

HUMAN RIGHTS INSTITUTIONS AS MEDIUM:
NATIONAL HUMAN RIGHTS INSTITUTIONS (NHRIS) AND REGIONAL HUMAN
RIGHTS INSTITUTIONS (RHRIS) IN ASIAN HUMAN RIGHTS CONTEXT

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by
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The purpose of my dissertation is to examine whether and how national human rights institutions (NHRIs) can be a driving force for the establishment of regional human rights institutions (RHRIs) in the Asia-Pacific region, which remains the only region without such institutions in contrast to Europe, the Americas, and Africa.

I first explore the issue of whether RHRIs are desirable in this region, and argue that such a system is desirable. Then I examine the reasons why RHRIs have not emerged in this region. I located these reasons in part by examining the reception of human rights in Asia and issues like the emergence of international human rights law from the Western cultural heritage, and the problematic question of what the Asian way of human rights means. The analysis of the obstacles that have hampered the creation of RHRIs leads me to focus on NHRIs. By reviewing the role that NHRIs can play in addressing the concerns and inhibitions of Asian states, while furthering the aims of international human rights law, I maintain that the way in which NHRIs collaborate demonstrates that they can be eminent actors toward the establishment of RHRIs. Further, I suggest four specific ways to realize this goal. Lastly, I explore the broader literature on the role that human rights NGOs can play in the relationship with RHRIs and NHRIs, thus illuminating their particular role in the Asian human rights context.

I conclude that we need a new actor which can strengthen the human rights system at the national level, change a government's human rights policies, and ultimately lead to the creation

of RHRIs in this region. It should be a channeling institution that can mediate between the national interest and international norms, similarly to RHRIs that can work as intermediaries to reflect the regional specificity and meet international human rights standards. At the same time, this new actor should gradually raise public awareness of human rights through an active cooperation with civil society. Overall, NHRIs can play such a role as a driving force for establishing RHRIs in the Asia-Pacific region.

BIOGRAPHICAL SKETCH

Buhm-Suk Baek earned his LL.B. from Seoul National University in South Korea. He then obtained his M.A. in International Relations at Yonsei University, while working at Advocates Korea, a human rights NGO in Korea. His thesis “Definition of Crimes of Aggression in International Criminal Court” received the Korean Society of International Law Award. In the year 2007, Mr. Baek entered the J.S.D. program at the Cornell Law School just after obtaining his LL.M. from the same School with honored thesis “Economic Sanctions against Gross Human Rights Violations” under the supervision of Prof. Muna Ndulo. In the summer of 2009, he worked as a research fellow at the National Human Rights Commission of Korea. At Cornell, he also served as a reviewer for the Cornell Graduate Legal Conferences and was a J.S.D. editor for the Cornell International Law Journal.

Mr. Baek’s areas of research and teaching interests include Public International Law, International Human Rights Law, International Criminal Law, Law and Development, International Law and International Relations, and Law and Social Change.

To My Family
Minyoung and Ethan

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LIST OF ABBREVIATIONS

AAA	the American Anthropological Association
ACHPR	the African Charter on Human and People's Rights
ACHR	the American Convention on Human Rights
ACJ	the Advisory Council of Jurists
AICHR	ASEAN Intergovernmental Commission on Human Rights
ANNI	the Asian NGOs Network on National Human Rights Institutions
APEC	the Asia Pacific Economic Cooperation
APF	the Asia Pacific Forum of National Human Rights Institutions
ASEAN	the Association of Southeast Asian Nations
CAT	the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	the Convention on the Elimination of All Forms of Discrimination against Women
CERD	the Convention on the Elimination of All Forms of Racial Discrimination
CRC	the Convention on the Rights of the Child
CRPD	the Convention on the Rights of Persons with Disabilities
ECHR	the European Convention on Human Rights
ECtHR	the European Court of Human Rights
ICC	the International Coordination Committee of National Institutions
ICCPR	the International Covenant on Civil and Political Rights
ICESCR	the International Covenant on Economic, Social and Cultural Rights
IDPs	Internally Displaced Persons
MWC	the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
NAP	National Human Rights action plans
NAM	the Non-Aligned Movement
NHRCK	National Human Rights Commission of Korea
NHRIs	National Human Rights Institutions
NI	National Institutions
OAS	the Organization of American States

PIF	the Pacific Islands Forum
RHRIs	Regional Human Rights Institutions
SAARC	the South Asian Association for Regional Cooperation
SUHAKAM	the Human Rights Commission of Malaysia
TRCs	Truth and Reconciliation Commissions
UDHR	the Universal Declaration of Human Rights
UNOHCHR	the Office of High Commissioner for Human Rights
UPR	the Universal Periodic Review

CHAPTER ONE

Introduction

Unlike their counterparts in Africa, the Americas, and Europe, countries in the Asia-Pacific region have not created regional human rights institutions (RHRIs) yet. This region remains the only one which does not have any regional human rights mechanisms comparable to the European Court of Human Rights, the Inter-American Commission of Human Rights, the Inter-American Court of Human Rights, the African Commission on Human and People's Rights, or the African Court of Human and People's Rights. The purpose of this dissertation is to examine whether and how national human rights institutions (NHRIs) can be a driving force for establishing RHRIs in the Asia-Pacific region, and while answering this question, to review the way in which NHRIs and RHRIs can protect and promote human rights in Asia.

1.1. TERMINOLOGY: THE ASIA-PACIFIC REGION

Before I proceed further, let me explain how I understand the Asia-Pacific region. It is impossible to define the Asia-Pacific region by its single or common elements of identities like ethnicity, culture, history, language or religion. Even geographical boundaries that distinguish this region from others are not clear. Rather than perceiving it as any homogeneity among Asian countries or as an objective geographical point of view, it is generally maintained that the

concept of the Asia-Pacific is constructed by the reflection of the Western-centric perception.¹ As Onuma Yasuaki points out, “[t]he very notion of Asia is not Asian, but of European origin. There is no single Asia, there are many Asias.”² In this context, considering geographical proximities, historical and cultural backgrounds, and economic and political affiliation, a sub-regional approach has generally been used in the Asia-Pacific region, which comprises for instance East Asia, South-East Asia, South Asia, West Asia, Central Asia, and the Pacific. Indeed, several inter-governmental organizations have been established based on such a sub-regional grouping: the Association of Southeast Asian Nations (ASEAN) in the South-East Asia region, the South Asian Association for Regional Cooperation (SAARC) in the South Asia region, and the Pacific Islands Forum (PIF) in the Pacific region.

Further, in various international institutions there are no general guidelines to categorize their member states into regional groupings in the name of the Asia or Asia-Pacific region. Even in the U.N. structure, there are no official standards. For example, in the General Assembly, the member states are unofficially divided into five geopolitical regional groupings: the African Group, with fifty-three member states; the Asian Group, with forty-three member states; the Eastern European Group, with twenty-three member states; the Latin American and Caribbean Group (GRULAC), with thirty-three member states; the Western European and Others Group (WEOG), with twenty-eight member states.³ In the Regional Commissions of the U.N. for

¹ See Edward W. Said, *ORIENTALISM*, 1-9 (2003). See also Paul Evans, *the Concept of Eastern Asia* in *EASTERN ASIA: AN INTRODUCTORY HISTORY*, 7, 8 (Colin Mackerras ed., 2000).

² Onuma Yasuaki, *In Quest of Intercivilizational Human Rights: Universal VS. Relative, Human Rights Viewed from an Asian Perspective*, 1 *Asia Pac J.H.R. & L.*, 53, 55 (2000). For example, the word Asia was derived from the Greek word Asu, which means the east of Greece, and the other term Orient was derived from the Latin word Oriens, which means where the sun rises. See Amartya Sen, *Human Rights and Asia Values*, *The New Republic*, 13 (1997).

³ See the U.N. *deleGATE: Members of the General Assembly Arranged in Current Regional Groups* http://www.un.int/wcm/webdav/site/gmun/shared/documents/GA_regionalgrps_Web.pdf

Economic and Social Cooperation, the five regional commissions are: the U.N. Economic Commission for Europe (UNECE), the U.N. Economic and Social Commission for Asia and the Pacific (UNESCAP), the Economic Commission for Latin America (ECLAC), the U.N. Economic Commission for Africa (ECA) and the U.N. Economic and Social Commission for Western Asia (UNESCWA).⁴ In the case of the Office of High Commissioner for Human Rights (UNOHCHR), member states are grouped into five regional sections: Africa, Americas, Asia-Pacific, Europe and Central Asia, and Middle East and North Africa.⁵ As seen above, different institutions of the U.N. use different regional grouping guidelines based on their operational needs, and as a result, the number of member countries grouped into the Asia or Asia-Pacific region are all different.

Regional organizations in the Asia-Pacific region are using even more complicated grouping guidelines for their memberships. For example, in the Asia-Pacific Economic Cooperation (APEC), there are twenty-one member economies⁶ within the name of the Asia-Pacific including the U.S., Canada, Mexico, and Chile in Americas, but not India, Sri Lanka, and Pakistan in the South Asia region. The Asia Pacific Forum of National Human Rights Institutions (APF), which is one of the main focuses of my dissertation, expands its membership to countries in the Middle-East region like Jordan and Qatar.

I recognize the Asia-Pacific region as the geo-political notion consisting of several sub-regions which share common elements rather than as a clearly defined geographical concept.

⁴ The U.N. Regional Commissions, <http://www.un.org/regionalcommissions/about.html>

⁵ The Office of High Commissioner for Human Rights (UNOHCHR), <http://www.ohchr.org/EN/Countries/Pages/HumanRightsintheWorld.aspx>

⁶ The APEC calls each member not a state but an economy in order to accommodate Taiwan and Hong Kong as its members. <http://www.apec.org/en/FAQ.aspx>

That is, as David P. Fidler articulates, from the perspective of subaltern theory, the world can be divided based on the geo-political context and Asia, Africa, and Latin America can be categorized as one group: the Third World.⁷ In this sense, I understand the Asia-Pacific region as a flexible and fluid notion which belongs to the Third World rather than one with a strict boundary, and for human rights discussion purposes, the general scope of this region is followed but not limited to the UNOHCHR regional categories. Therefore, the Asia-Pacific region in my dissertation embraces forty countries in four sub-regions: eight in the South Asia region (Afghanistan, Bangladesh, Bhutan, India, Pakistan, the Maldives, Nepal, and Sri Lanka), eleven in the South-East Asia region (Brunei Darussalam, Cambodia, Indonesia, Lao People's Democratic Republic, Malaysia, Myanmar, the Philippines, Singapore, Thailand, Timor-Leste, and Viet Nam), sixteen in the Pacific region (Australia, the Cook Islands, the Federated States of Micronesia, Fiji, Kiribati, Nauru, New Zealand, Niue, Palau, Papua New Guinea, the Republic of the Marshall Islands, Samoa, the Solomon Islands, Tonga, Tuvalu, and Vanuatu), and five in the East Asia region (China, Japan, the Democratic People's Republic of Korea, the Republic of Korea, and Mongolia).⁸ However, as various initiatives for the establishment of regional human rights system in the Asia-Pacific region which will be discussed in the following chapters, have not been confined to those four sub-regions, the states in other sub-regions, for example member countries of the APF in the Middle-East region, are not entirely excluded from the discussions and will be taken into consideration.

One more thing to be noted is that the regional identity of Asia might be emerging in the era of globalization. It means that in the era of a rapidly integrating world in the areas of

⁷ See David P. Fidler, *The Asian Century: Implications for International Law*, 9.S.Y.B.I.L. 19 (2005).

⁸ The Office of High Commissioner for Human Rights (UNOHCHR), Asia Region.
<http://www.ohchr.org/EN/Countries/AsiaRegion/Pages/AsiaRegionIndex.aspx>

economy, security, and politics, we recognize the increasing number of human rights problems that cannot be handled by one single country only, such as human trafficking and migrants, and as a result, there is growing consensus on the need to promote regional integration and cooperation in the name of Asia, for instance creating regional human rights systems to solve regional human rights issues of common concern which is the main focus of my dissertation.

1.2. OVERVIEW

After the birth of the Universal Declaration of Human Rights in 1948, international human rights law developed rapidly with the emergence of an increasing number of international human rights treaties. Indeed, international communities have made an effort to legalize fundamental human rights within the U.N. framework, extending the areas of human rights to be universally bound by. Since the end of the Cold War in the 1990s, their focus has moved to the internalization of human rights under the international human rights monitoring system, even though the internationalization of human rights is still a work in progress. As Mary Robinson points out, normative works for the protection and promotion of human rights are largely done at the international level, and the main task now is to effectively implement international human rights standards at the regional and national level.⁹ How can this task be accomplished specifically in the Asia-Pacific region? That is the initial question of my dissertation and my broad argument is that we need institutions as medium for the effective implementation of international human rights norms, especially considering two major changes in the development

⁹ Mary Robinson, *Realizing Human Rights: "Take hold of it boldly and duly..."* UN High Commissioner for Human Rights Romanes Lecture 1997, Oxford University (Nov. 11, 1997) <http://www.un.org/rights/50/dpi1938.htm>

of the international human rights system: the concept of *sovereignty* and the nature of *actors* involved.

The first change is in the understanding of the principle of sovereignty. In Asia, most countries have challenged the concept of universal human rights because they consider current established international human rights norms not really internationally acceptable ideas in the sense that they originate in the West. Many Asian governments have argued that Western countries use international human rights law as a tool to intervene in their domestic affairs and national sovereignty. They also maintain that their unique Asian values and Asian way of human rights have not been reflected in the process of formulation of most international human rights norms. I am skeptical to the debate on the universality of human rights itself, not because of the fact that there have been discussions on human rights and human dignities in the history of Asia, but because of the fact that now most countries have ratified major international human rights treaties and they have committed to comply with them. I believe that the universality of fundamental human rights should be maintained at least based on this simple but important fact. The evolving international human rights norms suggest that human rights issues should not be overlooked and that gross violations of human rights are no longer the exclusive concern of each individual state's domestic jurisdiction.¹⁰ Furthermore, they suggest that the protection and promotion of human rights should be achieved through the principle of state sovereignty, which is the main element of the public international law.

It is undeniable that protection of human rights and respect for state sovereignty are both important items in current international law. The problem is how to protect and promote human

¹⁰ Buhm-Suk, Baek, *Economic Sanctions against Human Rights Violations*, 15-8, Cornell Law School Inter-University Graduate Student Conference Papers (2008). <http://lsr.nellco.org/cornell/lps/clacp/11>

rights without impairing the principle of state sovereignty under the existing international legal system. The view that sovereign rights of states should be defied in the case of certain human rights violations because gross human rights violations can give legal grounds for defying the principle of state sovereignty has been gaining momentum.¹¹ In other words, the traditional concept of sovereignty has gradually changed from a limited understanding as the right of a state not to be interfered with by other countries, to include its responsibility to protect its nationals' basic human rights. That is, each individual state has a responsibility to protect and promote the human rights of its own nationals based upon the principle of sovereignty.

Overall, I argue that the relationship between human rights and state sovereignty should and can be complementary. The protection and promotion of human rights can be enhanced by the respect for a state's sovereignty. States should be viewed not as deniers of human rights, but as protectors and promoters of the human rights of their nationals. Respect for state sovereignty can be realized by protecting the fundamental rights of a state's nationals. State sovereignty and independence should serve not as a hurdle to, but as a guarantee for the realization of the fundamental human rights of the state's nationals.¹² Each individual state, then, should cooperate with other Asian states in order to carry out their obligations under state sovereignty and international human rights law. Therefore, it is necessary to establish regional human rights bodies in the Asia-Pacific region as mediators. They can effectively monitor individual member states' implementation of international human rights norms with the cooperation of neighboring member states, and at the same time, reflect regional specificities and consider historical, cultural

¹¹ See generally, Jarat Chopra & Thomas G. Weiss, *Sovereignty Is No Longer Sacrosanct: Codifying Humanitarian Intervention*, 6 *Ethics & Int'l Aff.* 95 (1992); Anne Bodley, *Weakening the Principle of Sovereignty in International Law: The International Criminal Tribunal for the Former Yugoslavia*, 31 *N.Y.U. J. Int'l L. & Pol.* 417 (1999); Jianming Shen, *National Sovereignty and Human Rights in a Positive Law Context*, 26 *Brook. J. Int'l L.* 417 (2000).

¹² Buhm-Suk, Baek, *supra* note 10, at 18.

and social context in the region. They can serve as channeling institutions not for the replacement of but as an effective supplement to the human rights protection system in each Asian state.

The second change is the emergence of new actors in the evolving international human rights mechanism. A growing number of actors, other than states, have emerged in many areas of public international law and their importance has increased, especially in international human rights law with its dynamic development, a fact discussed at length in the norm diffusion theory of international relations and the vernacularization theory in law and anthropology. Civil societies, human rights NGOs, and all other rights stakeholders now actively interact, share information for best human rights practices, act together cooperatively, enabled by technological developments like social media and the Internet. In other words, we live in the era of globalization in which the power of the people and the power from below cannot and should not be ignored.

It is undeniable that the historical paths of human rights development in Asian countries were not identical to those in Western countries. Most Asian states, however, embraced the ideas of human rights, democracy, and constitutional rights during their struggle against colonialism. And at the same time, people in Asia have also witnessed instances of misuse of the human rights language by authoritarian governments. I believe that human rights norms have developed in Asia through a complicated process, which includes not only the actions of individual states, but also the active intervention, participation, and cooperation of other emerging actors, including civil societies.

By exploring such a unique progress, I argue that it is important to have a institution as medium -NHRIs and RHRIs- for the protection and promotion of human rights in the Asia-Pacific region to intertwine the two main approaches on human rights: the top-down one of the U.N. and individual governments in the region and the bottom-up one of civil society, as well as take into consideration both the international standards and the regional, national, and local specificities, needs, traditions, and culture. Further, such a dynamic process of internalization of international human rights law through the intermediate institutions of RHRIs and NHRIs enables harmonization between the national, regional, and international norms, as Amitave Acharya maintains:

*The localization of ... norms does not extinguish existing local beliefs and practices, but may instead universalize and amplify the latter... A more interactive understanding of the process is warranted, in which the initiative belongs also to local agents. Through local initiative, feedback, and reconstruction, the constitutive localization process stimulates norm diffusion.*¹³

Since the adoption of the Bangkok Declaration in 1993, there have been numerous initiatives to establish regional human rights institutions and charters in the Asia-Pacific region. All efforts, however, have been impeded by deep cultural, political, and historical issues. The Asian governments' efforts under these processes have remained a mere ritual, with non-legally binding promises and temporal discussions, but without any concrete actions. Many countries in this region constantly stress the importance of "the inviolability of national sovereignty, political independence and territorial integrity" while also admitting "the need for international cooperation to address problems of massive and systematic violations of human rights."¹⁴ Most

¹³ Amitav Acharya, WHOSE IDEAS MATTER? AGENCY AND POWER IN ASIAN REGIONALISM, 4-5, 167-9. (2009).

¹⁴ See, for example, Press Release, UN GA/9606, "Questions of Sovereignty, the State System, the Future of the Organization Raised by General Debate Speakers," (Sept. 24, 1999) (including Singapore, Iraq, Dominican Republic,

Asian governments have only shown that there is no sufficient political will to establish RHRIs with their step-by-step approach and the excuses of sovereignty, regional diversity and culture, and the Asian way of human rights.

I believe it is necessary first and foremost to strengthen the domestic system for the promotion and protection of human rights in order to change the attitude of governments against the creation of RHRIs. And for this, we need a new actor which can strengthen the human rights system at the national level, change a government's human rights policies, and ultimately lead to the establishment of RHRIs in the region. It should be a channeling institution that can mediate between the national interest and international human rights norms, similarly to RHRIs that can work as intermediaries to reflect the regional specificity and meet international human rights standards. At the same time, this new actor should gradually raise public awareness of human rights through an active cooperation with human rights NGOs and civil society. Overall, NHRIs can play such a role as a driving force for establishing RHRIs in the Asia-Pacific region and this is the main argument of my dissertation.

Therefore, I will first explore the issue of whether RHRIs are desirable for the Asia-Pacific region. Then I will examine the reasons why such regional human rights systems have not emerged. These reasons are revealed in part by examining the reception of human rights in Asia and certain developments over the last few decades: the Asian values debate, and, more broadly, the emergence of international human rights law from the Western cultural heritage, and

Kazakhstan, and Iran); Press Release, UN GA/9627, "General Assembly Begins Discussion on Secretary-General's Annual Report on Work of Organization" (Oct. 6, 1999) (including Colombia, Kuwait, Mongolia, China, Bangladesh, India, Venezuela); Press Release, UN GA/9633, "Importance of State Sovereignty, Need to Address Human Rights Violations, Council Reform, Discussed in Assembly" (Oct. 8, 1999) (including Cuba, Algeria, Oman, Pakistan, Peru, the Philippines, Senegal, and the Sudan).

the problematic question of what the Asian way of human rights means. I will then proceed to critically examine these broader debates in order to explore the ways in which NHRIs can be a key player for the establishment of RHRIs by addressing some of the concerns and inhibitions of Asian states, while furthering the broad policies and aims of international human rights law. In examining the unique strengths and weaknesses of NHRIs and how they may play such a role, this paper also explores the role that non-state actors can play in the creation, administration and furtherance of international human rights law, thus illuminating the particular role of such actors in the relationship with RHRIs and NHRIs in the Asian human rights context.

1.3. CHAPTER OUTLINE

Chapter Two will examine the basic question of whether a regional human rights system is desirable for the Asia-Pacific region. After reviewing the development of human rights both in the international legal context and the Asian context, I conclude that such a system is desirable.

Asia is the largest and most populous region in the world. It is also the place where most of the major religions in the world originated. Indeed, in a region as large, diverse, and complex as Asia, it is a challenge to build an integrated regional system in which most Asian countries can agree on the protection and promotion of human rights because it is hard to generalize on the perception of human rights. Moreover, while regionalism in Asia has gradually developed in the areas of security and economic cooperation, especially after the financial crisis in Asia in the 1990s accelerated the integration of this region, human rights issues, including the discourse on the creation of regional human rights bodies have been intentionally avoided for a long time in

diplomatic forums both at the regional and sub-regional levels. Opponents of the establishment of a regional human rights mechanism often argue that this region does not need to set up RHRIs which are designed to assess invariant universal standards or values within a single - mainly Western - cultural context. Therefore, the first question that should be asked about the establishment of a regional human rights system in the Asia-Pacific region is whether it is desirable to have RHRIs there.

In Chapter Two, I will first provide four general reasons behind the necessity to establish RHRIs for the protection and promotion of human rights. First, RHRIs can be an additional highly effective tool for the implementation of international human rights norms though the state itself should still be the main obligor for the protection of human rights. Second, compared to the U.N., RHRIs can further enhance the legitimacy of interventions against gross human rights violations as demonstrated by controversial humanitarian interventions that have not always been attainable, or indeed desirable, as the past experiences in Kosovo, Iraq, Sudan, and North Korea reveal. Third, RHRIs can offer a better opportunity for individual states to participate in the cooperation for the protection of human rights through the neighborhood effect. Lastly, RHRIs can provide a better chance to protect the victims and human rights defenders when the U.N. or other international human rights institutions can hardly access the countries in which human rights violations occur, and also when they cannot work properly.

Then, I will show why it is desirable to have RHRIs specifically in the Asia-Pacific region by reviewing the development of international human rights law and the counter-responses by Asian countries against international human rights norms, that is, the birth of the Universal Declaration of Human Rights (UDHR) and the debate on universality versus relativity

of human rights, which has long been discussed in the scholarly literature. I will maintain that the validity of the universality of human rights should come at the very least as the product of a process in which most countries are committed to international human rights law by ratifying major international human rights conventions and treaties. However, because the universality of human rights does not mean uniformed implementation of human rights norms, it is necessary to establish some kind of intermediate human rights institutions at the regional and national levels to respond to the social and cultural context. In other words, it is desirable to create RHRIs in the Asia-Pacific region as a mediator for the internalization and localization of international human rights norms if individual states cannot and do not want to comply with international human rights norms, because RHRIs can be a mediator between regional specificity and international standards through their extensive contacts with individual states, civil society, and international institutions.

In addition, I will briefly review RHRIs in other regions: Europe, the Americas, and Africa to show how RHRIs can contribute to the promotion of human rights. Many human rights activists and scholars in other regions have published numerous papers and reports criticizing regional human rights courts' decisions or commissions' resolutions, and I agree that there is ample room for further improvement in RHRIs in those regions. The experience of RHRIs in Europe and the Americas, however, demonstrates positive effects on the development of human rights in the sense that at least regionally adopted human rights treaties reflect the specific sentiments in the region, and that regional institutions can handle human rights violation cases effectively with a better understanding of the context of a problem.

Overall, RHRIs can serve as an effective tool for the protection and promotion of human rights in this region not as a replacement, but as a supplement to both the international and national human rights system. They can make a meaningful difference to the human rights situation in the region as a channeling institution to reflect regional specificity and particular needs, and, at the same time, monitor an individual state's practices to meet international standards on human rights. If they are properly constituted and managed, RHRIs can be powerful tools for human rights by translating Asian countries' commitment on human rights into real improvements for the people in this region

Chapter Three will then provide the reasons why such a regional system has not emerged in the Asia-Pacific region so far. Since the adoption of the Bangkok Declaration in 1993, there have been numerous initiatives to establish regional human rights institutions and charters in Asia. All efforts, however, have been impeded by deep cultural, political, and historical issues. There have been two main approaches to the establishment of RHRIs: the top-down one and the bottom-up one. Many human rights activists and scholars argue that the former approach of the U.N. and the governments of Asian states has not fully cooperated with already existing national and regional institutions and has mainly relied upon individual governments' political will. The latter approach of numerous NGOs has lacked enough support from formal governmental institutions. Thus, examining this problem is the starting point of my research in Chapter Three and the main question that should be asked is why Asia has not had regional human rights institutions so far.

To answer this question, I will first review all the major initiatives to establish RHRIs in this region, especially since the first Asia-Pacific Workshop on human rights organized under the

umbrella of the U.N. in 1990. This workshop was considered the first step in exploring the possibility of regional human rights arrangements in the Asia-Pacific region.¹⁵ As the initiatives for setting up RHRIs in the Asia-Pacific region have been mainly categorized by their leading agencies, this chapter will review them in three parts: the U.N. initiatives, the NGOs initiatives and the National Human Rights Institutions (NHRIs) initiatives. These are examined in chronological order to see what items have been discussed, what has been a key development in their discussion, whether they have evolved toward realizing the establishment of RHRIs and lastly, how their activities can be evaluated. My broad argument is that the last more than two decades have witnessed futile efforts to establish regional human rights mechanisms, both through the top-down approach of the U.N. and Asian governments and the bottom-up approach of numerous NGOs in Asia, which only reveals that each Asian government has no sufficient political will to build up RHRIs in the region yet. The NHRIs initiatives, with their relatively immediate approach, have worked successfully both with governments and NGOs, and have shown some promising signs. To my mind, however, there are no concrete steps toward the establishment of RHRIs yet; only the hope that NHRIs and their regional network can gradually change the individual governments' attitudes, as demonstrated at the sub-regional level with the establishment of the ASEAN human rights body.

Through the analysis of all the major initiatives for setting up RHRIs in the Asia-Pacific region, I, then, will provide five main reasons that have hindered the establishment of a regional human rights system in Asia. Sovereignty is the first one. Truly, sovereignty and the traditional concepts of the principle of non-intervention have been one of the main obstacles for setting up

¹⁵ U.N. General Assembly Resolution on Regional arrangements for the promotion and protection of human rights in the Asian and Pacific region, G.A. Res. 45/168, UN Doc. A/RES/45/168. (Dec. 18, 1990).

RHRIs in this region because for a long time, most Asian governments have considered human rights issues an internal affair. The second reason is the failure in the recognition of human rights after WWII. It is deeply related to the issue of the post-war compensations and the reparations of war victims by Japan, the gross human rights violator at the time of the War. The third reason is the failure of major Asian powers to play a leading role in the human rights movement. The lack of regional leadership for the improvement of the human rights conditions in the region by the major Asian powers, China, Japan, and India shows the practical difficulties in establishing RHRIs in Asia. The fourth reason is the relatively low ratification rate of U.N. human rights treaties. It means that in many Asian countries, there is still a lack of individual governments' political will to comply with international human rights norms. And lastly, the fifth reason is the Asian values debate, a unique human rights discourse in this region, which has been examined in a large number of publications by both scholars and activists for over a decade. The last reason of the Asian values will be examined in a separate section, because I believe that it is the most important factor in most Asian countries' reluctance to establish RHRIs. With the ongoing conversation on post-colonialism, Lee Kuan Yew's famous Asian values argument, indeed, has been a major challenge for setting up a regional human rights system in the region because it rejects international human rights law as a Western concept and thus argues that it is inapplicable to the Asian context.

