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“A tongue but no teeth”? The emergence of a
regional human rights mechanism in the
Asia-Pacific

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Abstract

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Introduction

Sixty years ago there were no regional human rights courts, most countries lacked bills of rights and even the term human rights was rarely heard in the courts. ... Regional human rights courts have ... been established in the Americas and in Europe. ... A third regional human rights court was established in 2006 when the 11 judges of the newly constituted African Court on Human and Peoples' Rights were sworn in. It is, ironically, Asia, the world's most populous region, that has remained largely impervious to the regional penetration of the Universal Declaration of Human Rights, despite the urging of independent lawyers and civil society. There is no immediate prospect of the creation of an Asian convention on human rights, which leaves lawyers without effective remedies for clients living in Burma and China.¹

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In November 2007, leaders of the 10 ASEAN nations signed the Charter of the Association of Southeast Asian Nations (the ASEAN Charter), designed “to strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and freedoms.”² Article 14 of the Charter committed members to establishing an ASEAN Human Rights Body (AHRB), the detailed structure and functions of which were to be determined. While moves towards the establishment of a sub-regional mechanism hover between resistance and cautious endorsement by ASEAN member states, and arguments about values and sovereignty, freedom and social cohesion, good (often requiring interventionist) governance and individual rights have continued to stymie any comprehensive moves towards implementation of a regional body since the inception of its proposal 15 years ago.³ At the same time, there has been a significant growth of national human rights institutions (NHRIs) across the region.

Positioned between the proposed ASEAN human rights body and established NHRIs in the region, is the Asia Pacific Forum of National Human Rights Institutions (APF), a network of NHRIs that has had a significant role and impact in the dissemination of international human rights principles and practice in the Asia-Pacific and beyond. Established in 1996 as an informal regional forum of human rights institutions created in accordance with the Paris Principles,⁴ the APF has evolved into a key agent of human rights promotion and protection in the region. The APF’s primary roles are to support the establishment of NHRIs in accordance with minimum criteria contained in the Paris Principles and to strengthen the capacity of existing national institutions.

This paper considers the rationale for and efforts towards the creation of a sub-regional human rights body, in the light of the evolution of the ASEAN human rights mechanism – the only ongoing initiative for the development of a human rights body in the Asia-Pacific region – and the continuing and potential contributions of NHRIs and networks of NHRIs should a sub-regional mechanism eventually be established. Part A of the paper provides the institutional background to the discussion, sketching the current status of the ASEAN Charter initiative and placing this in the context of other developments at the national and regional levels. In Part B we provide an overview of the existing regional mechanisms and the social and political circumstances behind their development. Part C of the paper traces the history of efforts to develop a sub-regional human rights mechanism within ASEAN and analyses the reasons for the slow progress of those discussions. Part D contrasts the thus far inclusive discussions about regional and sub-regional mechanisms with the development of regional networks of NHRIs (in particular the APF) and their significant contributions to human rights protection in the region. Part E argues that, whatever the outcome of the ASEAN process, the establishment of relevant and effective NHRIs and the existence of well-resourced and legitimate

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¹ Geraldine van Bueren, *Times Online*, 1 April

2008, <http://business.timesonline.co.uk/tol/business/law/article3648391.ece>

² “ASEAN Leaders Sign ASEAN Charter”, Media Release, Association of Southeast Asian Nations, 20 November 2007 at <http://www.aseansec.org/21085.htm>

³ See chronology of evolution of proposal under “The rise of the regional human rights mechanism” at p 6 below.

⁴ Principles relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights (the Paris Principles), endorsed by the United Nations General Assembly in GA Res 48/134 (20 December 1993). See Office of the High Commissioner for Human Rights at <http://www.unhchr.ch/html/menu6/2/fs.19htm#annex>

regional networks – such as the APF – will continue to be critical to the strengthening and broadening a human rights culture in the region, and that a sub-regional body is likely to play a supplementary, though potentially important, role.

A. The ASEAN Charter commitment and other regional and national developments in human rights institutions

Following the adoption of the ASEAN Charter and its commitment to the establishment of a sub-regional mechanism, at a meeting in Manila in early 2008, human rights commissioners from four ASEAN countries - Indonesia, Malaysia, the Philippines and Thailand⁵ – suggested that the proposed regional mechanism be a commission, with the possibility that it might evolve into a human rights court. Despite the stated intention of the ASEAN Charter to establish a regional human rights body, no *regional* (particularly in light of a reluctance among ASEAN nations to adopt universal human rights norms) human rights convention or charter, a standard or set of principles has been developed against which the proposed new body will assess and determine compliance.⁶ Soon after the adoption of the ASEAN Charter, doubts about its likely substance and capacity to enforce human rights started to emerge, a primary criticism leveled at those who promoted the body being that they “were more into rhetoric than real action.”⁷ In response to the impending establishment of an AHRB, Singapore’s Foreign Minister, George Yeo offered perhaps the most acute assessment. “I’m not sure that it will have teeth,” said the Minister, “but it will certainly have a tongue. It will certainly have moral influence if nothing else.”⁸

Some months earlier, the Singaporean Second Minister for Foreign Affairs, Raymond Lim, told his Parliament that Singapore, as ASEAN chair, would work with all the member countries to ensure that the regional body established is “practical, meaningful and has everyone’s support”. He added that the proposed ASEAN Human Rights Commission’s powers will “more likely be consultative rather than prescriptive”, cautioning that the development of any such regional body required consideration and perhaps accommodation of the “history, the realities and culture of all the 10 ASEAN member states.” While the Foreign Minister doubted that the establishment of the regional body would have any direct implications for Singapore’s domestic laws and foreign policy, he was nevertheless encouraged by its potential to “raise ASEAN’s international standing.”⁹

The ongoing ambivalence around the creation of an ASEAN human rights body is well illustrated by

⁵ Known as the ASEAN NHRI Forum

⁶ The Asian Human Rights Commission and other groups initiated a major consultation process in 1994 to form the basis for an Asian Human Rights Charter. Over 100 Asian NGOs were consulted and provided information for use by a drafting committee consisting of six persons. After three further consultations, a first draft was finalised and submitted to Asian human rights NGOs, community organisations, concerned persons and groups. The final document was completed in 1997. The Asian Human Rights People’s Charter, *Our Common Humanity*, was launched by NGOs in Kwangju, South Korea on 17 May, 1998. It called for the adoption by governments of a regional convention on human rights. Two further drafts of the Charter were submitted for consultation, the most recent, drafted by the Association of Asian Parliaments for Peace, appears to have been rejected at a meeting of Asia-Pacific NGOs held in Cambodia in 2000. See (2000) 1 *Asia Pacific Journal on Human Rights and the Law* 126-166.

⁷ Sinapan Samyodorai, President of the Think Centre, quoted in Wayne Arnold, “Historic Asean Charter reveals divisions”, *International Herald Tribune*, 20 November 2007, at <http://www.iht.com/articles/2007/11/20/asia/asean.php>

⁸ Quoted in “Myanmar crisis to dominate ASEAN summit, but free trade, climate, also high on agenda”, *International Herald Tribune*, 17 November 2007, at <http://www.iht.com/articles/ap/2007/11/18/asia/AS-GEN-ASEAN.php>

⁹ Quoted in *The Straits Times*, 28 August 2007, at http://www.yawningbread.org/arch_2007/yax-787.htm

Minister Lim' s acknowledgment that the process will require the critical accommodation of the "history, the realities and the culture of all 10 ASEAN member states." These considerations echo the Bangkok Governmental Human Rights Declaration (the Bangkok Declaration) which emanated from the United Nations Asia Regional Meeting on Human Rights in Bangkok, held in April 1993. While recognizing that human rights were "universal in nature", the Declaration added the proviso that rights be considered "in the context of national and regional particularities, and various cultural, historical, and religious backgrounds, and with the understanding that norms and values change over time"¹⁰. Additionally, the Declaration endorsed the principle of sovereignty and "urged the promotion of human rights by cooperation and consensus, not confrontation and conditionality".¹¹

At the third workshop for an ASEAN Regional Mechanism on Human Rights, held in Bangkok in May 2003, Professor Vitit Muntarbhorn, a prominent Thai international human rights lawyer and co-chairperson of the Working Group for an ASEAN Regional Human Rights Mechanism, declared that in the ten years since the 1993 Bangkok Declaration in which ASEAN Foreign Ministers called for consideration (by member states) of the establishment of an appropriate regional mechanism on human rights, not only had no mechanism been created but "ASEAN Governments [had] not yet put forward ideas on the shape and substance of such [a] mechanism. It [was] thus high time," said Professor Muntarbhorn, "to move from mere intention to more concretization."¹² Although the ASEAN Charter and subsequent discussions stimulated by its adoption have given renewed momentum to the process that has now been underway for the last fifteen years at least, it remains unclear whether any meaningful mechanism will be adopted and, if so, when this might occur (see the discussion in Part C below).

