. H.R. (Ser. A) No. 11 (1990).
- 38 A considerable deliberation should be paid in allowing the lodging of petitions by the third party and groups without direct connection to the violation, because it might be misused by individuals who can challenge the provisions of a regional system.
- 39 The ACHPR does not exactly specify "individual communications," which, in practice, are included in the "other communications." Rachel Murray, "Decisions by the African Commission on Individual Communications under the African Charter on Human and People's Rights," *The International and Comparative Law Quarterly* 46, no. 2(1997). pp.412–434.
- 40 R. Murray and M. Evans, "Non-Compliance of State Parties to Adopted Recommendations of the African Commission: A Legal Approach," *Documents of the African Commission on Human and People's Rights* 758, 2001.
- 41 Article 58.1 states, "When it appears after deliberations of the Commission that one or more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission shall draw the attention of the Assembly of Heads

understandable that a gross violation of human rights that affects a large population, rather than several peripheral cases, might be more critical for African countries. However, a question remains about when petitions can be brought to the Court.⁴² Without definite criteria for judgment, any “serious violation” might be neglected regardless of its significance. In addition, whether to conduct in-depth study on the proposed case might hinge on the result of the majority vote by the Organization of African Union member states. Thus, it is more likely that political clout and lobbying, not the rule of law, will determine the case.⁴³ Asian states will be anxious about the individual’s direct access to the Court to file complaints directly against them. Furthermore, state-to-state communication might not be practically implemented in Asia because it is under an environment where political relations and diplomatic courtesy are highly valued and favored by a majority of states. The fact that the European system is not a supranational body⁴⁴ hints that a state’s political will to take up matters at the risk of endangering its diplomatic relationships with other states is critical.⁴⁵ In this regard, the Asian system might need to 1) allow individuals to petition to the Court, 2) detail the due process in legal instrument, 3) stipulate strict provisions to enforce states to comply with the Court judgment, and 4) specify follow-up measures for non-compliance.

Competence of the Court

Despite the increased efficiency of a full-time European Court, breach of the right to a hearing within a reasonable time is still a problem and the excessive length of proceedings might seem to be another violation

of State and Government to these special cases.”

- 42 It is unclear if the political organ will decide whether the case should be studied. Article 58 states, “The Assembly of Heads of State and Government may then request the Commission to undertake an in-depth study of these cases and make a factual report, accompanied by its findings and recommendations.”
- 43 Article 10.2 of the OAU Charter states “All resolutions shall be determined by a two-third majority of the Members of the Organization.”
- 44 It can be argued that even the European system has not been a supranational body, but rather has remained as a loose confederation because states’ parties rarely take cases against other states’ parties to the Court.
- 45 States may refer to the Court any alleged breach of the provisions of the Convention and the protocols according to Article 33 of the ECHR. Inter-state cases include Ireland v. the United Kingdom in 1971 and 1972, Denmark, Netherlands, Norway and Sweden v. Greece in 1967, 1968, and 1970, and France, Denmark v. Turkey in 1982.

of human rights.⁴⁶ The Inter-American Court of Human Rights has extensive competence with regard to providing advisory opinions to any member state of the OAS regardless of its ratification of the Convention (Article 64).⁴⁷ Although the Court rarely suggests a detailed process of implementation, its judgment stipulates compensatory damages.⁴⁸ It should be also noted that achievement in providing an advisory opinion might contribute to “*jurisprudence constante*,” and enhance continuity and predictability.⁴⁹ However, the fact that only the states’ parties and the Commission may submit a case to the Court (Article 61)⁵⁰ and the case, if not resolved through friendly settlement, may be indirectly brought to the Court (Article 51.1),⁵¹ might be a limitation of the American system. The function of the African Court is to “complement the protective mandate of the Commission,” and individuals and NGOs cannot bring a suit against a state through the Court.⁵² Thus, the entire responsibility of human rights protection is imposed on the African Commission. Asian

46 In November 1998, a full-time European Court was established, replacing the original two-tier system of the part-time Commission and Court, which might increase the efficiency of the European Court.

47 Article 64 states “The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties.” Another distinctive uniqueness of the Inter-American system is that a state party is, upon ratifying the Convention, recognizing the jurisdiction of the Court without any special agreement (Article 62.1). Article 62.1 states, “A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention.”

48 See *Velasquez Rodriguez Case, Compensatory Damages* (Art. 63(1) American Convention on Human Rights), Judgment of July 21, 1989 Inter-Am.Ct.H.R. (Ser. C) No. 7 (1990).

49 The word “Laws” in ACHR(OC-6/86, 1986), *habeas corpus in emergency situations* (OC-6/86, 1986), *Judicial Guarantees in States of Emergency* (OC-9/87, 1987), *Compulsory Membership in an Association* (OC-5/85, 1985), and *Enforceability of the Rights to Reply* (OC-7/85, 1986). See The Word “Laws” in Article 30 of the American Convention on Human Rights, *Advisory Opinion OC-6/86*, May 9, 1986, Inter-Am. Ct. H.R. (Ser. A) No. 6 (1986); *Habeas Corpus in Emergency Situations* (Arts. 27(2) and 7(6) of the American Convention on Human Rights), *Advisory Opinion OC-8/87*, January 30, 1987, Inter-Am. Ct. H.R. (Ser. A) No. 8 (1987); *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and 8 of the American Convention on Human Rights), *Advisory Opinion OC-9/87*, October 6, 1987, Inter-Am. Ct. H.R. (Ser. A) No. 9 (1987); *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 of the American Convention on Human Rights), *Advisory Opinion OC-5/85*, November 13, 1985, Inter-Am. Ct. H.R. (Ser. A) No. 5 (1985); *Enforceability of the Rights to Reply or Correction* (Arts. 14(1), 1(1) and 2 American Convention on Human Rights), *Advisory Opinion OC-7/85* of August 29, 1986.

50 Article 61 states “Only the States Parties and the Commission shall have the right to submit a case to the Court.”

51 Article 51.1 states, “If, within a period of three months from the date of the transmittal of the report of the Commission to the states concerned, the matter has not either been settled or submitted by the Commission or by the state concerned to the Court and its jurisdiction accepted, the Commission may, by the vote of an absolute majority of its members, set forth its opinion and conclusions concerning the question submitted for its consideration.”

52 Makau Mutua, “African Human Rights Court: A Two-Legged Stool?” *Human Rights Quarterly* 21 (1999): 355.

countries might need to be advised to establish a system that enjoys both independence and empowerment. Direct access to the Court might need to be paid consideration in the long run. To make it effective, the Court needs to be operated by full-time judges with long-term commitments.⁵³ The first step to expanding the influence of the Court might be allowing any state to inquire into advisory opinions from the Court, as thus it might improve understanding of the legal instruments in Asia. The ultimate goal of a human rights regime is not codification of the law or proliferation of institutions, but institutionalization of the rule of law in this region. Thus, the regional system should be responsible for providing 1) guidelines for the interpretation of the law, 2) educational effects for the lawyers of the national court, and 3) conflict resolution among states.

Implementation

The strength of the European system is its supervisory mechanism, although it has no formal means of forcing member states to comply. The Committee of Ministers supervises the execution of court decisions.⁵⁴ Voluntary acceptance of the system by its member states that take it as authoritative might originate from the fear of expulsion from the Council of Europe. It should be noted that states risk any form of cost for their non-compliance and the European Union's keen interest in the jurisprudence. Thus, the Court's authorized decision that provides a high degree of individual protection and impels states to award damages might be the strength of the European system. Due to the lack of enforcement mechanisms, the ACHR looks rather like a non-binding declaration. In fact, the actual compensation is executed by the domestic procedure of the concerned state.⁵⁵ Given the unstable political condition in Latin America, however, it is not surprising that authoritarian governments

53 It should be noted that judges should sit on the Court in their individual capacity and, in particular, should not be allowed to engage in any activity incompatible with their independence, which is enjoyed by the judges in the European Court (Article 21.3). Article 21.2 of the European Court and Article 52, 53 of the ACHR stipulate that judges are elected based on their individual competence. Judges in the European Court are not allowed to engage in any activity incompatible with their independence. (Article 21.3).

54 Council of Europe, *Supervision of execution of judgments of the European Court of Human Rights* (accessed March 16, 2007); available at <https://wcd.coe.int/ViewDoc.jsp?id=35403>.

55 State parties to the ACHR should comply with the judgment of the Court. Article 68 states, "The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties."

tend to challenge the binding decision of the Commission.⁵⁶ The non-enforceability of the African Commission's decisions might also be a major drawback of the African system. The Commission not only lacks the power to enforce its decisions,⁵⁷ but also fails to provide clear and sufficient remedies or guidance to the member states.⁵⁸ It should be noted that the decision only "declares" or "recommends" resolutions. The African human rights system has been the less effective partly because of the political climate and cultural traditions such as preference for diplomatic solutions and amicable settlements. Asia has the mixture of Latin America's authoritative political culture and Africa's risk-averse cultural tradition.⁵⁹ Thus, the role of the Commission that supervises state parties to comply with judgments by exerting political clout might be important for the Asian system, although it might be infeasible to stipulate forcibly binding clauses in the legal instrument.