After examining the five major reasons, I conclude that all those obstacles, including the Asian values discourse that have hindered the establishment of RHRIs, are the result not of a different understanding of fundamental human rights under the already existing international human rights legal system, but mainly of political considerations. Therefore, I will ask who benefits from these assertions behind the rejection of RHRIs in the region. Those who are most

vulnerable to violations of their fundamental human rights and find it hard to seek the protection of their rights both at the international and the national level are definitely not the ones who will benefit from the absence of RHRIs in the region. Neither are the human rights defenders who fight for them. Finally, the analysis of the identified obstacles will lead me to focus on national human rights institutions, relatively new actors in the international human rights framework, as a driving force for the establishment of RHRIs in the Asia-Pacific region.

Overall, most initiatives to explore the possibility of establishing RHRIs have remained a mere ritual only, with non-legally binding promises and ad-hoc discussions, but without any concrete actions. As a result, it leads me to focus on a new actor which can strengthen the human rights system at the national level, change a government's human rights policies, and ultimately lead to the establishment of RHRIs in the region. It should be an intermediate institution that can link between the national needs and international human rights standards, similarly to RHRIs that can work as channeling institutions to mirror the regional characteristics and meet international human rights norms. This new actor should also raise public consensus on human rights through an active collaboration with civil societies including human rights NGOs. My broad argument is that NHRIs can play such a role as an eminent actor for setting up RHRIs in the Asia-Pacific region.

Chapter Four will examine why NHRIs can be an eminent actor for setting up RHRIs. To answer these questions, I will first review what NHRIs are and examine how they have emerged in the development of international human rights law. In addition, by reviewing the National Human Rights Commission of Korea as a case study, I will show how NHRIs can work and interact with all other rights stakeholders and what issues they may encounter. The

precondition for NHRIs to be a main actor toward RHRIs is that they should be well constituted and managed. Preconditions such as independence, effectiveness, and accountability have already been discussed in a large number of articles by human rights scholars, lawyers and activists. Though they are not the main focus of my research, I will briefly review them as well.

Later in this chapter, I will provide three reasons why NHRIs can be a driving force for the establishment of RHRIs in the region. First, NHRIs can bridge the gap between the international community, including the U.N., and the individual government in the Asia-Pacific region, on the understanding of international human rights norms. For over a decade, NHRIs have been strong critics of the idea of Asian values. Unlike other governmental institutions that have argued for the Asian way of human rights with the sole purpose of maintaining their power and undemocratic policies, NHRIs can redefine the universality of human rights from the perspective of the people. In other words, NHRIs are independent national agencies established to protect those who are most vulnerable to violations of their fundamental human rights and examine the cause of the problems in light of local culture and traditions. The second reason is the nature of NHRIs. They are mediators that can reflect both the national interest and public opinion. They exist as both state and non-state institutions; that is, they are governmental institutions but their dynamic interaction with civil society makes them work as non-governmental organizations, too. This characteristic of NHRIs makes them a distinct national institution that can strengthen the domestic system for a better human rights practice, together with raising public awareness of human rights. The last reason is their cooperation through the Asia Pacific Forum (APF), the network of NHRIs in this region. The regional networks of NHRIs have shown some positive signs. By sharing information, exchanging staff members and identifying human rights issues of common concern, they have enhanced the capacity of

individual member NHRI for a better human rights practice at the national level, and have also encouraged the establishment of NHRIs in Asian countries without them. Notably, their successful cooperation at the sub-regional level, for example the ASEAN human rights body, demonstrates why they can be eminent actors for setting up RHRIs in the end.

Overall, NHRIs can be a driving force for the establishment of a regional human rights system. Unlike other initiatives toward RHRIs, their cooperation and networks will strengthen the human rights protection system at the national and regional level, and in the end, change each government's skeptical attitude towards RHRIs.

Chapter Five will discuss the next question of how NHRIs can work together to take specific steps toward establishing a regional human rights mechanism. For this, I will suggest four ways in which NHRIs can work together for the establishment of RHRIs.

The first one is to support setting up regional arrangements on human rights issues of common concern. If it is hard to build up regional human rights arrangements that govern all human rights areas at once, it would be a good idea to establish legally binding agreements on specific human rights issues at first. Through the U.N. workshops and the APF annual meetings, there has been an effort to identify human rights issues of common concern, which should be handled together with neighboring countries. In order to propose the most viable solutions to identified regional human rights problems, NHRIs have cooperated together to research, share information and report those issues to their governments and international communities. Such a process will lead to the adoption of regional agreements on human rights issues of common concern, which meet international human rights standards and at the same time, reflect regional specificity and needs. I believe that the increasing number of such agreements will ultimately

lead to the adoption of a regional human rights charter. In this section, I will illustrate how the APF and NHRIs have worked together in eight selected areas of human rights of common concern, with the potential to take practical steps for regional arrangements. These areas are human trafficking; women's rights; the rights of people with disabilities; the rights of human rights defenders; the prevention of torture; the rights of internally displaced persons; the rights of migrants; and the environment.

The second suggestion is to establish sub-regional human rights bodies in advance. The APF and member NHRIs have already worked together and supported the setting up of sub-regional human rights arrangements in the South-East Asia, South Asia, and Pacific regions. For this, they have cooperated with already existing sub-regional organizations like the South Asian Association for Regional Cooperation (SAARC), the Association of South-East Asian Nations (ASEAN), and the Pacific Islands Forum (PIF), even though these sub-regional bodies were originally established for political and economic cooperation. I maintain that sub-regional mechanisms will be a good starting point for establishing RHRI in the region, because once sub-regional organizations are created, it would be much easier for them to build an institution from the sub-regional to the regional level. That is, they can facilitate the integration of several sub-regions under the unified regional human rights mechanism. In the sections that follow, I will review how each sub-regional organization has worked, in cooperation with NHRIs, for the establishment of a sub-regional human rights body, which can be the most positive and important development for a human rights protection mechanism in this region.

My third suggestion is to strengthen the role of the Asia Pacific Forum of National Human Rights Institutions (APF). The APF has emerged as the most cohesive regional human

rights body in the region so far. Since Asia has no RHRIs comparable to Europe, the Americas and Africa, NHRIs still represent the best tools to monitor, investigate and seek remedies for human rights violations in this region. Thus, it is difficult to overstate the important role of the APF, which is to enhance the functions of NHRIs to meet international standards and coordinate their operation to accord with the best human rights practices. In this section, I will present three ways to enhance the role of the APF. By strengthening its own mandate, the APF should raise member NHRIs' operational powers and capacities based on the standards of the Paris Principles. Also, the APF annual meeting should not remain as a forum for NHRIs only, but be developed as a place that can bring all rights stakeholders in this region together to discuss human rights issues. Lastly, through the APF, NHRIs should urge their governments to adopt legally binding regional human rights arrangements. At the initial stage, NHRIs can draft human rights declarations on common issues during the APF annual meetings. Such statements can be developed, as a soft law, in the form of informal and non-legally binding agreements when representatives of individual NHRIs sign them. As NHRIs are national institutions, such agreements can finally be developed into formal and legally binding resolutions when ratified by high ranking officials from countries with member NHRIs.

The fourth suggestion is to start establishing RHRIs among the countries which favor them in the first place. Realistically, the odds of Asia having a single unified human rights system that all Asian states across the region participate in are rather low. But, the APF and a network of NHRIs have shown that there are many human rights issues of common concern which cannot be handled by any individual state alone. So, it could be an alternative solution to establish RHRIs with small number of countries with NHRIs that understand the necessity to solve complicated human rights issues together. Once they are established, their practices will

attract other countries in the region, because it is not at all impossible to encourage other states to accept the regional human rights system by increasing the benefits of membership. Thus, the founding countries can, in the long run, extend membership in these small but strong human rights bodies in the Asia-Pacific region to other neighboring countries.

Overall, the quest for establishing a regional human rights system in the Asia-Pacific region is a significant timely issue in progress and I believe that with the four suggestions provided, NHRIs and their network in the APF can play a vital role as a breakthrough for moving forward to setting up RHRIs in this region.

Chapter Six will explore the broader literature on the role that human rights NGOs might play in the creation, administration, and furtherance of international human rights law, thus illuminating the particular role of such actors in the relationship between NHRIs and RHRIs in the context of Asian societies. It is no longer a new phenomenon, and indeed is an undeniable fact that human rights NGOs have played a crucial role for the promotion and protection of human rights in the world. Especially, their transnational character and increasing intervention on and participation in human rights issues at the national, regional and international level cannot be over emphasized. I believe RHRIs can play an essential role as an intermediate institution to link regional human rights NGOs' advocacy network to social change and legal mobilization for fostering a human rights culture in the Asia-Pacific region. At the same time, NHRIs and their networks are also vital for better human rights practices in individual Asian countries as a channeling institution actively cooperating and collaborating both with individual governments and local human rights NGOs.

In this chapter, I will review the characteristics of human rights NGOs and their evolving role within the existing international and regional human rights mechanisms, and further, in Asia, the way in which they have worked together for better human rights practices and the establishment of RHRIs in this region. Then, I will examine the role of human rights NGOs in strengthening human rights protection systems at the national level, especially in cooperation with NHRIs. In addition, the process of establishing NHRIs in selected countries in Asia and more specifically, how human rights NGOs have influenced this process will be briefly discussed.

CHAPTER TWO:

Do We Need Regional Human Rights System in Asia?

The normative work is largely done. The international human rights standards are in place. The task for us all will be to implement them.¹

Human rights are African rights. They are also Asian rights, they are European rights. They are American rights. They belong to no government, they are limited to no continent, for they are fundamental to humankind itself.²

2.1. INTRODUCTION

Asia is the largest and most populous region in the world.³ It is also the place where most of the major religions in the world originated.⁴ Because of this uniqueness of the Asia-Pacific region, Choong-Hyun Paik recognizes that regional human rights mechanisms in Asia, “[a]n attempt to identify and, even, to create a homogeneous community in Asia bound by the common goals of human dignity protection, thus, may be looked as equal to building a cultural-

¹ Mary Robinson, *Realizing Human Rights: “Take hold of it boldly and duly...”* UN High Commissioner for Human Rights Romanes Lecture 1997, Oxford University (11 November 1997) <http://www.un.org/rights/50/dpi1938.htm>

² Kofi Annan, *Address to the Facing History and Ourselves benefit*, New York, (15 October, 1997) Press Release, SG/SM/6359.

³ See The Asia Pacific Forum (APF), *The Region*. <http://www.asiapacificforum.net/about/the-region>

⁴ See BRADLEY K. HAWKINS, *ASIAN RELIGIONS: AN ILLUSTRATED INTRODUCTION* (2003); See also National Geographic, *Religion and Belief Systems in Asia*, <http://www.nationalgeographic.com/xpeditions/lessons/10/g68/index.html>

legal bridge that extends across the boundaries of Islamic creeds, Christian beliefs, Hinduist custom, Buddhist philosophy and Confucian regimes.”⁵

Indeed, it is a challenge to build an integrated system in which most Asian countries can agree on the protection and promotion of human rights in this region because it is hard to generalize on the perception of human rights in a region as large, diverse, and complex as Asia.⁶ This diversity is also the main reason why Asia has not established regional human rights institutions (RHRIs) so far. In this sense, through the 1993 Bangkok Declaration, the ministers and representatives of Asian countries recognized that “while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.”⁷ Furthermore, one of the Chinese delegates argued at the U.N. Workshop for the Asia-Pacific Region on Human Rights Issues that “Asia-Pacific was not a homogeneous area with respect to history, culture, language or political orientation. Models of existing regional arrangements were therefore, for the establishment of human rights regime in Asia, only of limited usefulness because of this lack of any unifying tradition.”⁸

⁵ Choong-Hyun Paik, *Regional Arrangements: Practical Matters for Consideration in the Establishment of Regional Human Rights Mechanism* in paper presented at the Third Asia-Pacific Workshop on Human Rights Issues, Seoul, Korea, 2 (18-20 July, 1994) cited in Seong-Phil Hong, *Problems and Prospect: Establishment of Regional Human Rights Institutions in the Asia-Pacific Region*, INTERNATIONAL HUMAN RIGHTS LAW VOL.2., 336, 337-8 (The Korean Society of International Human Rights Law, 2004) [written in Korean].

⁶ Yash Ghai, *Human Rights and Governance: The Asia Debate*, 10 Asia. Pac. J.HR & L., 1, 9-52 (2000).

⁷ Bangkok Declaration, Art.8, REPORT OF THE REGIONAL MEETING FOR ASIA OF THE WORLD CONFERENCE ON HUMAN RIGHTS, (Bangkok, Mar. 29 – Apr. 2, 1993), UN Doc. A/CONF.157/ASRM/8.

⁸ REPORT: UNITED NATIONS WORKSHOP FOR THE ASIA-PACIFIC REGION ON HUMAN RIGHTS ISSUES, (Jakarta, Jan. 26-28, 1993), 13-4. UN Doc. HR/PUB/93/1 cited in Seong-Phil Hong, *supra* note 5, at 338.

In addition, for a long time, regionalism in Asia was strongest mainly in the areas of security and economic cooperation.⁹ As Richard Falk argues, globalization compels Asia to be grouped as a region and Asia had to be united as a group to compete against and at the same time co-exist with other regions in the rapidly integrating world economy.¹⁰ For example, the financial crisis in Asia in the 1990s accelerated the integration of Asia at the regional and sub-regional level.¹¹ Overall, regional cooperation is still focused on economic and security issues, while human rights issues are intentionally avoided in diplomatic forums both at the regional and sub-regional levels.

A regional human rights mechanism is, however, not designed to assess invariant universal standards or values within a single cultural context. As Michael Reisman suggests, it is set up “to build a regional society where the states and nations with divergent value systems may prosper together with the benefit of minimizing unnecessary conflicts and confusions in the concept.”¹² Therefore, the first question that should be asked regarding the establishment of regional human rights system in the Asia-Pacific region is whether it is desirable to have RHRIs there.

Over the last two decades, there have been a large number of studies by human rights scholars in law, anthropology, sociology, and political science, exploring the possibilities for establishing RHRIs in the Asia-Pacific region. They, however, have mainly focused on

⁹ For example, the APEC, ASEAN Plus Three (APT), and ARF have been accelerating regional integration in Asia.

¹⁰ See Richard Falk, *Regionalism and World Order after the Cold War*, 1995 St. Louis-Warsaw Trans’L 71 (1996).

¹¹ *Id.*

¹² W.M.Reisman, *Establishment of a Regional Human Rights Arrangement in the Asian and Pacific Region: Experiences of Other Regions* in REPORT: THE FOURTH ASIA-PACIFIC WORKSHOP ON REGIONAL HUMAN RIGHTS ARRANGEMENTS: ASIAN AND PACIFIC, 14-6 (Kathmandu, Feb. 26-28, 1996), UN Doc. HR/PUB/96/3.

examining the reasons why such regional human rights systems have not emerged in the Asia-Pacific region and on suggesting ways in which RHRIs in this region can be created, without answering or only slightly discussing the basic question that should be reviewed first: the issue of whether we need RHRIs in the Asia-Pacific region. Indeed, this question has long been ignored in most academic literature. But it is necessary first and foremost to answer it in order to explore further the ways for establishing RHRIs in the Asia-Pacific region and analyze the obstacles they face, and this is the main purpose of this chapter.

So, I will first provide four general reasons behind the necessity to establish RHRIs for the protection and promotion of human rights. First, RHRIs can be an additional highly effective tool for implementation of international human rights norms though the state itself should still be the main obligor for the protection of human rights. Second, compared to the U.N., RHRIs can further enhance the human rights situation in the specific area making humanitarian interventions unnecessary since very often, they are neither attainable, nor indeed desirable, as the past experiences in Kosovo, Iraq, Sudan, and North Korea reveal. Third, RHRIs can offer a better opportunity for individual states to participate in the cooperation for the protection of human rights through the neighborhood effect. Lastly, RHRIs can provide a better chance to protect the victims and human rights defenders when the U.N. or other international human rights institutions can hardly access the countries in which human rights violations occur, and also when they cannot work properly.

Then, I will show why it is desirable to have RHRIs specifically in the Asia-Pacific region. To this purpose, I will review the development of international human rights law and the counter-responses by Asian countries against international human rights norms. Here, I will

examine the birth of the Universal Declaration of Human Rights (UDHR) and the debate on the universality versus the relativity of human rights, a long-standing issue in the scholarly literature. I do not, however, intend to engage in the traditional philosophical debates over universalism and relativism. Rather, I will focus on the ways in which the universality of international human rights law has been challenged ever since the adoption of the UDHR to articulate why and how countries in the Asia-Pacific region have responded and interacted with the development of international human rights law. My broad argument is that the validity of the universality of human rights should come at the very least as the product of a process in which most countries are committed to international human rights law by ratifying major international human rights conventions and treaties. Some kind of human rights institutions as medium are necessary for the implementation of international human rights law at regional and national levels to meet their social and cultural context because the universality of human rights does not mean uniformed implementation of human rights norms. If individual states cannot and do not want to comply with international human rights norms, the role of RHRIs is important as an intermediate institution for the internalization and localization of international human rights norms because RHRIs can be a mediator between regional specificity and international standards by extensive contacts with individual states, civil society, and international institutions.

Lastly, I will briefly review RHRIs in other regions: Europe, the Americas, and Africa, to show how RHRIs can positively impact the promotion of human rights, another reason why it is desirable to establish RHRIs in the Asia-Pacific region, as well. Many human rights activists and scholars in Europe and the Americas have published numerous papers and reports criticizing regional human rights court decisions or commissions' resolutions. It is also true that there is ample room for further improvement in RHRIs in other regions. The experience of RHRIs in

Europe and the Americas, however, demonstrates positive effects on the development of human rights in the sense that at least regionally adopted human rights treaties reflect the specific sentiments in the region, and that regional institutions can handle human rights violation cases effectively with a better understanding of the context of a problem.

2.2. NECESSITY OF ESTABLISHING REGIONAL HUMAN RIGHTS INSTITUTIONS

2.2.1. Regional Human Rights Institutions

RHRIs have created after WWII with the global consensus of adding human rights agendas from the national to the regional and international level, based on human rights provisions of the U.N. Charter and the Universal Declaration of Human Rights.¹³ RHRIs can be said, in general, to consist of three elements.¹⁴ First, there should be a list or lists of internationally guaranteed and regionally agreed human rights and corresponding state obligations such as regional human rights charters or conventions based on international human rights norms. Second, there should be permanent institutions such as regional human rights courts, and/or regional human rights commissions. And third, legally binding enforcement procedures and compliance mechanisms should exist to guarantee the protection and promotion of individual human rights. In this sense, regional human rights systems do not exist in Asia but do in Europe, the Americas, and Africa.

¹³ Dinah L. Shelton, REGIONAL PROTECTION OF HUMAN RIGHTS, 16 (2008).

¹⁴ *Id.*, at 15.

Here, I will provide one main reason and three additional ones to explain the necessity of establishing regional human rights systems under the framework of international human rights law.

2.2.2. Effective Tool for Implementation of International Human Rights Norms: Better Account of Regional Conditions and Peculiarities

With the ongoing debate on the universality of human rights in the last decades, both international relations and international law scholars have increasingly produced interdisciplinary studies in the area of human rights.¹⁵ The questions of who the main actor in the internalization process of international human rights norms is and what the role of all related actors in the international human rights system is have been the main interest in both areas of scholarship.¹⁶

While international relations scholars mainly focus on state actors, a different liberal school of international relations theories – including the ideational approach, neo-liberalism, and constructivism - has emerged. These scholars emphasize that the individual state is just one of

¹⁵ See Anne-Marie Slaughter, et. al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 Am. J. Int'l L. 367 (1998).

¹⁶ See Helen M. Stacy, *HUMAN RIGHTS FOR THE 21ST CENTURY: SOVEREIGNTY, CIVIL SOCIETY AND CULTURE* (2009); Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink eds., *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* (1999); Simon Halliday and Patrick Schmidt, *HUMAN RIGHTS BROUGHT HOME* (2004); Mark Goodale and Sally Engle Merry eds., *THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL* (2007); Kevin Boyle ed., *NEW INSTITUTIONS FOR HUMAN RIGHTS PROTECTION* (2009); Julie A. Mertus, *HUMAN RIGHTS MATTERS* (2009); Beth A. Simmons, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009).

many different actors¹⁷ and stress international cooperation¹⁸ as explained by Kant in his article *Perpetual Peace*.¹⁹ Scholars like Kathryn Sikkink and Martha Finnemore underline the importance of the different values of each state and region in the cooperation of implementing international human rights norms.²⁰ These scholars emphasize the role of transnational advocacy networks.²¹ As Thomas Risse and Kathryn Sikkink propose, transnational advocacy networks are a methodology to understand the normative dynamics of international law.²² They argue that a state is an entity that is “composed of different institutions and individuals.” The development of human rights is not solely a domestic matter, but a process of interaction among international organizations, civil society, media, corporations, academics and other private entities at the international, regional and national level.²³ Domestic social movements have played an especially critical role in the process of legalizing international human rights standards.²⁴ Along the same lines, as Jack Donnelly points out, using the regime approach to the field of human rights, the importance of the role of international organizations has increased.²⁵ He describes the

¹⁷ Anne-Marie Slaughter, *International Law and International Relations Theory: A Dual Agenda*, 87 A.J.I.L. 205 (1993).

¹⁸ Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes*, 102 Colum. L. Rev. 1832, 1842-43 (2002).

¹⁹ See Immanuel Kant, *Perpetual Peace: A Philosophical Sketch* in KANT: POLITICAL WRITINGS, 99-102 (Hans Reiss ed., H.B. Nisbet trans., 1991); See also Ken. I. Kersch, *The Supreme Court and International Relations Theory*, 69 Alb. L. Rev. 771, 783-90 (2006).

²⁰ See Martha Finnemore and Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 International Organization 887 (1998).

²¹ See Thomas Risse et. al., *supra* note 16, 17-35 (1999).

²² *Id.*, at 4.

²³ *Id.*, at 20-35.

²⁴ See Balakrishnan Rajagopal, *INTERNATIONAL LAW FROM BELOW* 245-253 (2003). See also A. M. Wiesburd, *Implications of International Relations Theory for the International Law of Human Rights*, 38 Colum. J. Transnat'l L. 45, 111 (1999).

²⁵ See Jack Donnelly, *International Human Rights: a regime analysis*, 40 International Organization 599 (1986).

international regime as consisting of “norms and decision-making procedures accepted by international actors to regulate an issue area”²⁶ and I understand this not only as the consensus of each individual state for the protection of human rights but also the interaction of all related stakeholders as the foundation of international human rights regimes. International law scholars like Harold Koh emphasize a transnational legal process approach to explain the roles of transnational actors in the domestication of human rights norms while also introducing the definitional change of the principle of sovereignty.²⁷ That is, the relationship between human rights and state sovereignty should and can be complementary. In other words, the protection and promotion of human rights can be enhanced with a respect for state sovereignty. Each individual state has a responsibility to protect and promote the human rights of its own nationals based upon the principle of sovereignty. State sovereignty and independence should serve not as a hurdle to, but as a guarantee for, the realization of the fundamental human rights of the state’s nationals. Therefore, each individual state should cooperate with other states and human rights related actors in order to carry out their obligations under state sovereignty and international human rights law.

The discourse on international human rights law by various international relations and international law scholars reveals at least two things.

First, there are many actors in the process of the development of human rights. Their interaction especially with the civil society is important in the protection and promotion of human rights in individual states. However, it might be a mistake to place too much emphasis on

²⁶ *Id.*, at 602.

²⁷ Harold Hongju Koh, *Why Do Nations Obey International Law?* 106 *Yale L. J.* 2599, 2635, 2645-6, 2656-7 (1997).

the interactions with civil society only, including human rights NGOs, and other private entities. There are still national borders that divide countries and human rights issues are often highly politically contentious.²⁸ Indeed, individual states have constantly used human rights as political tools in international diplomatic fora.²⁹ While the internal dynamic of the civil society and the cooperation among local, national, and international human rights NGOs is an important factor in the protection and promotion of human rights in individual countries, the state is, still, inevitably the main actor in international human rights law. For example, in countries like Myanmar and North Korea, there are few domestic human rights NGOs. Only a couple of government-sponsored NGOs might exist to mislead the population into justifying human rights violations by the government. In this case, external pressures from the regional and international level may be more important. This is why cooperation and collaboration at the state level are important factors in the process of the development of human rights while it is still necessary to find ways to communicate and cooperate with local NGOs and the local population.

Second, therefore there is a necessity to establish so-called channeling actors like RHRIs which link various actors at the local, national, regional, and international level. Furthermore, the fact that almost all related discourse on international human rights deals with cultural diversity, different levels of economic development, political systems, and various levels of constitution and domestic legislation in individual states, shows the necessity to have regional human rights institutions as a medium. Human rights problems are so complex that they are hard

²⁸ See Sigrun I. Skogly *BEYOND NATIONAL BORDERS: STATES' HUMAN RIGHTS OBLIGATIONS IN INTERNATIONAL COOPERATION*, 23-55 (2006).

²⁹ See *Id.*, 13-5; See also Anne L. Clunan, *Redefining Sovereignty: Humanitarianism's Challenge to Sovereign Immunity* in *NEGOTIATING SOVEREIGNTY AND HUMAN RIGHTS: ACTORS AND ISSUES IN CONTEMPORARY HUMAN RIGHTS POLITICS*, 7-9 (Noha Sahwki and Michalelene Cox eds., 2009).

to understand from a single perspective.³⁰ Considering the interdependence, complexity, and dynamics of the norms, institutions, and procedures of international human rights law,³¹ it is important to establish intermediate institutions like RHRIs, especially when the state, the main obligor for the protection of human rights, does not work properly and is reluctant to accept any intervention from international human rights institutions.

RHRIs are indeed important in the Asia-Pacific region because no such regional human rights regime has been formed there yet. If a regional human rights institution is established, the individual state in the Asia-Pacific region will surely benefit from its geographical proximity and historical and cultural bonds. Furthermore, a regional institution can ensure higher standards or effective enforcement of human rights because it is the result of the need to provide an additional or better protection of human rights.

Regional human rights systems emerged as a result of the frustration with the ineffectiveness of the mechanisms at the international level³² and, at the same time, the desire for a better implementation of international human rights norms as a complement to international human rights mechanisms. The global human rights systems have less ability to reflect the diversity and particularities of each region than a regional body does. The U.N. Charter and the international human rights treaties cannot fully incorporate regional contexts. That is the reason

³⁰ James L. Hildebrand, *Complexity Analysis: A Preliminary Step toward a General Systems Theory of International Law*, 3 Ga. J. Int'l & Comp. L. 271, 291-293 (1973).

³¹ See Dinah Shelton, *the Promise of Regional Human Rights Systems in THE FUTURE OF INTERNATIONAL HUMAN RIGHTS*, 363 (Burns Weston and Stephen Marks eds., 2000); See also Dinah Shelton, *supra* note 13, at 16-7.

³² *Id.*, at 353-54.

why the U.N. Office of the High Commissioner for Human Rights (UNOHCHR) has been trying to enhance its presence in the field by establishing regional offices.³³

Overall, regional human rights mechanisms are considered a more effective and efficient tool for the protection and promotion of human rights than the international human rights system under the U.N. structure.³⁴ Along with the emphasis on “the need to explore the possibilities of establishing regional arrangements for the promotion and protection of human rights in Asia” in the 1993 Bangkok Declaration,³⁵ the Vienna Declaration of the 1993 World Conference on Human Rights clearly shows the necessity for regional human rights mechanisms:

37. 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 endorses efforts under way to strengthen these arrangements and to increase their effectiveness, while at the same time stressing the importance of cooperation with the United Nations human rights activities. 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 exist³⁶ (emphasis added).

Surely, RHRIs cannot be a perfect solution and a total remedy to all human rights violations in the region. They, however, can work effectively not as a replacement but as a complement to both the international and the national human rights system, because regional human rights mechanisms can reflect regional specificity and its particular needs, and at the

³³ See The Office of the High Commissioner for Human Rights (UNOHCHR), *OHCHR in the world: Making Human Rights a Reality on the Ground*. <http://www.ohchr.org/EN/Countries/Pages/WorkInField.aspx>

³⁴ Hidetoshi Hashimoto, *THE PROSPECTS FOR A REGIONAL HUMAN RIGHTS MECHANISM IN EAST ASIA*, 1-2 (2004)

³⁵ Bangkok Declaration, *supra* note 7, Art. 26.