The growth of national human rights institutions in the region

Yet, over the last twenty years and in parallel with the ASEAN and other regional discussions about the establishment of (sub-)regional mechanisms, there have been two other important institutional developments in human rights protection: the proliferation of NHRIs in the region and the emergence of regional networks of NHRIs (the APF, within the Asia Pacific). Each of these developments has implications for the nature and role of any regional or sub-regional mechanism that might eventually be established.

Of the ASEAN member states, the Philippines (1987), Indonesia (1993), Malaysia (2000) and Thailand (2001) have national human rights institutions. In a keynote address to a conference in 2006 in Cambodia on establishing NHRIs, the Prime Minister of Cambodia made a commitment to establish a national human rights commission.¹³ Although similar commitments have not yet been made by the governments of Lao PDR, Myanmar, Singapore or Vietnam, these nations were represented at the *Regional Workshop on the Establishment of National Human Rights Institutions in*

¹⁰ Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights ("The Bangkok Declaration"), Bangkok, 29 March-2 April 1993. See Diane K. Mauzy, "The human rights and 'Asian values' debate in Southeast Asia: trying to clarify the key issues" (1997) 10(2) *The Pacific Review* 210-236 at 221

¹¹ *Ibid*

¹² Vitit Muntarbhorn, "A Roadmap for an ASEAN Human Rights Mechanism", paper presented at the Third Workshop for an ASEAN Regional Mechanism on Human Rights, Bangkok, 28-29 May 2003, at <http://www.fnf.org.ph/liberallibrary/roadmap-for-asean-human-rights.htm>

¹³ Conference on the Establishment of a National Human Rights Institution in Cambodia, Siem Reap, Kingdom of Cambodia, 25-27 September 2006: APF website at <http://www.asiapacificforum.net/services/capacity-building/nhri-development/cambodia/?searchterm=Cambodia>

Asia, held in Manila in October 2007.¹⁴ In May 2004, the National Parliament of Timor-Leste (not yet a member of ASEAN but located within South-East Asia), established the Timor-Leste Provedor (the Office of the Ombudsman for Human Rights and Justice), an independent national human rights institution which addresses matters of human rights, good governance and anti-corruption.

Of the East Asian states (sometimes referred to as North-East Asia and which include China and North Korea), South Korea (2001) and Mongolia (2001) have human rights commissions. In 2002, the Japanese legislature commenced debate on the Human Rights Protection Bill which proposed the establishment of a national human rights commission. Sustained objections to the bill precipitated its demise but it was revived in 2005, only to lapse when the Diet was dissolved in 2005.¹⁵ Similarly, proposals for the establishment of a national human rights commission in Taiwan have been shelved with the disbanding in 2005 of the Human Rights Consultative Group that had drafted a statute for the creation of a human rights institution.¹⁶ Within South Asia, India (1993), Nepal (2000), Sri Lanka (1997), Afghanistan (2002), the Republic of the Maldives (2006) and Bangladesh (2008) have established national human rights commissions. In December 2008, the government of Pakistan introduced legislation proposing the creation of a national human rights institution.¹⁷ In West Asia, the Palestinian Territories established an independent human rights commission in 1993, with Qatar and Jordan following suit in 2002.

In the Pacific, of the Pacific Island Forum¹⁸ member states, Fiji (1999), New Zealand (1993) and Australia (1986), have established human rights commissions and Papua New Guinea has developed an options paper outlining a proposal for the establishment of a commission.¹⁹ In addition, the Solomon Islands have committed to the development of an NHRI²⁰. At a symposium which considered strategies for human rights protection in the Pacific held in Samoa in April 2008, the Attorney-General of Samoa “indicated his willingness to explore the establishment of a NHRI”.²¹

Many of the NHRIs mentioned above have sought membership of the APF²² (APF membership

¹⁴ The Workshop was organised by the United Nations Office of the High Commissioner for Human Rights and the Commission on Human Rights of the Philippines.

¹⁵ Ian Neary, “Human Rights Governance in East Asia – towards a regional: structure?”, paper presented at the annual meeting of the International Studies Association 48th Annual Convention, Chicago, 28 February 2007, at 12-13. We are grateful to the author for providing us with a copy of this paper.

¹⁶ Ibid at 14-15

¹⁷ See <http://www.asiapacificforum.net/news/apf-consultations-on-pakistan-nhri-bill.html>. An independent, voluntary, non-government organisation, the Human Rights Commission of Pakistan, was established in 1986. Its mission includes promoting the ratification and implementation by Pakistan of international treaties, increasing public awareness of human rights norms and assisting victims of human rights violations: see

http://www.hrcpweb.org/hrcpDetail_abtHrcp.cfm?catId=222&catName=About%20HRCP

¹⁸ The Pacific Island Forum comprises Vanuatu, Papua New Guinea, Samoa, New Zealand, Fiji, Tonga, Nauru, Solomon Islands, Australia, Cook Islands, Tuvalu, Kiribati, Palau, Niue, Republic of the Marshall Islands and the Federated States of Micronesia.

¹⁹ See: <http://www.asiapacificforum.net/news/png-set-to-establish-human-rights-commission.html/?searchterm=Papua%20New%20Guinea>

²⁰ See: <http://www.asiapacificforum.net/news/establishing-national-institutions-asian-nations-meet.html?searchterm=Solomon+Islands>

²¹ See <http://www.asiapacificforum.net/news/call-for-pacific-human-rights-mechanism.html>

²² Current members of APF are: Australia (NHRI established 1986, APF founding member), New Zealand (NHRI established 1993, APF founding member), India (NHRI established 1993 (APF founding member), Indonesia (NHRI established 1993, APF founding member), Philippines (NHRI established 1987, APF founding member), Sri Lanka (NHRI established 1997, admitted to APF 1997), Nepal (NHRI established 2000, admitted to APF 2000), Mongolia (NHRI established 2000, admitted to APF 2001), South Korea (NHRI established 2001, admitted to APF 2002), Thailand

criteria replicate the Paris Principles requiring compliance with key standards for the effective operation of NHRIs), with the Forum frequently playing a significant role in their establishment and ongoing development. The increasing emergence of national commissions in the Asia Pacific region, as opposed to the slow evolution of a regional human rights mechanism, perhaps indicates a capacity for NHRIs to accommodate and fashion domestic considerations and cultures within a broadly accepted international human rights framework. The difficulties of creating a single regional human rights mechanism across such an expansive geographical and varied political and cultural region, may be the primary reason why only one sub-regional human rights proposal has endured within the Asia Pacific, and even that initiative is struggling to mediate the divergent histories, interests and positions within the smaller community of ASEAN members.

Regional NHRI networks: the APF

The other significant development has been the founding and growth of the APF. Membership of the APF is open to NHRIs from countries in Asia Pacific region broadly understood (and thus extends well beyond ASEAN and other sub-regional groupings). In 2006²³ Professor Muntarbhorn noted that “the APF and its network of national human rights institutions are the closest that the Asia-Pacific region has come to a regional arrangement or machinery for the promotion and protection of human rights.”²⁴

While debate about the form, structure, functions and reach of an ASEAN human rights body enters its 15th year of deliberation, the APF, has, in a comparatively short period of time, conducted its primary function of strengthening and establishing national human rights institutions to good effect, developing “a reputation as the pre-eminent regional human rights forum.”²⁵ The contribution of the APF to enhancing the capacity and supporting the work of NHRIs in the protection of human rights, and how those efforts relate to the possible role of a regional or sub-regional mechanism is explored in Part C below.

B. The rise of the regional human rights mechanism

The importance of a regional mechanism lies in the fact that it is designed to articulate a common approach to a complex problem, an approach that will assist states, from a position of shared regional values, to address shortcomings in their national frameworks so as to allow individuals the means to enjoy their rights in full, and to obtain effective redress when those rights are denied.²⁶

(NHRI established 2001, admitted to APF 2002), Malaysia (NHRI established 2000, admitted to APF 2002), Jordan (NHRI established 2002, admitted as an Associate member 2004 and a Full member in 2007), Afghanistan (NHRI established in 2002, admitted as an Associate member in 2004 and a Full member in 2005), Timor Leste (NHRI established 2004, admitted as an Associate member in 2005 and a Full member in 2007). Currently, the Palestinian Territories, Qatar and the Maldives are Associate Members)

²³ 13th Workshop on Regional Cooperation for the Promotion and Protection of Human Rights in the Asia-Pacific Region in Beijing, 29 August – 2 September 2005

²⁴ Cited in Asia Pacific Forum of National Human Rights Institutions, *Report on Activities to the 62nd Session of the UN Commission on Human Rights*, UN Doc E/CN.4/2006/NI/1, at 15-16.

²⁵ Above n12, at 5

²⁶ Ms. Louise Arbour, UN High Commissioner for Human Rights, 13th UN Workshop on Regional Cooperation for the Promotion and Protection of Human Rights in the Asia-Pacific Region, 29 August - 2 September 2005, Beijing. See <http://www.hurights.or.jp/asia-pacific/041/03.htm>

The establishment of a sub-regional human rights institution in Southeast Asia would parallel the evolution of regional human rights mechanisms that exist in Africa, the Americas and Europe. These regional bodies co-exist with – and in most instances, pre-dated - the establishment of national human rights institutions.