Institutionalized Loopholes

The ECHR stipulates the right of derogation under special circumstances (Article 15).⁶⁰ It is often accused of limiting the fundamental rights and liberties so as to assure a normative percentage of flexibility with the aim of interpreting the rights in accordance with the cultural values.⁶¹

56 Although the Inter-American system has no compulsory implementation mechanism, states may specify the cases in which a state has not complied with the judgment of the Court in the report on its work. Article 65 states, "The each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations." Steiner, pp.641-642.

57 That the majority of state parties delay submitting reports to the Commission might be also attributed to the Commission's lack of authority over other member states. Claude E. Welch and Ronald I. Meltzer, *Human Rights and Development in Africa* (Albany: SUNY Press, 1984). p.157.

58 Chidi Anselm Odinkalu and Camilla Christensen, "The African Commission on Human and People's Rights: The Development of its Non-State Communication Procedures," *Human Rights Quarterly* 20, no. 2(1998): 235-280.

59 Asia has many non-democratic states such as China, Bhutan, Burma, and some Middle East states, and Asian states claim that they prefer a non-confrontational approach. Viti Muntarhorn, "Asia, Human Rights and the New Millennium: Time for a Regional Human Rights Charter?" *Transnational Law and Contemporary Problems* 8, no.2 (1998): 359-405.

60 Article 15.1 states, "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."

61 For example, European Convention, which has been used as a model by a number of states in drafting constitutional and legislative provisions, was used to justify the persecution and oppression of the press. Between 1992 and 1996, Article 10(2) of the 1950 ECHR was used more than 1,000 times in 109 countries to justify oppression of the media. Julie Moffett, "Report Exposes Loopholes in Human Rights Convention," *Radio Free Europe*, February 19, 1998. Marcela Rad, "Limits of the Fundamental Rights

The American system has a list of non-derogable rights, which is longer than that of other human rights instruments.⁶² However, the ACHR allows derogation in the case of “war, public danger, or other emergency that threatens the independence or security of a State Party.” As the ACHR demands a lower threshold of derogation, it is probable that a certain catalogue of rights may be suspended under a declaration of an ambiguous “threat of security.”⁶³ It is worrisome that regional human rights law itself creates a loophole that allows states to invoke a “security problem” as justification for declaring states of emergency through which arbitrary actions may be carried out. The African Charter contains no emergency clause, and therefore allows no derogation from the rights it enshrines.⁶⁴ Nonetheless, there is no specific provision on non-derogable rights, such as time, condition, or degree. Although the ACHPR accords very detailed and elaborated provisions for the protection of rights, its “clawback clause” limits implementation of the law at the domestic level.⁶⁵ Thus, the apparently absolute rights might be restricted within the law.⁶⁶ The problem is not that conventions stipulate the right of derogation, but that states might take advantage of it. Thus, the establishment of the regional system should be pursued along with domestic progress

and Liberties Stipulated by the European Convention of Human Rights,” *European Studies* 1, no.2 (1998): 21–28.

62 The American system has the “rules of jus cogen,” mandatory, inalienable norms that are binding upon states. Non-derogable right includes rights to participate in government, rights of the child and the family, rights to a name and nationality and right to juridical personality (Article 27).

63 The ECHR allows derogation in time of war or other public emergencies threatening “the life of the nation.”

64 It does not allow any suspension of rights during wartime. Therefore, it allows no derogation from fundamental human rights, such as the right to life. Amnesty International, *Fair Trials Manual chapter 31* (accessed March 12); available at http://www.amnestyusa.org/international_justice/fair_trials/manual/index.html.

65 “Clawback clause” means that it permits, in normal circumstances, breach of an obligation for a specified number of public reasons. It also means a provision that entitles a state to restrict the granted rights to the extent permitted by domestic law. R. Gittleman, “The African Charter on Human and People’s Rights: A legal analysis,” *Virginia Journal of International Law* 22, no. 4(1982): 667; R. Higgins, “Derogations under Human Rights Treaties,” *The British Year Book of International Law, 1976–1977* 48 (1978): 466.

66 The ACHPR states that individuals are guaranteed political and civil rights, including the right to express, right to assemble, right to freely participate in the government “within the law,” “abide by the law” or behave “in accordance with the provisions of the law.” Article 9 states, “Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions within the law”; Article 10.2 states, “Every individual shall have the right to free association provided that he abides by the law”; Article 13.1 states, “Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law”; Article 13.3 states, “Every individual shall have the right of access to public property and services in strict equality of all persons before the law.”

in improving democratic values. Rights might not be protected unless the tradition of rule of law is preceded. It is important in Asia that the possible abuse of human rights during authoritarian rule under militia should be prevented by the law. It should be noted that cultivating culture that respects rights and essential freedom might be the catalyst for establishing a regional human rights regime in Asia. It is not at all hard to imagine that laws with derogation clauses might not stop human rights violations in Asian countries that have a record of frequent impositions of martial law and states of emergency, compounded with tension from frequent armed clashes between government soldiers and rebels.

Asian Model

The Commission might be a single set of monitoring organs for a plurality of human rights treaties. The objective of the Commission should be as follows: 1) enhance the authority to safeguard the enforceability of its decisions, 2) encourage states to report practical problems directly related to the issues in question, 3) promote state parties to respect the regional system, and 4) guarantee independence of the Commission. It is likely that all kinds of activities will help the Commission achieve the mandate and develop jurisprudence: These include standard setting, obtaining consultative opinions, and distribution of publications.⁶⁷ To avoid a heavy burden on the Commission, regularly examining communications and the jurisprudence set for the Commission over the short-term, and guaranteeing legislation conventions into domestic law and encouraging interpretation and determination of domestic cases in the long-term should be followed. To realize these tasks, stable financing for adequate staffing is important. Another critical step to help the Commission stand on its own without political influence from the member states might be electing independent judges who are not affiliated with the government.

The Asian Court of Human Rights needs to be constituted for a successful monitoring of human rights. The Court should have

67 Distribution and publication should be followed so as to encourage states to expose their domestic system to human rights problems. It is also important in improving transparency. Arousing public awareness is important because the limitations of the domestic system might be a result of the lack of knowledge about international law and various conventions, which were adopted and ratified by their respective states. It should be understood that a connection between national systems and the regional system will help national systems make references to regional and international treaties.

guaranteed impartiality and independence. The objective of the Court should be as follows: 1) allow both individuals and states to bring complaints, 2) provide redress even in cases where proper local remedies are not sought due to weak law enforcement or government obstruction, 3) monitor human rights conditions in the whole region, 4) make state parties automatically accept the jurisdiction of the Court, and 5) secure independence from other regional organizations.

Efforts to Develop a Regional System in Asia

Efforts to Set Up a Regional Human Rights Mechanism

Period of Awakening

Even before the 1990s, states expressed their concern over human rights protection in Asia.⁶⁸ In this period, raising awareness, finding obstacles, and exploring possibilities were pursued. Since 1990, UN regional workshops in the Asia-Pacific area and sub-regional meetings explored possibilities for the establishment of regional arrangements.⁶⁹ In 1994, states acknowledged the importance of regular meeting and sub-regional initiatives.⁷⁰ The South Asian Association for Regional Cooperation (SAARC) issued the Malé Declaration in 1990 and the Colombo Declaration in 1991, emphasizing increasing integration among nations and their commitment to democracy, human rights and the rule of law. ASEAN adopted the Singapore Declaration and Kuala Lumpur AIPO Declaration on Human Rights, which emphasized the setting up of an

68 The first UN seminar in Sri Lanka in 1982 discussed consideration of regional and national institutions for the promotion and protection of human rights. In 1983 the ASEAN Secretariat accepted the "Declaration of the Basic Duties of ASEAN People and Governments" proposed by the first General Assembly of the Regional Council on Human Rights in Asia. South Asian Association for Regional Cooperation (SAARC) including India, Pakistan, Bhutan, Bangladesh, Nepal, Sri Lanka, and the Maldives was established by the Charter of the South Asian Association for Regional Cooperation, and adopted the Bangalore Declaration in 1986, recognizing peace, security, and respect for international law as essential for growth and stability. *UNESCO* (accessed March 28, 2007); available at <http://www.unesco.org/most/lnngo1.htm>.

69 Dato Seri Syed Hamid Albar, *Keynote Address at the Opening Ceremony of the Fifth Workshop on an ASEAN Regional Mechanism on Human Rights*, June 29, 2006.

70 It is important that the third UN workshop in 1994 proposed to convene the workshop on a regular basis, not just because it could facilitate the exchange of ideas and information in the field of human rights but because a consensus on finding common interests and desirability could be reached. UN Workshop for the Asian and Pacific Region on Human Rights Issues, *Concluding Remarks by the Chairman*, July 18-20, 1994 (accessed March 5, 2007); available at <http://asiapacificforum.net/international/un/asia-pacific/third.doc>.

appropriate regional human rights mechanism in 1993.⁷¹ In 1994, the ASEAN Colloquium on Human Rights in Manila was held to facilitate a sub-regional human rights body, and emphasized the important role of national human rights institutions.⁷² It can be hardly said that an actual action was taken by Asian states until the early 1990s. However, the adoption of various declarations was symbolically meaningful because it was the expression of the aspiration of Asian states to improve the human rights mechanism in this region.