³⁶ Vienna Declaration and Programme of Action, World Conference on Human Rights, para. 37 of part I. (Jun. 14-25, 1993), UN Doc. A/CONF.157/23.

same time monitor individual states' practices in their region to meet international standards on human rights.³⁷

2.2.3. *The Legitimacy of Interventions*

Regional arrangements can enhance the legitimacy of interventions.³⁸ The U.N. has greater authority than a regional body, but its intervention is not always attainable and sometimes not desirable.³⁹ Article 2(4) of the U.N. Charter and the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations⁴⁰ clearly state the principle of non-intervention in

³⁷ Hidetoshi Hashimoto, *supra* note 34, at 1-2.

³⁸ See Sigrun I. Skogly, *supra* note 28, at 171-185.

³⁹ See in general Mahmood Mamdani, *SAVIORS AND SURVIVORS: DARFUR, POLITICS, AND THE WAR ON TERROR* (2009).

⁴⁰ Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (24 October 1970) U.N. Doc. A/RES/2625 (XXV).
.....*The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter*
No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.
No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.
The use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention.
Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.
Nothing in the foregoing paragraphs shall be construed as affecting the relevant provisions of the Charter relating to the maintenance of international peace and security.
..... *To this end:*

international law. The International Court of Justice (ICJ) has also recognized the principle of non-intervention.⁴¹ Numerous General Assembly Resolutions have repeatedly emphasized the importance of the principle of state sovereignty and non-intervention, too.⁴²

However, evolving international human rights law now requires a re-examination of this principle. That is, when states agree to bilateral, multilateral or customary human rights norms through human rights treaties or conventions, their sovereignty will be limited by such norms.⁴³ I believe that to a certain extent, as Sir Hartley Shawcross confidently declared at the Nuremberg Trials, “[t]he right of ... intervention on behalf of the rights of man, trampled upon by a state in a manner shocking the sense of mankind, has long been considered to form part of the recognized law of nations.”⁴⁴

(a) States shall co-operate with other States in the maintenance of international peace and security;
(b) States shall co-operate in the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all, and in the elimination of all forms of racial discrimination and all forms of religious intolerance;
(c) States shall conduct their international relations in the economic, social, cultural, technical and trade fields in accordance with the principles of sovereign equality and non-intervention;
(d) States Members of the United Nations have the duty to take joint and separate action in co-operation with the United Nations in accordance with the relevant provisions of the Charter.
States should co-operate in the economic, social and cultural fields as well as in the field of science and technology and for the promotion of international cultural and educational progress. States should co-operate in the promotion of economic growth throughout the world, especially that of the developing countries.

⁴¹ See, for example, *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Merits, 1986 ICJ REP. 14, 106-109, Para.202-207 (June 27).

⁴² Meinhard Schoroder, *Principle of Non-intervention* in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, VOL. II, 620 (R. Bernhardt ed., 1999).

⁴³ Jianming Shen, *National Sovereignty and Human Rights in a Positive Law Context*, 26 Brook. J. Int'l L. 417, 428-9 (2000).

⁴⁴ The Avalon Project at Yale Law School, *Nuremberg Trial Proceedings Volume 3*, Tuesday, 4 December 1945, <http://www.yale.edu/lawweb/avalon/imt/proc/12-04-45.htm>

It is undeniable that intervention against gross human rights violations had been abused in the past by strong states to pursue other political, economic or military objectives.⁴⁵ There is little express support from states for the doctrine of humanitarian intervention by individual states or by the international community as a whole.⁴⁶ The Non-Aligned Movement (NAM) also rejects humanitarian intervention as having no legal basis in the U.N. Charter.⁴⁷ The time may not yet be ripe for recognizing humanitarian intervention as an established exception to the principle of non-intervention. The reasons are as follows: first, the U.N. Charter and the current international treaties do not seem to incorporate such a doctrine specifically. Second, in the last two centuries, and especially since the end of WWII, only a very few cases can be considered a genuine humanitarian intervention, if any at all. Last, the potential for abuse of humanitarian intervention overshadows its usefulness. However, it is certain that there is increasing international interest in the development of a detailed framework for humanitarian intervention for the protection of human rights.⁴⁸ At this point, the most important element is to focus on how to reduce the reluctance of the country in question to accept humanitarian intervention by

⁴⁵ Peter Malanczuk, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW*, 221, (7th ed., 1998).

⁴⁶ See Christine Gray, *The Use of Force and the International Legal Order* in *INTERNATIONAL LAW*, 594-7 (Malcolm D. Evans ed., 2006).

⁴⁷ Declaration of the Group of 77 South Summit, para.54, (Havana, Apr. 10 -14 2000)
www.nam.gov.za/documentation/southdecl.htm

54. We stress the need to maintain a clear distinction between humanitarian assistance and other activities of the United Nations. We reject the so-called "right" of humanitarian intervention, which has no legal basis in the United Nations Charter or in the general principles of international law... We further stress the need for scrupulously respecting the guiding principles of humanitarian assistance, adopted by the General Assembly in its resolution 46/182, and emphasize that these principles are valid, time-tested and must continue to be fully observed. Furthermore, we stress that humanitarian assistance should be conducted in full respect of the sovereignty, territorial integrity, and political independence of host countries, and should be initiated in response to a request or with the approval of these States.

⁴⁸ Christine Gray, *supra* note 46, at 596.

lessening any politicized motives from other countries and how to enhance the legitimacy of intervention by sharing a bond of sympathy with other countries with a common background.

Therefore, the role of RHRIs is important because a regional system can be positioned “in the middle between undesirable unilateral actions and desirable but less accessible roles of the U.N.”⁴⁹ In other words, through the RHRIs, human rights would improve in the area in question, making it unnecessary to have humanitarian interventions. For example, in the case of gross human rights violations in Myanmar, the international community and the U.N. have constantly criticized the Myanmar government’s misdemeanors but there have been no significant changes. Myanmar argues that the international community condemns it without understanding its historical, social, and cultural background. But, what if there were human rights resolutions against the Myanmar government’s human rights violations by the ASEAN countries? Criticisms from neighboring countries which share common social and cultural background will be a more powerful means of changing the government’s human rights policy compared to those from the international community, especially developed Western countries. Article 4 of the Constitutive Act of the African Union (2000) may show how the regional framework on the protection of human rights can be developed. It states that the African Union has “the right ... to intervene in a Member State ... in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.”⁵⁰

Regionally adopted human rights treaties can reflect the specific sentiments in the region, and a regional institution can consider the context of a problem in a better way while avoiding

⁴⁹ See Joseph S. Nye, *INTERNATIONAL REGIONALISM*, 79 (1968).

⁵⁰ Organization of African Unity, *Constitutive Act of the African Union*, (Jul. 1, 2000) http://www.africa-union.org/root/au/aboutau/constitutive_act_en.htm

high-level politicization because regional human rights bodies will be staffed by people from that region who are very closer to local realities and are less likely to be subject to political manipulation by governments or local elites.⁵¹ RHRIs can have “a distinct vantage point that derives from their position as neither national nor international... [thus] are positioned [to be not only] broadly compatible with the spirit of international treaties but also to respond to the ways that local cultures coexist with national politics and national economic capacity.”⁵² Overall, it is necessary to establish RHRIs because they can improve the human rights situation in the subject area and reduce the danger of politicization by other countries by avoiding humanitarian interventions, still a controversial international norm.

2.2.4. *The Neighborhood Effect*

A regional institution can offer a better opportunity for individual states to participate in human rights cooperation with its neighborhood effect.⁵³ Originally, the neighborhood effect was institutionalized in Europe.⁵⁴ To be considered for the European Union membership, states must become member state to the European Convention on Human Rights and accept the jurisdiction

⁵¹ Helen M. Stacy, *supra* note 16, at 150-1.

⁵² *Id.*

⁵³ See David P. Forsythe and Patrice C. McMahon eds., *HUMAN RIGHTS AND DIVERSITY: AREA STUDIES REVISITED*, 311 (2003); See also Robert Wade, *Selective Industrial Policies in East Asia: Is the East Asian Miracle Right?* In *MIRACLE OR DESIGN? LESSONS FROM THE EAST ASIAN EXPERIENCE*, 65-69 (Overseas Dev. Council Policy Essay No. 11, 1994).

⁵⁴ David P. Forsythe & Patrice C. McMahon, *id.*, at 312

of the European Court on human rights.⁵⁵ It means that applicant states for the EU should show their serious commitment to human rights.

In a regional system, states with similar economic and security concerns can invite neighboring states to join the forum, and can force each other to comply with international human rights obligations with less political tension. Indeed, a regional human rights body will encourage more non-member states to participate in the institution and bring them to join the human rights dialogue with greater openness. At first, there might be a small number of states that agree to establish a regional human rights body. But once established, this regional body will solicit more non-member Asian states to join the existing regional human rights framework. In that sense, it is necessary to establish RHRIs because the regional institution can implement human rights norms with increased persuasiveness in dealing with human rights situation operating in a more candid and friendly manner than the much politicized international institutions.⁵⁶

2.2.5. Effective Tool for the Protection of Victims and Human Rights Defenders

A regional human rights institution can offer a better opportunity to the victims of human rights violations and human rights defenders who often put their lives at risk in their work for the protection of the rights of others. It is easy for them to utilize RHRIs which offer a more

⁵⁵ See Dinah Shelton, *The Boundaries of Human Rights Jurisdiction in Europe*, 13 Duke J. of Comp. & Int'l L. 95 (2003).

⁵⁶ Tae-Ung Baik, *EMERGING REGIONAL HUMAN RIGHTS SYSTEM IN ASIA – WITH A FOCUS ON EAST ASIAN STATES*, Dissertation, 255 (Notre Dame Law School, 2009).

convenient opportunity for remedies by mobilizing neighbor states, especially when the U.N. or other international human rights institutions cannot work properly.⁵⁷

The victims of human rights violations face many difficulties trying to reach international human rights agencies and pursuing their remedies and protection from the violating state in question. For instance, because of geographical limitations, they have to hide in remote areas and it is hard for them to cross borders. Sometimes because of the language problem, it is also hard to access English-language resources. Even worse, human rights defenders, who play an important role in assisting victims and serve as a crucial link between victims and the state, have consistently been victims of extrajudicial killings, enforced disappearances, arbitrary arrests, detention, and torture, particularly where states use national security laws in the context of countering terrorism.

Therefore, an effective and accountable regional human rights body at the regional level is necessary to promote an overall culture of respect for human rights. There is also the need to establish through RHRIs a regional index on human rights victims and human rights defenders in order to effectively track their situation and facilitate experience sharing. In the case of the Americas, the Inter-American Commission on Human Rights, for instance, has been devoted to the protection of human rights defenders and has been able to refer cases to the Inter-American Court of Human Rights.⁵⁸

At present, Asia has not established a regional human rights system that has the mandate to investigate individual complaints of human rights violations, monitor and report on the human

⁵⁷ David P. Forsythe and Patrice C. McMahon, *supra* note 53.

⁵⁸ See Human Rights Defenders Mechanisms in Inter-American Commission on Human Rights: Functional Unit for Human Rights Defenders, <http://www.humanrights-defenders.org/iachr-mandate/>

rights situations in its member states, conduct visits and investigations, raise awareness of human rights issues, and issue recommendations pertaining to human rights issues to member states. If both national and international human rights institutions cannot work properly, the establishment of RHRIs is vital as they can identify gaps in the protection of human rights by monitoring member states' national human rights situations and providing effective remedies for human rights victims and human rights defenders.

2.3. IDEAS IN TRANSIT: DEVELOPMENT OF INTERNATIONAL HUMAN RIGHTS LAW IN THE ASIAN HUMAN RIGHTS CONTEXT

In the previous section, I demonstrated why it is necessary to have regional human rights institutions by providing one major reason and three additional ones. Most of them have already been discussed by a number of human rights scholars and activists within the discourse of the development of international human rights law. Their discussion has been mainly focused on the debate of the universality versus the relativity of human rights, along with the role of various human rights institutions at the national, regional, and international level of international human rights norms. For a long time, many Asian states have been reluctant to accept the concept of universal human rights and have been maintaining that human rights is a domestic issue and it should be handled at the national level. Asia still remains the only region which does not have RHRIs.

Thus, the next question that can be asked is why it is necessary to establish RHRIs specifically in the Asia-Pacific region. And to answer that question, it is necessary to examine

Asian human rights context within the framework of international human rights law and its development since the adoption of the Universal Declaration of Human Rights.

As Louis Henkin mentions, the concepts of human rights are heavily indebted to natural law (*jus gentium*) and Western philosophical traditions.⁵⁹ The values of human dignity in the Asian context, the so-called *Asian values*, should be recognized as part of the philosophical and cultural component of the Asian human rights context. The development of international human rights law in Asia is, however, not just the acknowledgment of the philosophical values but a real process of adopting treaties and conventions which have a binding power on individual states and related actors. Here, to show why Asia needs to have RHRI, I will review how human rights have developed as legal norms both in the international and the Asian human rights context and will examine whether, as Amartya Sen articulates, fundamental human rights and rights ideas have existed not only in Western cultures, but in Asian cultures as well⁶⁰ and how Asian countries have dealt with the progress of legalization of international human rights.⁶¹

2.3.1. UDHR: Before and After

⁵⁹ Louis Henkin et. al., HUMAN RIGHTS, 7-8 (1999).

⁶⁰ Amartya Sen, HUMAN RIGHTS AND ASIAN VALUES, 30 (1997).

⁶¹ *Legalization of human rights* can be defined in many different ways: the attempt to secure human rights ideals by international and domestic law (Michael Freeman, Jack Donnelly and Richard Ashby Wilson); the establishment of a practice of adjudicating and monitoring domestic conflicts by international institutions (Edward Weisband);/ international institutionalization of legal protections for human rights in post-conflict reconstruction (David Chandler); an attempt to limit the interpretation of the notion of human rights by appeal to certain forms of authority supposedly underlying international legal norm production (Upendra Baxi). In general, it is about the discussion of the role of law in defining and pursuing human rights goals. See Saladin Meckled-Garcia and Basak Cali ed., THE LEGALIZATION OF HUMAN RIGHTS: MULTIDISCIPLINARY PERSPECTIVES ON HUMAN RIGHTS AND HUMAN RIGHTS LAW (2006).

The 1948 Universal Declaration of Human Rights (UDHR) is generally considered a starting point of modern international human rights law. The idea of human rights, mainly civil and political rights developed between 16th and the 19th centuries by many eminent Western jurists, theorists and philosophers like Francisco de Vitoria, John Locke, and Immanuel Kant, plays a rather prominent role in the UDHR. Indeed, the standard human rights theories view the idea of human rights as having emerged after the Middle Ages with the resistance to religious intolerance and political-economic bondage, along with the long transition to liberal notions of freedom and equality.⁶² The Magna Charta of 1215, the Petition of Rights of 1628 and the Bill of Rights in England (1689) all show the shift from natural law as duties to natural law as inalienable rights.⁶³

Francisco de Vitoria, the 16th-century Spanish jurist, expresses the idea of natural rights in his *De Indis Noviter Inventis*, regarded as the first international law text.⁶⁴ Vitoria searches for the “lawful titles whereby the aborigines of America could have come into the power of Spain.”⁶⁵ He assumes that “[t]hese aborigines were true owners alike in public and in private law before the advent of the Spaniards among them”.⁶⁶ In other words, Vitoria recognizes that every human being, including indigenous people, has certain natural rights. He, however, justifies

⁶² See Cho Hyo-Je, *A Grammar of Human Rights* 49-89 (2009) written in Korea.

⁶³ *Id.*

⁶⁴ See Anthony Anghie, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW*, 9, 17-23 (2004).

⁶⁵ Franciscus de Victoria, *De Indis et de Ivre Belli Relectiones* (‘*On the Indians Lately Discovered*’) 150, (Ernest Nys ed., John Pawley Bate trans., 1917).

⁶⁶ *Id.*, at 115.

Spain's colonization by arguing that a violation of those rights which the Spanish enjoy under the law of nature⁶⁷ could have constituted a lawful title of power over the Indians.⁶⁸

John Locke, the 17th-century British political theorist, is one of the key philosophers on the development of human rights. As the godfather of modern natural law, he claims that certain rights self-evidently pertain to individuals as human beings because they existed in *the state of nature*, before human kind entered civil society.⁶⁹ Locke, therefore, argues that people create governments by entrusting the protection and enforcement of their natural rights to them.⁷⁰

Immanuel Kant, the 18th-century German philosopher, provides an account of modern philosophical justifications of human rights.⁷¹ Based upon an appeal to the formal principles of ethics, he emphasizes ideals of equality and the moral autonomy of rational human beings. For Kant, the basis of moral reasoning must rest on “a condition that all rational individuals are bound to assent to.”⁷² With this basic sense of universality, he provides a formulation of fundamental moral principles that are based on equality and moral autonomy of all rational human beings.⁷³ In other words, human rights are rights we give to ourselves, so to speak, as autonomous and formally equal beings.

⁶⁷ *Id.*, at 154.

⁶⁸ Anthony Anghie, *supra* note 64, at 28-31.

⁶⁹ John Locke, *SECOND TREATISE OF GOVERNMENT*, Ch. XIII, ¶149 (C.B. Macpherson ed., 1980)

⁷⁰ Cho Hyo-Je, *supra* note 62, at 59.

⁷¹ See Marc F. Plattner, *Human Rights* in *POLITICAL PHILOSOPHY: THEORIES, THINKERS, CONCEPTS* (Marint Lipset Seymour ed., 2001).

⁷² Andrew Fagan, *Human Rights*, Internet Encyclopedia of Philosophy. <http://www.iep.utm.edu/hum-rts>

⁷³ *Id.* See also Immanuel Kant, *supra* note 19, at 99-102.

These scholars have had a profound influence on the Western world of the late 18th and early 19th centuries. Although the philosophy of natural law (*jus gentium*) lent much to the conceptual basis of human rights, with time, it became increasingly important to translate vague concepts of rights derived from nature into specific written laws, which would provide concrete protection for the rights of the individual within the larger framework of society. Great precedents in the recognition and protection of specific human rights lie in such documents as the U.S. Bill of Rights and the French Declaration of the Rights of Man.⁷⁴

On December 10, 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR). Eleanor Roosevelt, first chairwoman of the Commission on Human Rights (CHR) which drafted the Declaration, stated that it "may well become the *international Magna Carta* of all men everywhere."⁷⁵ The UDHR has been approved by virtually all governments representing all societies, and human rights are enshrined in the constitutions of virtually every one of today's 170 states.⁷⁶ Indeed, the Declaration is generally considered a starting point of international human rights law. Its preamble describes the "..... inalienable rights of all members of the human family..... fundamental human rights..... as a common standard of achievement for all peoples and all nations."⁷⁷ The UDHR arose from the experience of WWII and represents the first global expression of rights to which all human beings are

⁷⁴ America's Declaration of Independence, proclaimed by the thirteen American Colonies on July 4, 1776, states: "...all men are created equal, they are endowed by their Creator with certain unalienable Rights that among these are Life, Liberty and the Pursuit of Happiness." Similarly the French imitated the pronouncements in the Declaration of the Rights of Man and of the Citizen in August 26, 1789. See also Louis Henkin, *THE AGE OF RIGHTS*, 1, 6 (1990)

⁷⁵ Eleanor Roosevelt, *Speech: On the Adoption of the Universal Declaration of Human Rights*, delivered Dec. 9 1948 in Paris, France. <http://www.americanrhetoric.com/speeches/eleanorrooseveltdeclarationhumanrights.htm> See also Mary Ann Glendon, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001).

⁷⁶ See Louis Henkin, *supra* note 59, at Preface, xvii.

⁷⁷ Universal Declaration of Human Rights, GA res. 217A (III), U.N. Doc. A/810 at 71 (1948).

entitled.⁷⁸ As a declaration, it is not legally binding. However, because many of the rights in the UDHR have become widely observed as a binding law, they have become a recognized part of *customary* international law.⁷⁹ Since its adoption, a large number of human rights treaties have been adopted and entered into force on the international and regional levels. Among them, these nine international human rights treaties are considered the major ones: the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁸⁰ the International Covenant on Civil and Political Rights (ICCPR),⁸¹ the Optional Protocol to the International Covenant on Civil and Political Rights (OPT 1),⁸² the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (OPT 2),⁸³ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),⁸⁴ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),⁸⁵ the Convention on the Elimination of All Forms of Racial Discrimination

⁷⁸ See Mary Ann Glendon, *supra* note 75.

⁷⁹ See Henry J. Steiner and Philip Alston, *International Human Rights in Context*, 151 (2nd ed. 2000).

⁸⁰ International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966), *entered into force* Jan. 3, 1976.

⁸¹ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), *entered into force* Mar. 23, 1976.

⁸² Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, UN Doc. A/6316 (1966), *entered into force* March 23, 1976.

⁸³ Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, G.A. res. 44/128, annex, 44 U.N. GAOR Supp. (No. 49) at 207, UN Doc. A/44/49 (1989), *entered into force* July 11, 1991.

⁸⁴ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984), *entered into force* June 26, 1987.

⁸⁵ Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, UN Doc. A/34/46, *entered into force* Sept. 3, 1981.

(CERD),⁸⁶ the Convention on the Rights of the Child (CRC),⁸⁷ and the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (MWC).⁸⁸

As pointed out, most of the civil and political rights developed by Western jurists and philosophers between the 16th and the 19th centuries, feature prominently in the UDHR. It also seems that there is no dispute about the Western origins of the philosophy of the international human rights; even non-Westerners who advocate its universality accept this basic fact.

2.3.2. Challenges against International Human Rights Law

In the last decades, there have been a lot of debates in Asia about the nature of international human rights law, and more specifically, the universality of international human rights in light of cultural relativity. The main questions are whether it is possible to maintain the fundamental universality of human rights while still taking into account the historical and cultural particularity of human rights and further, whether human rights themselves are universal. This paper argues that the question that should be asked is about the scope of fundamental human rights, i.e. what sorts of human rights are universal, and about the extent of their implementation, because it is an inescapable fact that there are certain universal human rights even though the idea of modern international human rights originated from Western countries.

⁸⁶ International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, UN Doc. A/6014 (1966), *entered into force* Jan. 4, 1969.

⁸⁷ Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, UN Doc. A/44/49 (1989), *entered into force* Sept. 2 1990.

⁸⁸ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, UN Doc. A/45/49 (1990), *entered into force* 1 July 2003.

This paper, however, does not aim to enter the traditional philosophical debates over universalism and relativism. Rather, it focuses on the ways in which the universality of international human rights law has been challenged ever since the adoption of the UDHR to articulate why and how countries in the Asia-Pacific region have responded and interacted with the development of international human rights law, which will be discussed at length in section 2.3.3.

The first criticism against the universality of human rights came from the American Anthropological Association (AAA)'s statement on human rights in 1947,⁸⁹ published just one year before the adoption of the UDHR. It argues that if the Declaration were "a statement of rights conceived only in terms of the values prevalent in the countries of Western Europe and America,"⁹⁰ it could not be applicable to all human beings because "[t]he Personality of the individual can develop only in terms of the culture of his society." Karen Engle regards this statement as having been written in the context of colonialism to oppose a dominant belief that the West and Western culture are superior and to suggest that all men are formed by the communities in which they live.⁹¹ Interestingly, the AAA changed its position on the universality of human rights in its 1999 declaration⁹² for the following reasons:

Cultural relativism is a major factor which has severely retarded anthropological involvement in human rights since the Executive Board's 1947 statement on the UN

⁸⁹ See American Anthropological Association: *Statement on Human Rights* 49 *American Anthropologist* New Series, No.4, 539 (Oct.-Dec., 1947)

⁹⁰ *Id.*

⁹¹ Karen Engle, *Culture and Human rights: the Asian Values Debate in Context*, 32 *N.Y.U. J. Int'l L. & Pol.* 291, 308-9 (2000).

⁹² American Anthropological Association, *Declaration on Anthropology and Human Rights* (1999) <http://www.aaanet.org/stmts/humanrts.htm>

*Universal Declaration of Human Rights. Furthermore, in recent years some countries accused of gross violations of human rights have attempted to take refuge in relativism and simplistically and falsely asserted that human rights are reducible to Western moral imperialism...*⁹³

I agree with Engle's assertion that in reality AAA's position on human rights and its understanding of culture have not significantly changed.⁹⁴ Even though at first glance, it may seem that the AAA's 1947 statement is skeptical of international human rights law, "the statement does not argue against the idea of a declaration on human rights. Rather, it suggests that any declaration must attend to differences among cultures⁹⁵ ... [and] imagined there could be a document with worldwide applicability."⁹⁶

As the AAA's 1947 statement explained, many non-Western countries were still under colonial rule and had no chance to participate in the drafting of the UDHR in 1948.⁹⁷ In addition, the so-called Third World at the United Nations at that time was mainly composed of non-Asian or African countries, but rather of Latin American countries whose dominant world view was European. Mary Ann Glendon emphasizes the important role played by Charles Malik of Lebanon and Peng-chun Chang of China in the drafting of the Universal Declaration,⁹⁸ but Makau Mutua argues that although they were non-Westerners, both Malik and Chang were

⁹³ American Anthropological Association, 1995 Annual Report: Commission for Human Rights (1995) <http://www.aaanet.org/committees/cfhr/ar95.htm>

⁹⁴ Karen Engle, *From Skepticism to Embrace: Human Rights and the American Anthropological Association from 1947-1999*, 23 Hum. Rts. Q. 536, 527-549 (2001).

⁹⁵ *Id.*, at 540.

⁹⁶ *Id.*, at 559.

⁹⁷ 51 countries participated in the establishment of the UN in 1945 and member states were increased to 58 in 1948. Even the member states from Asian region were only five: China (Taiwan), India, Philippine, Thailand and Burma. See UN: *Growth in United Nations membership, 1945-present*. <http://www.un.org/en/members/growth.shtml>

⁹⁸ See Mary Ann Glendon, *supra* note 75.

educated in the United States and were firmly rooted in the European intellectual traditions of the day.⁹⁹

*The contributions of these two prominent non-Westerners were not steeped in the philosophies or the intellectual and cultural traditions from which they hailed. In fact most of the Third World human rights formulators were trained in the West. Even African conceptions of peoples' rights and duties and the more celebrated right of development remain marginal to the mainstream practice of human rights.*¹⁰⁰

Balakrishnan Rajagopol describes this issue as the *birth defect* of the international human rights movement in terms of its representativity, simply noting *the absence of particular cultures and communities*.¹⁰¹ He also argues that this defect has never fully been cured because of the way in which it responded to colonialism, the most dominant political question of the 20th century.¹⁰² Similarly, Susan Marks and Andrew Clapham identify two types of: meta-ethical relativism and normative relativism.¹⁰³ The former understands that the idea of human rights originated from the West and universal human rights themselves reflect the theoretical values and ideas of the West. Thus, it is inadequate to apply them to non-Western societies. The latter recognizes the universal human rights movement as another type of colonialism and criticizes the use of human rights as a tool meant to change non-Western cultures into a uniform standard. Thus, as Mutua sees, liberalism, democracy and human rights are used as a *Holy Trinity* for Western countries to keep their hegemony over non-Western countries:

⁹⁹ Makau Mutua, HUMAN RIGHTS: A POLITICAL & CULTURAL CRITIQUE, 154-5 (2002).

¹⁰⁰ *Id.*

¹⁰¹ Balakrishnan Rojagopol, *The International Human Rights Movement Today*, 24 Md. J. Int'l L. 56, 57-8 (2009) http://www.law.umaryland.edu/academics/journals/mjil/documents/vol_24_6.pdf

¹⁰² *Id.*

¹⁰³ See Susan Mark and Andrew Clapham, INTERNATIONAL HUMAN RIGHTS LEXICON (2005).

*In the historical continuum, therefore, liberalism gave birth to democracy which in turn now seeks to present itself internationally as the ideology of human rights. The main focus of human rights law has been on those rights and programs that seek to strengthen, legitimize, and export political or liberal democracy. Furthermore, the currency of civil and political rights has been so strong that they have become synonymous with the human rights movement.*¹⁰⁴

In other words, the universality of modern international human rights law has been challenged ever since the adoption of the UDHR. Further, Upendra Baxi argues that the paradigm of the UDHR is being replaced by a *trade-friendly* and *market-friendly* human rights paradigm to promote and protect the collective rights of global capital and international corporate well-being.¹⁰⁵ International financial institutions and donor agencies constitute an increasingly important component of the political approach to human rights: see, for example, the World Bank's Good Governance Project as a dual policy that opposed human rights violations while strengthening democracy.¹⁰⁶ Anthony Anghie even claims that "the colonial history of international law is concealed even when it is reproduced"¹⁰⁷ and "the rhetoric governance, as articulated by the West and the IFIs [International Financial Institutions], is driven significantly by economic considerations... [and] the powerful discourse of human rights has been used for this purpose."¹⁰⁸

¹⁰⁴ Makau Mutua, *The Ideology of Human Rights*, 36 Va. J. Int'l L. 589, 601-2 (1996).