The rationale for the development of regional human rights institutions with powers ranging from advisory to those of investigation and enforcement – their creation often triggered by shared histories of subjugation and the aftermath of war – is that the cultural, political, economic and legal commonalities frequently endemic to geographic regions, permit a relatively high degree of consensus regarding the content of rights, the process for their protection, and the framework for sanction and redress.²⁷ Although they reflect the “needs, priorities and conditions” of a particular region, regional mechanisms, rather than being seen as detracting from the universal application of human rights, can “complement the United Nations system”²⁸ by disseminating and enforcing international human rights standards and principles at a regional level.

The oldest and most advanced regional human rights grouping, the Council of Europe, was established in 1949. Its system for the protection of human rights includes at its centre the European Convention on Human Rights (and its additional Protocols), the European Social Charter and other instruments. The European Commission of Human Rights (now defunct) and the European Court of Human Rights, were established pursuant to the implementation in 1953 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Convention had its origins in the meeting of the Congress of the European Movement in The Hague in 1948 which agreed to consider a proposal for a European Charter of Rights.²⁹ The Convention created a common philosophical framework to consolidate unity amongst European democracies³⁰ emerging from the horrors of World War II and to enforce certain rights of the Universal Declaration as a “safeguard against the revival of aggressive and repressive dictatorships”.³¹

The American Declaration of the Rights and Duties of Man was adopted by the Ninth International Conference of American States (the precursor to the Organisation of the American States (OAS)) in Bogota in 1948, an instrument similar to yet slightly pre-dating the Universal Declaration of Human Rights. In 1959, the Inter-American Commission on Human Rights was created under the auspices of the OAS and in 1969, the American Convention on Human Rights was adopted by the OAS, for implementation by the Inter-American Commission. The American Convention entered into force in 1978 and similarly to the European Convention, it provided for supervision of its implementation by a Commission (already in existence and located in Washington) and an Inter-American Court of Human Rights (established in 1979 and situated in San José, Costa Rica). The Inter-American system of human rights protection grew out of a sustained period of economic crisis and political turmoil, triggered by the repressive reign of dictatorial and military regimes across Latin America and the Caribbean, many of which maintained power into the 1980s.³²

²⁷ Burns H. Weston, Robin Ann Lukes and Kelly M Hnatt, Kelly, “Regional and Human Rights Regimes: A Comparison and Appraisal” (1987) 20 (4) *Vanderbilt Journal of Transnational Law* 585, at 589

²⁸ Hidetoshi Hashimoto, *The prospects for a Regional Human Rights Mechanism in East Asia* (2004) at 1

²⁹ Above n 27, at 591

³⁰ Hashimoto, above n28 at 89

³¹ Above n 27, at 592

³² Lidiana Rios, “Effectiveness of the Inter-American Commission on Human Rights: A Case Study of Nicaragua, 1978 – 1992 (2005)”. Honors College Thesis Paper 25. http://digitalcommons.pace.edu/honorscollege_theses/25, at 5-8

Histories of colonization and apartheid, the right to self-determination³³ and the “relationship between human rights and development”³⁴ combined with prompting by the UN to create regional human rights mechanisms, “NGO lobbying and a recognition by some African leaders themselves that human rights in another state were also their concern”, led to the adoption of the African Charter on Human and Peoples’ Rights (the African Charter) by the Organisation of African Unity (OAU) in 1981.³⁵ The Charter, which came into force in 1986, provided for the establishment of the African Commission on Human and Peoples’ Rights, based in Banjul, the Gambia. In 1998, by way of a Protocol to the Charter, the OAU Assembly of Heads of State and Government approved the establishment of an African Court on Human and Peoples’ Rights.

The 1967 Arab-Israeli conflict provided the impetus for the League of Arab States (the Arab League), a regional organization of Arab countries largely corresponding with those comprising West Asia,³⁶ to agree to establish a Permanent Commission of Human Rights. The Commission’s primary role is the promotion of human rights among league member states. In 1994, the Arab League adopted the Arab Charter of Human Rights which failed to secure ratification by any of the league member states and a revised Charter, reflecting greater compliance with international human rights principles and standards, was adopted in 2004. The revised Charter, which took effect from March 2008, established an expert Arab Human Rights Committee to consider reports submitted by member states on their progress in implementing Charter provisions (articles 45 and 48)³⁷.

Despite a few unsuccessful attempts to create a human rights mechanism for the Pacific since 1982,³⁸ the idea was revived at a human rights symposium in Samoa in 2008.³⁹ Following calls from symposium delegates that Pacific Island governments implement commitments to good governance agreed to in the *Pacific Plan for Strengthening Regional Cooperation and Integration* (2006) (the Pacific Plan), a working group was mandated to draft a proposal for a regional mechanism for consideration at the Pacific Island leaders meeting scheduled for August 2009. In contrast to the ASEAN initiative, countries within the Pacific region offer positive prospects for the development of a viable regional mechanism. There is a significant degree of political, economic and cultural commonality across Pacific countries and territories. Perhaps more importantly, most of the Pacific countries (excluding Australia and New Zealand), do not have the populations or resources sufficient to sustain Paris Principle-compliant national human rights commissions, with the exception of Papua

³³ Rachel Murray, *Human Rights in Africa: from the OAU to the African Union* (2004) at 17- 20

³⁴ *Ibid* at 25-26 and 47

³⁵ *Ibid* at 22

³⁶ Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, Yemen

³⁷ See <http://www1.umn.edu/humanrts/instree/loas2005.html>

³⁸ The first proposal to set up a human rights mechanism for the Pacific emerged from a UN seminar held in Colombo in 1982 on National, Local and Regional Arrangements for the Promotion and Protection of Human Rights in the Asia Pacific Region. The idea was further explored at a LAWASIA meeting in 1985 in Fiji at which a Pacific Charter of Human Rights was drafted. In 2007 at a meeting in Auckland to discuss the Pacific Plan and the domestic application of human rights conventions and standards, members of Parliament from 11 Pacific Island countries requested the Pacific Regional Rights Resource Team (RRRT) to “take a lead role in setting up or exploring the possibility of setting up a Pacific Island Regional Human Rights Commission.” See the Pacific Regional Rights Resource Team Submission to the Parliament of Australia Joint Standing Committee on Foreign Affairs, Defence and Trade – Inquiry into Human Rights Mechanisms and the Asia Pacific, November 2008 at

http://www.aph.gov.au/house/committee/jfadt/asia_pacific_hr/subs/Sub%2013.pdf

³⁹ “Strategies for the Future: Protecting Rights in the Pacific”, 27-29 April 2008, Apia, Samoa

New Guinea, the Solomon Islands and possibly Samoa.⁴⁰ National offices of a regional mechanism may be a more affordable and accessible alternative to the establishment of national commissions.

The above survey shows the variety of political and social developments that have led (or may be leading in the case of the Pacific) to the emergence of regional human rights mechanisms. It also illustrates that there is a range of functions that are performed by the various regional bodies. Under all of the regional systems some provision is made for the consideration of complaints of violations of the rights guaranteed in the regional conventions, by one or more bodies. In the case of the organs established under the European Convention on Human Rights (the European Court of Human Rights and the former European Commission on Human Rights), their function was to deal with complaints alleging violations of the Convention lodged by eligible individuals, organisations or States. The same is broadly true of the current monitoring body established under the European Social Charter (the European Committee of Social Rights), which has the power to consider collective complaints alleging violation of the Charter (as well as reviewing regular State reports and adopting conclusions). The Inter-American Commission on Human Rights has the power to consider individual and group communications, while the African Commission on Human and Peoples' Rights also has the competence to consider communications alleging violations. The Inter-American Court of Human Rights and the African Court of Human Rights have purely judicial functions, with the power to make binding decisions in contentious cases and also to issue advisory opinions. A number of the bodies also have broader powers. For example the Inter-American Commission has the power to undertake country and thematic studies and to appoint special thematic mechanisms. Similarly, the African Commission has as one of its major roles the review of State reports, as well as promotional work.

However, it is not a major role of these bodies to support the development of the capacity of national human rights institutions in the way that the regional networks of these institutions have done to varying degrees. It is accordingly important to identify the functions that a regional mechanism might play that are distinct from national institutions and regional networks. In the next section we examine the history of the debate over an ASEAN human rights mechanism and the type of functions that might be conferred on it, and in the following section (Part D) contrast that with the functions performed by the regional network of NHRIs, the APF, as part of our exploration of the continuing relevance of a regional network of this sort if a regional mechanism is established within ASEAN.

C. Regional human rights mechanisms in Asia: the ASEAN debate

Asia is regularly singled out as the only region in the world without an inter-governmental regional mechanism for the protection of human rights. The absence of such a mechanism, however, has not been for want of initiative, most prominently within ASEAN. Debate and discussion about the viability of and necessity for such a mechanism within ASEAN has been described as “a long and winding road”⁴¹ - characterised by regional meetings and deliberations over a sustained period of time with little progress in between. The call for the establishment of regional mechanisms came in June 1993 at the United Nations World Conference on Human Rights. The Vienna Declaration and

⁴⁰ The Fiji Human Rights Commission, currently the only NHRI in the Pacific, was established in 1999.