Period of Institutionalization

It is obvious that Asian states did not lose momentum in the mid 1990s. It should be noted that Asian states could recognize their common interests and lay a foundation for taking practical steps for the institutionalization of the human rights system by: 1) exploring the feasibility of establishing a regional system,⁷³ 2) forming a working group,⁷⁴ 3) developing a regional technical cooperation program,⁷⁵ and 4) dealing with specific issues.⁷⁶ The mid 1990s experienced horizontal and vertical expansion because other sub-regional meetings (Track I) began to be held, and also because the establishment of a forum among the national human rights commissions

71 AEAN Inter-Parliament Organization (AIPO) adopted the "Kuala Lumpur AIPO Declaration on Human Rights" at its 14th General Assembly. Article 21 of the Declaration states, "It is the task and responsibility of Member States to establish an appropriate regional mechanism on human rights."

72 ESCOR, "Regional Arrangements for the Promotion and Protection of Human Rights in the Asian and Pacific Region," *UN Economic and Social Commission for Asia and the Pacific*, 58th meeting, April 11, 1997.

73 The UN 1995 Workshop among representatives of the government, regional organizations and NGOs from the ASEAN was an historical event to consider the feasibility of establishing an appropriate human rights arrangement in a multi-environment setting. The 4th Workshop in 1996 reached "common principles" regarding the establishment of a regional human rights arrangement, acknowledged diversities and complexities of the region that require extensive consultations among states. UN Asia-Pacific Workshop, *Conclusions of the fourth workshop on regional human rights arrangements in the Asian and Pacific Region*, February 26-28, 1996.

74 States in East and South Asia have undertaken meaningful steps to explore the feasibility of establishing a regional system and organized a working group for continuing this effort. Working Group for an ASEAN Human Rights Mechanism was formally recognized by ASEAN governments as an important vehicle for discussion about the establishment of a regional human rights mechanism. It was designed to examine and implement measures to assist the effective and efficient functioning of national human rights institutions.

75 The 5th workshop in 1997 reaffirmed development of a regional technical cooperation program to strengthen national and regional human rights capacities and proposed the establishment of a working group to facilitate an executive process. UN Economic and Social Council, *Report of the Secretary-General submitted in accordance with paragraph 24 of Commission on Human Rights resolution*, Commission on Human Rights, 53rd sess., January 27, 1996.

76 SAARC has also decided on the feasibility of establishing a Regional Convention on Combating the Crime of Trafficking in Women and Children for Prostitution and Convention on Regional Arrangement on the Promotion of Child Welfare in South Asia.

(Track II) was begun,⁷⁷ and similar efforts were taken by NGOs (Track III)⁷⁸ via: 1) designing functions of national human rights commissions,⁷⁹ 2) establishing subsidiary organs,⁸⁰ and 3) forming a partnership with NGOs.⁸¹ The declarations announced by the states and debates over the enforcement of human rights have obviously sparked discussions on the concept of human rights as stated in the document through consultations across regions. This led to the drafting of the Asian Human Rights Charter in 1998.⁸²

Period of Expansion

Efforts have been exerted to expand the scope of issues and endorse practical approaches. In particular, the late 1990s was a period of understanding mutual interdependence and emphasizing regional cooperation, partly due to an economic crisis that hit most states in Asia. Furthermore, it is important to notice that the scope of interest had expanded from economic issues to specific human rights issues that concern most states in this region. The 7th UN workshop began to

recognize that democracy, development, respect for human rights and fundamental freedoms are interdependent and mutually reinforcing.⁸³ In addition, the 8th Workshop ensured the universality of human rights.⁸⁴ Efforts included identifying national human rights action plans, forming a framework for Regional Technical Cooperation in the Asia-Pacific area⁸⁵ and allocating funds for four regional priority areas.⁸⁶ ASEAN adopted Vision 2020 to highlight the cooperative measures in dealing with transnational problems⁸⁷ and the Hanoi Plan of Action through which it emphasized the protection of all human rights.⁸⁸ SAARC also

77 The first regional workshop of national human rights institutions was held in Darwin, and adopted the Larrakia Declaration in 1996. It concluded that national institutions, independent and pluralistic in nature, work in close co-operation with NGOs and with governments to ensure that human rights principles are fully implemented in effective and material ways. *Larrakia Declaration: Conclusions, Recommendations and Decisions, Asia Pacific Forum of National Human Rights Institutions*, First Regional Workshop in Darwin, Australia, July 8–10, 1996 (accessed March 15); available at http://www.asiapacificforum.net/annual_meetings/first/larakia.pdf.

78 The 4th Workshop welcomed NGOs' participation in the process of the development of regional arrangements. Fourth Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions, *Statement of Conclusion*, September 6–8, 1999 (accessed March 7, 2007); available at http://asiapacificforum.net/annual_meetings/fourth/concluding.pdf.

79 This includes 1) acting as source of human rights information, 2) educating the public, 3) giving advice to the government, 4) submitting reports and reviewing judicial decisions, 5) promoting conformity of national laws with international human rights standards, and 6) encouraging ratification and implementation of international standards.

80 The workshop in Jakarta in 1998 agreed on the establishment of an Advisory Council of Jurists to assist in developing regional human rights jurisprudence and agreement to hold a workshop on the partnership of National Institutions and NGOs. It organized Senior Executive Officers of forum member institutions and commended their efforts to assist the effective and efficient functioning of the national human rights institutions. *Statement of Conclusions*, Fourth Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions in Jakarta, September 7–9, 1998 (accessed March 15, 2007); available at http://www.asiapacificforum.net/annual_meetings/third/concluding.doc.

81 It is clear that governments, agencies and NGOs have shown efforts to regularize meetings, establish partnership and make cooperation. It should be noted that human rights NGOs have participated in promoting regional integration in Asia as "sovereign-free-actors." James N. Rosenau, *Turbulence in World Politics: A Theory of Change and Continuity* (Princeton: Princeton University Press, 1990).

82 Three regional consultations had been held to discuss the draft among over 200 NGOs in 1995 and 1996. Asian Human Rights Commission, *International Conference to Commemorate Kwangu Uprising and to Declare Asian Human Rights Charter—A People's Charter*, May 14–18, 1998 (accessed March 8, 2007); available at <http://material.ahrchk.net/charter/mainfile.php/declaration/78/>.

83 It is significant that, at this point, states reaffirmed all forms of rights—civil, cultural, economic, political, social and right to development—and began to take a practical approach. Conclusion of the Seventh Workshop on Regional Arrangements for the Promotion and Protection of Human Rights in the Asian and Pacific Region emphasizes: 1. Coherently reaffirm the universality, indivisibility, interdependence and interrelatedness of all human rights—civil, cultural, economic, political, social—and the right to development; 2. Enhance regional cooperation for the promotion and protection of human rights in accordance with the pace and priorities; and 3. Develop and strengthening national capacities for the promotion and protection of human rights in accordance with national conditions. Available at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.1999.94.En?OpenDocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.1999.94.En?OpenDocument).

84 The intention to acknowledge a comprehensive approach to human rights is clearly stated in the conclusion of the 8th Workshop, which affirmed the importance of ensuring the universality, objectivity and non-selectivity of the consideration of all human rights issues. *Conclusion of the Eighth Workshop on Regional Arrangements for the Promotion and Protection of Human Rights in the Asian and Pacific Region in Beijing*, March 1–3, 2000 (accessed March 15); available at <http://asiapacificforum.net/international/un/asia-pacific/eighth.doc>.

85 UN workshop in Teheran identified national human rights action plans as a key area to facilitate possible regional arrangements. Commission on Human Rights, ECOSOC, *Report of the Secretary-General submitted in accordance with paragraph 27 of Commission on Human Rights resolution 1997/45*, Fifty-fourth session, March 12, 1998 (accessed March 18, 2007); available at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.1998.50.En?OpenDocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.1998.50.En?OpenDocument).

86 The four areas are 1) National Plans of Action for the Promotion and Protection of Human Rights and the Strengthening of National Capacities, 2) Human Rights Education, 3) National Institutions for the Promotion and Protection of Human Rights, and 4) Strategies for the Realization of the Right to Development and Economic, Social and Cultural Rights.

87 At the sub-regional level, the second ASEAN Informal Summit in 1997 adopted ASEAN Vision 2020 and highlighted the cooperative measures to deal with problems that can be met only on a regional scale, including trafficking in women and children and other transnational crimes. It also envisioned socially cohesive and caring nations with a focus on the welfare and dignity of the human person. Through "ASEAN Vision 2020: A Community of Caring Societies" ASEAN envisions "a socially cohesive and caring ASEAN where hunger, malnutrition, deprivation and poverty are no longer basic problems, where strong families as the basic units of society tend to their members particularly the children, youth, women and elderly; and where the civil society is empowered and gives special attention to the disadvantaged, disabled and marginalized and where social justice and the rule of law reign." It states, "We envision the evolution in Southeast Asia of agreed rules of behavior and cooperative measures to deal with problems that can be met only on a regional scale, including environmental pollution and degradation, drug trafficking, trafficking in women and children, and other transnational crimes. We envision our nations being governed with the consent and greater participation of the people with its focus on the welfare and dignity of the human person and the good of the community." ASEAN, *ASEAN Vision 2020*, December 15, 1997 (accessed March 10, 2007); available at <http://www.aseanhrmech.org/downloads/Asean-Vision-2020.pdf>.