¹⁰⁵ See Upendra Baxi, *Voices of Suffering and the Future of Human Rights*, 163-4, 8 Transnat'l L. & Contemp. Probs. (1998) cited in Anthony Anghie *supra* note 64, at 256; See also Upendra Baxi, *THE FUTURE OF HUMAN RIGHTS*, Preface (2006).

¹⁰⁶ Anthony Anghie, *supra* note 64, at 245-272.

¹⁰⁷ *Id.*, at 268.

¹⁰⁸ *Id.*, at 269.

Many human rights scholars also expose the fact that the most prominent international human rights NGOs, based in Western countries, have sought to enforce the application of human rights norms internationally, particularly towards repressive states in non-Western countries. Mutua criticizes the mandates of leading INGOs like Amnesty International and Human Rights Watch, stressing the narrow range of civil and political rights, and the overlooking of other important human rights violators like international corporations.¹⁰⁹

So, has international human rights law been developed in such a biased way based solely on developed Western countries' perspectives and mainly focused on civil and political rights? Were there any contributions by Third-World developing countries to the development of international human rights norms?

Contrary to the views of Mutua and Rajagopal, there are human rights scholars who maintain that international human rights have been by and large about Third-World states, as Roland Burke argues:

The principal triumph of the African, Asian, and Arab diplomats who entered the UN in the 1950s and 1960s was their successful struggle to make human rights truly universal... [and] in virtually every significant debate, Arab, Asian, and African delegations played a leading role, with their contribution central to the creation of major pillars of the modern human rights system: the covenants, ICERD, and the right to individual petition... [they] had secured the status of universal rights and greater scrutiny of state power.¹¹⁰

It was the Third-World states that have put the biggest human rights issues on the U.N. agenda including colonialism, self-determination, racial discrimination, apartheid, the right to development and economic, social and cultural rights for last 60 years after the adoption of the

¹⁰⁹ Makau Mutua, *supra* note 104, at 610-626

¹¹⁰ See Roland Burke, *DECOLONIZATION AND THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS*, 145-9 (2010).

UDHR. Third-World states, especially early anti-colonial nationalists who were ardent supporters of universality have played a major role in developing international human rights norms,¹¹¹ though at the same time, many post-colonial authoritarian governments also use the same anti-colonial doctrine to impose their power and authority and maintain their regimes in the name of cultural relativism.

Therefore, I suggest that the argument of whether the role of Third World countries in the development of international law during the process of decolonization after WWII, has been positive or not, is both partially right and partially wrong. Roland Burke is right in the sense that “[t]he politics of anti-colonialism both advanced and obstructed the progress of international human rights.”¹¹² Though it is true that much of Asia and most of Africa had not been involved in the drafting process of the UDHR in 1948, it is also true that the adoption of the UDHR itself is not the end of the story for the universality of international human rights norms but its beginning in a decades-long process by those who had no chance to participate in the creation of the UDHR.¹¹³

It seems that even among cultural relativists, there is no one who completely sides with anti-human rights relativism except for undemocratic and human rights abusive authoritarian regimes. That is, there is no one who argues that if a certain culture permits it, torture and slavery can be allowed. What is more, with the gradually increasing number of countries which ratified major human rights conventions and treaties, people inside individual states’ civil societies have increasingly used international human rights norms to enhance the legitimacy of their claims for

¹¹¹ *Id.*, at 5.

¹¹² *Id.*, at 6.

¹¹³ *Id.*, at 146.

the protection of certain fundamental human rights. Therefore, this paper believes that there are certain basic human rights and that these human rights should be promoted and protected by the state, the basic obligor of human rights law, the international community, and all human rights related actors. The questions that should be asked are, what kind of human rights can be embraced in non-Western cultures and how such a process can be conducted in non-Western societies,¹¹⁴ as Bhikhu Parekh explains:

*The minimum universal values which we may legitimately insist upon are by their very nature general and need to be interpreted, prioritized, adopted to, and in case of conflict reconciled, in the light of the culture and circumstances of each society. Respect for human life is a universal value, but different societies disagree on when human life begins and ends and what respect for it entails.*¹¹⁵

Similarly to Jack Donnelly, I believe that in the world we live in today, human rights are not optional but necessary¹¹⁶ because human rights protection itself is about human dignity and justice. Therefore “some kind of intermediate position is required” because unrestricted relativism is as inappropriate as radical universalism.¹¹⁷ I suggest that it may be RHRIs that are uniquely situated “to formulate morally credible and practically attainable standards of human rights – a negotiation between reality and hope.”¹¹⁸

2.3.3. *Human Rights in the Asian Context*

¹¹⁴ See Andras Sjo ed., HUMAN RIGHTS WITH MODESTY: THE PROBLEM OF UNIVERSALISM 1-29 (2004).

¹¹⁵ Bhikhu Parekh, RETHINKING MULTICULTURALISM: CULTURAL DIVERSITY AND POLITICAL THEORY 135 (2006).

¹¹⁶ Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 Hum. Rts. Q. 400, 406 (1984).

¹¹⁷ Jack Donnelly, UNIVERSAL HUMAN RIGHTS: IN THEORY & PRACTICE 92 (2003)

¹¹⁸ Helen M. Stacy, *supra* note 16, at 169.

As Amartya Sen articulates, human dignity and fundamental rights ideas have existed not only in Western cultures, but in Asian cultures, as well. A number of historical and classical texts discuss the values of human dignity, as well as the pursuit of economic, social, and cultural well-being in the Asian cultural context.¹¹⁹ Thus, the so-called Asian values and the Asian way of human dignity should be recognized as a philosophical and cultural component of the Asian human rights context. These are, however, different from the modern concept of human rights, especially in terms of its legal nature. This is precisely the reason why human rights are still regarded as somewhat alien by many Asians. As Onuma Yasuaki mentions, the formulation of modern human rights emerged in a legalistic culture, with the protection of individual rights to be realized by the rule of law.¹²⁰ This is also why the notion of human rights was born in Western countries where a legalistic culture is predominant, whereas Asian countries have relied on the concepts of virtue, conciliation, family, community ties, or prudence¹²¹ and have not been very comfortable with this legalistic culture.

In the last decades, however, Asian countries have achieved a remarkable development in the legalization of human rights.¹²² The progress seems slow, but it is undeniable that an increasing number of actors have been involved in the process of developing human rights norms in Asia. Their interacting initiatives, including intergovernmental, NGOs', and other public and private entities' cooperation, have gradually and positively changed the environment of human

¹¹⁹ See Onuma Yasuaki, *In Quest of Intercivilizational Human Rights: "Universal" Vs. "Relative" Human Rights Viewed from an Asian Perspective*, 1 Asia. Pac. J.H.R & L., 53 (2000).

¹²⁰ *Id.*, at 75-6.

¹²¹ *Id.*

¹²² See Tae-Ung Baik, *supra* note 56, at 130-206. See also the definition of legalization at footnote 61.

rights in individual states. This section will examine the normative development of a human rights framework in the Asia-Pacific region.

Many Asian states incorporated basic human rights norms in their domestic laws as early as the 19th century. The modern Western concepts of rights and constitutionalism were initiated and promoted in Asia mostly by Asian people themselves rather than imposed by the external world, as those elites of the movements against imperialism during the 19th and 20th centuries dreamt of independent states with democracy and human rights protections.

For example, Western ideas, civilization, and technologies were introduced to China by Chinese intellectuals only in the 19th century.¹²³ Undoubtedly, Henry Wheaton's book, *Elements of International Law*, translated into Chinese in 1876, also contributed to the introduction of Western legal ideas.¹²⁴ The 1911 Xinhai Revolution led by Sun Yatsen was a form of democratic revolution and the civil rights ideas of the West had a great impact on the movement.¹²⁵ Japan pursued the Meiji Reform, initiated by the Japanese Emperor; it was a strong push for Westernization in Japan.¹²⁶ Fukuzawa Yukichi was a leading scholar who introduced Western ideas and institutions with his numerous publications, including *Seiyō Jijō* in 1867.¹²⁷ In Korea, *Seoyu Gyeonmun* (Observations on a Journey to the West) by Yu Kil-Joon (1889) played a significant role in introducing the ideas of democracy and rights.¹²⁸ In Vietnam, French

¹²³ See William Theodore De Bary, *EAST ASIAN CIVILIZATIONS: A DIALOGUE IN FIVE STAGES* 96 (1988).

¹²⁴ See Pyong-Choon Hahm, *KOREAN JURISPRUDENCE, POLITICS AND CULTURE* 124 (1986).

¹²⁵ See Albert H.Y. Chen, *Civil Liberties in China: Some Preliminary Observations* in *CIVIL LIBERTIES IN HONG KONG*, 109-110 (Raymond Wacks ed., 1988). See also David Curtis Wright, *THE HISTORY OF CHINA* 120-2 (2001).

¹²⁶ See De Bary, *supra* note 123, 79.

¹²⁷ See Norio Tamaki, *YUKICHI FUKUZAWA, 1835-1901: THE SPIRIT OF ENTERPRISE IN MODERN JAPAN* (2001).

¹²⁸ See Gi-Wook Shin and Michael Robinson, *COLONIAL MODERNITY IN KOREA* 367 (1999).

colonialists imported Western rights-based law and political morality during the colonial period between 1867 and 1954, and at the same time Vietnamese elites also selectively adopted the rights concept during their independence movements.¹²⁹ In the Philippines, the human rights discourse began with the independence movement against Spain, and resulted in the 1899 *Political Constitution of the Republic*, written in terms inspired by the French Revolution.¹³⁰ Thailand did not experience colonialism, but Thai kings such as King Mongkut and King Chulalongkorn were active in absorbing Western culture during the modernization process.¹³¹ It is no surprise to see that, when Asian states adopted their constitutions and domestic legislation after independence, they were eager to add civil and political rights provisions.¹³² The leaders of newly independent Asian states promised internally and externally to respect democracy and rights values. The regimes, however, could not fulfill their vows and it took a rather long time for many Asian states to enforce fully and meaningfully the constitutional texts.¹³³ It should also be noted that the concepts of rights and other Western-oriented human rights ideas adopted in Asia did not carry the exact same meanings and effects as in Western society.¹³⁴

Ever since the early 1990s, there has emerged a negative response to the human rights discourse from a group of newly industrializing countries in Asia. Its most active advocate may

¹²⁹ See John Gillespie, *Evolving Concepts of Human Rights in Vietnam* in HUMAN RIGHTS IN ASIA 453 (Randal Peerenboom, et. al. eds., 2006).

¹³⁰ See Raul C. Pangalangan, *The Philippines, The persistence of Rights Discourse vis-à-vis Substantive Social Claims*, in Randal Peerenboom, et. al., *id.*, at 346.

¹³¹ See Lucian W. Pye and Mary W. Pye, *ASIAN POWER AND POLITICS: THE CULTURAL DIMENSIONS OF AUTHORITY* 97 (1985).

¹³² See Hahm, *supra* note 124, at 125; Chen *supra* note 125, at 109-10. See also Wright, *supra* note 125, at 120.

¹³³ See Lucian W. Pye and Mary W. Pye, *supra* note 131, at 112-3.

¹³⁴ See Tae-Ung, Baik, *supra* note 56, at 102-4.

be Singapore.¹³⁵ It is hard to define the argument clearly, because it conflates, on the one hand, the development argument, which gives priority to economic development over other social goals, and, on the other, the post-colonialism argument, which describes human rights movements in cultural imperialism terms.¹³⁶ As Bilahari Kausikan points out, most East and South-East Asian governments see “order and stability as preconditions for economic growth, and growth as the necessary foundation of any political order that claims to advance human dignity.”¹³⁷ Through the Asian value debate on economic development and a non-Western approach to human rights, many Asian governments have rejected the universal validity of international human rights norms.¹³⁸ It seems that most Asian leaders, especially those in authoritarian governments, have the intention of weakening the normative basis of Western interference.¹³⁹

Although the concept of Asian values is considered relatively recent, peaking at it did in the mid-90s, it should not be seen as a novel phenomenon.¹⁴⁰ Asian values have many localized precedents in colonial and post-colonial history as Michael Jacobsen and Ole Bruun explain: “the late nineteenth-century Chinese debate on ‘self-strengthening’; the post-war Indonesian

¹³⁵ Xiaorong Li, “Asian Values” and the Universality of Human Rights, Report of the Institute for Philosophy and Public Policy, Vol. 16. No.2, (Spring 1996); Takashi Inoguchi and Edward Newman, *Asian Values and Democracy in Asia*, (Mar. 28, 1997). <http://www.unu.edu/unupress/asian-values.html>

¹³⁶ See Bilahari Kausikan, *An Asian Approach to Human Rights*, 89 AM. SOC’Y INT’L L. PROC. 146 (1995); Joseph Chan, *Asian Values & Human Rights: An Alternative View* in DEMOCRACY IN EAST ASIA, 28 (Larry Diamond and Marc Plattner ed., 1998); American Society of International Law, *The East Asian Debate on International Human Rights: Domestic Approaches and Attitudes in the Absence of Regional Commitments*, 92 AM. SOC’Y INT’L L. PROC. 64 (1998); Inoue Tatsuo, *Liberal Democracy and Asian Orientalism* in THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS, 27 (Joanne R. Bauer and Daniel A. Bell, eds., 1999).

¹³⁷ Bilahari Kausikan, *Asia’s Different Standard*, 92 FOREIGN POLICY 24, 35 (Fall, 1993).

¹³⁸ Inoue Tatsuo, *supra* note 136, at 37-42.

¹³⁹ *Id.*

¹⁴⁰ See Michael Jacobsen and Ole Bruun eds., HUMAN RIGHTS AND ASIAN VALUES: CONTESTING NATIONAL IDENTITIES AND CULTURAL REPRESENTATIONS IN ASIA, 5 (2000)

Pancasila ideology; the *Panchayat* system in Nepal; the ‘Basic Democracy’ policy in Pakistan and the more recent Malaysian ‘2020-vision’ under Premier Mahathir are all examples of struggles to activate a native values resource in the service of nation-building and frequently in the face of foreign domination.”¹⁴¹ Besides those, there are also countless examples of emergency orders, which may rest on similar principles.

I believe that such a view shows a clear misunderstanding of the nature of human rights.¹⁴² As Kevin Tan argues, there is a fine line between the West and the East regarding economic development and the anti-colonialism argument.¹⁴³ For instance, countries like Taiwan and Korea have experienced the oppression of an Eastern colonial power, namely, Japan. And the people in these states who suffered are still claiming the remedies from the Japanese for past wrongs under the internationally recognized principles of fundamental human rights. In addition, as Amartya Sen points out, there is no direct evidence that authoritarian governance influenced economic growth in Asia and furthermore, it is very doubtful that there are pre-existing rights standards or values that all Asian states can accept other than those contained in modern international human rights law.¹⁴⁴

In March 1993, Asian state representatives adopted the Bangkok Declaration, a statement that would represent the Asian region’s stance on human rights at the World Conference on Human Rights held in June of the same year in Vienna.¹⁴⁵ Although delegates of the Asian

¹⁴¹ *Id.*

¹⁴² Amartya Sen, *Human Rights and Asian Values*, 14-21, THE NEW REPUBLIC (Jul. 1997).

¹⁴³ Kevin Y.L. Tan, *What Asians Think about the West’s Response to the Human Rights Debate*, Human Rights Dialogue, Vol.4, 3-4 (Human Rights Initiative, Mar. 1996).

¹⁴⁴ Amartya Sen, *supra* note 142.

¹⁴⁵ Bangkok Declaration, *supra* note 7.

regional group recognized that some human rights were universal, they asserted that there were other human rights which were founded on the Western ideal of individual autonomy and which did not necessarily reflect Asian values.¹⁴⁶ They further stated that, in the absence of economic development and social stability, emphasis on civil and political rights, as in the developed countries, would be inappropriate.¹⁴⁷ A large number of Asian human rights NGOs, intellectuals, and ethnic minorities also gathered in Bangkok at the same time and issued the NGO Bangkok Declaration,¹⁴⁸ a significant departure from the governments' statement. It argued that cultural and religious traditions did not constitute an obstacle to the realization of international human rights norms.¹⁴⁹ What is more, as Yash Ghai notes, the NGOs also addressed the market system and the international economic order, and saw "a closer connection with domestic oppression and international exploitation.... [by] multinational corporations and aid agencies."¹⁵⁰ Civil society in Asia geared up its efforts to build regional human rights mechanisms with the adoption of the Asia Pacific NGO Human Rights Congress Resolutions in 1996¹⁵¹ and the Asian Human Rights Charter of 1998, signed by more than 200 human rights NGO groups.¹⁵² In addition, there have been some sub-regional normative developments in Asia, including the ASEAN Declaration of 1967,¹⁵³ the ASEAN Charter of 2007¹⁵⁴ in South-East Asia, the Charter of

¹⁴⁶ *Id.*, Art.8.

¹⁴⁷ *Id.*, Art. 10, 17 and 19.

¹⁴⁸ Bangkok NGO Declaration on Human Rights, Mar. 23, 1993.

¹⁴⁹ Human Rights Solidarity, *Summary of Bangkok NGO Declaration*, <http://www.hrsolidarity.net/mainfile.php/1993vol03no02/2050/>

¹⁵⁰ Yash Ghai, *Human Rights and Governance: The Asia Debate*, 15 Aust. Y.B. Int'l L. 1, 14 (1993).

¹⁵¹ Asia Pacific NGO Human Rights Congress Resolutions, Dec. 6, 1996.

¹⁵² Asian Human Rights Charter, adopted in Kwangju, South Korea, 1998. <http://material.ahrchk.net/charter>

¹⁵³ ASEAN Declaration, Bangkok, Aug. 8, 1967.

¹⁵⁴ Charter of the Association of Southeast Asian Nations, Nov. 20, 2007.

SAARC of 1985,¹⁵⁵ and the Social Charter of 2004¹⁵⁶ in South Asia. All the discussions and normative consensus on human rights are limited and not always the focus of their cooperation, but at least some positive changes have been made at the regional and sub-regional level.¹⁵⁷ More importantly, these changes have been effected not by Asian states themselves, but by the regional cooperation of a complex network of civil society, including both internal forces like grassroots human rights activists and local NGOs and external forces like regional and international human rights NGOs.

As illustrated, the development of human rights in Asia is not as the result of transplanting foreign concepts but as the product of its internal dynamics of normative development. As Amartya Sen articulates, the concept of freedom, liberty, rights, and human dignity might have existed not only in Western cultures, but in Asian cultures as well.¹⁵⁸ However, as Jack Donnelly argues, human dignity is a concept distinct from that human rights which is a legal idea. And in that sense, Asian traditions may be not identical to the modern forms of human rights.¹⁵⁹ As Louis Henkin maintains, “the contemporary idea of human rights was formulated and given content during the Second World War and its aftermath.”¹⁶⁰ As briefly reviewed above, many Asian countries chose to adopt a democratic political system and embraced the ideas of human rights and constitutional rights after their long fight against

¹⁵⁵ The Charter of the South Asian Association for Regional Cooperation, Dec. 8, 1985.

¹⁵⁶ The Social Charter of the South Asian Association for Regional Cooperation, Twelfth SAARC Summit, Jan. 4, 2004.

¹⁵⁷ See Tae-Ung Baik, *surpa* note 56, at 209-231.

¹⁵⁸ See Amartya Sen, HUMAN RIGHTS AND ASIAN VALUES, 30 (1997)

¹⁵⁹ Jack Donnelly, *Human Rights and Asian Values: A Defense of “Western” Universalism*, in THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS 66 (Joanne R. Bauer and Daniel A. Bell, eds., 1999).

¹⁶⁰ Louis Henkin, *The Rights of Man Today* in HUMAN RIGHTS, 7-8 (Louis Henkin et. al., 1999)

colonialism or authoritarian regimes.¹⁶¹ Another point to emphasize is that people in Asia have also witnessed instances of misuse of the human rights language. In other words, states that provide for extensive human rights protection through national legislation and constitution have continuously violated the human rights of their people in reality.¹⁶² As Tae-Ung Baik asserts, “the right provisions in many newly independent [Asian] states were often mere window-dressing until democracy movements changed the political landscapes of these Asian societies.”¹⁶³ Undeniably, however, once adopted or ratified, human rights norms create a moral power that mobilizes internal social movements to monitor the enforcement of the norms, provide rallying points for activists, and offer hope for social change to people.¹⁶⁴

Overall, there is no reason that Asia should not have a regional human rights system comparable to other regions. Actually, it is even more necessary to establish RHRIs in the Asian human rights context because in the process of legalization of human rights, Asian countries need to reconcile the new *foreign cultural* norms and ideas with domestic moral traditions.¹⁶⁵ And if each individual country cannot afford to do it or is not willing to do it, regional human rights institution can fill the gap between the adoption of international human rights norms and their implementation, or, in other words, the gap between the current U.N. human rights system and many national legal systems, because RHRIs can effectively work as a complement to already existing human rights system in the Asia-Pacific region.

¹⁶¹ See Andre Schmid, KOREA BETWEEN EMPIRES, 1895-1919, 13 (2002).

¹⁶² Tae-Ung Baik, *supra* note 56, at 81.

¹⁶³ *Id.*

¹⁶⁴ See Simon Halliday and Patrick Schmidt, HUMAN RIGHTS BROUGHT HOME: SOCIO-LEGAL PERSPECTIVES ON HUMAN RIGHTS IN THE NATIONAL CONTEXT 10 (2004).

¹⁶⁵ Michael D. Barr, CULTURAL POLITICS AND ASIAN VALUES: THE TEPID WAR, 168 (2002).

2.4. THE EXPERIENCE OF RHRIS IN OTHER REGIONS: EUROPE, THE AMERICAS, AND AFRICA

So far, I have examined whether it is necessary to have RHRIs in the Asia-Pacific region both in the international human rights context and in the Asian human rights context and concluded that it is desirable to do so. Lastly, this chapter will briefly review regional human rights systems in other regions to show their positive contribution and particular advantages for the promotion and protection of human rights, which can be reflected in the Asia-Pacific region to show why it is desirable to establish RHRIs in this region, as well.

Regional human rights systems emerged after the end of WWII but different historical and political reasons inspired each region for the creation of RHRIs.¹⁶⁶

The Americas has the oldest regional human rights protection system. The Inter-American Declaration on the Rights and Duties of Man was adopted in 1948 with a growing “regional solidarity developed during the movements for independence”¹⁶⁷ and a coalition against communist threats.¹⁶⁸ Following that, the Inter-American Commission of Human Rights was created in 1959 and the American Convention on Human Rights (ACHR) was adopted in 1969. The Convention itself deals mainly with civil and political rights but it has two Protocols *on economic, social and cultural rights* and *on the abolition of the death penalty*, though compared to the Convention, they have a relatively weak protection mechanism by reserving the individual petition system only for the violations of the right to education and trade union rights.

¹⁶⁶ Dinah Shelton, *supra* note 13, at 16-7.

¹⁶⁷ *Id.*

¹⁶⁸ See OAS, *Caracas Declaration of Solidarity (The Declaration of Solidarity for the Preservation of the Political Integrity of the American States Against the International Communism)*, Tenth Inter-American Conference, (Mar. 28, 1954). http://avalon.law.yale.edu/20th_century/intam10.asp

¹⁶⁹ Finally, the Inter-American Court of Human Rights was established in 1979. Most of its cases concern Central and South America and Mexico, mainly focusing on human rights violations related to military coups.¹⁷⁰

Europe adopted the European Convention on Human Rights (ECHR) and established the European Court of Human Rights in 1950 as part of a European reconstruction for democracy, the rule of law and peace to guarantee individual rights after the experience of the WWII atrocities. As A.H. Robertson describes, European states needed human rights to be respected so as to secure democracy and avoid dictatorship. The conflict between Eastern and Western Europe also enabled states in the West to make an exclusive human rights system.¹⁷¹ In 1954, the European Commission of Human Rights was established, but it was abolished in 1998 with a project to reformat the European Court of Human Rights. Today, the ECHR exercises jurisdiction over the twenty seven members of the EU and the additional twenty member states of the Council of Europe.¹⁷² The Court received more than 50,000 complaints in 2006 alone and the number is increasing, especially from the newly democratized countries in Central and Eastern Europe.¹⁷³

Africa adopted the African Charter on Human and People's Rights (ACHPR) in 1981. Self-determination from colonization was a recognized part of the African human rights agenda, as were the regional actions ignited by the apartheid policy and human rights abuses in South

¹⁶⁹ Art. 19(6) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights: Protocol of San Salvador, O.A.S. Treaty Series No. 69 (1988).

¹⁷⁰ Helen M. Stacy, *supra* note 16, at 148-9.

¹⁷¹ See A.H. Robertson, HUMAN RIGHTS IN THE WORLD, 81 (1982).

¹⁷² Helen M. Stacy, *supra* note 16, at 147-8.

¹⁷³ *Id.*

Africa.¹⁷⁴ The Charter distinctively recognizes collective rights and especially the right to development in its Article 22.¹⁷⁵ It also recognizes legal obligations to the community (*ubuntu*), family, and society. The African Commission on Human and People's Rights was created in 1987 and the following year saw the adoption of the Protocol establishing the African Court of Human and People's Rights. Finally in 2006, the African Court on Human and Peoples' Rights was established. The Court has a unique provision which differs from other regional human rights courts, according to which any human rights treaties that have been ratified by African member states are claimed as part of the Court's jurisdiction.¹⁷⁶

RHRIs in other regions show how regional human rights institutions can get positive results in the promotion of human rights though the degree of effectiveness of each system may vary. As Helen M. Stacy maintains, "if [RHRIs] developed in the right way, [they] could play a role in making cultural human rights adjudication both morally credible and practically attainable."¹⁷⁷ Dinah Shelton describes the effective contribution of RHRIs in Europe, the Americas, and Africa to human rights as follows:

The functioning European and Inter-American courts are one of the great contributions to human rights by regional systems. The ... protocol to the African Charter, creating a court in the African system,... add[s] to the regional protection... Thus, regional systems have elements of uniformity and diversity in their origins. All of them began as the global human rights system was developing and they were inspired by the agreed universal norms. At the

¹⁷⁴ See Dinah Shelton, *supra* note 31.

¹⁷⁵ Article 22 of the African Charter on Human and People's Rights:

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

¹⁷⁶ Helen M. Stacy, *supra* note 16, at 149-150.

¹⁷⁷ *Id.*, at 141-145.

*same time, each region had its own issues and concerns. As the systems have evolved, the universal framework within which they began and their own interactions have exercised a strong influence...*¹⁷⁸

The regional human right systems in Europe, the Americas and Africa also offer some meaningful lessons for the establishment of an Asian human rights system, namely, regional human rights conventions, a reporting system, individual petition, and regional human rights courts.

First, the provisions of human rights charters or conventions in those other regions include their own regional characteristics, along with the goal of meeting international human rights standards. Article 4.1 of the American Convention on Human Rights, the right to life, for instance, contains an anti-abortion provision which is believed to reflect the Roman-Catholic religious background of most Inter-American countries: “Every person has the right to have his life respected. This right shall be protected by law and, in general, *from the moment of conception*” (emphasis added). Unlike Article 8 of the ECHR and Article 5 of the ACHR, the African Charter on Human and People’s Rights does not specify the right to privacy. This may arise from the unique African view on personhood which is different from the Western concept of individualism. Therefore, the ACHPR emphasizes the harmonious development of the family, national solidarity and independence, and African values and unity in Article 29.¹⁷⁹ These

¹⁷⁸ Dinah Shelton, *supra* note 13, at 17.

¹⁷⁹ Article 29 of the African Charter on Human and People’s Rights:

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 strengthened;*
- 5 To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to his defence in accordance with the law;*

examples might be a valuable lesson to Asian states that seek to preserve indigenous distinctiveness.

Second, all three regional human rights institutions have their own reporting system on human rights violation by member states or monitoring systems for member states' compliance. In Europe, the Organization of Security and Cooperation in Europe (OSCE) has operated to monitor member state's commitment in human rights and fundamental freedoms.¹⁸⁰ Active inspections and investigations include unfettered visits, empirical study, ad-hoc visits etc., and Europe is considered to have a very advanced system of preventive mechanisms for human rights violations. The Inter-American Commission does not have a coercive power to intervene in individual member states' internal affairs, but its activity in investigating and issuing a country report based on Article 41 of the ACHR has contributed to raising public awareness in the region and also to mobilizing the international community.

Many Asian countries have regarded the reporting and monitoring system by international human rights institutions as an infringement of sovereignty. But, if RHRIs are established in the Asia-Pacific region, they might accept reports from RHRIs with less reluctance because an investigation by neighboring countries can be seen as a relatively informal procedure and be conducted in amicable environments. RHRIs, however, should be mindful of the danger

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.

¹⁸⁰ See Rachel Brett, Human Rights and the OSCE, 18 Hum. Rts. Q. 668 (1996).

that countries with dismal human rights record can submit a report as a means of defending themselves, bypassing an otherwise long and extensive investigation.