⁴¹ Vitit Muntarbhorn, “A Roadmap for an ASEAN Human Rights Mechanism”, at <http://www.fnf.org.ph/liberallibrary/roadmap-for-asean-human-rights.htm>

Programme of Action, which emerged from the conference, called for the establishment of regional and sub-regional arrangements for the promotion and protection of human rights where they do not already exist.”⁴² In support of the Vienna Declaration and Programme of Action, a meeting in Singapore in 1993 of ASEAN Foreign Ministers, agreed that ASEAN consider the establishment of a human rights mechanism appropriate to the region.⁴³ In the same year, a similar agreement was reflected in the Declaration of Human Rights issued by the ASEAN Inter-Parliamentary Organisation which stated that it was the “task and responsibility of member states to establish an appropriate regional mechanism on human rights.”⁴⁴

In 1994 at a Colloquium on Human Rights in Manila, the role of national institutions and NGOs in developing such a mechanism was emphasised and a year later in Manila, the Human Rights Committee of LAWASIA established the Working Group for an ASEAN Human Rights Mechanism (the Working Group)⁴⁵ to recommend the structure, form and content of the proposed body and the necessary steps for its implementation.⁴⁶ The Working Group is a coalition of national working groups from ASEAN states composed of representatives of government institutions, parliamentary human rights committees, the academy, and NGOs. The formation of the Working Group and the importance of its continued dialogue with ASEAN was acknowledged by Foreign Ministers at the 31st ASEAN Ministerial Meeting in 1998, and at the 33rd Ministerial Meeting in Thailand in July 2000, the Working Group submitted a Draft Agreement for the Establishment of the ASEAN Human Rights Commission. This document contained the proposed mandate, structure, powers and functions of a Commission for consideration by ASEAN governments. Since 2001, the Working Group, a host ASEAN state and its national human rights institution (if in existence) have convened an annual workshop to develop “building blocks”⁴⁷ for the realization of an ASEAN Human Rights Mechanism. These meetings, the most recent of which was held in Manila in September 2008,⁴⁸ bring together representatives of governments, national human rights institutions and civil society organisations to discuss and formulate steps towards the establishment of a human rights mechanism, such as the creation of interim mechanisms on women and children⁴⁹ and migrant workers.

In the report of the Eminent Persons Group (EPG) on the ASEAN Charter, published in December 2006,⁵⁰ the EPG, comprising former heads of state and ministers, noted that the possible establishment of an ASEAN human rights mechanism “was a worthy idea (and) should be pursued further, especially in clarifying how such a regional mechanism can contribute to ensuring the respect for and protection of human rights of every individual in every Member State”. The report

⁴² Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993 A/CONF.157/23

⁴³ See <http://www.aseanhrmech.org/aboutus.html>

⁴⁴ Ibid

⁴⁵ The ASEAN members with established human rights commissions – Indonesia, Malaysia, the Philippines and Thailand (“the ASEAN Four”) – lead the Working Group and the initiative to establish a regional human rights body. Myanmar, Laos, Cambodia and Vietnam remain unenthusiastic, with Singapore and Brunei adopting a neutral stance. See: <http://www.aseanhrmech.org/aboutus.html>

⁴⁶ See note 41

⁴⁷ Ibid

⁴⁸ Working Group meetings have been held in Jakarta (2001); Manila (2002), Bangkok (2003), Jakarta (2004), Kuala Lumpur (2006) and Manila (2007), Singapore (June 2008).

⁴⁹ The proposal for the establishment of an ASEAN Commission on Women and Children, a component of the Vientiane Action Program (VAP) on human rights and obligation, was adopted by the 10th ASEAN Summit and the Working Group has convened various workshops by way of supporting ASEAN’s commitment to implement the VAP.

⁵⁰ See <http://www.aseansec.org/19247.pdf>, at para 47

recommended that consultative procedures or “channels” for regular consultation with civil society and parliamentarians from ASEAN member states be established for this purpose. The EPG further indicated that the ASEAN Charter should contain provision for the establishment of an ASEAN human rights mechanism as an organ of ASEAN.⁵¹ A few months later, a meeting of ASEAN Foreign Ministers resolved that the drafters of the ASEAN Charter (the high level task force) include “an enabling provision”⁵² for the creation of a human rights mechanism and in November 2007, ASEAN nations signed the ASEAN Charter, Article 14 of which commits members to establishing an ASEAN Human Rights Body (AHRB). Despite the recommendations of the EPG, the Charter failed to clarify the structure or precise role of a regional human rights body, neglected to establish consultative mechanisms for this purpose, and made no reference to the guiding principles or convention or treaty that will inform the powers and functions of a regional body.⁵³

Given the centrality of the principle of universality to the promotion and protection of human rights through the United Nations and its associated agencies, “the wisdom of encouraging the creation of regional human rights systems was . . . doubted” by some, because of concerns that regional initiatives “might detract from the perceived universality of human rights.”⁵⁴ However, AH Robertson has observed that a state “is more likely to give greater powers to a regional organization of restricted membership, of which the other members are its friends and neighbours, than to a world-wide organ in which it (and its allies) play a proportionally smaller part.”⁵⁵ At first glance, the reservations expressed by ASEAN governments to the Universal Declaration of Human Rights and the Vienna Declaration and Programme of Action – the universal application of human rights norms, the over-emphasis on civil and political rights “at the expense of the right to development”,⁵⁶ the right to individual freedom as a restriction on the right to govern and protect national security – would seem best accommodated within a regional human rights mechanism “rather than a global arrangement.”⁵⁷ ASEAN support for a regional mechanism with potential to develop a “common approach . . . based on shared regional values, to address shortcomings in . . . national frameworks”,⁵⁸ remains ambivalent as regional states attempt an uneasy truce between acknowledging international and civil society sentiment, the imperatives of domestic economic growth and national stability and a “state-centric resistance”⁵⁹ to interference in domestic affairs, preferring a consultative rather than prescriptive model of rights protection.

The meeting of the Working Group in mid-June 2008 in Singapore (organized by the Singapore Institute of International Affairs) again highlighted the lack of consensus within ASEAN regarding the concrete development of a regional human rights mechanism. In his keynote address to the meeting, Singapore’s Second Minister for Foreign Affairs Raymond Lim, called for an “evolutionary” approach to the initiative, given that rights are “contested concepts” and warned

⁵¹ *Report of the Eminent Persons Group on the ASEAN Charter*, at <http://www.aseansec.org/19247.pdf>

⁵² See Working Group for an ASEAN Human Rights Mechanism at <http://www.aseanhrmech.org/aboutus.html>

⁵³ The Asian Human Rights Charter was developed by NGOs who initiated their own response to calls for a regional mechanism which were largely resisted by governments in the region. However the lack of government support for the Charter led to questions about its legitimacy and representativeness. See Ralph Wilde, “NGO Proposals for an Asia-Pacific Human Rights System” (1999) 1 *Yale Human Rights and Development Law Journal* 138.

⁵⁴ Weston et al above n 27

⁵⁵ *Ibid* at 590

⁵⁶ Maznah Mohamad, “Towards a Human Rights Regime in Southeast Asia: Charting the Course of State Commitment” (2002) 24 *Contemporary Southeast Asia* 230 at 233

⁵⁷ *Ibid* at 236

⁵⁸ See n 26

⁵⁹ See n 56 at 231: “The contestation for a human rights regime has always involved nation-states battling against their domestic civil society and an international movement pushing for a normative global order”.

against committing to a “fixed deadline” to allow for more time to focus on creating a “credible and meaningful body.”⁶⁰ Professor Koh, Singapore’s Ambassador-at-Large, who participated in the drafting of ASEAN Charter, told a journalist after the meeting that member nations remained divided on three key issues: whether the proposed mechanism “should have the power to investigate and monitor the human rights situation in member countries; whether it should consider rights and also responsibilities; and how to reconcile the principle of human rights with that of non-interference”.⁶¹ The last consideration remains a major barrier to progress in the development of the regional mechanism as its “very existence” will be seen “to undermine the concept of the strong, autonomous and economically-sound nation-state which Southeast Asian governments have traditionally promoted.”⁶²

D. National human rights institutions and regional networks: complementary partners in the regional advancement of human rights

“I believe that the existence of regional networks ... is of the utmost importance. They permit an exchange of experience and best practices among institutions that, belonging to the same region, often face similar challenges. And they also constitute safety nets that can be of support to single institutions when their independence or effectiveness is being threatened.”⁶³

National institutions

The impetus for the establishment of national human rights institutions can be traced to a meeting of the United Nations Economic and Social Council in 1946 which urged Member States to consider "the desirability of establishing information groups or local human rights committees within their respective countries to collaborate with them in furthering the work of the Commission on Human Rights".⁶⁴

Recognising the critical and unique role that national institutions could play in protecting and promoting human rights, particularly via the implementation of international standards, the UN Commission on Human Rights subsequently convened a seminar of Member States to consider and draft guidelines for the structure and functions of national human rights institutions (“NHRIs”).⁶⁵ The guidelines, devised at a seminar in Geneva⁶⁶ in September 1978, were the pre-cursor to a set of

⁶⁰ Nazry Bahrawi, ‘ASEAN’s human rights divide’, *Singapore News*, 13 June 2008 at <http://www.todayonline.com/articles/259299.asp>

⁶¹ Ibid

⁶² Mohamed above n 56 at 231

⁶³ Opening remarks by the Acting UN High Commissioner for Human Rights, Bertrand Ramcharan at the General Assembly of the Network of National Institutions of the Americas, Buenos Aires, Argentina, June 2004 at <http://www.nhri.net/pdf/Network%20Americas%20NI%20-AHC%20Speech.pdf>

⁶⁴ Office of the High Commission for Human Rights *Fact Sheet no 19 National Institutions for the Promotion and Protection of human Rights* available at <http://www.unhchr.ch/html/menu6/2/fs19.htm> accessed 15 September 2008

⁶⁵ Above n 4.