88 ASEAN adopted the Hanoi Plan of Action for a six-year timeframe covering the period from 1999 to 2004, through which states emphasized the exchange of information in the field of human rights among ASEAN countries and implementation of international instruments concerning women and

took a step to affirm the realization of the rights of all, especially those of the poor, to food, work, shelter, health, and education.⁸⁹ The workshop of national human rights institutions decided to establish two working groups, and explored practical means of promoting economic, social and cultural rights⁹⁰ and, in particular, promoting inclusive democracy.⁹¹ It is important that the Program of Action was discussed in frank and constructive terms by Forum members and representatives of regional NGOs. The expansion of networks is significant because it encourages extensive transnational consultation and the exchange of information. In addition, recognizing universal human rights might help improve human rights culture.

Period of Stabilization

In this period, states focused on revising past efforts, identifying strategic priorities and mapping out a more detailed plan. Efforts in this period include 1) reviewing progress of achievement, 2) affirming respect for human rights as a universal obligation,⁹² and 3) discussing a detailed

plan of action.⁹³ Four areas of concern became basic themes at the UN Workshop: National Human Rights Plans of Action, national capacity building, human rights education, and National Human Rights Institutions.⁹⁴ ASEAN expressed more concerns on specific issues, such as the trafficking of women and children and transnational crime, and has adopted a series of declarations.⁹⁵ These efforts can be understood as an attempt to find common interests as a springboard to recognizing a sense of unity and to enhancing future cooperation. An important advancement at the sub-regional level was holding the first Regional Conference on National Human Rights Institutions in the Arab World among 19 Arab countries in 2005.⁹⁶ It can be argued that sub-regional efforts had some spillover effect in other sub-regions. It should be noted that the workshop of national institutions continued to include a wide range of issues, including HIV/AIDS, crimes against humanity, internally displaced persons, rule of law in countering terrorism, prevention of

children. The Hanoi Plan emphasized enhancing exchange of information in the field of human rights among ASEAN countries in order to promote and protect all human rights and fundamental freedoms of all peoples in accordance with the Charter of the United Nations, the Universal Declaration of Human Rights, and the Vienna Declaration and Program of Action. It also emphasized working towards the full implementation of the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women and other international instruments concerning women and children. ASEAN, *Hanoi Plan of Action* (accessed March 11, 2007); available at <http://www.aseansec.org/8754.htm>.

89 It also declared the years 1991–2000 as the “Decade of the Rights of the Girl Child” and the years 2001–2010 as “Decade of the Rights of the Child.”

90 In 1999, special attention was given at the meeting to the trafficking in women and girls, views and experiences on the death penalty were exchanged, and it was decided to establish two working groups on the development of a handbook on the implementation of human rights values, principles and norms in the Asia Pacific region, and a study of inter-religious tolerance and respect. *Statement of Conclusions, Fourth Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions in Manila*, September 6–8, 1999 (accessed March 16, 2007); available at <http://www.nhri.net/pdf/APF4conclusions.pdf>.

91 Under the theme of “Promoting Democracy” the 5th workshop emphasized the importance of promoting the understanding of the ideal of inclusive democracy in terms of protection of the human rights of minorities and vulnerable groups were discussed. *Statement of Conclusions, Fifth Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions in Rotorua*, August 7–9, 2000 (accessed March 16, 2007); available at http://www.asiapacificforum.net/annual_meetings/fifth/concluding.doc.

92 The 10th UN Workshop again identified all forms of human rights, reaffirming the universality, indivisibility, interdependence and interrelatedness of all human rights—civil, cultural, economic, political and social—and the right to development. Asian states have long claimed cultural relativism and challenged universal standards. Thus it is meaningful that the 11th Workshop mentioned promoting universal respect for, and observance of, human rights and fundamental freedoms in “conformity with international obligations” particularly through strengthening the rule of law. *Conclusion of the Eleventh Workshop on Regional Arrangements for the Promotion and Protection of Human Rights in the Asian and Pacific Region in Islamabad*, February 25–27, 2003 (accessed March 20, 2007); available at <http://www.nhri.net/pdf/Islamabad-Recs-Concs.pdf>.

93 The Beijing Workshop in 2000 adopted detailed plans of action under each of the four “Teheran pillars.” It should be noted that the 9th UN Workshop in 2001 began initial discussion on possible sub-regional and regional modalities for the promotion and protection of human rights. *Conclusion of the Ninth Workshop on Regional Arrangements for the Promotion and Protection of Human Rights in the Asian and Pacific Region in Bangkok*, February 28–March 2, 2001 (accessed March 19, 2007); at <http://asiapacificforum.net/international/un/asia-pacific/ninth.doc>.

94 States demonstrated efforts to make available technical cooperation and advisory services to support national human rights capacity. This includes assistance to training of teachers and curriculum and materials development. *Conclusion of the Tenth Workshop on Regional Arrangements for the Promotion and Protection of Human Rights in the Asian and Pacific Region in Beirut*, March 4–6, 2002 (accessed March 22, 2007); available at <http://www.nhri.net/pdf/BeirutConclusions.pdf>.

95 ASEAN acknowledged development for human dignity and declared establishment of a related human rights mechanism through “Declaration on HIV/AIDS” at the 7th ASEAN Summit in 2001, “Joint Declaration of ASEAN and China on Cooperation in the Field of Non-Traditional Security Issues” at the 6th ASEAN-China Summit in 2002, “Declaration Against Trafficking in Persons Particularly Women and Children” at the Tenth ASEAN Summit in 2004, and “ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers” at the 12th Summit in 2007. *ASEAN 7th Summit Declaration on HIV/AIDS in Brunei Darussalam*, ASEAN 7th Summit, November 5, 2001 (accessed March 22, 2007); available at <http://www.aseansec.org/8582.htm>; *ASEAN, Joint Declaration of ASEAN and China on Cooperation in the Field of Non-Traditional Security Issues*, 6th ASEAN-China Summit, November 4, 2002 (accessed March 24, 2007); available at <http://www.aseansec.org/13185.htm>; *ASEAN, Declaration Against Trafficking in Persons Particularly Women and Children*, November 29, 2004 (accessed March 24, 2007); available at <http://www.aseansec.org/16793.htm>; *ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers*, 12th ASEAN Summit, January 13, 2007 (accessed March 26, 2007); available at <http://www.aseansec.org/19264.htm>.

96 It was held in 2005, organized by the Egyptian National Council for Human Rights in cooperation with the UN Commission for Human Rights and the Foreign Ministry and the Arab League. Representatives of national institutions and civil society organizations in 19 Arab countries and a number of Arab justice ministers and representatives of parliamentary committees and Arab and foreign ambassadors were present at the meeting. Egypt State Information Service, “Abul-Gheith: Arab countries keen on respecting human rights,” (accessed February 12, 2007); available at http://www2.sis.gov.eg/Functions/S_Print.asp?ArtId=020100000000000004045.

torture and other forms of ill-treatment, and human rights defenders.⁹⁷ Detailed action plans, including ratification, implementation, enforcement, victim protection, research and policy, education, and cooperation were discussed in reports from the Advisory Council.⁹⁸

Assessment and Prospectives

Awareness: Path Dependent

Political will is a prerequisite for developing a regional human rights system. Efforts to develop a human rights system began by acknowledging common interest first. The first UN workshop acknowledged that the necessary political will to promote human rights through intergovernmental collaboration does not exist in the region. This is, however, the first step to raising awareness of the necessity for a human rights mechanism and to designing a forum to facilitate dialogue between Asia-Pacific nations. It is significant that states have been trying to expand the scope of concerns into related areas and reaffirm mutual interdependence and cooperation.⁹⁹ The national commission workshop has also moved from focusing on a thematic approach to dealing with

97 The Statement of Conclusions at the Sixth Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions stated that HIV/AIDS should not be viewed as solely a health issue but as a human rights issue, and committed themselves to combat discrimination and human rights violations on the basis of HIV/AIDS. It also stressed that it was vital that the pursuit and prosecution of perpetrators of human rights violations and crimes against humanity is in accordance with the rule of law and that human rights of internally displaced persons should be protected. A new reference on the issue of the primacy of the rule of law in countering terrorism world-wide was formulated at the 7th workshop, the issue of terrorism at the 8th workshop, prevention of torture during detention at the 9th workshop, other forms of ill-treatment at the 10th workshop, and human rights defenders at the 11th workshop. Asian Pacific Forum, *Conclusion of the Annual Meeting* (accessed February 10, 2007); available at http://www.asiapacificforum.net/annual_meetings/sixth/concluding.doc; http://www.asiapacificforum.net/annual_meetings/eighth/concluding.htm; http://www.asiapacificforum.net/annual_meetings/ninth/concluding.htm; http://www.asiapacificforum.net/annual_meetings/tenth/concluding.htm; <http://www.asiapacificforum.net/annual%5Fmeetings/eleventh/concluding.htm>.

98 Acknowledging recent threats to the effective functioning of national human rights institutions, the 10th forum encouraged national human rights institutions to establish effective partnerships with their educational authorities. The 11th forum further discussed initiatives for the establishment of both domestic and regional human rights mechanisms in the Pacific. Asian Pacific Forum, *Conclusion of the Annual Meeting*, (accessed February 10, 2007); available at <http://www.nhri.net/pdf/APF7%20Concluding%20Statement.pdf>.