Third, individual petitions are considered a critical component of the European human rights system but inter-state complaints have been politically sensitive issues in other regions. In fact, individual complaints have not been a core activity of the Inter-American Commission of Human Rights. But Inter-America has a much more advanced system than other regions in allowing exceptions to the exhaustion of local remedies based on Article 46 of the ACHR.¹⁸¹ The unstable political conditions in Latin America, similar to those in many Asian states, might be the main reason for such a provision. As a democratic system has not been institutionalized in many Asian countries, such specific provisions might need to be taken into consideration for the establishment of RHRIs in the Asia-Pacific region. In addition, unlike Europe, the lack of public awareness on human rights violations and the lack of means to bring the case to the regional level will lead to relatively small number of individual complaints at the beginning of RHRIs in this region.

Lastly, in the case of Europe, the European Court of Human Rights greatly strengthens the protection of human rights on the continent. The Court initially started as a marginal institution under the Council of Europe, but it has become one of the most important institutions

¹⁸¹ Article 46.2 of the American Convention on Human Rights:

The provisions of paragraphs 1.a and 1.b of this article shall not be applicable when:

- a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;*
- b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or*
- c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.*

of the organization.¹⁸² As a permanent judicial body with full-time judges, it has been successfully supplementing other human rights institutions in Europe.¹⁸³ Such a harmonization with all different human rights institutions under different organizations has not weakened the protection of human rights but strengthened it. It can be a good example for Asian states in their multidimensional efforts to institutionalize a human rights system. The Inter-American Court of Human Rights has extensive competence in providing advisory opinions to any member state of the Organization of American States (OAS) regardless of its ratification of the Convention,¹⁸⁴ and in this sense, the OAS has also become an integral part of the human rights protection system in the region.¹⁸⁵ While the fact that not all OAS member states have signed the American Convention on Human Rights, indeed one of the weaknesses of the American human rights system, the Inter-American Commission's full authority to monitor and deal with human rights violations sustains the system as a useful mechanism.¹⁸⁶ It shows that the establishment of RHRIs in the Asia-Pacific region can be started with a small number of countries at first once there is a guarantee on the authority, effectiveness and independence of RHRIs. Then, with the increasing number of member states, RHRIs can gradually strengthen their power for the protection and promotion of human rights. In Africa, it took a long time for states to obtain

¹⁸² Mark W. Janis, *INTERNATIONAL COURT FOR THE TWENTY-FIRST CENTURY*, 105-6 (1992); See also Giovanni Bonello, *The European Court of Human Rights* in the *Essentials of Human Rights*, 115-118 (Rhona K.M. Smith and Christien van den Anker eds., 2005).

¹⁸³ See Kevin Boyle, *Council of Europe, OSCE, and European Union* in *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE* 143 (Hurst Hannum ed., 2004).

¹⁸⁴ Article 64 of the American Convention of Human Rights.

¹⁸⁵ See Dinah Shelton, *The Inter-American Human Rights System* in *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE* 127, 140-1 (Hurst Hannum ed., 2004).

¹⁸⁶ *Id.*

sufficient ratifications to establish the African Court on Human and Peoples' Rights.¹⁸⁷ The eventual establishment of the Court, however, demonstrates that well-coordinated efforts and interactions between the stakeholders - states, NGOs and regional bodies- can push a region toward the establishment of a regional human rights institution.¹⁸⁸ The function of the Court is to “complement the protective mandate of the commission” and individuals and NGOs cannot bring a suit against a state through the Court.¹⁸⁹ Thus, the responsibility of human rights protection is heavily imposed on the Commission itself. But because of the African states' risk-averse political culture, the African Commission has no power to enforce its decisions, which is considered a major drawback of the African human rights system.¹⁹⁰ Thus, it is important for the Asian human rights system to design a way in which RHRI can ensure member states' compliance with declared or recommended decisions by exerting political clout and providing clear remedies to victims of human rights violations.

2.5. CONCLUSION

Regional human rights mechanisms are considered a more effective and efficient tool for the protection and promotion of human rights than the international human rights system under

¹⁸⁷ See Muna Ndulo, *The Commission and the Court under the African Human Rights System* in INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS 635-640 (Gudmundur Alfredsson et al. eds., 2009).

¹⁸⁸ See Coalition for an Effective African Court on Human and Peoples' Rights (CEAC), About the African Court, <http://www.africancourtcoalition.org>

¹⁸⁹ See Makau Mutua, *African Human Rights Court: A Two-Legged Stool?* 21 Hum.Rts. Q. 355 (1999).

¹⁹⁰ See Claude E. Welch, *The African Commission on Human and Peoples' Rights: A Five-Year Report and Assessment*, 14 Hum. Rts. Q. 43 (1992).

the U.N. structure,¹⁹¹ and it is indeed desirable to establish RHRIs in the Asia-Pacific region. If a regional human rights institution is established, Asian states will surely benefit from their geographical proximities, and historical and cultural bonds.

As discussed, most Asian countries have experienced colonial rule, during which there were abundant human rights violations by the colonizing state or the local collaborators. In many states, the colonial legacy has not been disposed of properly and it often becomes a source of continuing human rights violations. In addition, there are transitional justice issues concerning the principles and mechanisms that can guarantee justice during a transition from an authoritarian regime or internal conflict to a democratic rule.¹⁹² Asia has been facing many unresolved transitional justice issues during and after democratization. These human rights violations include the legacy of killing fields in Cambodia, the Cultural Revolution and the recent Tiananmen Massacre in China, the WWII issue of comfort women, forced labor, and the Nanking Massacre committed by Japan, the Gwangju Massacres in South Korea, war crimes during the Vietnam War, and the human rights violations in North Korea.¹⁹³ None of the historical legacy issues in Asia is easy to solve by a single country, which truly hinders the development of human rights in the Asia-Pacific region. In fact, these are only a few of the many troublesome human rights issues that cannot be effectively handled either at the domestic or the international level.

¹⁹¹ Hidetoshi Hashimoto, *supra* note 34, at 1-2.

¹⁹² See Tai-Ung Baik, *Justice Incomplete: The Remedy for the Victims of Jeju April Third Incident* in RETHINKING HISTORICAL INJUSTICE IN NORTHEAST ASIA: THE KOREAN EXPERIENCE IN REGIONAL PERSPECTIVE (Gi-Wook Shin et al. ed., 2006).

¹⁹³ See Tai-Ung Baik, *supra* note 56, at 401-3.

Surely, RHRI cannot provide a total solution to human rights violations. A regional human rights system, however, emerges as the result of the frustration with the ineffectiveness of international mechanisms¹⁹⁴ and, at the same time, the hope for a better implementation of international human rights norms as a supplement to human rights mechanisms. RHRI have unique institutional advantages for the promotion and protection of human rights. Considering the continuing debate on Asian values and the Asian way of human rights in the last two decades, the U.N. Charter and the international human rights treaties cannot fully incorporate Asian regional contexts, which is another reason why regional human rights institutions should be established in the region.

¹⁹⁴ Dinah Shelton, *supra* note 31, at 353-4.

CHAPTER THREE:

Why Have We Failed to Establish RHRIs in Asia?

It was never the people who complained of the universality of human rights, nor did the people consider human rights as a Western or Northern imposition. It was often their leaders who did so.¹

In the twenty years [since 1990], there has been a growing recognition in the [Asia-Pacific] region... of the importance of developing regional arrangements to complement national and international efforts in promoting, protecting and realizing human rights... [T]he establishment of regional mechanisms lies at the heart of any credible regional human rights arrangement.²

3.1. INTRODUCTION

In Chapter Two, after examining the development of human rights both in the international legal context and the Asian context, I concluded that it is desirable to establish regional human rights institutions in the Asia-Pacific region. Indeed, RHRIs can serve as an effective tool for the protection and promotion of human rights in this region not as a replacement, but as a supplement to both the international and national human rights system. They can make a meaningful difference to the human rights situation in the region as a channeling institution to reflect regional specificity and particular needs, and, at the same time, monitor individual state's practices to meet international standards on human rights. If they are

¹ Statement by Kofi Annan, cited in José A. Lindgren Alves, *The Declaration of Human Rights in Postmodernity*, 22 Hum. Rts. Q. 478, 498 (2000).

² Kyung-wha Kang, Deputy High Commissioner for Human Rights, Opening Statement at 15th Workshop on Regional Cooperation for the Promotion and Protection of Human Rights in the Asia-Pacific Region (Bangkok, Apr. 21, 2010).

properly constituted and managed, RHRIs can be powerful tools for human rights by translating Asian countries' commitment on human rights into real improvements for the people in this region.

Since the adoption of the Bangkok Declaration in 1993, there have been numerous initiatives to establish regional human rights institutions and charters in Asia. All efforts, however, have been impeded by deep cultural, political, and historical issues. There have been two main approaches to the establishment of RHRIs: the top-down one and the bottom-up one. Why have both not worked? Many human rights activists and scholars argue that the former approach of the U.N. and the governments of Asian states has not fully cooperated with already existing national and regional institutions and has mainly relied upon individual governments' political will. The latter approach of numerous NGOs has lacked enough support from formal governmental institutions. Thus, examining this problem is the starting point of my research in Chapter Three and the main question that should be asked is why Asia has not had regional human rights institutions so far.

To answer this question, first, I will review all the major initiatives to establish RHRIs in this region, especially since the first Asia-Pacific Workshop on human rights was held in Manila, the Philippines in 1990, which was organized under the umbrella of the U.N., particularly the Office of the U.N. High Commissioner for Human Rights (OHCHR). This workshop was considered the first step to explore the possibility of regional human rights arrangements in the Asia-Pacific region.³ As the initiatives for setting up RHRIs in the Asia-Pacific region have been mainly categorized by their leading agencies, this chapter will review them in three parts: the

³ U.N. General Assembly Resolution on Regional arrangements for the promotion and protection of human rights in the Asian and Pacific region, G.A. Res. 45/168, UN Doc. A/RES/45/168. (Dec. 18, 1990)

U.N. initiatives, the NGOs initiatives and the National Human Rights Institutions (NHRIs) initiatives. These are examined in chronological order to see what items have been discussed, what has been a key development in their discussion, whether they have evolved toward realizing the establishment of RHRIs and lastly, how their activities can be evaluated.

Through the analysis on all the major initiatives for setting up RHRIs in the Asia-Pacific region, I, then, will provide five main reasons that have hindered the establishment of a regional human rights system in Asia. That is, first, sovereignty. Truly, sovereignty and the traditional concepts of the principle of non-intervention have been one of the main obstacles for setting up RHRIs in this region because for a long time, most Asian governments have considered human rights issues an internal affair. The second reason is the failure in the recognition of human rights after WWII. It is deeply related to the issue of the post-war compensations and the reparations of war victims against Japan, the gross human rights violator at the time of the War. The third reason is the failure of major Asian powers to play a leading role in the human rights movement. The lack of regional leadership for the improvement of the human rights conditions in the region by the major Asian powers, China, Japan, and India shows the practical difficulties in establishing RHRIs in Asia. The fourth reason is the relatively low ratification rate of major U.N. human rights treaties. It means that in many Asian countries, there is still a lack of individual governments' political will to comply with international human rights norms. And lastly, the fifth reason is the Asian values debate, a unique human rights discourse in this region. The first four reasons will be discussed in the same section, while the Asian values argument, which has been examined in a large number of publications by both scholars and activists for over a decade now, will be reviewed in a separate section. The reason for examining it separately is my belief that it is the most important factor in most Asian countries' reluctance to establish RHRIs. With

the ongoing conversation on post-colonialism, Lee Kuan Yew's famous Asian values debate, indeed, has been a major challenge for setting up a regional human rights system in the region because it rejects international human rights law as a Western concept and thus argues that it is inapplicable to the Asian context.

After examining the five major reasons, I will conclude that all those obstacles, including the Asian values discourse that have hindered the establishment of RHRIs, are the result not of a different understanding of fundamental human rights under the already existing international human rights legal system, but mainly of political considerations. Therefore, I will ask who benefits from these assertions behind the rejection of RHRIs in the region. Those who are most vulnerable to violations of their fundamental human rights and find it hard to seek the protection of their rights both at the international and the national level are definitely not the ones who will benefit from the absence of RHRIs in the region. Neither are the human rights defenders who fight for them. Finally, the analysis of the identified obstacles will lead me to focus on national human rights institutions (NHRIs), relatively new actors in the international human rights framework, as a driving force for the establishment of RHRIs in the Asia-Pacific region. NHRIs will be discussed in Chapter Four.

3.2. INITIATIVES TO ESTABLISH RHRIS IN THE ASIA-PACIFIC REGION

There have been numerous initiatives to establish regional human rights mechanisms in the Asia-Pacific region for the past two decades after the first 1990 Asia-Pacific Workshop on

human rights explored the possibility of regional human rights arrangements in the region.⁴ They can be categorized, in three main subsets: U.N. initiatives, NGOs initiatives, and NHRIs initiatives.

3.2.1. The U.N. Initiatives

The first category includes the U.N. initiatives. In the 1960s, the U.N. Commission on Human Rights created a study group to review the establishment of regional human rights institutions all over the world and in 1968, it requested that the U.N. Secretary General, U Thant, organize regional seminars in the regions with no RHRIs with a view of establishing such regional bodies.⁵ A series of U.N. General Assembly resolutions on regional arrangement for the promotion and protection of human rights followed in the 1970s. For example in 1977, the U.N. G.A. resolution pointed out:

Recognizing the important contribution of the regional commissions of the United Nations in the economic and social fields,

- 1. **Appeals** to States in areas where regional arrangements in the field of human rights do not yet exist to consider agreements with a view to the establishment within their respective regions of suitable regional machinery for the promotion and protection of human rights;*
- 2. **Requests** the Secretary-General, under the programme of advisory services in the field of human rights, to give priority to the organization, in regions where no regional commission on human rights exists, of seminars for the purpose of discussion the*

⁴ *Id.*

⁵ Sou Chiam, *Asia's Experience in the Quest for a Regional Human Rights Mechanism*, 40 *Vict. U. Wellington L. Rev.* 127, 128 (2009).

*usefulness and advisability of the establishment of regional commissions for the promotion and protection of human rights;*⁶

In 1982, the U.N. organized a seminar on “National, Local and Regional Arrangements for the Promotion and Protection of Human Rights in the Asian Region” in Colombo, Sri Lanka.⁷ During the seminar, the U.N. Centre for Human Rights called upon the participating 19 member states of the Economic and Social Commission for Asia and the Pacific to ratify the major human rights conventions and recommended setting up periodic regional meetings on human rights issues.⁸ It called for the Office of the High Commissioner for Human Rights (OHCHR) to facilitate a dialogue among member states on appropriate arrangements for human rights in the Asia-Pacific region. But the participants agreed that it was untimely to discuss the establishment of a regional arrangement in the Asia-Pacific region.⁹ Finally, in 1990, the OHCHR began to organize an annual *Workshop on Regional Cooperation for the Promotion and Protection of Human Rights in the Asia-Pacific Region*.

There have been 15 workshops so far: in Manila (1990), Jakarta (1993), Seoul (1994), Kathmandu (1996), Amman (1997), Tehran (1998), New Delhi (1999), Beijing (2000), Bangkok (2001), Beirut (2002), Islamabad (2003), Doha (2004), Beijing (2005), Bali (2007) and Bangkok (2010). They were attended by representatives of individual governments in Asia, NHRIs,

⁶ U.N. General Assembly Resolution on regional arrangements for the promotion and protection of human rights, UN Doc. A/RES/32/127 (1977). See also UN Doc. A/RES/34/171 (1979), A/RES/35/197 (1980), A/RES/36/154 (1981).

⁷ Hidetoshi Hashimoto, THE PROSPECTS FOR A REGIONAL HUMAN RIGHTS MECHANISM IN EAST ASIA, 112 (2004).

⁸ *Id.*

⁹ Sou Chiam, *supra* note 5, at 128.

international organizations, including U.N. agencies and human rights NGOs.¹⁰ The main issues discussed and the key developments of those workshops are briefly reviewed below:

The Asia-Pacific Workshop on Human Rights	Time, Place and Participation	Main Issues and Report (<i>emphasis added</i>)
The 1 st Asia-Pacific Workshop	Manila, the Philippines, 1990. 23 governments.	<ul style="list-style-type: none"> * Reviewed the role the Universal Declaration of Human Rights had played. * Reviewed other regional systems for promoting and protecting human rights. * Debated the advantage of a regional human rights institution.
The 2 nd Asia-Pacific Workshop	Jakarta, Indonesia, 1993. 28 governments.	<ul style="list-style-type: none"> * Outlined the main objectives of subsequent meetings, including: 1) raising awareness of human rights standards and procedures and 2) of existing mechanisms available to governments in fulfilling their human rights obligations, 3) promoting bilateral cooperation, and 4) encouraging the development of human rights institutions in the region. * Identified key obstacles to the establishment of a regional system: 1) the geographical complexity, 2) different levels of development and cultural diversity, 3) the lack of a unifying tradition and 4) the absence of mutual understanding between governments.
The 3 rd Asia-Pacific Workshop	Seoul, South Korea, 1994. 29 governments.	<ul style="list-style-type: none"> * Agreed to adopt a <i>step-by-step</i>, “<i>building block</i>” approach to developing a regional arrangement. * Emphasized the importance of national-level actions to protect human rights, particularly through national human rights institutions (NHRIs) and the development of national action plans (NAP).
The 4 th Asia-Pacific Workshop	Kathmandu, Nepal, 1996. 30 governments.	<ul style="list-style-type: none"> * Focused on the need to create regional arrangements that would be <i>agreed upon by consensus</i>.

¹⁰See website of OHCHR, Regional arrangements for the promotion and protection of human rights in the Asian and Pacific region, <http://www.unhchr.ch/> See also website of Asia-Pacific Human Rights Information Center, HURIGHTS OSAKA, http://www.hurights.or.jp/index_e.html

		<p>* Welcomed the NGOs' participation in the process of development of regional arrangements.</p> <p>* Affirmed that the building blocks of human rights arrangements include: 1) national human rights education programs, 2) the ratification of human rights instruments, 3) the development of national action plans, and 4) the establishment of national human rights institutions.</p> <p>* UN Doc. E/CN.4/1996/46/Add.1</p>
The 5 th Asia-Pacific Workshop	Amman, Jordan, 1997. 31 governments.	<p>* Urged OHCHR to work with governments to implement a regional technical cooperation program.</p> <p>* Reiterated that any regional arrangement must emerge from the needs and priorities set by the <i>governments</i> of the region.</p> <p>* UN Doc. E/CN.4/1997/44</p>
The 6 th Asia-Pacific Workshop	Teheran, Iran, 1998. 36 governments.	<p>* Stressed that any regional arrangement for the Asia-Pacific region should be based on priorities and needs identified by <i>the region</i>.</p> <p>* Adopted a <i>Framework for Regional Technical Cooperation in the Asia Pacific Region</i> (the so-called <i>Teheran Framework</i>) built on <u>four pillars</u>: 1) national human rights plans of action, 2) human rights education, 3) national human rights institutions, and 4) strategies for the realization of the right to development and economic, social and cultural rights.</p> <p>* Decided that countries in the region would implement technical cooperation programs in partnership with OHCHR.</p> <p>* UN Doc. E/CN.4/1998/50</p>
The 7 th Asia-Pacific Workshop	New Delhi, India, 1999. 29 governments.	<p>* Recommended that a series of <i>inter-sessional workshops</i> be organized to discuss the Framework's four pillars.</p> <p>* Reaffirmed the universality, indivisibility, interdependence, and interrelatedness of all human rights and the promotion of universal respect for human rights by the <i>step-by-step and building-blocks approach</i>.</p> <p>* UN Doc. E/CN.4/1999/94</p>

The 8 th Asia-Pacific Workshop	Beijing, China, 2000. 40 governments.	<ul style="list-style-type: none"> * Emphasized the importance of the rights of women, children, and other marginalized groups. * Requested OHCHR to undertake an evaluation of the implementation of the <i>Tehran Framework</i>. * UN Doc. E/CN.4/2000/102
The 9 th Asia-Pacific Workshop	Bangkok, Thailand, 2001. 33 governments.	<ul style="list-style-type: none"> * Called for “concrete and sustainable sub-regional and national activities” and for “training and awareness programs for government officials and key professional groups...” * With recognizing civil society’s significant contribution for human rights, <i>decided to hold consultations with NGOs prior to the opening of each annual Workshop</i>. * UN Doc. E/CN.4/2001/98
The 10 th Asia-Pacific Workshop	Beirut, Lebanon, 2002. 30 governments.	<ul style="list-style-type: none"> * Recommended that activities to combat <i>racism</i> be included in national action plans for human rights. * Recognized the importance of <i>good governance</i>, at national and international levels. * Recognized that <i>poverty and unemployment</i> are among the major obstacles to the realization of the right to development and economic, social, and cultural rights. * UN Doc. E/CN.4/2002/WP3
The 11 th Asia-Pacific Workshop	Islamabad, Pakistan, 2003. 29 governments.	<ul style="list-style-type: none"> * Focused on <i>the right to development and economic, social, and cultural rights</i>. * Recognized the link between development and the full realization of human rights. * Emphasized the need for participation by developing countries in international economic decision-making and standard-setting. * UN Doc. E/CN.4/2003/109
The 12 th Asia-Pacific Workshop	Doha, Qatar, 2004. 36 governments.	<ul style="list-style-type: none"> * Adopted the Plan of Action 2004-2006 that focused on: 1) gathering lessons learned and best practices concerning national plans of action, 2) incorporating human rights education within national school systems, 3) <i>strengthening the role of national human rights institutions and the Asia-Pacific</i>

		<p><i>Forum</i>, and 4) strengthening national capacities to realize the right to development and economic, social, and cultural rights.</p> <p>* UN Doc. E/CN.4/2004/89</p>
The 13 th Asia-Pacific Workshop	Beijing, China, 2005. 33 governments.	<p>* Discussed in depth the issue of human rights and <i>human trafficking</i>.</p> <p>* For the future of the Asia-Pacific Framework, some states stressed the primacy of improving national level activities for the protection of human rights, while other states supported a sub-regional approach to promoting the Framework.</p> <p>* UN Doc. E/CN.4/2006/100</p>
The 14 th Asia-Pacific Workshop	Bali, Indonesia, 2007. 25 governments.	<p>* Summarized the recommendations of the regional workshops since the 1991 workshop in Manila.</p> <p>* Recognized the important linkage between human rights and efforts to address <i>extreme poverty</i>.</p> <p>* UN Doc. A/HRC/7/35</p>
The 15 th Asia-Pacific Workshop	Bangkok, Thailand, 2010. 31 governments.	<p>* Provided participants with an opportunity to study already existing regional human rights mechanisms in Africa, the Americas, and Europe, as well as the recent sub-regional developments such as ASEAN and the Arab League.</p> <p>* Recognized that <i>regional networks of NHRIs</i> can play a valuable role in supporting the establishment of regional human rights mechanisms.</p> <p>* Noted that the regional arrangements, while evolving in different forms in different regional contexts, should reinforce universal human rights standards.</p> <p>* Underlined the importance of developing <i>partnerships between governments, NHRIs and civil society at the national and regional levels</i> in developing regional mechanisms.</p> <p>* UN Doc. A/HRC/15/39</p>

Table 1: The U.N. Workshop on Regional Cooperation for the Promotion and Protection of Human Rights in the Asia-Pacific Region

All fifteen workshops' main discussions can be summarized with the four priority pillars under the Asia-Pacific regional human rights framework – generally known as the Tehran Framework.

The first pillar is national human rights action plans. The workshops have discussed and shared information and good practices to support each member state initiating a national human rights action plan because the OHCHR and the participants believe that the development of such a national time-bound plan can strengthen the culture of human rights by reforming various human-rights related domestic legislation and also consolidate the cooperation among similarly-minded government officials, NHRIs, NGOs and all other civil society stakeholders.¹¹ Along the same lines, a number of sub-regional and inter-sessional regional workshops on national human rights action plans have been organized, e.g. in Bangkok (1999), Tokyo (2000), Ulaanbaatar (2000), and Bangkok (2004). Still, only a small number of Asia-Pacific countries have adopted national human rights action plans and even in countries with action plans, there are concerns over their slow and limited implementation.¹²

The second pillar is human rights education. The important role of human rights education has been emphasized both for children through the school curriculum and for professional groups like law enforcement officials, judges, and lawyers through technical training programs.¹³ Such a rights-based approach to education is believed to raise awareness of human rights among the general public and at the same time, enhance domestic human rights

¹¹ See Report of the Secretary-General on Regional Arrangements for the Promotion and Protection of Human Rights in the Asian and Pacific Region, Annex I (Mar. 12, 1998) UN Doc. E/CN.4/1998/50.

¹² Vitit Muntarbhorn, *In Search of the Rights Track: Evolving a Regional Framework for the Promotion and Protection of Human Rights in the Asia-Pacific Region*, 14, UNOHCHR (2005).

¹³ *Id.*, at 15.

protection systems. But, as these human rights education programs are national rather than regional, individual states can face financial difficulties implementing them with limited resources if there is no support from the outside, including the OHCHR.¹⁴ Sub-regional and inter-sessional workshops on human rights education have also been held, for example, in Seoul (1999), the Marshall Islands (2001), Chiangmai (2001), Fiji (2002), and Doha (2004).

The third pillar is economic, social and cultural rights and the right to development. The recognition of the right to development as a human right is indeed a contribution of developing countries, including most Asian states. The right to development and the realization of economic, social, and cultural rights has been identified as an important item of regional cooperation since the Fifth Workshop in Amman, Jordan (1997).¹⁵ In addition, the workshops, including the inter-sessional and sub-regional ones, have constantly emphasized the close relationship of economic, social and cultural rights and human trafficking, the rights of women, children and migrant workers, and poverty.¹⁶ But, there has been limited implementation at the national level compared to the active efforts and discussions during the workshops. Even when there are actions taken by individual states, in most cases they are “ad hoc rather than sustainable or sustained.”¹⁷

The last pillar is national human rights institutions (NHRIs). Participating member states at both the 12th Workshop in Doha (2004), and the 13th Workshop in Beijing (2005) stressed that

¹⁴ *Id.*, at 15.

¹⁵ See Report of the Secretary-General on Regional Arrangements for the Promotion and Protection of Human Rights in the Asian and Pacific region, (Jan. 27, 1996), UN Doc. E/CN.4/1997/44.

¹⁶ *Id.*

¹⁷ Vitit Muntarbhorn, *supra* note 12, at 16-7.

an NHRI is the strongest of the Tehran Framework's four pillars.¹⁸ Indeed, the Asian-Pacific Forum (APF), a network of national human rights institutions, is the closest, that this region has come to regional mechanisms for the protection and promotion of human rights so far. Seventeen countries in the region have established NHRIs and their network through the APF has played a central role in the establishment of a culture of human rights in Asia.¹⁹ Under the 1993 Paris Principles,²⁰ NHRIs have a power to review and monitor national legislation, government policies and programs to meet international human rights standards, to receive and investigate complaints of human rights violations cases, and to raise public awareness of human rights through their human rights education programs.²¹ In the Asia-Pacific region, their network under the framework of the APF, established in 1996, has contributed to each NHRI improving its own capacity through sharing human rights information and best practices, and training and exchanging staff. It also demonstrated how a regional approach to human rights issues can be effectively handled with the cooperation of NHRIs, for example, on the issue of the rights of migrant workers, and of internally displaced persons through the APF coordinated annual meetings.²² The OHCHR has also actively supported and participated in the APF annual

¹⁸ See UN Doc. E/CN.4/2004/89 and E/CN.4/2006/100.

¹⁹ The Office of the High Commissioner of Human Rights (OHCHR), *Summary of Recommendations made and Progress achieved under the Framework on Regional Cooperation for the Promotion and Protection of Human Rights in the Asia-Pacific Region*, United Nations, 17 (2010). http://bangkok.ohchr.org/news/events/asia-pacific-regional-framework-workshop-2010/files/summary_recommendations_progress.pdf

²⁰ U.N. General Assembly Resolution 134, U.N. GAOR. 48th Sess., 85th mtg., (1993) UN DOC. A/RES/48/134. *Paris Principles* list the role and functions of NHRIs, the requirements for independence and the broad mandate of NHRIs. Paris Principles are internationally recognized standards which have been adopted by the United Nations General Assembly in Dec. 20, 1993.

²¹ More details on NHRIs' role and functions for the protection and promotion of human rights will be discussed in depth in Chapters Four and Five. .

²² OHCHR, *supra* note 19, at 18-9.

meetings. The APF and the network of NHRIs in the region, however, are not regional human rights arrangements in the sense of other already existing RHRIs in other regions.