⁶⁶ The Seminar on National and Local Institutions for the Promotion and Protection of Human Rights

- (a) To act as a source of human rights information for the Government and people of the country;
- (b) To assist in educating public opinion and promoting awareness and respect for human rights;
- (c) To consider, deliberate upon, and make recommendations regarding any particular state of affairs that may exist nationally and that the Government may wish to refer to them;
- (d) To advise on any questions regarding human rights matters referred to them by the Government;
- (e) To study and keep under review the status of legislation, judicial decisions and administrative arrangements for the

expanded principles adopted at a subsequent workshop hosted by the Commission on Human Rights in Paris in 1991. The 1980s and 1990s saw the emergence of a significant number of national human rights institutions⁶⁷ and the 1991 workshop brought together existing national and regional human rights institutions to review their status and operation and explore the potential for their increased effectiveness. The Paris Principles which grew out of the workshop, included minimum guidelines on competence and responsibilities, composition, guarantees of independence and pluralism, methods of operation and the status of commissions with quasi-jurisdictional competence.⁶⁸ The UN General Assembly endorsed the principles on 20 December 1993,⁶⁹ affirming “that priority should be accorded to the development of appropriate arrangements at the national level to ensure the effective implementation of international human rights standards.”⁷⁰

Some months earlier at the World Conference on Human Rights, the Vienna Declaration and Programme of Action had affirmed “the important and constructive role played by national institutions for the promotion and protection of human rights, in particular in their advisory role to the competent authorities, their role at remedying human rights violations, in the dissemination of information and education in human rights.”⁷¹ The United Nations High Commissioner for Human Rights has consistently identified national human rights institutions as essential partners in the task of protecting and promoting human rights at the national and regional levels. At the Fifth International Workshop for National Institutions for the Promotion and Protection of Human Rights held in Rabat in 2000, the participants noted “with satisfaction” the significant increase in the number of NHRIs since 1997 established in accordance with the Paris Principles, and acknowledged NHRIs efforts to “improve the public appreciation of the universality and indivisibility of human rights”.⁷² The Rabat Declaration invited those states without independent NHRIs “to set up such bodies in conformity with the Paris Principles, in order to strengthen the protection of human rights and consolidate the rule of law.”⁷³

As at December 2008, the number of UN member states in Europe is 52; of those, 20 have NHRIs with United Nations A status accreditation (ie compliant with Paris Principles).⁷⁴ Out of 35 member

promotion of human rights, and to prepare and submit reports on these matters to the appropriate authorities;
(f) To perform any other function which the Government may wish to assign to them in connection with the duties of that State under those international agreements in the field of human rights to which it is party.⁶⁶

The guidelines, which were endorsed by the Commission on Human Rights and the General Assembly, further recommended that NHRIs should:

(a) be so designed as to reflect in their composition, wide cross-sections of the nation, thereby bringing all parts of that population into the decision-making process in regard to human rights;

(b) function regularly, and that immediate access to them should be available to any member of the public or any public authority;

(c) in appropriate cases, have local or regional advisory organs to assist them in discharging their functions.

⁶⁷ In the Asia Pacific region, human rights commissions were established in Australia (1986) and the Philippines (1987).

⁶⁸ Above n 4.

⁶⁹ Ibid

⁷⁰ Ibid.

⁷¹ Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights on 25 June 1993

⁷² Rabat Declaration 2000, para 1 at <http://www.unhchr.ch/html/menu2/rabatdec.htm>

⁷³ Ibid

⁷⁴ In accordance with the Paris Principles and the ICC Sub-Committee Rules of Procedure, the classifications for accreditation used by the ICC are:

A: Compliance with the Paris Principles;

B: Observer Status - not fully in compliance with the Paris Principles or insufficient information provided to make a determination;

states, the Americas have 15 accredited NHRIs; Africa, with 53 UN member states, has 16 accredited NHRIs and the Asia-Pacific region has 13 accredited NHRIs out of 52 UN member states.⁷⁵

Given the focus of this paper, it is interesting to note the significant contribution by the four ASEAN NHRIs to the protection and promotion of human rights in the region. The four institutions have established their own network and, at various consultation meetings (Thailand 2004, Malaysia 2006, Bali 2007, Philippines (Manila and Cebu) 2008) have developed working plans for regional collaboration and strategies for the promotion and protection of human rights. At the 2006 meeting they agreed to focus their activities on five thematic areas of common interest, namely: implementation of economic, social, and cultural rights and the right to development; enhancement of human rights education; human rights aspects of trafficking, especially women and children; protection of the human rights of migrants and migrant workers; and the suppression of terrorism while respecting human rights. In 2007, the ASEAN Four signed a Declaration of Cooperation in which they agreed to “do whatever possible to carry out jointly, either on bilateral or multilateral basis, programmes and activities in areas of human rights.”⁷⁶ The 2008 meetings saw the group adopt the official name of the ASEAN NHRI Forum and finalise the terms of the reference for the ASEAN Human Rights Commission.⁷⁷

Regional networks

The need for co-ordination between national human rights mechanisms was recognised at the Second International Workshop on National Institutions for the Promotion and Protection of Human Rights,⁷⁸ held in Tunis in 1993. The meeting determined that the national institutions of Tunisia, Cameroon, Canada, Mexico, the Philippines, France, Australia and New Zealand, representing North Africa, sub-Saharan Africa, North America, Latin America, Asia, Europe and Oceania, act as a Coordination Committee to maintain “regular contacts between the national institutions and the Centre for Human Rights to (inter alia) establish and implement a joint programme of action”. The resulting International Coordinating Committee (ICC) is responsible for accrediting applicant institutions, reviewing their compliance with the Paris Principles to ensure that NHRIs are and continue to be “credible, legitimate, relevant and effective”.⁷⁹

C: Non-compliant with the Paris Principles.

See National Human Rights Institutions Forum at http://www.nhri.net/2007/List_Accredited_NIs_Dec_2007.pdf. Prior to 2008 the ICC also used a fourth category A(R) (‘Accreditation with reserve – granted where insufficient documentation is submitted to confer A status’). In 2008 the ICC discontinued use of the A(R) category for new accreditations.

⁷⁵ See National Human Rights Institutions Forum at <http://www.nhri.net>

⁷⁶ Declaration of Cooperation, Bali, 28 June 2007, Komisi Nasional Hak Asasi Manusia (Komnas HAM), Human Rights Commission of Malaysia (SUHAKAM), Commission on Human Rights of the Philippines (CHRP), National Human Rights Commission of Thailand (Khamakarn Sit) <http://www.asiapacificforum.net/about/annual-meetings/12th-australia-2007/downloads/regional-cooperation-between-nhris/Declaration%20of%20Cooperation.pdf>

⁷⁷ See http://www.chr.gov.ph/MAIN%20PAGES/about%20hr/advisories/pdf_files/PressJan2508.pdf and http://www.aseanhrmech.org/downloads/TOR_ASEANHRbody.pdf

⁷⁸ The Workshop was organised by the United Nations Centre for Human Rights in cooperation with the Tunisian Higher Committee on Human Rights and Fundamental Freedoms

⁷⁹ Guidelines for Accreditation & Re-Accreditation of National Human Rights Institutions to the International Coordinating Committee of National Human Rights Institutions Adopted by International Coordinating Committee of National Human Rights Institutions for the Promotion and Protection of Human Rights (ICC) at its 20th session in Geneva, 14-18 April 2008. http://nhri.net/2008/Guidelines_for_accreditation_application_April_2008_En.pdf accessed 20 June 2008

The ICC currently comprises representatives of national institutions from four regions: namely Africa, Europe, the Americas, and the Asia-Pacific. Each region has its own International Co-ordinating Sub-Committee, namely the European Regional Group of National Institutions for the Promotion and Protection of Human Rights, the General Assembly of the Network of the National Institutions of the Americas, the Network of African Human Rights Institutions (formerly the Coordinating Committee of African National Human Rights Institutions), and the Asia-Pacific Forum of National Human Rights Institutions. The ICC Co-ordinating Sub-Committees facilitate exchange of information between national institutions in defined regions, plan and co-ordinate regional NHRI activities, encourage and advise national governments on the establishment of new NHRIs in conformity with the Paris Principles, and represent regional national institutions at international and other fora.