99 The regional forum expressed its deep concern at the effect of the economic crisis on the observance of economic, social and cultural rights, emphasizing that economic crisis should not be used as the occasion for the further restriction of civil and political rights in the region. It should be noted that the 1990 Malé Declaration by the SAARC acknowledged the integration of national economies into the world economy and the need for mutual cooperation, but in the next year, it recognized the interdependence and equal importance of civil, political, economic and social rights in the Colombo Declaration of 1991. UN Economic and Social Council, *Report of the Secretary-General submitted in accordance with paragraph 24 of Commission on Human Rights resolution*.

comprehensive issues since 2000.¹⁰⁰ It should be noted that the regional conference has evolved as a venue to engage in domestic affairs, expressing concerns on certain types of human rights violations.¹⁰¹ It can be argued that the efforts for institutionalization of human rights are “path-dependent,” as states have continued to find areas of mutual interests to sustain collective efforts in developing the regional human rights system. The 5th workshop of the national institutions gave momentum because states agreed that democracy and protection of minorities are issues not only of newer democratic societies, but also of societies with older democratic institutions.¹⁰² Sustained commitment has later been paid to the promotion and protection of the human rights of women by focusing on the exploitation of women trafficking, on the death penalty, and on child pornography.

Membership: Expanding Participation

The 1st Asia-Pacific Human Rights Workshop in Manila began with 23 states in 1990, but the 6th Workshop was attended by government representatives from 36 countries in 1998, and has continued to maintain this membership.¹⁰³ The 1st Asia-Pacific Regional Workshop of National Human Rights Institutions in Darwin started with representatives from four countries in 1996.¹⁰⁴ This number continued to increase, with nine in 2001 and seventeen in 2006.¹⁰⁵ It has gradually diversified

100 The 3rd Workshop in Jakarta was held under the theme of “Human Rights and the Economic Crisis in the Asia Pacific,” 4th Workshop in Manila under “National Human Rights Institutions and Economic and Social Rights,” and 5th Workshop in Rotorua under “National Human Rights Institutions and the Protection and Promotion of Economic, Cultural and Social Rights.”

101 The 10th Workshop discussed human rights and combating discrimination in 2005 and the 11th Workshop covered IDPs, terrorism, the right to environment, and the right to education in 2006.

102 The 5th Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions, Rotorua, *Concluding Statement*, New Zealand, August 7–9, 2000, available at <http://www.unhcr.ch/html/menu2/zealand.htm>.

103 Participating states include Afghanistan, Australia, Bangladesh, Bhutan, Brunei Darussalam, Cambodia, China, Cyprus, Fiji, India, Indonesia, Iran, Japan, Kuwait, Lebanon, Malaysia, Maldives, Marshall Islands, Mongolia, Myanmar, Nepal, Oman, Pakistan, Palau, Philippines, Qatar, Republic of Korea, Saudi Arabia, Samoa, Sri Lanka, Syria, Thailand, Timor Leste, United Arab Emirates, Yemen, and Palestine. Asia Pacific Forum, *Overview*, First Regional Workshop, July 8–10 1996 (accessed March 15, 2007); available at http://asiapacificforum.net/annual_meetings/first/overview.pdf.

104 National human rights commissions in Australia, India, Indonesia and New Zealand attended the second workshop, and three additional commissions in the Philippines, Sri Lanka and Fiji joined the second regional workshop.

105 Participating states include Fiji, Afghanistan, Australia, India, Indonesia, Jordan, Malaysia, Mongolia, Nepal, New Zealand, Palestine, Philippines, Qatar, Republic of Korea, Sri Lanka, Thailand and Timor-Leste. Asia Pacific Forum, *Concluding Statement*, 11th Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions, July 31–August 3, 2006 (accessed March 16, 2007);

membership based on associate membership, candidate membership and full membership, accepting representatives from the governments of other states as observers whose efforts to establish their own regional national commissions were inspired and supported.¹⁰⁶ It also provided further support to its member institutions, particularly to newly established institutions seeking information of any practical assistance.

Partnership: Growing "Inter-Connectedness"

Integration among regional, sub-regional, and NGOs workshops creates a synergy effect that facilitates a horizontal connectedness and a vertical connectedness. The UN Workshop provides a venue where states show commitment to enhancing regional and sub-regional cooperation.¹⁰⁷ The workshop of national institutions also incorporates issues discussed in NGOs forums and accepts representatives from civil society.¹⁰⁸ In addition, discussions in the intersession workshop of national commissions and in the sub-regional workshop have been incorporated in the regional workshop. It is important that cross-track follow-up activities at the national, sub-regional and regional levels have been encouraged.¹⁰⁹ It might also contribute in developing civil society, because this process encourages NGOs to submit substantive written submissions and to contribute collective participation and advocacy.¹¹⁰

available at <http://asiapacificforum.net/annual%5Fmeetings/eleventh/concluding.htm>.

106 Asia Pacific Forum of National Human Rights Institutions, *Constitution* (accessed March 24, 2007); available at <http://www.asiapacificforum.net/about/governance/documents/constitution.pdf>.

107 The UN workshop supports efforts of states interested in establishing national human rights institutions and encourages governments to promote the development of national strategies for human rights education. In addition, it facilitates cooperation among multiple actors, including national human rights institutions and civil society.

108 The 6th workshop of national human rights institutions also acknowledged the importance of relations between NGOs and national human rights institutions, accepting over 100 observers, which included representatives from 36 NGOs. It was clear that the participation of the NGO representatives in the discussion had become active and their views were considered with significance at the workshop. Sixth Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions, *Statement of Conclusions*, September 24–27, 2001 (accessed March 20, 2007); available at http://www.asiapacificforum.net/annual_meetings/sixth/concluding.doc.

109 It aims to promote national projects, regional networks and financial and technical assistance, which might ultimately accelerate the process of improving national capabilities and developing a regional human rights mechanism.

110 In this regard, the 11th workshop in Suva was purely multi-track in nature. There were representatives, as observers, from the institutions of the Maldives and Saudi Arabia, 57 international, regional and national non-governmental organizations, the representatives of the governments, the representatives of the European Union, Pacific Islands Forum, Republic of China and the OHCHR, ILO, UNDP, UNICEF, UNESCO and WHO. Asia Pacific Forum, *Concluding Statement*, 11th Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions.

Bottom-up Approach: Capacity Building

For the process of moving from agenda setting to planning practical actions, states have recognized two pillars for developing a regional human rights mechanism: national commission and education. The 12th UN Workshop in 2004 re-emphasized an understanding of diverse social and cultural values, and emphasized the importance of achieving consensus through capacity building of the civil society.¹¹¹ Consequently, states expressed the aim of promoting a multicultural understanding of human rights, focused on training and education, and agreed on detailed plans that include conducting and disseminating the results of surveys on human rights education materials, organizations and programs. All these are the basis for an inclusive, practical, building-blocks approach towards enhancing regional cooperation for the promotion and protection of human rights.

The Role of NGOs

NGOs have been crucial components in this effort. They are deeply involved in the inter-government and inter-agency workshops by preparing reports, presenting issues, providing training and education, and disseminating information. Since the 1980s, NGOs have made efforts to create an appropriate human rights mechanism for the Asia Pacific states and increased their influence on the state representatives by producing legal documents including "Declaration of the Basic Duties of ASEAN Peoples and Government," and "Pacific Charter on Human Rights (draft)."¹¹² The Asian Human Rights Charter in May 1998 was a

111 The preconditions for the development of the regional human rights system were recognized as follows: 1) making consensus on the importance of the respect for human dignity, 2) recognizing diversity of traditions as an obstacle to overcome, and 3) improving capacity of the civil society. Asia Pacific Workshop, *Conclusions of the 12th Workshop on Regional Cooperation for the Promotion and Protection of Human Rights in the Asian-Pacific Region*, March 2–4, 2004 (accessed March 22, 2007); available at http://asiapacificforum.net/international/un/asia-pacific/twelfth_conclusions.doc.

112 The Regional Council on Human Rights in Asia drafted a Declaration of the Basic Duties of ASEAN Peoples and Government in 1983. It describes the general features of the human rights situation in Southeast Asia and provides a perspective of improvement of human rights conditions. In 1989, LAWASIA Human Rights Committee proposed the draft Pacific Charter on Human Rights, which envisaged the establishment of the Pacific Human Rights Commission, and has updated the Charter through the process of consulting human rights commissions with a view to raising the status of the document. LAWASIA, constituted by legal representative bodies of 26 countries, evolved out of a series of meetings among Asian leaders of the legal profession. "LAWASIA's role in the Asia-Pacific," *Lawyers Weekly*, October 20, 2003; Regional Council on Human Rights in Asia, *Declaration of the Basic Duties of ASEAN Peoples and Governments*, December 9, 1983 (accessed March 27, 2007); available at <http://www.unesco.org/most/lnngo1.htm>.

product of the efforts of over 200 NGOs and thousands of experts who directly participated in the drafting process.¹¹³ Human rights NGOs in Asia have been showing a growing presence in the conferences, workshops and “side-track” meetings.¹¹⁴ The Asian Pacific NGO Conference on Human Rights held in Bangkok in March 1993, attended by 110 NGOs from 26 countries, was a significant event for advocating human rights improvement in Asia.¹¹⁵ The Expert Meeting, organized by the Asia-Pacific Human Rights Information Center in 1995, proposed three steps for establishing a regional human rights mechanism.¹¹⁶ The Asia-Pacific Human Rights NGOs Congress, a joint effort of various human rights and development NGOs in Asia, recommended the establishment of a regional human rights mechanism in 1996.¹¹⁷ The resolution adopted by the participants was forwarded to inter-governmental organizations, to the UN, and to specialized agencies.