Under the Tehran Framework's four pillars, the U.N. Workshops have mainly discussed cooperation programs focusing on individual governments' actions to strengthen human rights mechanisms at the national level. This is far from what the 1982 Seminar in Colombo and related U.N. resolutions originally tried to initiate for regional human rights arrangements. What is more, as argued in Chapter Two, in the Asia-Pacific region, government actions alone are not sufficient for the promotion and protection of human rights. It is important to set up a forum for governments, civil society, the media, academics, NGOs, and all other human rights stakeholders to be linked and to act together for human rights development in the region. Yet, the workshops have not served a similar function. Therefore, even though the U.N. Workshops have shown some positive signs and provided gradual contributions for the protection of human rights at the national level, they have not properly worked for the establishment of a regional human rights system. No specific items were even discussed during the workshops for the establishment of RHRIs, for instance drafting regional human rights charters, adopting time-bound agreements for the building of regional human rights institutions, or, at least, bringing high-level government officials in order to ensure individual states' commitment to RHRIs, rather than just adopting non-legally binding declarations. As Vitit Muntarbhorn points out, after 1999, even the title of the U.N. Human Rights Commission's annual resolutions on the Asia-Pacific region has changed from *Regional Arrangements for the Promotion and Protection of Human Rights in the Asia and Pacific Region* to *Regional Cooperation for the Promotion and Protection of Human Rights in the Asian and Pacific Region*.²³ The title of the workshops also changed after the ninth one in

²³ Vitit Muntarbhorn, *supra* note 12, at 16, 23-5.

2001 from *Regional Arrangement to Regional Cooperation*. One explanation for this is that most Asian countries in the workshops have formed underlined tacit consensus that establishing RHRIs in the region is still premature and should be done gradually. They have focused more on building and strengthening the national capacity for human rights rather than on setting up and initiating regional human rights mechanisms. The discussions at the workshops, especially during the first 10 years, clearly reveal such a position. At the first regional seminar in Colombo (1982), there was consensus among the participants that there was little need for a regional human rights arrangement in the Asia-Pacific region. Eight years later, in Manila (1990), participants were concerned with the derogation of national sovereignty that a regional arrangement may cause.²⁴ Three years later in Jakarta, governments identified three issues that needed to be discussed before any talk of regional arrangements. These were geographical complexity, different levels of development and the absence of high levels of understanding between governments.²⁵ At the 1994 Workshop in Seoul, one solid principle was established: the development of a regional arrangement should be done through a *step-by-step* and *building-block* approach.²⁶ Two years later in Kathmandu (1996), the workshop emphasized the importance of the development of regional cooperation for the strengthening of national capacities in the area of human rights, rather than the development of a regional arrangement.²⁷ The 1997 Amman Workshop reaffirmed that “any regional arrangement must emerge from and be directed to the needs and priorities set by governments of the region, with roles, functional tasks, outcomes and achievements determined by consensus by governments of the region”

²⁴ See UN Doc. A/RES/45/168, *supra* note 3.

²⁵ Hidetoshi Hashimoto, *supra* note 7, at 113.

²⁶ *Id.*

²⁷ See Report of the Secretary-General on Regional Arrangements for the Promotion and Protection of Human Rights in the Asian and Pacific region, (Apr. 3, 1996) UN Doc. E/CN.4/1996/46/Add.1.

through the step-by-step and building-block approach.²⁸ The same principles have been reiterated at the rest of the workshops, along with a discussion of the 1998 Tehran Framework for strengthening national capacities for the protection of human rights.

Through the U.N. Workshops, there have been dynamic discussions on various human rights issues in Asia including extreme poverty, human trafficking, racism, the right to development and the relationship among development, human rights, and democracy. They have indeed contributed at least to identifying the human rights areas of common concern in the region. But, for the last two decades, in the name of the *step-by-step* and *building-blocks* approach,²⁹ individual governments in the region have demonstrated that they have no sufficient and concrete political will to enter into the establishment of regional human rights mechanisms in Asia yet. Indeed, some human rights NGOs in the region heavily criticized the U.N. annual workshops as “a means for states to avoid establishing any such permanent arrangement under the pretext of appearing committed to the ideal.”³⁰

3.1.2. The NGOs Initiatives

The second subset of initiatives is those by NGOs. In 1993, more than 110 NGOs from 26 Asian countries formulated the Asia-Pacific NGO Conference on Human Rights in Bangkok,

²⁸ See UN Doc. E/CN.4/1997/44, *supra* note 15.

²⁹ Report of the Secretary-General on Regional Arrangements for the Promotion and Protection of Human Rights in the Asian and Pacific region, (Mar. 8, 2002) U.N. Doc. E/CN.4/2002/WP3.

³⁰ Asia Pacific Human Rights Network, *Establishing a Regional Human Rights Mechanism for the Asia-Pacific Region*, 2-3, APHRN Paper – Feb. 2004. http://www.asiapacificforum.net/about/annual-meetings/8th-nepal-2004/downloads/ngo-statements/ngo_regional.pdf; See also, South Asia Human Rights Documentation Center (HRDC), *No Miracles in the Forbidden City Ritual Workshop in Beijing for an Asia Pacific Regional Human Rights Arrangement* (Mar. 1, 2000) <http://www.hrhc.net/sahrhc/hrfeatures/HRF16.htm>

Thailand and adopted the Bangkok NGO Declaration on Human Rights.³¹ In the absence of regional intergovernmental human rights mechanisms, NGOs, such as the Asian Forum for Human Rights and Development (Forum-Asia), the Asia-Pacific Human Rights Information Center (HURIGHTS Osaka, Japan), the NGO Forum on Asia-Pacific Economic Cooperation (APEC), the Asia-Pacific Human Rights NGOs Congress, and the Law Association for Asia and the Pacific (LAWASIA) have deliberated the establishment of an NGO-led regional human rights system in Asia.³² At the 1995 Expert Meeting organized by HURIGHTS in Osaka, participating NGOs identified the obstacles to establishing RHRIs as follows: 1) the low level of ratification of human rights treaties, 2) the non-observance of treaty-obligations after ratification, and 3) the cultural relativist argument as opposed to the universality of human rights by the leadership in the region.³³ The NGO Forum on Asia Pacific Economic Cooperation (APEC) was held the same year in Tokyo, Japan with more than 100 NGO participants, which urged the member states of the APEC to ratify and implement all major human rights treaties.³⁴ The 1996 Asia-Pacific Human Rights NGO Congress was organized in Delhi, India by 117 NGOs from 28 Asian countries to reaffirm the importance of observing existing international human rights norms and the respect for the universality, indivisibility, and non-selectivity of human rights. In 1998, over 200 NGOs in Asia adopted the Asian Human Rights Charter – A Peoples’ Charter.³⁵

³¹ Hidetoshi Hashimoto, *supra* note 7, at 117-9.

³² *Id.*

³³ *Id.* The Expert Meeting also proposed three steps for establishing a regional human rights mechanism. They are 1) to set up sub-regional NGO-led body to handle research and education, 2) to set up inter-governmental forum, and 3) to set up sub-regional or regional human rights mechanism.

³⁴ *Id.*

³⁵ Asian Human Rights Charter, adopted in Kwangju, South Korea, 1998. <http://material.ahrchk.net/charter>; See also Seth R. Harris, *Asian Human Rights: Forming a Regional Covenant*, 1 ASIAN-PAC. L. & POL’Y J. 17, 2-5 (2000); Vitit Muntarbhorn, *Asia, Human Rights and the New Millennium: Time for a Regional Human Rights Charter?* 8 TRANSNAT’L L. & CONTEMP. PROBS. 407, 413-5 (1998).

It reflects the growing recognition by NGOs of the importance of regional human rights institutions and conventions³⁶ against “the official disregard or contempt of human rights in many Asian states.”³⁷ Many human rights NGOs have also been deeply involved in and have cooperated in intervening and raising awareness by preparing reports, presenting issues, and disseminating information during most of the major inter-governmental regional meetings, and have urged member states and regional organizations to place human rights at the center of their agenda.

Undoubtedly, the role of human rights NGOs in the region for the support of RHRIs cannot be ignored, which will be discussed in depth in Chapter Six. I believe such extensive transnational alliances and rich networks make human rights NGOs in the Asia-Pacific region the impetus for a regional human rights system. The reason lies in the fact that many NGOs are not tied to the boundary of the state in their particular human rights issues and work across national borders as agents for a regional civil society and for fostering a human rights culture in the region. Indeed, it is encouraging that numerous NGOs in the Asia-Pacific region have worked for the establishment of regional human rights mechanisms. There are, however, still weak links between NGOs and governments and relatively low support from individual governments for NGO initiatives.³⁸ And unfortunately, this has hampered NGOs’ enormous efforts to bring about regional human rights arrangements.

³⁶ Asian Human Rights Charter, *Id.*, Art.16.1. and 16.2.

³⁷ *Id.* Art.1.6.

³⁸ Hidetoshi Hashimoto, *supra* note 7, at 39-41.

3.1.3. *The NHRIs Initiatives*

The last subset of initiatives includes the National Human Rights Institutions (NHRIs) initiatives under the framework of the Asia-Pacific Forum of National Human Rights Institutions (APF). The APF's goal is to coordinate the functions of NHRIs in accordance with international human rights standards by sharing information on human rights violations, exchanging NHRI staff and cooperating for best practices. So far, it is considered "the most cohesive regional human rights body in the Asia-Pacific region."³⁹

During the First U.N. Regional Workshop in Manila (1990), three heads of NHRIs from Australia, New Zealand, and the Philippines discussed the feasibility of a regional organization of NHRIs, but decided that at least five countries in the region should join to establish such an institution for it to be credible and accountable.⁴⁰ With the adoption of the 1993 Paris Principles, the Asia-Pacific region saw an increasing number of NHRIs. In 1994 and 1995, a detailed proposal for the structure of an *Asia-Pacific Conference* of NHRIs by the Australian Human Rights and Equal Opportunity Commission (HREOC) provided an opportunity for more concrete discussions among several NHRIs, including some from India and Indonesia.⁴¹ Finally, in 1996, following an agreement among the heads of NHRIs from Australia, India, Indonesia, and New Zealand, the APF was established as a regional human rights organization in the Asia-Pacific

³⁹ The Asia-Pacific Human Rights Network, *Report on Establishing a Regional Human Rights Mechanism for the Asia-Pacific Region*, 2 Asia. Pac. J.H.R. & L. 82, 83 (2004).

⁴⁰ Brian Burdekin, NATIONAL HUMAN RIGHTS INSTITUTIONS IN THE ASIA-PACIFIC REGION, 98-101 (2007).

⁴¹ *Id.*

region and held its first meeting in Darwin, Australia.⁴² During the first meeting, they adopted its charter, the so-called *Larrakia Declaration*, which outlines the following objectives of the APF:

*[T]o provide support to governments in the region in the establishment and development of national human rights institutions, and to expand mutual support, cooperation and joint activity among member institutions.*⁴³

Based on the two basic principles, in 1998, the APF established the Advisory Council of Jurists (ACJ) to support the Forum and individual NHRIs by giving advice on the implementation and interpretation of international human rights norms and issuing a report on the human rights situation in individual member states.⁴⁴ Currently, the APF has 15 full member institutions and two associate members. As a full member, each NHRI should comply with the 1993 Paris Principles and indeed, the condition of meeting the minimum international standard of human rights has strengthened the credibility of the APF.⁴⁵ So far, the APF has held fifteen annual meetings. Their main outcomes are reviewed below:

The Asia-Pacific Forum Annual Meeting	Time, Place and Participation	Main Issues and Report (<i>emphasis added</i>)
The 1 st APF Annual Meeting	Darwin, Australia, 1996 4 NHRIs.	* Discussed matters of common interest to NHRIs: <i>independence, functions and powers, education, media relations, and investigation process.</i> * Adopted the <i>Larrakia Declaration</i> with an agreement to establish the APF.

⁴² *Id.*, at 98-101.

⁴³ See The History of the Asia-Pacific Forum, <http://www.asiapacificforum.net/about/history>

⁴⁴ See Pamela A. Jefferies, *Human Rights, Foreign Policy, and Religious Belief: An Asia/Pacific Perspective*, 2000 BYU L. REV. 885, 892 (2000).

⁴⁵ Brian Burdekin, *supra* note 40, at 98-101.

The 2 nd APF Annual Meeting	New Delhi, India, 1997 6 NHRIs.	<ul style="list-style-type: none"> * Emphasized that no category of rights takes priority over another by focusing <i>both on the economic, social and cultural rights and the civil and political rights</i>. * Agreed to set up an international human rights law advisory panel stressing the importance of developing human rights jurisprudence for the Asia-Pacific region.
The 3 rd APF Annual Meeting	Jakarta, Indonesia, 1998 6 NHRIs and 21 governments as observers.	<ul style="list-style-type: none"> * Changed the name from <i>Regional Workshop</i> to <i>Annual Meeting</i> to reflect the growth of the APF. * Established an <i>Advisory Council of Jurists</i>. * Rejected arguments that human rights were out of character with Asian Values, and stressed a clear commitment to the universality of human rights.
The 4 th APF Annual Meeting	Manila, the Philippines, 1999 7 NHRIs and 20 governments as observers.	<ul style="list-style-type: none"> * Addressed the role of NHRIs in the fight against <i>gender discrimination</i>, especially the <i>trafficking in women</i> and discussed the death penalty and its use. * Provided an <i>intervention from the NGOs</i> to present joint statements to each plenary session of the annual meeting.
The 5 th APF Annual Meeting	Rotorua, New Zealand, 2000 8 NHRIs and 21 governments as observers.	<ul style="list-style-type: none"> * Discussed the role of NHRIs in <i>the promotion of democracy, and against racism</i>. * Discussed the use of child soldiers and the situation of internally-displaced persons in the region.
The 6 th APF Annual Meeting	Colombo, Sri Lanka, 2001 9 NHRIs.	<ul style="list-style-type: none"> * Addressed the role of NHRIs in responding to <i>gender issues and HIV-AIDS</i>.

		* Stressed building co-operative relationships with NGOs.
The 7 th APF Annual Meeting	New Delhi, India, 2002 12 NHRIs.	* Addressed the role of NHRIs for the prevention of <i>the trafficking of women and children</i> . * Considered the role of NHRIs in the development of a proposed international convention on <i>the rights of people with disabilities</i> . * Established the category of 'Associate Membership' of the APF.
The 8 th APF Annual Meeting	Kathmandu, Nepal, 2004 12 NHRIs as full members.	* Focused on <i>the rule of law, anti-terrorism measures</i> , and the role of NHRIs. * Discussed the independence of NHRIs based on the Paris Principles. * Discussed the issue of trafficking, the death penalty, and child pornography.
The 9 th APF Annual Meeting	Seoul, Korea, 2004 14 NHRIs as full members.	* Held prior to the 7 th International Conference for NHRIs. (One-day closed business session meeting.) * Considered a training workshop and seminar for NHRIs. * Discussed the issue of the responsiveness of governments to the recommendations and findings of NHRIs.
The 10 th APF Annual Meeting	Ulaanbaatar, Mongolia, 2005 15 NHRIs as full members.	* Discussed the role of NHRIs in <i>the prevention of torture and other forms of ill-treatment</i> . * Addressed the role of NHRIs in human rights education.
The 11 th APF Annual Meeting	Suva, Fiji Islands, 2006 16 NHRIs as full members.	* Welcomed proposals to strengthen the <i>accreditation guidelines</i> of the International Coordination Committee of National Institutions (ICC) and recommended that the APF

		<p>membership procedures be reviewed once the ICC guidelines were finalized.</p> <ul style="list-style-type: none"> * Addressed the role of NHRIs for <i>international labor standards</i> focusing on incorporating them in domestic codes and applying them to issues of trafficking and migration. * Discussed strategies to protect <i>the rights of human rights defenders</i>. * Discussed ACJ's report on <i>the right to education</i>.
The 12 th APF Annual Meeting	<p>Sydney, Australia, 2007 17 NHRIs. (150 representatives from NHRIs, governments, NGOs, and the U.N.)</p>	<ul style="list-style-type: none"> * Discussed the issues of 1) <i>the protection of the rights of people with disabilities</i> and 2) the response to the human rights dimensions of <i>climate change</i>. * NHRIs from Thailand, Indonesia, Malaysia, and the Philippines signed a <i>Declaration of Cooperation</i> with a commitment to work together in areas of shared concern. They agreed to cooperate in the development of a human rights mechanism for the ASEAN region. * NHRIs from Afghanistan, Jordan, Palestine, and Qatar also expressed strong interest in establishing a similar model of cooperation for West Asia. * NGOs highlighted the important role of NHRIs for the protection mechanisms for human rights defenders.
The 13 th APF Annual Meeting	<p>Kuala Lumpur, Malaysia, 2008 17 NHRIs (170 representatives from NHRIs, governments, NGOs, and the U.N.)</p>	<ul style="list-style-type: none"> * Discussed effective approaches to engage with the <i>Universal Periodic Review</i> process established by the U.N. Human Rights Council. * Stressed the importance of <i>the</i>

		<p><i>corporate social responsibility</i> for the protection of human rights.</p> <p>* Discussed the situation facing <i>human rights defenders</i> across the Asia-Pacific region, and NGOs suggested practical steps to the APF for supporting human rights defenders.</p> <p>* Noted the APF's concern with the continuing human rights violations in Myanmar.</p>
The 14 th APF Annual Meeting	<p>Amman, Jordan, 2009 17 NHRIs (150 representatives from NHRIs, governments, NGOs, and the U.N.)</p>	<p>* Discussed the role of NHRIs in <i>fighting corruption</i> by developing a human-rights based approach.</p> <p>* Regarding the issue of <i>human rights and religion</i>, stressed the building of inter-faith and intra-faith dialogue to promote understanding the protection of human rights, and shared member states' practices.</p> <p>* NGOs urged the APF and NHRIs to support human rights defenders in the region.</p> <p>* Noted concerns with human rights violations in a number of countries across the region, especially, Myanmar, Iran and the Occupied Palestinian Territories.</p>
The 15 th APF Annual Meeting	<p>Bali, Indonesia, 2010 17 NHRIs and 3 newly established NHRIs in the region as observers.</p>	<p>* Decided that <i>the APF Conference</i> is to be held on a biennial basis from 2011 in conjunction with the APF meeting. It will bring a wide range of stakeholders together to discuss human rights issues in the Asia-Pacific region.</p> <p>* Discussed the drafting of a five-year APF Strategic Plan for 2011-2015.</p>

Table 2: The Asia-Pacific Forum of National Human Rights Institutions Annual Meeting

In my estimate, the APF annual meetings have made four significant contributions so far. First, they have strengthened the capacity of each NHRI to protect and promote human rights in its country by sharing information and best practices. The APF meetings have been held to examine the role of NHRIs in human rights issues of common concern in the Asia-Pacific region, such as economic, social, and cultural rights, the right to education, human trafficking, gender discrimination, anti-corruption, racism, religion, and the rule of law and democracy. In addition, with the exchange of experiences, each NHRI can get a sense of what should be a top priority for the promotion and protection of human rights in any individual state.

Second, the annual meetings have supported NHRIs in meeting international standards and effectively implementing them by discussing timely issues, such as the rights of people with disabilities, the rights of migrant workers, the prevention of torture, and the Universal Periodic Review (UPR), in conjunction with the newly adopted international human rights conventions and treaties, or the new monitoring system of the U.N. For example, the 13th APF meeting in 2008 reviewed what the role of NHRIs is in the effective implementation of the UPR process created in 2006 by the U.N. They also tried to delineate how NHRIs can intervene in governments' drafting and submission of the national reports on human rights to the U.N., and at the same time, reflect concern from civil society and human rights NGOs in the report.

Third, compared to the U.N. Workshops, the APF meetings provided more opportunities for NGOs, including the Asian NGOs Network on National Human Rights Institutions (ANNI),⁴⁶ to actively participate in and present their concerns in the region. In particular, at those meetings,

⁴⁶ The Asian NGOs Network on National Human Rights Institutions (ANNI) has evolved to coordinate NGOs in the region to develop effective NGO-NHRI relationships with human rights NGOs from 14 countries across Asia.

NGOs stressed the importance of the rights of human-rights defenders and highlighted the experiences of these defenders.

Fourth, the APF meetings facilitated the cooperation of NHRIs at the sub-regional level for the establishment of sub-regional human rights institutions. Four NHRIs in the South-East Asia region actually adopted a declaration of cooperation during the 12th Annual Meeting and it became the driving force behind the establishment of sub-regional human rights bodies in the region. As a result, the ASEAN Charter, including the mandate to establish an ASEAN human rights body, was ratified in 2008 and the establishment of an ASEAN Intergovernmental Commission on Human Rights (AICHR) was adopted and approved in 2009.⁴⁷ More details of the developing human rights system at the sub-regional level through NHRIs⁴⁸ will be discussed in the next two chapters.

By ensuring that NHRIs meet international standards of independence and accountability, the APF has served as “an intermediary in the region between individual state policy and/or behavior and their respective monitoring bodies.”⁴⁹ Furthermore, though it is not a high-level inter-governmental institution and its interests are still limited to NHRIs, the APF has fostered “an environment which may increasingly become more amenable to the creation of a strong regional human rights institution,”⁵⁰ through its active work and dynamic cooperation with member NHRIs.

⁴⁷ See The Working Group for an ASEAN Human Rights Mechanism, <http://www.aseanhrmech.org/aboutus.html>

⁴⁸ See Andrea Durbach, Catherine Renshaw and Andrew Byrnes, *A tongue but no teeth? The emergence of a regional human rights mechanism in the Asia-Pacific*, 31 Sydney Law Review 211 (2009).

⁴⁹ The Asia-Pacific Human Rights Network, *supra* note 39, at 83.

⁵⁰ Andrea Durbach et. al., *supra* note 48, at 238.

3.1.4. Summary

In general, the over two decades since the First U.N. Workshop for establishing regional human rights arrangements in Manila (1990) and the adoption of the 1993 Bangkok Declaration,⁵¹ have witnessed futile efforts, both through the top-down approach of the U.N. and Asian governments and the bottom-up approach of numerous NGOs in Asia, which have failed to establish regional human rights mechanisms. Why have both approaches failed? The former has not fully cooperated with already existing national and regional human rights institutions and has mainly relied on individual governments' political will, which obviously has no intention of establishing a regional human rights system and binding norms. The latter has worked without enough support from formal governmental institutions. The NHRIs initiatives, with their relatively immediate approach, have worked successfully both with governments and NGOs, and have shown some promising signs as examined above. To my mind, however, there are no concrete steps toward the establishment of RHRIs yet; only the hope that NHRIs and their network through the APF can gradually change the individual governments' attitudes, as demonstrated at the sub-regional level with the establishment of the ASEAN human rights body.

3.2. WHY HAS ASIA NOT HAD REGIONAL HUMAN RIGHTS INSTITUTIONS SO FAR?

Above, I reviewed all the major initiatives for the creation of RHRIs in the Asia-Pacific region categorizing them in three subsets. Based on this analysis, I will suggest five main reasons

⁵¹ Bangkok Declaration, REPORT OF THE REGIONAL MEETING FOR ASIA OF THE WORLD CONFERENCE ON HUMAN RIGHTS, (Bangkok, Mar. 29 – Apr. 2, 1993), UN Doc. A/CONF.157/ASRM/8. Article 26 of the Bangkok Declaration clearly “reiterates the need to explore the possibilities of establishing regional arrangements for the promotion and protection of human rights in Asia.” *Id.* at 26.

that have hindered the establishment of RHRIs. These are: 1) sovereignty, 2) the failures in the recognition of human rights after WWII, 3) the failure of major Asian powers to play a leading role in human rights initiatives, 4) the relatively low ratification rate of major U.N. human rights treaties, and 5) the Asian values debates. The first four items will be discussed in this section and the Asian values arguments will be examined in the next one.

3.2.1. *Sovereignty and Human Rights*

Many Asian governments still consider human rights issues an internal affair.⁵² In this context, states are reluctant to join or establish regional human rights arrangements that might make a state vulnerable to accusations by individuals, NGOs or even by other countries.⁵³ In other words, most Asian governments have considered international human rights norms a threat to state sovereignty and nothing more than a politicization of human rights by the Western countries in order to intervene in Asian states' internal affairs. Though the 1993 Bangkok Declaration on Human Rights emphasized the need to explore the possibility of establishing RHRIs in its Article 26, it also stressed "the universality, objectivity and non-selectivity of all human rights and the need to avoid the application of double standards in the implementation of human rights and its politicization."⁵⁴ Many U.N. members from the Third World countries have

⁵² Hidetoshi Hashimoto, *supra* note 7, at 130-1.

⁵³ *Id.* See also Bilahari Kausikan, *The Asian Values Debate: A View from Singapore*, in *DEMOCRACY IN EAST ASIA* 17-26 (Larry Diamond and Marc Plattner eds., 1998); Bilahari Kausikan, *An Asian Approach to Human Rights*, 89 *AM. SOC'Y INT'L L. PROC.* 146 (1995); Christina M. Cerna, *East Asian Approaches to Human Rights*, 89 *AM. SOC'Y INT'L L. PROC.* 152 (1995).

⁵⁴ Bangkok Declaration, *supra* note 51. At preamble and Art. 7.

also shown concern for the politicization of human rights.⁵⁵ In fact, most developing countries consider international human rights “merely notes in the margins of legal and political debate, supported with zeal by few and ignored by many.”⁵⁶ As Antony Anghie maintains, the challenge to universality from the Third World countries arose “not because of differences in culture [and religions], but differences in interest: the difference between the developed and developing states.”⁵⁷ He also points out the relationship between international human rights law and sovereignty:

*Human rights law is revolutionary because it purports to regulate the behavior of a sovereign within its own territory. The emergence of Third World societies, as independent sovereign states, was simultaneous with the creation of international human rights law, which significantly conditioned the character of that sovereignty.*⁵⁸

I agree with his argument that “Third World sovereignty is distinctive,” in the sense that Western sovereignty has been protected against the development of international law, while non-Western countries have been subject to international law. But, at the same time, I want to point out that the international human rights mechanism was emerged from the ideal to protect the people, whose human rights are violated by their governments but who cannot seek remedies from their countries. Therefore, while it is important to contest the imperial and post-colonial

⁵⁵ For example, Tareq Ariful Islam, the delegate from Bangladesh said that “the politicization of human rights was an obstacle to the non-selective and universal application of human rights standards.” Nasharudin Mat Isa, the delegate from Malaysia stated that “too often political considerations came into play in debates on economic, social and cultural rights, and some countries continued to pick and choose among the rights, in terms of whether they would highlight those rights and how they would be enjoyed.” The Third Committee (Social, Humanitarian and Cultural) of the U.N. General Assembly, *Speakers Warn against Politicization of Human Rights Issues on United Nations*, Sixty-third General Assembly session, (Oct. 28, 2008) UN Doc. GA/SHC/3929. <http://www.un.org/News/Press/docs/2008/gashc3929.doc.htm>

⁵⁶ Helen M. Stacy, HUMAN RIGHTS FOR THE 21ST CENTURY: SOVEREIGNTY, CIVIL SOCIETY AND CULTURE, 8 (2009). See also Jack L. Goldsmith and Eric A. Posner, THE LIMITS OF INTERNATIONAL LAW, 13, 21-78. (2005).

⁵⁷ Antony Anghie, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW, 201 (2004).

⁵⁸ *Id.*, at 254.

nature of international human rights law, it is also important to further the extension of the original ideals of human rights law for the people who face a hostile government, not for the authoritarian government itself.

Using the traditional concept of state sovereignty, China has persistently criticized the U.N. Commission on Human Rights discussion of its policy and stated that human rights belong to its domestic jurisdiction as a sovereign state and it has a policy of noninterference in the domestic affairs of other states.⁵⁹ Therefore, it “is opposed to any action by any country to put pressure on other countries by using the human rights issue or politicizing human rights.”⁶⁰ The Democratic People's Republic of Korea (North Korea) has consistently denounced the report by the Special Rapporteur of the U.N. Human Rights Council.⁶¹ North Korea maintains that “extreme politicization, selectivity and double standards” are prevalent in the U.N.⁶² It also continuously rejects the U.N. General Assembly resolutions⁶³ condemning its human rights record. For example, Pak Dok Hun, a spokesman for the foreign ministry of North Korea, strongly denounced the resolution as a “product of a political plot to forcibly change North Korea's system and ideology” and “a provocation to the North's dignity.”⁶⁴ Most of the Asian

⁵⁹ Seth Harris, *Asian Human Rights: Forming a Regional Covenant*, 17 Asia Pacific Law & Policy Journal 13, 16 (2000).

⁶⁰ The Chinese Foreign Ministry, *China Opposes to Politicization of Human Rights Issues*, Embassy of the People's Republic of China in the United States of America (Mar. 12, 2002) <http://www.china-embassy.org/eng/z/zgrq/t36649.htm>

⁶¹ U.N. Human Rights Council, Human Rights Council Considers reports of Special Rapporteurs on Democratic People's Republic of Korea and Myanmar, (Mar. 13, 2008).