The creation of regional networks for the protection and promotion of human rights – particularly via their strengthening and establishment of regional NHRIs - offers a contrasting approach to the traditional, top-down dissemination of international human rights principles to national (domestic) systems of government. Regional networks of NHRIs, such as the Asia Pacific Forum of National Human Rights Institutions, not only provide the opportunity for the sharing of best practices,⁸⁰ and consequently enhance NHRI performance and compliance with international standards, but also incrementally, initiate and build transnational human rights programs of collaboration via their various activities with human rights commissions, national governments and NGOs. This “transnational horizontal network”⁸¹ executes an effective form of “human rights diplomacy”⁸² and may arguably present an interim alternative and/or aid to the development of a regional human rights body.

The Asia-Pacific Forum of National Human Rights Institutions: “a partnership for human rights in our region”

In the early 1990s, only five countries within the Asia Pacific region had established national human rights institutions which conformed to the Paris Principles requirements of independence, pluralism and a broad mandate for the protection and promotion of human rights: Australia, India, Indonesia, New Zealand and the Philippines. In July 1996, four NHRI representatives from these nations⁸³ met in Darwin, Australia for the first meeting of the Asia Pacific Forum of National Human Rights Institutions (APF). The meeting, sponsored by the United Nations Office of the High Commissioner for Human Rights, was also attended by representatives of eight governments where the establishment of NHRIs was in train (Pakistan, Sri Lanka, Nepal, Mongolia, Thailand, Papua New Guinea, Solomon Islands and Fiji) and representatives of several non-government organizations.⁸⁴ The meeting gave rise to the Larrakia Declaration which set out foundational principles for the nascent human rights organisation. The Declaration endorsed the need for regional cooperation to ensure effective human rights promotion and protection and the establishment of effective and

⁸⁰ See Gauthier de Beco, ‘Networks of European Human Rights Institutions’, (2008) 14, 6 *European Law Journal* 860-877

⁸¹ Anne-Marie Slaughter *A New World Order* (2004) at 19, 239

⁸² Hashimoto, above n 28 at 89

⁸³ The Philippines Commission was invited and accepted an invitation to attend, but was unable to do so.

⁸⁴ At the first meeting, representatives of attending NHRIs discussed matters of common interest to national human rights institutions in the region, including their independence, their functions and powers, their investigation and conciliation processes, community education and media relations.

credible national human rights institutions (compliant with the Paris Principles) to work with non-government organisations and governments (where possible) to effect successful implementation of human rights principles.⁸⁵

By 2002, APF's work was defined by three core activities: strengthening the capacity of individual APF member institutions to enable them to undertake their national mandates; assisting governments and non-governmental organisations to establish national institutions in compliance with the minimum criteria contained in the Paris Principles; and promoting regional cooperation on human rights issues. In addition to facilitating information exchange between member institutions, forging links between NHRI staff in different countries and disseminating technological expertise, the APF's Advisory Council of Jurists (ACJ),⁸⁶ created in 1998, considers specific human rights situations or questions and the Council's reports and recommendations – on issues such as trafficking, the death penalty, torture and the right to education – are considered and where possible or applicable, implemented by APF member NHRIs and utilized by NGOs. The reports of the ACJ, often devised in collaboration with international experts, academics and practitioners, seek to contribute to the development of regional jurisprudence on international human rights law.

Once established, NHRIs may apply to the APF for membership.⁸⁷ Similar to the criteria for ICC members, the APF Constitution establishes three membership categories: full members, candidate members and associate members, based on the institution's degree of compliance with the Paris Principles. Full members are national human rights institutions that comply with the Paris Principles. Candidate members do not fully comply with the Paris Principles but might comply within a reasonable period of time. Admission as a candidate member requires the institution to take active steps to meet the Paris Principles, sufficient to become a full member of the APF. As of February 2009, there were no candidate members of APF. Associate members do not comply with the Paris Principles and are unlikely to do so within a reasonable period. Associate member institutions must, however, possess a broad human rights mandate. Currently, the Palestinian Independent Commission for Citizens Rights, the National Human Rights Committee of Qatar and the Human Rights Commission of the Maldives are associate members of APF. The APF Forum Council determines membership applications; member institutions, which pay an annual fee based on their membership category, participate in the Forum Council and at APF annual meetings. Since its inception in 1996, the APF Secretariat⁸⁸ has been located in Sydney and is funded by member institutions and donors.

The APF describes its role as “opening up important new avenues for strengthening human rights observance and advancing human rights protection for the peoples of the region in a constructive and cooperative environment.”⁸⁹ It pursues this role by assisting governments and civil society in the establishment and strengthening of NHRIs via a number of core activities.

⁸⁵ Larrakia Declaration www.asiapacificforum.net/about/annual-meetings/1st-australia-1996/downloads/larakia

⁸⁶ The ACJ comprises former judges, human rights and international law academics and practitioners, nominated by APF member institutions.

⁸⁷ Andrew Byrnes, Andrea Durbach and Catherine Renshaw, “Joining the club: the Asia Pacific Forum of National Human Rights Institutions, the Paris Principles, and the advancement of human rights protection in the region” (2008) 14(1) *Australian Journal of Human Rights* 63-98 (working paper version available at [2008] UNSW LRS 39 at <http://law.bepress.com/unswwps/flrps39/>)

⁸⁸ APF was incorporated under Australian law in 2002 as an independent, non-profit organisation. The Forum Council is the decision-making body of the APF. Established by the APF Constitution, the Forum Council is comprised of one voting councillor nominated by each full member.

⁸⁹ Asia Pacific Forum, APF website (2006a), <http://www.asiapacificforum.net/>

(a) Information dissemination

The APF website, Annual Reports, newsletters⁹⁰ and discussion papers provide members with information about best practice and operational efficiencies. Their comprehensive profiles about member NHRIs are instructive for both NHRIs keen to enhance their operations and governments considering the establishment of NHRIs. The information provided by APF illustrates the value of NHRIs to political and administrative decision-makers, and civil society and national institutions have access to the APF collection of legislation, casework, procedures and outcomes of relevance to national institutions both within and outside the region.⁹¹

(b) Technical expertise and capacity building

The APF has developed an extensive technical assistance program⁹² which seeks to enhance the skills and knowledge of NHRI staff and develop and improve NHRIs' structures and procedures in accordance with the Paris Principles. Additionally, APF provides governments in the region with assistance and information as requested to facilitate the development of national institutions.⁹³ Following a formal request for assistance, APF conducts an extensive "needs assessment mission," consulting with relevant members of government, civil society, United Nations officials and international NGOs.⁹⁴ It reviews and coordinates available expertise in the region or internationally and plans a programme of assistance, which might include securing funding for specific projects.

In developing and exchanging information and expertise between member institutions, governments and NGOs in countries potentially hosting an NHRI, the APF brings players in the region together, many of whom might not otherwise meet.⁹⁵ The establishment of APF sponsored specialist networks, such as the Investigators Network and a Senior Executive Officers (SEO) Network, and thematic networks, including the Trafficking Network and IDP Focal Point Network, enhance and strengthen the operational and substantive functioning of NHRIs.

(c) Strengthening and establishing NHRIs

The APF Secretariat exercises broad hospitality in relation to its annual meetings, extending invitations beyond its members; government representatives of states without NHRIs or those from countries considering their establishment, or who have NHRIs that do not comply with the Paris Principles, commonly attend the APF annual meeting as observers.⁹⁶ At annual meetings, while NHRIs are given prominence, states with NHRIs that do not currently conform to the Paris

⁹⁰ APF also produces a regular newsletter, the Forum Bulletin, which keeps APF members, governments and NGOs informed of important policy, legal, administrative and training developments in the region.

⁹¹ <http://www.asiapacificforum.net/> accessed on 20 June 2008

⁹² Ibid

⁹³ For example, APF has provided advice and assistance in relation to the establishment of NHRIs to the governments of Samoa, Bangladesh, Papua New Guinea, East Timor, Afghanistan.

⁹⁴ For example, in 1998, the Forum Secretariat conducted needs assessment missions to Indonesia, Mongolia and Fiji.

⁹⁵ In 1998, at the request of the government of Bangladesh who indicated a keenness to establish a national human rights commission, the APF facilitated a visit by a senior Bangladeshi delegation to the human rights commissions of Australia and New Zealand. Officers from the Human Rights Project team of the Bangladesh Department of Law, Justice and Parliamentary Affairs undertook a three month human rights training internship in the Australian Commission. This was combined with an academic coursework programme designed by the APF in consultation with the University of Sydney. In 1997, APF organised a similar study tour in New Zealand for a group of experts from the Vietnamese Prime Minister's Research Group.

⁹⁶ Together with NGOs, international NGOs, United Nations, academics and government officials.