Challenges and Opportunities

Challenges: Disengagement

Despite the fact that more governments are sending representatives to participate in the conferences and human rights institutions, and that NGOs have participated in the in-depth discussions, Asia has not produced any tangible results.¹¹⁸ Some may argue that many Asian states

are suspicious of any expansion of human rights and do not welcome a regional mechanism that will monitor them.¹¹⁹ This paper will examine diversities within the region, such as the geographical complexity, different levels of development and cultural diversity, and the lack of a unifying tradition and the absence of mutual understanding between governments, which might be obstacles to overcome.

Geopolitical Diversity

Diversities exist among and within the diverse states. According to the UN categorizations, Asia is divided into Central, Eastern, Northern, Southeastern, Southern and Western Asia.¹²⁰ Although Asia might be divided into different sub-regions that share certain attributes, it is still practically impossible to delineate and group Asian states by a definite yardstick. The boundary between sub-regions is ambiguous because of a complex mixture of diverse ethnic groups. Thus, in the initial stage, developing a sub-regional mechanism among like-minded countries might be desirable.¹²¹ However, integrating sub-regional efforts to establish a regional human rights system is another issue to be dealt with in the long run. Asia is composed of a number of states that run various political systems, ranging from the world’s largest democracy to some of the most repressive authoritarian regimes. It is meaningless to create a regional system while leaving some countries out of it.¹²² It should be comprehensive and competent, and this should be realized in the long run.

113 Three sub-regional consultations have been held in order to generate further input: The first meeting for the Charter was held in 1994 in Hong Kong, which was followed by several sub-regional consultation meetings in 1995 and 1996. The Charter has stressed the universality and indivisibility of rights, and has expressed the aspirations of the peoples of Asia to live in peace and dignity. *Asian Human Rights Charter: A People’s Charter*, Asian Human Rights Commission, May 17, 1998 (accessed February 24, 2007); available at http://material.ahrchk.net/charter/mainfile.php/eng_charter/; Sarah Pritchard, “Asia Pacific and Human Rights: Recent Discussions of Regional Arrangements,” *Human Rights Defender*, 1996 (accessed March 28, 2007); available at <http://www.austlii.edu.au/au/journals/HRD/1996/16.html>.

114 Participation by NGOs to Asia Pacific Economic Cooperation (APEC) has increased since 1993. NGO representatives have urged APEC members to implement international instruments and to engage in regional cooperation at the NGO forum, which is annually held as a parallel meeting. John Gershman, “Asia Pacific Economic Cooperation,” *Foreign Policy in Focus* 3, no.35 (1998): 1–4.

115 Bangkok NGO Declaration states, “We can learn from different cultures in a pluralistic perspective and draw lessons from the humanity of these cultures to deepen respect for human rights. There is emerging a new understanding of universalism. Universal human rights standards are rooted in many cultures.”

116 Three steps are to 1) set up sub-regional NGO-led body to handle research and education, 2) set up inter-governmental forum, and 3) set up sub-regional or regional human rights mechanism.

117 It stressed non-derogation from existing international human rights norms and standards and non-selectivity of human rights, and addressed four themes: 1) reasserting universality, 2) integrating women’s right in the activities of the human rights NGOs, 3) human rights violations under the national security laws, and 4) developing a module for coordination among the Asia-Pacific human rights NGOs.

118 For example, ASEAN considered the Draft Agreement on the Establishment of the ASEAN Human

Rights Commission proposed by the Working Group for an ASEAN Human Rights Mechanism in July 2000. The Association of Asian Parliaments for Peace (AAPP) considered a draft Charter of Human Rights for Asian Nations in consultation with UNDP in January 2001. However, these efforts could not bear fruit.

119 Vitit Muntarbhorn.

120 Asia is bounded by the Pacific Ocean to the east, the Indian Ocean to the south, the Suez Canal, Caucasus Mountains, and Black Sea to the west and the Arctic Ocean to the north. UN Statistics Division, *Composition of macro geographical regions, geographical sub-regions, and selected economic and other groupings* (accessed April 2, 2007); available at <http://unstats.un.org/unsd/methods/m49/m49regin.htm>.

121 Organizing regional entities might depend on various factors: shared interest, territorial distinction, language, religion, economic strength or political system. A sub-regional arrangement might better serve cultural, legal and economic needs of each country in the respective region.

122 How states are operating is important because some non-democratic states might resist the acceptance of a human rights mechanism that goes along with democratization. It might take time to implement universal human rights standards at the domestic level. However, there is no reason that the regional system must be exclusive.

Cultural Diversity

There is a sense that people interpret international norms and principles from an Asian-wide perspective.¹²³ Cultural relativism points out significantly different social morality and rules.¹²⁴ Furthermore, skeptical relativism argues that moral judgments cannot be resolved rationally and both sides of a conflict are equally correct or justified. This implies that it would be hard for Asian countries to agree on trans-boundary legal standards. Cultural diversity has also served as an excuse for the violation of human rights of people in Asia. It seems likely that the tension over universal human rights is overshadowed by the way of seeing the clash of cultures. Thus, it should be noted that according to this line of thought, human rights violations could be tolerated despite their gravity and transnational character. European, Inter-American, and African regional human rights systems express their own outlooks on the concept of human rights in their human rights convention. This does not mean that Asia should be selective in adopting human rights standards.

Asian values

It is often believed that Confucian tradition is deeply rooted in the Asian society, and that it impedes the Western concept of human rights. The often-invoked perspective that human rights are a revelation of Western ideology and the idea of seeing Confucianism vis-à-vis respect for individual rights has been unduly argued.¹²⁵ The Bangkok Declaration is a revelation of the proliferation of Asian countries' attempts to expand the list of rights that reflects Asian values, such as the rights of the elderly and

the rights of cultural communities to their ancestral domains. However, it can be argued that Asian values, such as filial piety, loyalty to the state authority, social discipline and collectivism might be used to justify ignorance of the universal values of human rights. In a way, to create a national identity in the process of developing a nation-state or imagined community, a shared ideology emerges to serve vital psychological as well as economic needs under the peculiar modern conditions of secular capitalism.¹²⁶ In fact, Asian values have emerged in the 1980s and 1990s as a way to emphasize national identity and defend western influence.¹²⁷ Thus, it might be argued that the government has continued to promote these ideas through deliberate efforts and to strengthen a national ideology that is distinct from other societies.¹²⁸ However, the ancient philosophy in Asia does not deny individual rights.¹²⁹ Many writings of many Asian theorists such as Confucius,¹³⁰ Buddha,¹³¹ and Ashoka¹³² demonstrate that our beliefs are misguided.¹³³

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- 123 Cultural relativism points out respect for other cultures because all moral values are relative to the cultural context. Burns H. Weston, "Human Rights" in *Human Rights in the World Community: Issues and Action, 2nd edition*, eds., Richard Pierre Claude and Burns H. Weston (Philadelphia: University of Pennsylvania, 1992); Jack Donnelly, "Human Rights and Western Liberalism" in *Human Rights in Africa: Cross-Cultural Perspectives* eds., Abdullahi Ahmed An-Naim and Francis M. Deng (Washington D.C.: The Brookings Institution, 1990), pp.31–55.
- 124 Donnelly argues that culture is a principal or maybe an important source of the validity of moral rights or rule. Crocker claims that different cultures, societies or classes have significantly different social morality, and that one should follow the moral rules of one's group since morality is relative. Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca, N.Y.: Cornell University Press, 1989), 109; David Crocker, "Moral Relativism and International Affairs" *Technos* 8 (January–December, 1979), pp.19–38.
- 125 K. Leung and M.H. Bond, "The impact of cultural collectivism on reward allocation," *Journal of Personality and Social Psychology* 47 (1984): 793–804; C.F. Wei and K.K. Hwang, "Positive duties and negative duties: A cross-cultural comparison of moral judgment between Taiwanese and American college students," *Chinese Journal of Psychology* 40 (1998): 137–153.