⁶² *Id.*

⁶³ See, for example, Third Committee Draft Resolutions Address Human Rights Violations, (Nov. 21, 2008) UN Doc. GA/SHC/3940.

⁶⁴ See *Report: North Korea rejects U.N. rights resolution*, the Associated Press, Nov. 22, 2008; *North Korea protests proposed UN General Assembly rights resolution*, Jurist, (Nov. 22, 2008); *North Korea rejects UN human rights resolution*, International Herald Tribune, (Nov. 24, 2008).

developing countries' concern for the politicization of human rights stems from "the conditionalities, or linking development assistance to progress in democratization or human rights."⁶⁵ As most Asian countries are still in poor economic conditions, it is natural for leaders of these nations to put their primary concern to improve the material situation through economic development.⁶⁶ Therefore, it has been considered acceptable in the name of economic development and national integrity to infringe on the civil and political rights of people.⁶⁷ I, however, believe that economic development cannot be an excuse for gross human rights violations especially by authoritarian governments in the region. What China, North Korea, and other Asian countries with human rights violations express is not apprehension of interference in the right to development, but rather of interference by the international community against their sovereignty and power to maintain their authority.

Inoue Tatsuo argues that "the disproportionate emphasis on sovereignty betrays a lack of understanding about the close connection between sovereignty and human rights."⁶⁸ In addition, as discussed in Chapter Two, the constraints on accepting the international human rights standards and concepts, in the Asian human rights context, do not come from a lack of understanding of fundamental human rights, but from political considerations.⁶⁹ That is to say, concerns over the politicization of the human rights issue are mainly the result of authoritarian governments' interest in keeping control over their people. The protection and promotion of

⁶⁵ Christina M. Cerna, *supra* note 53, at 155.

⁶⁶ Onuma Yasuaki, *In Quest of Intercivilizational Human Rights: "Universal" Vs. "Relative" Human Rights Viewed from an Asian Perspective*, 1 *Asia. Pac. J.HR & L.*, 53, 60 (2000).

⁶⁷ *Id.*

⁶⁸ Inoue Tatsuo, *Liberal Democracy and Asian Orientalism* in *THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS* 27, 31 (Joanne R. Bauer and Daniel A. Bell, eds., 1999).

⁶⁹ See Bilahari Kausikan, *supra* note 53.

human rights can be enhanced by the respect for a state's sovereignty.⁷⁰ In this new and better developed concept of sovereignty, states should be viewed not as deniers of human rights, but as protectors and promoters of the human rights of their nationals.⁷¹ Indeed, under the regional human rights mechanisms in Asia, "mutual cooperation in furtherance of human rights will not only strengthen national identities and all that goes with that may indeed help different states to discover their true identities and enable them to examine the whole issue of sovereignty in a more enlightened context."⁷² Moreover, as identified by the U.N. Workshops and the APF Annual Meetings, there are common concerns on certain human rights issues that need to be settled through the cooperation of neighboring countries in the region and with financial support from the U.N., such as human trafficking, development, and rights of migrants. Thus, the principle of sovereignty cannot be an excuse against the establishment of RHRIs, because a regional compromise is possible, at least in certain areas of human rights, in which each government will be comfortable to ratify international human rights treaties and adopt regional human rights arrangements. Such cooperation can be the first step toward setting up RHRIs in the region and the increasing number of regional arrangements in certain areas of human rights will ultimately extend its regional cooperation for human rights in general.

3.2.2. Past Failures in the Recognition of Human Rights

⁷⁰ Inoue Tatsuo, *supra* note 68, at 32-4.

⁷¹ *Id.*

⁷² I.A. Rehman, Director of Human Rights Commission of Pakistan, *Asian Human Rights Charter: Need for Asian Regional Mechanisms to Secure Human Rights*, (May. 16, 1998) presented at the Asian Human Rights Charter Conference in Kwangju, South Korea <http://www.hrsolidarity.net/mainfile.php/1998vol08no06/1455>

It has been argued that a regional human rights mechanism in Asia is hard to establish until Japan, the gross human rights violator during WWII, offers redress to its victim countries in Asia.⁷³ To-date, post-war compensations and the reparations of war victims have, however, not been fully settled in spite of the persistent claims against Japan.

The recent unsolved contention over *comfort women* who were forced into prostitution by the Japanese military during WWII is a good example. The majority of women were recruited by force from Korea and China, but women from the Philippines, Vietnam, Malaysia, Thailand, Indonesia, India, Myanmar, and other Japanese-occupied Asian countries were also forced into sexual slavery.⁷⁴ Another example is the consistent denial of the Nanking Massacre, despite the estimate of over 300,000 casualties. Further, the 1946 International Military Tribunal for the Far East (the Tokyo Tribunal) failed to fully disclose the cases of gross human rights violations against civilians in colonized Asian states by the Japanese military officials.⁷⁵ This unwillingness of the Japanese government to offer compensation for its past wrongs not only made its relations with neighboring Asian states worse,⁷⁶ but, more importantly, if certain Asian countries are criticized for their failure to protect human rights, they point out that Japan has not taken full responsibility for human rights violations during its colonial rule yet. The consistent mutual distrust among countries in the Asia-Pacific region has undoubtedly been a considerable

⁷³ Seong-Phil Hong, *The Korean Comfort Women Case: New Claims for the Human Dignity in Asia*, 14, ASIL Human Rights Interest Group Newsletter, Vol.4 No.2 (1994).

⁷⁴ Sarah Soh, *Japan's Responsibility Toward Comfort Women Survivors*, Japan Policy Research Institute, JPRI Working Paper No. 77, (May, 2001) <http://www.jpri.org/publications/workingpapers/wp77.html>; *Factbox: Disputes over Japan's Wartime "Comfort Women,"* Reuters, (Mar. 5, 2007).

⁷⁵ Antonio Cassese and B.V.A. Roling, *THE TOKYO TRIAL AND BEYOND: REFLECTIONS OF A PEACEMONGER*, 48-50 (1993).

⁷⁶ Seong-Phil, Hong, *A Quest for Accountability: Redressing the Wrongs of the Comfort Women*, 35-6, Korean and Korean American Studies Bulletin, Vol.5. (Fall/Winter 1994).

impediment for reconciliation in the region.⁷⁷ Therefore, the task of establishing a regional human rights system in Asia is largely entrusted to the government of Japan, which once humiliated its neighboring countries by establishing the so-called “Great East Asia Co-Prosperty Sphere.”⁷⁸

One more thing to be noted is that at the same time, this is why it is necessary to establish RHRIs in the Asia-Pacific region. The future of human rights is closely linked to how we understand and accommodate the past in the present. In this sense, a large number of Truth and Reconciliation Commissions (TRCs) have been created since the early 1990s with the goal of achieving national unity and legal justice by revealing long-suppressed truths. Similarly, RHRIs in this region can heal the trauma of memory in victim countries and bring regional reconciliation and peace by investigating incidents of gross human rights violations and massacres during WWII and acknowledging past wrongdoings at the regional level.

3.2.3. Failure of Major Asian Powers to Play a Leading Role for Human Rights

There has been no initiator or leader to actively work for the establishment of RHRIs in the region. If there were a commitment by the influential countries, it will be a driving force to persuade other reluctant states to agree to RHRIs in the region. Indeed, the role of major Asian power countries is critical to further the establishment of a regional human rights system. But, as Onuma Yasuaki argues, India, China, and Japan, which are generally considered the major powers in Asia with their regional dominance, economic development and large populations, all

⁷⁷ *Id.*

⁷⁸ *Id.*

have failed to improve the human rights conditions in the Asia-Pacific region.⁷⁹ On the contrary, these countries themselves have many human rights problems of their own.⁸⁰

The Chinese government, for instance, has always rejected the idea of the universality of human rights as a Western notion and, based on Confucianism, the traditional Chinese culture, has been skeptical of the concept of rights due to its legalistic nature.⁸¹ It is true that in 2003, China amended its constitution by adding the provision that "the state respects and safeguards human rights,"⁸² emphasizing the importance of human rights. Yet, considering that China has had and still has a large number of human rights problems especially against ethnic minorities and political offenders, the Chinese government's gradual changes on human rights policy are mainly intended to defend their public policy and reduce criticism from the international community rather than to genuinely protect and promote human rights. Thus, it is hard to expect China to lead other Asian countries in the establishment of RHRI which will be conceived as more harm than good for their domestic human rights situation.

India, a liberal democratic country with a pluralistic party system and free elections, has a generally well-developed human rights protection system at the national level, especially regarding civil and political rights. It, however, has failed to guarantee effectively human rights to its underprivileged people, a large number of whom are illiterate and live in rural areas.⁸³ As Onuma Yasuaki argues, "if one adopts a more comprehensive perspective that includes

⁷⁹ Onuma Yasuaki, *supra* note 66, at 61-9.

⁸⁰ See Bilahari Kausikan, *Asia's different standard*, Foreign Policy, 24-41 (Fall, 1993).

⁸¹ *Id.*, at 61.

⁸² Chinese government, *Report on Progress in China's Human Rights Cause in 2003* (2004).
http://www.gov.cn/english/official/2005-07/28/content_17972.htm

⁸³ Onuma Yasuaki, *supra* note 66, at 62-3.

economic, social and cultural rights, India's overall domestic condition is even less favorable than that of China with regard to human rights."⁸⁴ In India, there is a huge gap between the elites and the other majority of the population in terms of income and education. Also, the broad diversity of religions, languages, and cultures has produced various human rights violations, such as caste discrimination, problems in Kashmir, human trafficking, religious violence, communal violence, and discriminations against minorities.⁸⁵ Overall, India could not have played a leading role in the protection and promotion of human rights in the Asia-Pacific region.

Finally, Japan, whose economic power has been as high as those of major Western countries, has shown little concern for the protection and promotion of human rights in the region.⁸⁶ Not only has it failed to confront the problems of human rights violations during WWII, but, with the belief of most Japanese government officials that Japan should not play a leading political role either regionally or internationally in the postwar period, it has focused its efforts on economic development.⁸⁷ Moreover, the Japanese government has been criticized for its own human rights policy, especially the discrimination against minorities like the Korean residents (Zainichi), the Buraku and the Ainu people.⁸⁸ Ostensibly, since adopting its 1991 Official Development Assistance (ODA) program, the Japanese government has gradually been making an effort to protect basic human rights and freedoms in recipient countries as the ODA Charter stipulates:

⁸⁴ *Id.*

⁸⁵ See Human Rights Watch, *Reports about India*, <http://www.hrw.org/en/by-issue/publications/141>

⁸⁶ Onuma Yasuaki, *supra* note 66, at 63-9.

⁸⁷ *Id.*

⁸⁸ See Jennifer Chan, *GENDER AND HUMAN RIGHTS POLITICS IN JAPAN: GLOBAL NORMS AND DOMESTIC NETWORKS*, (2004).

*Full attention should be paid to efforts for promoting democratization and introduction of a market-oriented economy and the situation regarding the securing of basic rights and freedoms in the recipient country.*⁸⁹

But, in reality, it is hard to assert that “there has been sufficient consistency and transparency in the implementation of the ODA Charter.”⁹⁰ In addition, though there is large number of domestic human rights NGOs in Japan, they are far less influential and effective in changing the Japanese government’s human rights policies compared to Western NGOs.⁹¹ For example, even though there have been decade-long deliberate efforts by NGOs, Japan has not established NHRIs yet.⁹²

Overall, all three countries have failed to play a leading role in the promotion and protection of human rights with the goal of establishing RHRIs in the region. What is even worse, they all have their own human rights problems.

Furthermore, all those major Asian power countries have long been confronting unresolved border disputes. These have raised the regional tension and distrust among the neighboring countries in this region and are also considered an obstacle to the establishment of RHRIs. For example, there have been regional conflicts between China and Japan on the Senkaku Islands; China, India, and Pakistan in the Aksai Chin / Jammu and Kashmir / Azad

⁸⁹ Ministry of Foreign Affairs, Economic Corporation Bureau, *Japan’s ODA 1994 Annual Report*, 248 (1995) cited in Onuma Yasuaki, *supra* note 66, at 68.

⁹⁰ *Id.*, at 69.

⁹¹ *Id.*

⁹² See Asia-Pacific Human Rights Information Center, *Japanese National Human Rights Commission*, FOCUS Vol. 28 (Jun. 2002) <http://www.hurights.or.jp/archives/focus/section2/2002/06/japanese-national-human-rights-commission.html> See also, Citizens' Council for Human Rights Japan, *JAPAN - One step forward to establish human rights relief agency*, Forum-Asia (Jun. 2010) http://www.forum-asia.org/index.php?option=com_content&task=view&id=2600&Itemid=130

Kashmir region; China, Vietnam, and the Philippines on the Macclesfield Bank and Spratly Islands; India and Bangladesh in the Boraibari, Lathitila, and Daikhata-Dumabari regions; India and Sri Lanka on the Kachatheevu Island; Japan and Korea on the Dokdo island / Liancourt Rocks; and Japan and Russia on the South Kuril islands.⁹³

One more thing is worth mentioning in regard to the role of the major Asian powers. As discussed in the previous chapter, Europe, the Americas, and Africa have had regional political and economic organizations like the Council of Europe, the Organization of American States, and the African Union, which have served as the home of the regional system. They have established their regional human rights institutions based on these functional foundations developed over time. Asian states, on the other hand, do not even have such a region-wide political organization as yet, mainly because of past conflicts and the threat to major Asian powers' interests. And finally, even in existing regional economic or security arrangements like APEC, human rights issues have not been a main agenda item but just one among hundreds of others. Here, it might be relevant to introduce what Ernst B. Haas calls the *spill-over effect*. It is a theory of neo-functionalism in international relations which focuses on how the process of regional integration in certain areas, mainly economic ones, expands and accelerates other areas of integration in the region.⁹⁴ It parallels the way regionalism has effectively benefited inter-state trade through regional trade agreements like the Central European Free Trade Agreement (CEFTA), the North American Free Trade Agreement (NAFTA), or the Southern African Development Community (SADC). In the case of the Asia-Pacific region, at the sub-regional

⁹³ Central Intelligence Agency, THE WORLD FACTBOOK: *Disputes – International*, 2009
<https://www.cia.gov/library/publications/the-world-factbook/fields/2070.html#>

⁹⁴ See Amitav Acharya and Alastair Iain Johnston ed., CRAFTING COOPERATION: REGIONAL INTERNATIONAL INSTITUTIONS IN COMPARATIVE PERSPECTIVE, 3-5 (2007). See also Ernst B. Haas, THE UNITING OF EUROPE: POLITICAL, SOCIAL, AND ECONOMIC FORCES 1950– 1957 (1958).

level, the Association of Southeast Asian Nations (ASEAN) recently established its human rights body almost twenty years after the ASEAN Free Trade Area (AFTA), a trade bloc agreement, was adopted in 1992,⁹⁵ and this may be considered an example of such a progress. I am, however, skeptical to employ this concept to my dissertation since I agree with Amitav Acharya that, “the literature on regional integration is heavily Eurocentric with fewer examples of comparative studies that applied the different concepts of regional integration to the Third World.”⁹⁶ In terms of economic integration, although there are several sub-regional political and economic institutions in the Asia-Pacific region, they have not achieved a level of integration equivalent to that in Europe with its “market centralization and generation of welfare,” which can have a *spill-over effect* into other forms of regional cooperation, including human rights.⁹⁷ In the same vein, Joseph S. Nye argues that such functionalist approaches are difficult to apply to other regions, especially where only a small number of elites have control over their governments, which is common in most Third World countries.⁹⁸ Overall, it is notable that the Asia-Pacific region has not even achieved the political and economic integration of other regions and it may partially raise practical difficulties for the creation of RHRIs in the region. Even if there were such political and economic institutions in Asia, I am still doubtful that they would play a critical role in building regional cooperation on human rights, considering the level of economic and political development in most Asian countries and the highly politicized discussion on Asian values which has been going on for over two decades in this region. This is also the reason why I did

⁹⁵ See ASEAN: AFTA & FTAs, <http://www.aseansec.org/12021.htm>

⁹⁶ Amitav Acharya and Alastair Iain Johnston, *supra* note 94, at 5-8.

⁹⁷ *Id.*

⁹⁸ Joseph S. Nye, *Central American Regional Integration*, in Joseph S. Nye, INTERNATIONAL REGIONALISM, 381-2, (1968). See also, Walter Mattli, *Ernst Haas's evolving thinking on comparative regional integration: of virtues and infelicities*, 12 Journal of European Public Policy 327 (2005).

not include the *spill-over effect* as a reason that hampers the creation of RHRIs in the Asia-Pacific region so far in a separate section, and will focus on NHRIs as a driving force for the establishment of RHRIs in Chapters Four and Five.

3.2.4. The Lack of Commitment to Human Rights: Relatively Low Ratification Rate of Major U.N. Human Rights Treaties

Many countries in the Asia-Pacific region still have not signed and ratified international human rights treaties. Many scholars and human rights professionals in NGOs argue that this is one of main obstacles for the establishment of regional human rights mechanisms in the Asia-Pacific region.⁹⁹

In order to examine this problem thoroughly, I will review all Asian states' current status of ratification of nine core international human rights treaties: the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹⁰⁰ the International Covenant on Civil and Political Rights (ICCPR),¹⁰¹ the Optional Protocol to the International Covenant on Civil and Political Rights (OPT 1),¹⁰² the Second Optional Protocol to the International Covenant on Civil

⁹⁹ Hidetoshi Hashimoto, *supra* note 7, at 130-1; Dinah Shelton, REGIONAL PROTECTION OF HUMAN RIGHTS, 1055-6 (2008).

¹⁰⁰ International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966), *entered into force* Jan. 3, 1976.

¹⁰¹ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), *entered into force* Mar. 23, 1976.

¹⁰² Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, UN Doc. A/6316 (1966), *entered into force* March 23, 1976.

and Political Rights, aiming at the abolition of the death penalty (OPT 2),¹⁰³ the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),¹⁰⁴ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),¹⁰⁵ the Convention on the Elimination of All Forms of Racial Discrimination (CERD),¹⁰⁶ the Convention on the Rights of the Child (CRC),¹⁰⁷ and the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (MWC).¹⁰⁸

However, before reviewing the statistics on the Asian countries' ratification rate of major international human rights norms let me briefly discuss the efficacy of international human rights treaties in terms of states' compliance, a topic that has been vigorously debated in the recent scholarly output.

In her 2002 article, "Do Human Rights Treaties Make a Difference?" Oona Hathaway presents arguments against the effect of international human rights treaties.¹⁰⁹ Based on her research covering the practices of 166 countries over a 40-year period in five areas of

¹⁰³ Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, G.A. res. 44/128, annex, 44 U.N. GAOR Supp. (No. 49) at 207, UN Doc. A/44/49 (1989), *entered into force* July 11, 1991.

¹⁰⁴ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984), *entered into force* June 26, 1987.

¹⁰⁵ Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, UN Doc. A/34/46, *entered into force* Sept. 3, 1981.

¹⁰⁶ International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, UN Doc. A/6014 (1966), *entered into force* Jan. 4, 1969.

¹⁰⁷ Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, UN Doc. A/44/49 (1989), *entered into force* Sept. 2 1990.

¹⁰⁸ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, UN Doc. A/45/49 (1990), *entered into force* 1 July 2003.

¹⁰⁹ Oona Hathaway, *Do Human Rights Treaties Make a Difference?* 111 Yale L.J. 935 (2002).

international human rights laws, she concludes that the ratification of human rights treaties has little or no effect on each individual state's human rights record:

*Although the ratings of human rights practices of countries that have ratified international human rights treaties are generally better than those of countries that have not, noncompliance with treaty obligations appears to be common. More paradoxically, when I take into account the influence of a range of other factors that affect countries' practices, I find that treaty ratification is not infrequently associated with worse human rights ratings than otherwise expected.*¹¹⁰

She also stresses that it is necessary to reassess the current U.N. human rights policy to pressure individual states into ratifying the major human rights treaties and to enhance the monitoring system of human rights treaties by strengthening each state's self reporting process, best exemplified, I believe, by the Universal Periodic Review.¹¹¹

*[B]ased on the present analysis, ratification of the treaties by individual countries appears more likely to offset pressure for change in human rights practices than to augment it. The solution to this dilemma is not the abandonment of human rights treaties, but a renewed effort to enhance the monitoring and enforcement of treaty obligations to reduce opportunities for countries to use ratification as a symbolic substitute for real improvements in their citizens' lives.*¹¹²

Ryan Goodman and Derek Jinks challenge Hathaway's analysis by arguing that "the incorporation of human rights norms [into state practice] is a process... treaty law plays an

¹¹⁰ *Id.*, at 1940.

¹¹¹ *Id.*, at 2023-4.

¹¹² *Id.*, at 2025.

important role in this process... and Hathaway's study does not provide a reason to reject these views."¹¹³

Similarly, in her 2009 book, Mobilizing for Human Rights, Beth Simmons argues that “international law, and specifically treaty ratification, has made a positive contribution to human rights practices around the world.”¹¹⁴ Using both quantitative case studies and qualitative analyses of how treaties have influenced politics and practices in particular countries and how government commitments to treaties are translated into better human rights practices (with six major human rights treaties in the last fifty years), she stresses:

*[E]ven the most politically sensitive human rights treaties have significant positive effects in those countries where political institutions have been unstable. Treaties alter politics through the channel of social mobilization, where domestic actors have the motive and the means to form and to demand their effective implementation. In stable autocracies, citizens have the motive to mobilize but not the means. In stable democracies, they have the means but generally lack the motive.*¹¹⁵

Though governments can ratify human rights treaties for both sincere and insincere strategic reasons,¹¹⁶ she demonstrates that the ratification of treaties can lead to better rights practices by focusing on rights stakeholders within ratifying countries rather than external pressure from the United Nations or international communities.

¹¹³ Ryan Goodman and Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 Eur. J. Int'l L. 171, 171-3 (2003).

¹¹⁴ Beth A. Simmons, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS*, 365 (2009).

¹¹⁵ *Id.*, at 16.

¹¹⁶ Regarding insincere strategic reasons, Simmons argues that sometimes, each government's decision to make a treaty commitment is influenced by the commitments of other countries in the region. And it shows a desire by governments to avoid criticism by pursuing a ratification of treaties that is similar and also acceptable in the region. *See Id.*, at 86-96 and 110-1.

*It should hardly be surprising that governments' solemn commitments to respect rights have been taken seriously by individuals and groups who imagine a better life if these promises are in fact kept.*¹¹⁷

In the same vein, Eric Neumayer points out that the efficacy of ratification of human rights treaties depended on the strength of civil society groups and without them, “treaty ratification has no effect and is possibly even associated with more human rights violations.”¹¹⁸

My interpretation of these discussions on the efficacy of international human rights treaties and states' commitment is the following. The ratification of international human rights treaties shows the willingness of individual countries to comply with them. Surely the ratification itself cannot be directly linked to the enhancement of human rights in individual states. It, however, has been a driving force for all rights stakeholders including civil society to mobilize toward better human rights practices. With the ratification, they have a means and motives to demand changes on governments' human rights policies for the effective implementation of international human rights norms, even when governments initially intended to ratify them with insincere motivation.

To establish an effective regional human rights system in the Asia-Pacific region, it is necessary for most countries in the region to abide by major international human rights norms. And as discussed, their intention to comply with international human rights standards can be shown through their ratification of international human rights treaties. But looking through the ratification of major human rights treaties by Asian states reveals that there still is a consistent lack of political will to set up RHRI in the region.

¹¹⁷ *Id.*, at 380.

¹¹⁸ Eric Neumayer, *Do International Human Rights Treaties Improve Respect for Human Rights?* 49 J. Conflict Resol. 925-6 (2005).

	ICESCR	ICCPR	OPT 1	OPT 2	CERD	CEDAW	CRC	CAT	MWC
All State Parties	160	167	113	73	174	186	193	147	44
Asia-Pacific region (40)	23	21	8	5	24	36	40	17	3
<i>In the last 10 years</i>	9	7	1	3	3	10	1	7	1
<i>Since 1993</i>	9	8	1	3	4	19	21	9	3
State with NHRIs (15)	12	12	7	5	13	14	14	13	3

Table 3: Ratification Status of Major Human Rights Treaties

This table indicates that except for the CRC and the CEDAW, most of the treaties are still not ratified in Asia. While it seems that there is an increasing recognition of the need to protect and promote women's (CEDAW) and children's (CRC) rights in the Asia-Pacific region, it is clear that there is still a lack of individual governments' commitment to the promotion and protection of the fundamental human rights of their nationals.

One positive aspect is that states with NHRIs¹¹⁹ have ratified most of the treaties. In addition, since the adoption of the 1993 Paris Principles, many countries in Asia have joined or ratified major human rights treaties with the establishment of NHRIs. This shows that there could be more ratification of treaties if the countries without NHRIs establish them.

Another positive aspect is that there are increasing numbers of ratifications in the last 10 years, especially regarding the most important human rights conventions, ICESCR and ICCPR. This demonstrates that there has been a growing consideration of human rights in the Asia-Pacific region even after the 1998 Asian financial crisis when the Asian values debate erupted.

¹¹⁹ Here, only the NHRIs with the full membership of the APF are grouped as NHRIs. See <http://www.asiapacificforum.net/members/apf-member-categories>

	ICESCR	ICCPR	OPT 1	OPT 2	CERD	CEDAW	CRC	CAT	MWC
South and West Asia (8)	7	6	3	1	7	8	8	6	1
South-East Asia (11)	7	6	1	2	7	11	11	5	2
East Asia (5)	5	4	2	0	4	5	5	4	0
Pacific (16)	4	4	2	2	6	12	16	2	0
Asia-Pacific region (40)	23	20	8	5	24	36	40	17	3

Table 4: Ratification Status of Major Human Rights Treaties in the Asia-Pacific region

This table breaks down the ratification rates by sub-region. Notice the extremely low level of ratification in the Pacific region.¹²⁰ Another notable point is the ratification rate of the OPT2. It demonstrates that all East Asian countries oppose the abolition of the death penalty. The last notable point is that only three Asian countries have ratified the MWC.¹²¹ Considering that Asia has the biggest migrant sending and receiving countries, there should be an intensive effort to get Asian governments to ratify this convention.

The ratification rates of major international human rights treaties by many countries in this region are still low compared to those in Europe, the Americas, and Africa. A recent overall ranking of states by the number of international treaties they have ratified, provided by a team of researchers from University College London, shows that countries in the Americas have the highest number of ratification rates, followed by European and African countries. The bottom

¹²⁰ OHCHR also indicates this factor. See website of OHCHR Pacific Regional Office, *Priorities* (2008-2009). <http://www.ohchr.org/EN/Countries/AsiaRegion/Pages/PacificSummary0809.aspx>

¹²¹ This convention is designed to prevent the exploitation of migrant workers, and in particular, to eliminate the illegal recruitment and trafficking of migrant workers and the irregular condition of employment. It provides the protection of human rights of both documented and undocumented migrants and obligations on migrant-sending and receiving countries. See International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, *supra* note 108.

end of the ranking is made up predominantly of most states in the Asia-Pacific region.¹²² The ratification rates of the primary human rights documents in other regions is also high: in Africa, all 53 member states of the African Union have ratified the African Charter on Human and People's Rights; in the Americas, 24 out of 35 member states of the Organization of American States have ratified the American Convention on Human Rights (though the U.S., Canada and Cuba have not ratified any of the human rights treaties of the Inter-American system); in Europe, all 47 member states of the Council of Europe have ratified the European Convention on Human Rights.¹²³

Overall, such an evidence of the lack of commitment to human rights by most countries in the Asia-Pacific region shows that this is one of main obstacles for the creation of RHRIs in the region.

3.3. ASIAN VALUES: HUMAN RIGHTS DISCOURSE IN ASIA

3.3.1. The Asian Values Argument

In Asia, the major obstacle for the establishment of RHRIs is the Asian values argument which stems from the different perception of human rights.¹²⁴ As Joseph Chan points out, most of the political vocabulary, constitutional and legal concepts and structures in Asian states were

¹²² University College London, NOMINAL COMMITMENTS TO HUMAN RIGHTS: A GLOBAL SURVEY, 2009 [HTTP://WWW.UCL.AC.UK/SPP/RESEARCH/RESEARCH-PROJECTS/NCHR/](http://www.ucl.ac.uk/spp/research/research-projects/nchr/)

¹²³ *Id.*

¹²⁴ Hidetoshi Hashimoto, *supra* note 7, at 130-1; Dinah Shelton, *supra* note 99.

inherited from the West, especially through the colonial period.¹²⁵ Although they have accepted other Western institutions and standards in the economic sphere, most Asian countries, however, have been reluctant to adopt and implement international human rights norms.¹²⁶ The debate on Asian values and the different concept on human rights in Asia has been going on for over a decade.¹²⁷ It is generally considered that the idea of Asian values emerged in 1977, when a conference was held on “Asian values and modernization” led by Lee Kuan Yew.¹²⁸

For a long time, many Asian leaders argued that human rights is a Western concept and thus inapplicable to the Asian people. The Asian values argument that has justified authoritarian rule has also been strongly supported by many political leaders in Asia.¹²⁹ Asian values themselves are a vague concept which was actively discussed in the early 1990s.¹³⁰ Though there is no single concept of Asian values, most of the claims include Confucian ideas such as loyalty towards family and state, and a sacrifice of individual rights for the nation’s development and security.¹³¹ For example, Xiaorong Li briefly summarizes the Asian values argument as follows:

- 1) *Rights are culturally specific.*
- 2) *The community takes precedence over individuals.*
- 3) *Social and economic rights take precedence over civil and political rights.*

¹²⁵ Joseph Chan, *Asian Values & Human Rights: An Alternative View* in *DEMOCRACY IN EAST ASIA*, 28, 32-4 (Larry Diamond and Marc Plattner ed., 1998).