Principles, or those in the process of establishing NHRIs, report on progress made since the last meeting.

APF has developed a set of “Best Practice Principles” outlining the necessary steps for establishing a national institution. Governments frequently submit draft enabling legislation to the APF for comment to ensure a proposed national institution’s conformity with the Paris Principles.⁹⁷ The Secretariat also provides advice to NHRIs seeking membership of APF, recommending adjustments to their legislative basis, structure or mandate prior to their formal application.

A more recent APF initiative has been the establishment of a training program aimed at supporting newly appointed NHRI commissioners. A two to three- day pilot program of “commissioner high-level dialogue” was held with the Philippines Commission on Human Rights in November 2008. Conducted in-country, the program explored the role of commissioners (their engagement with civil society, government, international bodies and specific communities), the application of the Paris Principles and international human rights law to the governance and work of NHRIs and NHRI engagement within the UN system.⁹⁸

(d) International and regional impact

In recognition of its impact and standing internationally, the APF Secretariat and Forum representatives are regularly invited to participate in regional and international workshops and meetings, including presenting reports on the APF and NHRIs to the United Nations Human Rights Council (and formerly, the Commission on Human Rights), meetings and conferences of the International Co-ordinating Committee of National Human Rights Institutions, ad hoc UN Committees and the annual UN Regional Workshop on Cooperation for the Promotion and Protection of Human Rights in the Asia Pacific Region. In the lead up to the UN General Assembly Ad Hoc Committee’s consideration of proposals for the Convention on the Rights of Persons with Disabilities, APF co-ordinated responses from member NHRIs, and also provided significant support to the NHRI delegation that participated in the Convention negotiations. Subsequent to the adoption of the Convention, APF and a major international disability advocacy organisation, Disability Rights Promotion International (DRPI), have collaborated to create a database of disability rights cases decided by NHRIs to promote awareness about the rights of people with disabilities, the application of the Convention and national legislative provisions which might follow its ratification by individual states. The ICC endorsed APF’s proposal with DRPI and created a steering group for the project, with members from the South African Human Rights Commission, the Mexican Human Rights Commission and the Irish Human Rights Commission, representing the regions of Africa, America and Europe respectively.

(e) Working with civil society

The annual meeting of the APF, one of the largest regular human rights events in the region, brings together APF members and other national human rights institutions, United Nations agencies, national governments, non-governmental organisations and donors “in a cooperative setting to discuss and share expertise on the pressing human rights issues in the region”.⁹⁹ In recent years, the

⁹⁷ In 2002, the APF Secretariat provided detailed legislative and legal advice to the recently elected Constituent Assembly, NGOs, representatives of the East Timor Administration and the United Nations Transitional Administration in East Timor on the possible mandate, role and functions of a prospective NHRI.

⁹⁸ An interview with the APF Secretariat’s Deputy Director, Pip Dargan, regarding the proposed program was conducted by the authors in August 2008

⁹⁹ See <http://www.asiapacificforum.net/about/annual-meetings>

APF has set aside the day before its annual meeting to host a meeting of international and domestic non-government organizations (NGOs), who prepare and present their own reports about the effectiveness of individual NHRIs. A network of NGOs based in the Asia Pacific, the Asian NGOs Network on National Human Rights Institution (ANNI), has evolved to coordinate NGO submissions, develop strategies for influencing NHRIs and share information about developing effective NGO-NHRI relationships. ANNI's members consist of human rights organisations and human rights defenders in 14 countries across Asia.

Despite the hold and prominence of the 'Asian values' perspective, the work of the APF since its inception in 1996, has undoubtedly influenced the pace and nature of the reception of international human rights principles, norms and procedures across the Asia Pacific region. In a number of submissions to the Australian Parliamentary *Inquiry into Human Rights Mechanisms and the Asia Pacific* announced in September 2008,¹⁰⁰, organisations and academics cautiously supported the establishment of a regional human rights mechanism in the Asia Pacific region. However, the majority of submissions argued that any support provided by the Australia government for the development of a regional (or sub-regional) mechanism¹⁰¹, must be accompanied by support for regional human rights NGOs¹⁰² and networks, ratification by Asia Pacific governments of human rights treaties and instruments¹⁰³ and the establishment and strengthening of NHRIs in the region,¹⁰⁴ potentially via existing structures such as the APF¹⁰⁵.

E. The relationship between an ASEAN mechanism and the APF

Building strong human rights institutions at the national level is what will, in the long run, ensure that human rights are protected and advanced in a sustained manner (in Africa).¹⁰⁶

The Working Group for an ASEAN Human Rights Mechanism (the Working Group) has suggested three key reasons for the establishment of a regional human rights mechanism. It would ensure adherence by ASEAN member states to international human rights standards; provide "a common platform" for ASEAN member states to articulate and discuss human rights-related concerns; and

¹⁰⁰ Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into Human Rights Mechanisms and the Asia-Pacific*, at http://www.aph.gov.au/house/committee/jfadt/asia_pacific_hr/index.htm

¹⁰¹ See submission by the Australian Council of Trade Unions (ACTU), which sets out the key criteria for an independent, credible and effective regional mechanism: :

http://www.aph.gov.au/house/committee/jfadt/asia_pacific_hr/subs/Sub%2016.pdf, at 8 -9.

¹⁰² Submission by World Vision Australia:

http://www.aph.gov.au/house/committee/jfadt/asia_pacific_hr/subs/Sub%207.pdf, at 6

¹⁰³ Submission by the Centre for International Governance and Justice, Australian National University:

http://www.aph.gov.au/house/committee/jfadt/asia_pacific_hr/subs/Sub%203.pdf, at 3

¹⁰⁴¹⁰⁴ Submission by the Sydney Centre for International Law:

http://www.aph.gov.au/house/committee/jfadt/asia_pacific_hr/subs/Sub%205.pdf, at 2 and 11

¹⁰⁵ Submission by the Human Rights Law Resource Centre:

http://www.aph.gov.au/house/committee/jfadt/asia_pacific_hr/subs/Sub%2015.pdf at 31-32; submission by the Australian Council for International Development:

http://www.aph.gov.au/house/committee/jfadt/asia_pacific_hr/subs/Sub%209.pdf, at 5; submission by the Centre for International Governance and Justice, Australian National University:

http://www.aph.gov.au/house/committee/jfadt/asia_pacific_hr/subs/Sub%203.pdf, at 4 and 5

¹⁰⁶ 'Strengthening of the United Nations: an agenda for further change', Report of the Secretary-General, , UN Doc A/57/387, para 50 (9 September 2002)

facilitate regional co-operation and a collective stand on human rights violations.¹⁰⁷ Additionally, the Working Group has argued that such a mechanism could assist ASEAN member states to address specific human rights concerns in their respective jurisdictions; ensure implementation and observance of international human rights laws endorsed by ASEAN; and engender a common understanding of universal human rights issues and perspectives amongst civil society.¹⁰⁸

As the proposal teeters towards some sort of in-principle acceptance by the majority of ASEAN states, concrete moves towards discussion of structure and function, however, appear to elicit division. The recommendations of the 7th Workshop on the ASEAN Regional Human Rights Mechanism were perhaps the most promising regarding the progression of the mechanism's establishment, with the meeting recommending, inter alia, the convening of a High Level Panel to draft the terms of reference for the proposed ASEAN human rights body for implementation by December 2009.¹⁰⁹ The meeting also highlighted the need for consultation with NHRIs in the development of the AHRB¹¹⁰ and a framework for more formal dialogue between ASEAN and ASEAN NHRIs, and encouraged those ASEAN member countries without NHRIs to establish national institutions to promote and protect human rights. At the first meeting of the High Level Panel (HLP), during the 41st ASEAN Ministerial Meeting in Singapore in July 2008, the inaugural chair of the HLP, Mr Bilahari Kausikan, said that the aim of the panel was "to achieve a result that is realistic, balanced and credible, and which would be in the best collective interest of ASEAN."¹¹¹

Despite positive indications, following the meeting, workshop co-chair Simon Tay, chairman of the Singapore Institute of International Affairs, highlighted the major points of contention within ASEAN which continue to undermine moves towards the establishment of the AHRB:

- whether the AHRB should comprise governmental officials who "may play it safe rather than jeopardise friendly relations" or independent experts who may be more critical of human rights violations;
- whether the AHRB should have powers to investigate complaints in countries, "like a regional police", or only promote and monitor human rights;
- whether a willing minority of ASEAN member states (Indonesia, Thailand, the Philippines and Malaysia) can progress the proposal in the absence of full ASEAN support.¹¹²

A further meeting of the High Level Panel was held in Manila in September 2008 with the Working Group for an ASEAN Human Rights Mechanism, the four ASEAN NHRIs (the ASEAN NHRI Forum), the Solidarity for Southeast Asian Peoples Advocacy and the Women's Caucus for an

¹⁰⁷ See Working Group for an ASEAN Human Rights Mechanism, at <http://www.aseanhrmech.org/aboutus.html>