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- 126 Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso Editions and New Left Books, 1983), pp. 17–25.
- 127 For example, the Singaporean government, the active proponent of Asian values, emphasized "nation before community and society before self," "family as the basic unit of society," "regard and community support for the individual," "consensus instead of contention" and "racial and religious harmony." Lily Kong and Brenda Yeoh, *The Politics of Landscapes in Singapore—Constructions of 'Nation'*. (New York: Syracuse University Press, 2003), p. 39.
- 128 M. Hill and K.F. Lian, *The Politics of National Building and Citizenship in Singapore* (London: Routledge, 1995), p. 214.
- 129 **The argument that an individual's worth is found only in the group, and that he is content with subordination to the group, might come from misunderstanding what is described in Confucianism, which takes "moral cultivation" as a starting point to pacifying the whole world, and emphasizes self-development and self-fulfillment before family or state. It demands that one should cultivate his morality first, then participate in external affairs to deal well with relationships among people.** Yang Baoyun, "The Relevance of Confucianism Today," in *Asian Values*, eds. Josiane Cauquelin, Paul Lim and Birgit Mayer-Konig (Richmond: Curzon Press, 1998), p. 83.
- 130 **The emphasis on the "self" is reaffirmed in Confucius' resume, and the priority of personalization before family or state is expressed in other classic texts.** "At fifteen I set my heart on learning, at thirty I stood on my own feet, at forty I had no perplexities. At fifty I learned what Heaven commanded of me. By sixty my ear had become attuned to it. At seventy I could follow my heart's desire without transgressing." Analects 2:4.
- 131 **Buddha explains nirvana in the language of freedom. The metaphysics of the person found in Mahayana Buddhism is conducive to fully realized individuality, and the "no-self" in Buddhism is an assertion of the ultimate value of the individual human.** Irene Bloom, J. Paul Martin, and Wayen L. Proudfoot, *Religious Diversity and Human Rights* (New York: Columbia University Press, 1996), p.9.
- 132 **Hinduism texts and law books reveal the highly individual nature, and describe individual rights for ultimate cosmic justice through the law of karma.** Ashoka, the Indian emperor in the third century B.C., tackled the issue of protecting minority rights in a multicultural and multi-religious policy.
- 133 **Amartya Sen, "Critical Perspectives on the Asian Values Debate" in *The East Asian Challenge for Human Rights* eds. Joanne R. Bauer & Daniel A. Bell (Cambridge: Cambridge University Press, 1999), p.98.**

Low Priority

Asian countries tend to connect government-centered policy initiatives to the management of economic development and the relegation of individual rights for the common interests of all. The main focus in the regional meetings has been economic cooperation and development in line with property rights and consumer rights.¹³⁴ Besides, during the Cold War, states ignored domestic human rights and democratic issues because fighting against the communist bloc was the priority. In addition, in order to maintain social order, many authoritarian states emphasize the “rule of power” before the “rule of law.” However, it should be understood that even though governments can seek and maintain their own political and economic policy-decisions, they do not have the authority to set a certain human rights standard for their people.

Non-intervening Principle

Asian countries have regarded human rights issues as domestic affairs. Non-interference in domestic affairs is one of the principles explicitly underlying ASEAN’s major document.¹³⁵ It points out respect for sovereignty, territorial integrity and noninterference in the internal affairs of others. Moreover, it rejects a confrontational approach to human rights issues in favor of cooperation based on equality and respect.¹³⁶ The tradition of resolving problems based on bilateral agreement rather than legal procedures is another problem. In ASEAN, bilateral issues are managed bilaterally, without being complicated by unnecessary regionalization or internationalization.¹³⁷ Yet, the principle of non-interference underpins the entire inter-government system. Thus, the

134 In fact, human rights and democratization were not directly discussed at the APEC meeting. Other regional forums, such as the Council for Security Cooperation in the Asia Pacific Region (CSCAP) also did not provide appropriate institutional frameworks for human rights. Sidney Jones, “Regional Institutions for Protecting Human Rights in Asia,” *Australian Journal of International Affairs* 50, no.3 (1996), pp.269–277.

135 See the Declaration on Southeast Asia as a Zone of Peace, Freedom and Neutrality in 1971 and the Treaty of Amity and Cooperation in Southeast Asia in 1976. This idea is also revealed in the Bangkok Declaration, which proclaimed the member states’ determination “to ensure their stability and security from external interference in any form or manifestation in order to preserve their national identities in accordance with the ideals and aspirations of their peoples.”

136 James T. H. Tang, ed., *Human Rights and International Relations in the Asia Pacific Region* (New York: St. Martin’s Press, 1995).

137 Rodolfo C. Severino, “ASEAN: Building the Peace in Southeast Asia,” paper presented at the Fourth High-level Meeting between the UN and Regional Organizations on Cooperation for Peace-Building, February 6–7, 2001 (accessed March 28, 2007); available at <http://www.aseansec.org/3172.htm>.

establishment of a regional body that will ultimately govern its member states in Asia should begin with finding a common concern to be tackled through concerted efforts. It is understandable that compromise has been made in consideration of what provisions governments would be comfortable ratifying and what they would be comfortable adopting. Thus, attention should be paid to what extent compromise can be made.

Absence of Facilitators

The role of countries with large populations and with regional dominance, such as China and India, is critical in facilitating the establishment of the regional system. The commitment of the influential countries might be a driving force that persuades states that are reluctant to accept the regional system. The problem is that many leading Asian leaders have their own problems:¹³⁸ India’s discrimination against minorities and communal violence,¹³⁹ China’s prosecutions of human rights defenders, religious leaders and others.¹⁴⁰ Besides, China puts emphasis on the right to self-determination and collective rights, and worries about the weakening of regional hegemony if it is open to international scrutiny.¹⁴¹ The possibility that the regional body might place pressure on domestic human rights policies through petition and monitoring of the system might be one of the great concerns of the Asian countries. It should be noted that the role of the regional power is critical in building any cooperative framework in the formation of the regional system in Asia.

Opportunities: Engagement

Growing Acceptance of International Standards

Asian countries, despite their diverse historical, cultural and religious backgrounds, have continuously signed and ratified international human rights instruments, which is an indication of growing acceptance

138 Bilahari Kausikan, “Asia’s different standard,” *Foreign Policy* Fall (1993): 24–41.

139 Separatist violence accompanied by grave human rights abuses on the part of Indian security forces in northeast India, legally sanctioned impunity of the members of the security services, discrimination against religious minorities, and communal violence are chronic problems that India is currently facing. Human Rights Watch, *World Report 2007* (accessed February 10, 2007); available at <http://hrw.org/englishwr2k7/docs/2007/01/11/india14868.htm>.

140 China has human rights-related problems such as state-sponsored backlashes against human rights defenders, politically motivated prosecutions of lawyers and journalists, restrictions on forming independent trade unions and the lack of freedom of religion outside of the state-controlled system.

141 Human Rights Watch.

of universality. It should be noted that recent efforts are made in the improvement of the rights of women, children and forced labor. The area of cooperation is expanding because tackling transnational problems such as terrorism requires coalitions among concerned states. This is a positive sign because these international human rights instruments might expand human rights culture in Asia, improving governments' commitment to promoting human rights, incorporating human rights standards and principles into national laws, and facilitating a process of producing a uniform institution across different cultures. Ratifying an international instrument is important because a regional system created by states that do not accept international principles might lower the human rights standard. It is true that a regional mechanism might not be effective without the political will of the member states. The new regional system should adhere to universal principles of human rights. Thus, accepting international standards and establishing a regional mechanism should go hand in hand.

Cooperative Efforts in Handling Transnational Problems

The growth of transnational problems, the diversity of activities, and the exchange of people across national borders make the meaning of domestic jurisdiction less clear and the principle and standards of one country less applicable. Protection of Child Rights in Asian states is one of the areas that require multilateral cooperation. In many parts of Asia, social inequality, limited resources for families to meet the needs of their children and low-quality education have so far contributed to the high vulnerability of children to trafficking and labor exploitation.¹⁴² As the lack of awareness and understanding of the scope of abuse and exploitation of children originates from insufficient arrangements for protection through the inability of the government, the role of governments in tackling this problem has become critical.¹⁴³ The last few years have seen growing interdependence and cooperation among Asian states to curb the production of child pornography, sexual

142 UNICEF EAPRO, *Report of the Seventh East Asia and Pacific Ministerial Consultation*, March 23–25, 2005.

143 International Bureau for Children's Rights, *Making Children's Rights Work: Country Profiles on Cambodia, Indonesia, Sri Lanka, Timor Leste, and Vietnam, 2006* (accessed March 28, 2007); available at <http://www.ibcr.org/>.

tourism, and child labor.¹⁴⁴ Multilateral cooperation among concerned countries, particularly states in the Mekong sub-region,¹⁴⁵ and between UN agencies, such as UNICEF and ILO, and INGOs is phenomenal.¹⁴⁶ The problem is that offenders who exploit children receive only minor charges and sentences, or escape the law.¹⁴⁷ The experience of the concerned states in incorporating international standards into domestic laws, extensive monitoring of human rights violations, and cutting illegal activities, such as recruiting a person for trafficking or selling a person for prostitution across national borders, might be constructive in the process of developing a regional human rights system.

Undocumented women migrants are of great concern because they are more vulnerable to exploitative situations than documented women due to their lack of legal status.¹⁴⁸ These exported women, sold as property, are often victims of racial discrimination, physical abuse, and prostitution.¹⁴⁹ The number of women migrant workers exported from countries like Bangladesh, Burma, India, Nepal, China and Pakistan is increasing, and women migrant workers outnumber male migrants in Sri Lanka, Indonesia, and the Philippines.¹⁵⁰ The 4th World Conference

144 Cambodia closed down its red-light districts, known as Svay Pak, with cooperation between the police and international NGOs in late 2004. Cambodia also adopted the first Five-Year Plan against Trafficking and Sexual Exploitation of Children in Cambodia for 2000–2004 and created a task force on child trafficking and sexual exploitation. Cambodia National Council for Children, *Five Year Plan against Trafficking and Sexual Exploitation of Children in Cambodia for 2000–2004*, (Government of Cambodia, 2000); AIDeTouS and COSECAM, *Impact of Closing Svay Pak: Study of Police and International NGOs Assisted Interventions in Svay Pak*, (Government of Cambodia, 2005).