¹⁰⁸ Ibid

¹⁰⁹ Singapore Institute of International Affairs, 7th Workshop on the ASEAN Regional Mechanism on Human Rights, Singapore, 12 – 13 June, 2008, Summary of Proceedings at http://www.siiionline.org/files/7th_WS_Summary_Proceedings.final.pdf

¹¹⁰ Following the first meeting of the HLP in July 2008 in Singapore, ASEAN human rights organisations met in Jakarta in early August 2008 for a 3-day regional consultation to discuss engagement with the HLP and ASEAN to ensure an "independent and effective regional human rights mechanism will be put up by the High Level Panel." The meeting was also attended by representatives from the Indonesian Government, the ASEAN Secretariat, Office of the UN High Commissioner for Human Rights, Working Group for an ASEAN Human Rights Mechanism, and National Human Rights Institutions in ASEAN. See <http://www.prachatai.com/english/news.php?id=736>

¹¹¹ Association of South East Asian Nations, Press Comments by the Chairman of the High Level Panel (HLP) on the Establishment of an ASEAN Human Rights Body, Singapore, 21 July 2008 at <http://www.aseansec.org/21782.htm>

¹¹² Simon Tay, "Human Rights: ASEAN's Way Forward", Singapore Institute of International Affairs, 18 June 2008 at <http://www.siiionline.org/?q=programmes/commentary/human-rights-asean's-way-forward>

ASEAN Human Rights Mechanism.¹¹³ While the Working Group has recommended different forms for the proposed human rights mechanism – including “a declaration of principles, a commission with monitoring, promotional, and recommendatory functions... and a court which could render binding decisions” – it “strongly recommends the establishment of an intergovernmental human rights commission”.¹¹⁴ The recent consultation in Manila supported the idea that the human rights body take the form of and function as a Commission which would “devise its own mechanisms and institutions for the promotion and protection of human rights”, including “sub-commissions, special rapporteurs and working groups.”¹¹⁵ The meeting envisaged that the Commission’s promotional role would include initiating “discussions on the establishment of an ASEAN human rights court.”¹¹⁶

The Working Group has also suggested that an ASEAN commission could emerge from the “coordinating efforts”¹¹⁷ between human rights commissions established in all ASEAN countries. This would require a focus on the development of national commissions prior to the establishment of a regional mechanism. Without undermining the need for and potential importance of an ASEAN human rights body, in light of the delayed, wholesale embrace of the mechanism by the majority of ASEAN member states, it may be that the observation of Professor Vitit Muntarbhorn in 2003 -- that the APF is “the closest that the Asia-Pacific region has come to a regional arrangement or machinery for the promotion and protection of human rights”¹¹⁸ - could be suggestive of the APF (as a network of national human rights mechanisms) playing an expanded regional role given the parallels of its activities with at least some of the rationale for and benefits of a regional human rights mechanism.

Despite the signing of the ASEAN Charter in November 2007 – Article 14 of the Charter commits members to establishing an ASEAN Human Rights Body -- there is consistent recognition among the majority of ASEAN member states that any progress towards the implementation of a regional human rights mechanism will require an “evolutionary approach”¹¹⁹ and an accommodation of “the history, the realities and culture of all the 10 ASEAN member states.”¹²⁰ Additionally, the majority ASEAN view which represents a “staunch adherence to the principle of non-interference in the domestic affairs of another State”¹²¹ and the “non-use of human rights as an instrument of political

¹¹³ Working Group for an ASEAN Human Rights Mechanism, ‘The Working Group Meets the High Level Panel on the ASEAN Human Rights Body’ at <http://www.aseanhrmech.org/news/working-group-meets-high-level-panel.html>>accessed 6 October 2008. See also Submission from the Second Regional Consultation on ASEAN and Human Rights to the High Level Panel on the Establishment of the ASEAN Human Rights Body at http://www.forum-asia.org/news/submission/Submission_to_HLP_on_ASEAN_human_rights_body-2008Aug7-FINAL-FORENDORS_EMENT.pdf

¹¹⁴ See <<http://www.aseanhrmech.org/aboutus.html>> accessed 6 October 2008

¹¹⁵ Ibid

¹¹⁶ Submission from the Second Regional Consultation on ASEAN and Human Rights to the High Level Panel on the Establishment of the ASEAN Human Rights Body at http://www.forum-asia.org/news/submission/Submission_to_HLP_on_ASEAN_human_rights_body-2008Aug7-FINAL-FORENDORS_EMENT.pdf

¹¹⁷ Ibid n 114

¹¹⁸ See Asia Pacific Forum of National Human Rights Institutions – Report of Activities to the 62nd Session of the UN Commission of Human Rights at http://www.nhri.net/pdf/E_CN_4_2006_NI_1%20_S_APF.pdf

¹¹⁹ See Proposed Elements for the Terms of Reference of an ASEAN Human Rights Body, paras 5 and 17-19, at <http://aseanhrmech.org/downloads/WGsubmissiontoHLP.pdf>.

¹²⁰ *The Straits Times*, 28 August 2007, above n 9.

¹²¹ Sienho Yee, “The Role of Law in the Formation of Regional Perspectives in Human Rights and Regional Systems for the Protection of Human Rights: The European and Asian Models as Illustrations” (2004) 8 *Singapore Year Book of International Law* 157, at 163.

pressure”¹²² may inhibit real moves towards the formation of a regional mechanism with capacity to enforce domestic (national) compliance with international human rights principles and standards. If, ultimately, an ASEAN regional human rights mechanism “is more likely be consultative rather than prescriptive”, it may be that a focus on NHRIs – their strengthening (with NHRI staff and stakeholders) and establishment (with governments) – and the development of a regional human rights jurisprudence (via mechanisms such as the APF’s Advisory Council of Jurists), will allow for a more effective and sustained advancement of human rights promotion and protection throughout the region.

By ensuring compliance with the Paris Principles before NHRIs become members of APF, the establishment of APF-sponsored NHRIs goes a long way to ensuring their adherence to international human rights standards (and their underlying principles of universality, indivisibility and interdependence), practices and procedures.¹²³ Indeed, NHRIs may be best able to resist being captured or “colonised”¹²⁴ by States antagonistic to the universality of human rights by maintaining full membership of the APF network. The creation of NHRIs and related activities via APF’s collaboration with the United Nations human rights bodies, national governments, academics, NGOs and practitioners via processes of consultation and co-operation, has created a legitimacy and credibility for the organization, across different, and sometimes opposing, sectors. As a regional network comprising NHRIs, opposed to a regional institution comprising states, APF’s activities often take it “closer to the ground” allowing it to be “conversant with local conditions”¹²⁵ and well-placed to translate domestic and local concerns into “strategies for human rights protection.”¹²⁶ In her opening address to the 6th Workshop on Regional Human Rights Arrangements in the Asia Pacific Region in 1998, Mary Robinson observed that national commissions are well positioned to “transform the rhetoric of international instruments into practical reality at the local level,” simultaneously respecting “ethnic, cultural, religious and linguistic diversities” and implementing “internationally agreed human rights principles.”¹²⁷

Conclusion

Regional organizations such as APF have played a significant role in furthering the “globalisation of human rights”.¹²⁸ Despite the signing and in some cases, the ratification of human rights treaties by ASEAN governments and the in-principle support – with reservations – for a regional human rights mechanism; the signing and implementation of treaties and the creation of regional institutions “by themselves do not necessarily translate into better protection of human rights unless accompanied by political will.”¹²⁹ APF’s transnational or horizontal “human rights diplomacy”¹³⁰ offers a

¹²² Ibid

¹²³ See the Paris Principles, above n 4.

¹²⁴ Neary above n 15, at 18

¹²⁵ Li-ann Thio, ‘Implementing Human Rights in ASEAN Countries: ‘Promises to Keep and Miles to Go Before I Sleep’ (1999) 2 (1) *Yale Human Rights and Development Law Journal* 1, at 76

¹²⁶ Mary Robinson, opening address to the 6th Workshop on Regional Human Rights Arrangements in the Asia Pacific Region Tehran 28 February 1998

[http://www.unhcr.ch/hurricane/hurricane.nsf/\(Symbol\)/OHCHR.STM.98.01.En?OpenDocument](http://www.unhcr.ch/hurricane/hurricane.nsf/(Symbol)/OHCHR.STM.98.01.En?OpenDocument)

¹²⁷ Ibid.

¹²⁸ Hashimoto, above n 28, at 879

¹²⁹ Andreas O’Shea, “A Critical Reflection on the Proposed African Court on Human and Peoples’ Rights”, (2001) 2 *African Human Rights Law Journal* 285, at 314.

complementary process to the establishment of a regional human rights body which currently risks the prospect of emerging as a mechanism which will circumvent universal human rights principles to accommodate “national and regional particularities”.¹³¹ In continuing and perhaps expanding its role, the APF, through its various core activities, can cultivate an environment which may increasingly become more amenable to the creation of a strong regional human rights institution which does not retreat from the major international human rights treaties, offering citizens of the region a human rights body with a tongue and all of its teeth,

¹³⁰ Hashimoto above n 28

¹³¹ Bangkok Declaration, above n 10