145 A number of agreements, including extradition treaties, were signed among China, South Korea, Lao PDR, Thailand and Cambodia in the hope to prevent victims from being treated as illegal immigrants and from facing charges. A close cooperation has developed in the Mekong sub-region, which includes Cambodia, China, Lao PDR, Myanmar, Thailand and Vietnam, to combat human trafficking. Asia Regional Cooperation to Prevent People Trafficking, *Memorandum of Understanding between the Kingdom of Cambodia and the Royal Government of the Kingdom of Thailand* (accessed March 29, 2007); available at <http://www.arcppt.org/docs/MOU%20Trafficking%20CAM-TH%20English.pdf>.

146 The Sub-Committee on Countering Trafficking and Sexual Exploitation of Children, established in 2000, is working with UN agencies and INGOs including UNICEF and ILO/IPEC. The Child Wise Tourism Program, which operates in partnership with ASEAN member governments, the ASEAN Secretariat, and international NGOs was started. Julian Pettifer, "Cambodia's Child Sex Shame," *BBC News*, November 3, 2004 (accessed March 29, 2007); available at http://news.bbc.co.uk/2/hi/programmes/crossing_continents/3975965.stm.

147 This is partly because national laws are not as broad as international standards for the protection of children against violations.

148 Ibid.

149 According to the International Labor Organization, 1.5 million Asian women, both legal and illegal, are working in foreign countries with 800,000 women leaving for overseas jobs every year in the 1990s. International Labor Organization, "Female Asian Migrants: A Growing But Increasingly Vulnerable Workforce," Press Releases, February 5, 1996 (accessed March 28, 2007); available at <http://www.ilo.org/public/english/bureau/inf/pr/1996/1.htm>.

150 Since the Asian economic crisis, poverty and unemployment have driven the migration of workers

on Women held in Beijing in 1995 was a historic landmark that raised awareness for women's issues in various respects, including poverty, education, violence and institutional mechanism. It recognized the special vulnerability of migrant women to abuse and violence. The Beijing Declaration recognizes that the government should take the lead role in implementing social change and development.¹⁵¹ To regulate the flow of migrants and protect the rights of migrant workers, Asian countries took some initiatives: crackdowns on illegal recruiters, providing shelters and counseling for workers, setting up training centers, and regular monitoring of migrants' health. Besides the accession and ratification of the Migrant Workers Convention, a number of policy changes took place in many Asian countries: these include implementing a new regulation, drafting national law on migrants, and signing a Memorandum of Understanding.¹⁵² In this process, the participation of the government in these efforts might contribute to expanding collaboration.¹⁵³

Growing Civil Society

Undoubtedly, the role of NGOs in supporting regional integration cannot be disregarded.¹⁵⁴ Human rights NGOs build a cultural environment that facilitates cooperation in the promotion and protection of human rights. Human rights NGOs are private associations that devote significant resources to the promotion and protection of human rights.¹⁵⁵ The role of NGOs includes providing a significant perspective

into developing countries. This is facilitated by the governments that see them as a means for foreign exchange remittance. Asian Migrant Center, *Asian Migrant Yearbook 2004* (accessed March 29, 2007), available at www.asian-migrants.org.

151 United Nations, *Strategic Objective A.1 paragraph 60(a) of the Beijing Declaration and the Platform of Action, 1996* (accessed March 29, 2007); available at www.un.org/womenwatch/daw/beijing/platform/decision.htm.

152 In 2004, Indonesia and Cambodia signed the Migrant Workers Convention, and Timor Leste accessed MWC. South Korea legislated the Act on Employment of Foreign Workers, and Thailand implemented a new registration and work permit scheme for undocumented migrants. Thailand, Lao PDR, Cambodia and Burma signed a MOU on Cooperation in the Employment of Workers. Philippines enacted the Anti-Trafficking in Persons Act of 2003. Indonesia passed Bill No. 39 to regulate the deployment of Indonesian migrant workers overseas.

153 Protecting and preserving women's rights should involve establishing a fair standard for female workers and implementing multilateral and regional agreements.

154 Walker argues that NGOs are critical social movements, showing an exponential growth in number. Rosenau suggests that NGOs operate independently of the state system and participate in global governance. R. B. J Walker, *One World, Many Worlds: Struggle for a Just World Peace* (Boulder: Lynne Rienner, 1988); James N. Rosenau, *The Study of Global Interdependence: Essays on the Transnationalization of World Affairs* (London: Frances Pinter, Ltd., 1980).

155 Laurie S. Wiseberg, "Protecting Human Rights Activists and NGOs: What More Can Be Done?" *Hu-*

on translating international law into domestic laws, working with national human rights institutions, and making partnerships among lawyers, human rights institutions, and individual advocates. NGOs have already been deeply involved in the domestic legislation process. Legal organizations have lobbied for new legislation for the establishment of a national human rights institution.¹⁵⁶ NGOs are also an effective means of providing legal assistance. The areas of work include providing legal education programs to help marginalized communities gain legal knowledge to protect their rights, assisting vulnerable people in addressing their problems, disseminating information through media, and publishing legal education materials.¹⁵⁷

NGOs might contribute in addressing the inadequate resources available to the Commission and the limited visibility of its work. The role of NGOs should be as follows: 1) encouraging national courts to be sensitive to the need to apply the regional instruments, 2) enlightening the civil society, which can put pressure on the state, and 3) leading public debate and assisting state parties in the application of regional instruments. Inducing policy reforms depends on actors at the domestic level. Thus, organizing public debates, advocating sensitive issues, and presenting diverse opinions might help to have the judges acquire an interest in using the norms of regional law to determine their local cases. The role of civil society to ensure the national court to be proactive and accessible is important because all local remedies should be exhausted first, and therefore, the regional human rights system might be the last resort. NGOs can be accelerators to urge states and regional organizations to have human rights as the centre of their focus. Accordingly, enhancing the expertise of NGOs would be necessary to overcome lack of expertise and capacity. Knowledgeable human rights advocates, lawyers, and NGOs might provide the Commission with expert input and with a reality check.

man Rights Quarterly 13 (1991): 529.

156 Japan Federation of Bar Associations, *Access to Justice* (accessed March 25, 2007); available at www.nichibenren.or.jp/en/about/justice.html.

157 D.J. Ravindran, *A Handbook on Training Paralegals* (Geneva: International Commission of Jurists, 1989); S. Golub and K. McQuay, "Legal Empowerment: Advancing Good Governance and Poverty Reduction," *Law and Policy Reform at the Asian Development Bank, 2001 Edition* (accessed March 28, 2007); available at www.adb.org/Documents/Others/Law_ADB/lpr_2001.asp?p=lawdevt.

Conclusion

This paper has examined the past achievements, implications, and prospects of the regional human rights system in Asia based on an assumption that institutionalization of human rights is a “process.” It has recognized positive signs in the integration of states, path-dependency of the activities, the increase of common interests, and the proliferation of actors with strong commitments. It has suggested that all these factors might contribute to finding comprehensive visions and finding a way to the establishment of the regional mechanism. It should be noted that the improvement of human rights cannot be realized without democratization and social progress, which provide a favorable culture for this effort. Thus, the further empowerment of civil society and the integration of all actors might be critical in overcoming the remaining problems, including a lack of political will, strong attachment to a non-intervention policy, and heterogeneity among the Asian states. For a horizontal integration, integration of each sub-regional forum should be pursued in order to build a comprehensive understanding of distinctive problems and to seek out common concerns and visions. For a vertical integration, an initiative to organize a joint forum that invites representatives from the governments, national commissions, and NGOs should be taken. In particular, the role of national human rights institutions should be strengthened by consolidating partnership with NGOs who can take part in significant activities that include reporting, investigation, education and publication of human rights materials.

There might be a low probability for Asia to have a single, unified human rights system that enjoys a comprehensive membership of the states across the Asian region. However, it is not at all impossible to induce and encourage states to accept the regional human rights system by increasing the benefits of membership. The first step might be developing a human rights mechanism under the existing regional cooperative mechanism. It might be desirable to recognize human rights concerns as a crucial component of the overall cooperative mechanism by imposing obligations, such as accepting international human rights standards and undertaking legal reforms, on any state to remain as a respectful member. The regional cooperative mechanism should be developed to the extent

that it can restrict or suspend rights and privileges of the member states in the case of non-compliance to the agreed human rights principles. This measure can ensure that the improvement of the domestic human rights situation goes hand in hand with the participation in other types of regional cooperation for social and economic development. The second step might be encouraging most-likely states to become members of the regional human rights system. With the assistance of the UN specialized agencies, states within the regional human rights system should support non-member states outside of the system in their efforts to improve the human rights protection mechanism. States that are undertaking social transition might be considered as top priorities in this effort. Any state that experiences smooth human rights reforms can also be a model for other states that are struggling to take similar steps. This measure might facilitate an integration of several sub-regions under the unified regional human rights mechanism.

Establishment of the regional human rights mechanism might be a breakthrough to supporting the regional settlement of disputes and to reducing human rights violations, which is consistent with the purposes of the UN Charter. It would also be beneficial for Asian states because it gives due regard to regional particularities. Thus, it should be understood that all the steps to building a regional human rights system are for this grand objective.

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