¹²⁶ *Id.*

¹²⁷ See Michael Barr, *LEE KUAN YEW: THE BELIEFS BEHIND THE MAN*, 220 (2000).

¹²⁸ Lee’s arguments gained international prominence from an interview in *Foreign Affairs* in 1994. See Fareed Zakaria, *Culture Is Destiny: A Conversation with Lee Kuan Yew*, *Foreign Affairs*, (Mar./Apr. 1994).

¹²⁹ Takashi Inoguchi and Edward Newman, *Asian Values and Democracy in Asia*, (Mar. 28, 1997).
<http://www.unu.edu/unupress/asian-values.html>

¹³⁰ Xiaorong Li, “*Asian Values*” and the *Universality of Human Rights*, Report of the Institute for Philosophy and Public Policy, Vol. 16. No.2, (Spring 1996).

¹³¹ Amartya Kumar Sen, *Democracy as a Universal Value*, *Journal of Democracy*, Vol.10 (3), 3, 10-11 (Jul. 1999).

4) *Rights are a matter of national sovereignty.*¹³²

As Lee Kwan Yew argues, it is relatively true that traditional Asian values have played a crucial role in the economic success of this region over the last few decades.¹³³ But based on Asian values, many governments like Singapore's have maintained that most of the international human rights norms should be interpreted for best use by individual Asian countries.¹³⁴ China, too, has contended that Asia should have a different standard of human rights. The Chinese government emphasized regional differences and asked the different human rights frameworks to allow for regional diversity arguing that individuals must put the rights of states before their own.¹³⁵ Some East and South-East Asian governments even saw "order and stability as preconditions for economic growth, and growth as the necessary foundation of any political order that claims to advance human dignity."¹³⁶ Overall, through the Asian value debate and a non-Western approach to human rights, many Asian governments have rejected the universal validity of international human rights norms.¹³⁷

However, as Amartya Sen points out, there is no general evidence to support the claims that there is a conflict between human rights, especially civil and political rights, and economic development.¹³⁸ Rather, the success of the most East Asian countries' economies is due to the

¹³² Xiaorong Li, *supra* note 130.

¹³³ Takashi Inoguchi and Edward Newman, *supra* note 129.

¹³⁴ *Id.*

¹³⁵ Fried Van Hoof, *Asian Challenges to the Concept of Universality: Afterthought on the Vienna Conference on Human Rights* in HUMAN RIGHTS: CHINESE AND DUTCH PERSPECTIVES 1, 6-8 (PETER R. BAEHR et al. ed., 1996); Xin Chunying, *Can the Pluralistic World Have a Unified Concept of Human Rights* in HUMAN RIGHTS: CHINESE AND DUTCH PERSPECTIVES 43, 55-6 (PETER R. BAEHR et al. ed., 1996).

¹³⁶ Bilahari Kausikan, *supra* note 80, at 35.

¹³⁷ Inoue Tatsuo, *supra* note 68, at 37-42.

¹³⁸ Amartya Sen, *Human Rights and Asian Values*, THE NEW REPUBLIC, July 14-21, 1997.

correct economic policies, which he calls “helpful policies,” including “openness to competition, the use of international markets, a high level of literacy and education, successful land reforms, and public provision of incentives for investment, exporting, and industrialization,” and not the result of a harsher political system that partially sacrifices the country’s basic human rights.¹³⁹ Contrary to what Asian values proponents maintain by linking economic development with lower recognition of political rights, many African countries with development-oriented dictatorships are still struggling with economic difficulties and hardships due to their political corruption, instability, and inappropriate intervention by outside actors including international financial institutions.¹⁴⁰

Further, as Sen argues, it is very doubtful that there are pre-existing human rights standards or values that all Asian states can accept.¹⁴¹ It is hard to define what Asian values are and where they come from because there are different value systems in Buddhism, Confucianism, Hinduism, and Islam which are all wide-spread in Asia.¹⁴² It is also notable that religious and cultural diversity in the Asia-Pacific region is not defined by national borders or sub-region. China, Indonesia, India, and Malaysia, for example, are all multi-religious, multi-cultural, and multi-national, even though they have a very strong voice in the Asian value debate.¹⁴³ In addition, many ideas of Confucianism are harmonious with the concept of international human

¹³⁹ *Id.*

¹⁴⁰ See Yemi Sinbajo and Oukonyisola Ajayi, *Human Rights and Economic Development in Developing Countries*, 28 *The International Lawyer* 727 (1994).

¹⁴¹ Amartya Sen, *supra* note 138.

¹⁴² *Id.*

¹⁴³ Inoue Tatsuo, *supra* note 68, at 42-9.

rights norms which are arguably based upon Western principles and beliefs.¹⁴⁴ That is, Confucius' ideas are not necessarily anti-democratic because the basic tenet of Confucianism is benevolence. In fact, Confucius' heritage has some positive elements consistent with human rights such as hard working ethics, emphasis on education, and respect for the elderly.¹⁴⁵ On a different note, Jack Donnelly contends that it is not uncommon for many authoritarian governments to be reluctant to recognize individual human rights and to try and seek refuge in the self-defined notion of traditional culture.¹⁴⁶ He also writes that:

*Arguments of cultural relativism are far too often made by (or on behalf of) economic and political elites that have long since left traditional culture behind. Even when this represents an admirable effort to retain or recapture cherished traditional values, it is at least ironic to see 'Westernized' elites warning against the values and practices they have adopted.*¹⁴⁷

The rebuttals of Dae-Jung Kim¹⁴⁸ and Aung San Suu Kyi¹⁴⁹ against Lee Kuan Yew also successfully show that the Asian values argument could be a politically expedient excuse for an authoritarian regime. Overall, both the argument on the Asian values as a defense to human rights violations and the attempt to create the Asian way of human rights protection with the

¹⁴⁴ See Henry Rosemont Jr., *Human Rights: A Bill of Worries* in CONFUCIANISM AND HUMAN RIGHTS 54, 55 (Theodore de Bary and Tu Weiming ed., 1998).

¹⁴⁵ *Id.*

¹⁴⁶ See Jack Donnelly, *Human Rights, Democracy, and Development*, 21 HUM. RTS. Q. 608 (1999).

¹⁴⁷ Jack Donnelly, UNIVERSAL HUMAN RIGHTS: IN THEORY & PRACTICE 102 (2003).

¹⁴⁸ See Kim Dae-Jung, *Is Culture Destiny? The Myth of Asia's Anti-Democratic Values*, Foreign Affairs, (Nov./Dec. 1994).

¹⁴⁹ See Aung San Suu Kyi, *Freedom, Development, and Human Worth*, 6 J. of Democracy 11, No.2 (1995)

skepticism of the Western approach to human rights have impeded the development of regional human rights mechanisms in the Asia-Pacific region.¹⁵⁰

3.3.2. *The Universality of Human Rights in Diverse Cultures*

Dae-Jung Kim, Abdullahi An-Na'im, and many other eminent scholars and activists have tried to conceptualize Asian human rights from their ancient forms based on Asian religions and other ancient teachings. They argue that the very existence of the traditional concept of human dignity rooted in Asian culture is evidence in support of the compatibility of human rights with the Asian context.¹⁵¹ Similarly, my broad position is that human rights ideas are heavily indebted to Western philosophers and the European cultural heritage, but that the Asian traditions of respecting human dignity have also contributed to the development of the human rights concept and its legalization in Asia.¹⁵²

As argued in the previous chapter, I am, however, skeptical about the question of the historical origins of human rights because the validity of the universality of human rights should come at the very least as a product of a process, from the fact that most countries in the world are now committed to international human rights law by ratifying major international human rights conventions and treaties. As Christina Cerna argues, such questions are, indeed, not relevant

¹⁵⁰ Amartya Sen, *Thinking about Human Rights and Asian Values*, HUMAN RIGHTS DIALOGUE, 3 (March 1996) cited from Seong-Phil Hong, *Problems and Prospect: Establishment of Regional Human Rights Institutions in the Asia-Pacific Region*, INTERNATIONAL HUMAN RIGHTS LAW VOL.2., 343 (The Korean Society of International Human Rights Law, 2004) [written in Korean].

¹⁵¹ See Kim Dae-Jung, *supra* note 148.

¹⁵² See William Theodore de Bary, *Constructive Engagement with Asian Values*, Columbia East Asian Review (Fall, 1997); J.J. Clarke, *ORIENTAL ENLIGHTENMENT: THE ENCOUNTER BETWEEN ASIAN AND WESTERN THOUGHT* (1997).

anymore.¹⁵³ This is also related to the *cross-cultural dialogue* approach which attempts to incorporate and accommodate the diversity and particularities of norm development within the universality of human rights.¹⁵⁴ Well-known cross-cultural approaches include Onuma Yasuaki's proposal for an inter-civilization approach,¹⁵⁵ Eva Brem's framework of inclusive universality,¹⁵⁶ Joseph Chan's *thick* and *thin* accounts of human rights,¹⁵⁷ and Jack Donnelly's weak relativism arguments.¹⁵⁸ All of these scholars have tried to explain how the universality of human rights functions in the diversity of different cultures and regions.

In the same vein, a number of recent studies have interestingly reported that in many countries in the Asia-Pacific region, even those that support the Asian values argument, the provisions of international human rights law have increasingly been part of their constitutions and the "spaces" within national laws and jurisprudence are gradually widened and effectively employed for the appropriate application of international human rights standards.¹⁵⁹ After reviewing twenty-three Asian countries' constitution, Baik Tae-Ung also points out that "a variety of human rights-related provisions are enumerated in each constitution ... [and] ... the constitutional rights are part of the important human rights norms in the Asian states," though the degree of recognizing the provisions of international human rights standards and the pace of

¹⁵³ See Christina M. Cerna, *East Asian Approaches to Human Rights*, 2 Buff. Jour. Int'l L. 201, 210 (1995-6).

¹⁵⁴ See Joanne R. Bauer and Daniel A. Bell eds., *THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS*, 3-23 (1999)

¹⁵⁵ See Onuma Yasuaki, *Toward an Intercivilizational Approach to Human Rights*, in Joanne R. Bauer and Daniel A. Bell, *id.*, at 103.

¹⁵⁶ See Eva Brems, *HUMAN RIGHTS: UNIVERSALITY AND DIVERSITY* (2001)

¹⁵⁷ See Joseph Chan, *Thick and Thin Accounts of Human Rights: Lessons from the Asian Values Debate* in *HUMAN RIGHTS AND ASIAN VALUES: CONTESTING NATIONAL IDENTITIES AND CULTURAL REPRESENTATIONS IN ASIA* 59 (Michael Jacobsen and Ole Bruun eds., 2000)

¹⁵⁸ See Jack Donnelly, *supra* note 147.

¹⁵⁹ See Jefferson R. Plantilla and Salbiah Ahmad, eds., *LAW, JURISPRUDENCE AND HUMAN RIGHTS IN ASIA* (HURIGHTS OSAKA and SIRD, 2011).

incorporating those rights are all different in each constitution.¹⁶⁰ Overall, it is time to focus on how to implement effectively international human rights norms in individual Asian-Pacific countries which all have different backgrounds and contexts, rather than remain stalled on the dichotomy of the universality of human rights vs. the Asian values argument.

3.3.3. *Asian Values, but for whom?*

Human rights are both a crucial concern for and a rising challenge to national identities. As discussed, Asian values are clearly expressive of a growing need to make one's own culture more explicit in the face of rapidly modernizing and globalizing forces outside the control of national elites. In this sense, it is necessary to pay attention to the questions that Sharon Hom asks: who benefits from these assertions of difference, who asserts these differences, and on whose behalf.¹⁶¹ She argues that to ensure the clarity of the oppositional East-West, universalist-relativist paradigms, voices of people inside are marginalized and eventually made invisible.¹⁶² And as she concludes, “[h]uman right is too important an issue to be left to governments, at least exclusively.”¹⁶³ Kofi Annan also stresses that, “[i]t was never the people who complained of the universality of human rights, nor did the people consider human rights as a Western or Northern imposition. It was often their leaders who did so.”¹⁶⁴

¹⁶⁰ Tae-Ung, Baik, EMERGING REGIONAL HUMAN RIGHTS SYSTEM IN ASIA – WITH A FOCUS ON EAST ASIAN STATES, Dissertation, 150-202 (Notre Dame Law School, 2009).

¹⁶¹ See Symposium: *Structure of World Order: East Asian Approaches to Human Rights*, 89 Am. Soc’y Int’l L. Proc. 165-7 (1995).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Kofi Annan, *supra* note 1.

For a long time, the competing frameworks of universalism and cultural relativism surrounding Asian values debates have essentially been based on the philosophical and epistemological understanding of the nature of human rights. The debates among the two schools are mostly focused on abstract concepts and there are few empirical studies of how human rights norms can be implemented for the people who are living in individual countries in this region and what their functions are.¹⁶⁵ As Randall Peerenboom points out, “the second round of debates of Asian values” is shifting from abstract theoretical discussions toward more concrete situations and I believe that this is not for the interest of the state, but for the rights of the people inside.¹⁶⁶ Constitutional rights and other domesticated human rights norms in Asia are not a simple copy of international norms, nor are they a pure continuance of their domestic traditions any longer.¹⁶⁷ Foreign norms are introduced through the “filters” of domestic conditions, and they are combined with existing norms to produce a new fusion.¹⁶⁸ Therefore, as Tae-Ung Baik suggests, this dynamic incorporation process of international human rights norms can be divided into two stages. The first stage in the development of human rights in Asia can be described as the introduction of Western oriented international norms and standards by the state elites as coercive transplanting by colonial powers.¹⁶⁹ The next stage can be the internalization and localization with an interaction among all rights stakeholders, which may generate national struggles or conflicts. Such a process should reflect various aspects which are unique to the Asian human

¹⁶⁵ See Randall Peerenboom, *Beyond Universalism and Relativism: The Evolving Debates About ‘Values in Asia’* UCLA, School of Law Research Paper No. 02-23 (2002).

¹⁶⁶ *Id.*

¹⁶⁷ Prakash Shah, *Globalization and the Challenge of Asian Legal Transplants in Europe*, 4 Singapore J. of Legal Studies 348, 348-49 (2005). See also Alan Watson, *Legal Transplants and European Private Law*, 4 Electronic J. of Comp. L., 1 (2000).

¹⁶⁸ Tae-Ung, Baik, *supra* note 160, at 94.

¹⁶⁹ See Pyong-Choon Hahm, *KOREAN JURISPRUDENCE, POLITICS AND CULTURE* 125 (1986).

rights context, such as cultural conditions, regional politics, and domestic interests. Therefore, to establish intermediate institutions like RHRIs is important in this filtering process. As discussed in Chapter Two, they can mediate between the regional culture and the internationally recognized standards on human rights, working with the individual governments, civil society, and international human rights institutions. However, this filtering process in Asia was conducted and manipulated for a long time solely by governments for the effective control over their people with the argument of Asian values. And as a result, they have rejected the idea of establishing RHRIs in the region. Further, the human rights related domestic policies produced without interaction with other rights stakeholders and at the sole discretion of governments have often raised internal conflicts and tensions in many Asian countries.¹⁷⁰

3.4. CONCLUSION

The main question in this chapter was why Asia has not established regional human rights institutions so far. And to answer this question, first, I reviewed all the major initiatives to establish RHRIs in this region, which were divided in three categories: the U.N. initiatives, the NGOs initiatives and the NHRIs initiatives. After examining these initiatives in chronological order, I concluded that though there have been dynamic discussions on various human rights issues in Asia, as well as efforts to identify the human rights areas of common concern in the region, all the major initiatives have failed to take a concrete and specific step toward establishing RHRIs in Asia in the last two decades. Most governments in the region have

¹⁷⁰ See W.M.Reisman, *Establishment of a Regional Human Rights Arrangement in the Asian and Pacific Region: Experiences of Other Regions* in Report: The Fourth Asia-Pacific Workshop on Regional Human Rights Arrangements: Asian and Pacific, Kathmandu, Nepal, 14-6 (February 26-28) U.N. Doc. HR/PUB/96/3.

obviously shown that they still have no sufficient political will to enter into the establishment of RHRIs. There has also been relatively low governmental support for the initiatives by NGOs. The NHRIs initiatives have worked successfully both with the governments and NGOs, and showed some positive signs. But, they are limited to the regional cooperation among NHRIs. Through the analysis of all the major initiatives for setting up RHRIs in the Asia-Pacific region, I, then, provided five main reasons that have been the main obstacles for establishing a regional human rights system in Asia: 1) sovereignty, 2) the failures in the recognition of human rights after WWII, 3) the failure of major Asian powers to play a leading role in human rights in Asia, 4) the relatively low ratification rate of major U.N. human rights treaties, and 5) the Asian values debates. As discussed, I believe that all those obstacles, including the Asian values discourse, that have hindered the establishment of RHRIs, have not come from a different understanding of fundamental human rights within the already existing international human rights legal system, but mainly from political considerations. The analysis of the obstacles led to my focus on national human rights institutions (NHRIs), another intermediary similar to RHRIs, only at the national level. NHRIs and their network through the APF, at least, have gradually changed each government's human rights policy for better human rights practices, e.g. greater openness toward the ratification of major human rights treaties, and provided more appropriate spaces for the effective implementation of international human rights norms. As an intermediate institution, they can also actively cooperate with all other rights stakeholders including civil society. Furthermore, the way which NHRIs have cooperated at the sub-regional level in the establishment of the ASEAN human rights body reveals that they can be eminent actors in surmounting the obstacles and ultimately in setting up RHRIs in this region. Therefore, they can

be a driving force in the establishment of a regional human rights body in this region. The following chapters will provide a further analysis of NHRIs.

CHAPTER FOUR:

Why can NHRIs be a driving force for establishing RHRIs in Asia?

NHRIs can and are seen as both state and non-state actors. This has profound implications for how they participate in the U.N. Charter and treaty body mechanisms,¹ ... Yet, NHRIs have so far not made full use of ... opportunities available to them. It is in the hands of NHRIs to determine their own future.²

The National Human Rights Commission is the national institution whose role it is to constantly criticize the government's wrongful acts and human rights violations. In its nature, it is inevitable for the Commission to have a conflict with the government. If there is no more tension between an NHRI and the government, such institution is not an NHRI anymore.³

4.1. INTRODUCTION

In the previous two chapters, I stressed the necessity of establishing regional human rights bodies in the Asia-Pacific region and examined the main obstacles to setting up RHRIs in this region. There is a general agreement that it is desirable to have RHRIs in Asia, but all the major initiatives, both the top-down approaches by the U.N. and Asian governments and the bottom-up ones by NGOs, have not taken any specific steps toward establishing regional human rights bodies in the region. As I discussed, this reveals that each Asian government has no sufficient political will to build up RHRIs in the region yet. To change this attitude of

¹ And I would add, in the regional human rights bodies.

² Rachel Murray, *THE ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS AT THE INTERNATIONAL AND REGIONAL LEVELS: THE EXPERIENCE OF AFRICA*, 89-91 (2007).

³ Kyung Hwan, Ahn, former Chairperson of NHRCK, *Interview: the government remains short but human rights last long*, The Hankyoreh, Mar. 28, 2009.

governments against RHRIs, it is necessary foremost to strengthen the domestic system for the promotion and protection of human rights. In this sense, it is not surprising that, after 1990, the U.N. Workshops changed their focus from regional arrangements to regional cooperation for human rights. The Asian governments' efforts during the workshops, however, have remained a mere ritual only, with non-legally binding promises and ad-hoc discussions, but without any concrete actions. They have constantly objected to the establishment of RHRIs based on the step-by-step approach with the excuse of sovereignty, regional diversity and culture, and the Asian way of human rights. Therefore, we need a new actor which can strengthen the human rights system at the national level, change a government's human rights policies, and ultimately lead to the establishment of RHRIs in the region. It should be a channeling institution that can mediate between the national interest and international human rights norms, similarly to RHRIs that can work as intermediate institutions to reflect the regional specificity and meet international human rights standards. At the same time, this new actor should gradually raise public awareness of human rights through an active cooperation with human rights NGOs and civil society. I believe NHRIs can play such a role as a driving force for establishing RHRIs in the Asia-Pacific region.

Thus, here and in the next chapter, I will examine why NHRIs can be an eminent actor for setting up RHRIs and how they can work together to achieve this goal. To answer these questions, I will first review what NHRIs are and examine how they have emerged in the development of international human rights law by discussing their role. In addition, by reviewing the National Human Rights Commission of Korea as a case study, I will show how NHRIs can work and interact with all other rights stakeholders and what issues they may encounter. The precondition for NHRIs to be a main actor toward RHRIs is that they should be well constituted and managed. Preconditions such as independence, effectiveness, and accountability have

already been discussed in a large number of articles by human rights scholars, lawyers and activists. Though they are not the main focus of my research, I will briefly review them here, as well.

Later in this chapter, I will provide three reasons why NHRIs can be a driving force for the establishment of RHRIs in the region. First, NHRIs can bridge the gap between the international community, including the U.N., and the individual government in the Asia-Pacific region, on the understanding of international human rights norms. For over a decade, NHRIs have been strong critics of the idea of Asian values. Unlike other governmental institutions that have argued for the Asian way of human rights with the sole purpose of maintaining their power and undemocratic policies, NHRIs can redefine the universality of human rights from the perspective of the people. In other words, NHRIs are independent national agencies established to protect those who are most vulnerable to violations of their fundamental human rights and examine the cause of the problems in light of local culture and traditions. The second reason is the nature of NHRIs. They are mediators that can reflect both the national interest and public opinion. They exist as both state and non-state institutions; that is, they are governmental institutions but their dynamic interaction with civil society makes them work as non-governmental organizations, too. This characteristic of NHRIs makes them a distinct national institution that can strengthen the domestic system for a better human rights practice, together with raising public awareness of human rights. The last reason is their cooperation through the APF. As discussed in Chapter Three, the networks of NHRIs have shown some positive signs. By sharing information, exchanging staff members and identifying human rights issues of common concern, they have enhanced the capacity of individual member NHRI for a better human rights practice at the national level, and have also encouraged the establishment of NHRIs

in Asian countries without them. Notably, their successful cooperation at the sub-regional level, for example the ASEAN human rights body, demonstrates why they can be eminent actors for setting up RHRIs in the end.

Overall, I will conclude that NHRIs can be a driving force for the establishment of a regional human rights system. Unlike other initiatives toward RHRIs, their cooperation and networks will strengthen the human rights protection system at the national and regional level, and in the end, change each government's skeptical attitude towards RHRIs. The next question of how NHRIs can work together to take specific steps toward establishing a regional human rights mechanism will be discussed in Chapter Five.

4.2. NATIONAL HUMAN RIGHTS INSTITUTIONS (NHRIs)

4.2.1. Definition of NHRIs and their Role

National Human Rights Institutions (NHRIs) have been defined as “a body which is established by a Government under the constitution, or by law or decree, the functions of which are specifically defined in terms of the promotion and protection of human rights.”⁴ The past two decades have witnessed the creation of numerous NHRIs in the form of national human rights commissions, ombudsman offices, or hybrids of both.⁵ NHRIs have been established in Africa,⁶

⁴ United Nations Centre for Human Rights, *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights*, Professional Training Series No.4 at para. 39, (1995) U.N. DOC. HR/P/PT/4, U.N. Sales No. E.95.XIV.2 [hereafter *NHRIs: A Handbook*]

⁵ *Id.*

⁶ See Nsongurua J. Udombana, *Social Rights are human rights: Actualizing the rights to work and social security in Africa*, 39 *Cornell Int'l L.J.* 181 (2006); Rebecca Wright, *Finding an impetus for institutional change at the African*

Europe,⁷ Latin America,⁸ the Commonwealth of Independent States (CIS),⁹ and Asian countries.¹⁰ The contemporary development of the human rights discourse from U.N. initiatives¹¹ like the 1993 Paris Principles¹² has been a driving force behind NHRIs. The Paris Principles are indeed, internationally recognized standards which were adopted by the United Nations General Assembly on December 20, 1993. They list the roles and functions of NHRIs, and the requirements for their independence and broad mandate.¹³

Anna-Elina Pohjola relates the emergence of NHRIs to the development of international human rights law as “the outcome of a long process, which began over fifty years ago and which is closely intertwined with the gradual strengthening of the international human

Court on human and peoples' rights, 24 Berkeley J. Int'l L. 463 (2006); Mary Ellen Tsekos, *Human Rights Institutions in Africa*, 9 No.2 Hum. Rts. Brief 21 (2002).

⁷ See Samantha Besson, *The European Union and Human Rights: Towards a post-national human rights institution?*, 6 Hum. Rts. L. Rev. 323 (2006); Ernst-Ulrich Petersmann, *On 'Indivisibility' of Human Rights*, 14 Eur. J. Int'l L. 381 (2003); Stephen Livingstone, *The Northern Ireland human rights commission*, 22 Fordham Int'l L.J. 1465. (1999).

⁸ See Manuel Jose Garcia-Mansilla, *Separation of Powers Crisis: the case of Argentina*, 32 Ga. J. Int'l & Comp. L. 307 (2004); Inter-American Institute of Human Rights, *PROMOTION AND DEFENSE OF REPRODUCTIVE RIGHTS: A NEW CHALLENGE FOR THE NATIONAL HUMAN RIGHTS INSTITUTIONS* (2003).

⁹ See Cynthia Alkon, *The cookie cutter syndrome: Legal reform assistance under post-communist democratization programs*, 2002 J. Disp. Resol. 327 (2002).

¹⁰ See Amanda Whiting, *Situating Suhakam: Human Rights Debates and Malaysia's national human rights commission*, 39 Stan. J. Int'l L. 59 (2003); Carole J. Petersen, *The Paris Principles and Human Rights Institutions: Is Hong Kong slipping further away from the mark?*, 33 Hong Kong L. J. 513 (2003); Vijayashri Sripathi, *India's National Human Rights Commission: A shackled commission?* 18 B.U. Int'l L.J. 1 (1997).

¹¹ Fact Sheet No.19, National Institutions for the Promotion and Protection of Human Rights at the Office of the High Commissioner for Human Rights (OHCHR). The General Assembly has issued G.A. Resolutions on NHRIs more than 5 times since 1993. See G.A. Res. 60/154 UN Doc. A/RES/60/154 (Feb. 25, 2006), G.A. Res. 54/176 UN Doc. A/RES/54/176 (Feb. 15, 2000), G.A. Res. 52/128 UN Doc. A/RES/52/128 (Feb. 26, 1998), G.A. Res. 50/176 UN Doc. A/RES/50/176 (Feb. 27, 1996), G.A. Res. 48/134 UN Doc. A/RES/48/134 (Dec. 20, 1993).

¹² U.N. G.A. Resolution 134, U.N. GAOR, 48th Sess., 85th mtg., (1993) UN DOC. A/RES/48/134 <http://www2.ohchr.org/english/law/parisprinciples.htm>

¹³ See *Id.*

rights regime.”¹⁴ By dividing the evolution of NHRIs into three stages: introduction of the idea (1946-1978), “popularization” of the concept of NHRIs (1978-1990) and expansion of NHRIs (from 1990 onwards), she points out three important moments in the discussion of NHRIs at the U.N.¹⁵ The first one is the resolution of the U.N. Commission on Human Rights in 1962,¹⁶ adopted to introduce the idea of establishing national human rights bodies in the form of “national advisory committees or local human rights committees” to “study questions relating to human rights, examine the situation on the national level, offer advice to the Government, and help to create public opinion favoring respect for human rights.”¹⁷ At that time, however, most governments considered establishing such a national institution a domestic issue to be decided by individual governments, and their creation within the jurisdiction of each state rather than following a unified model.¹⁸ The second important moment was the 1978 Resolution of the U.N. Commission on Human Rights.¹⁹ Its objective was to provide a guideline for the structure and function of national institutions for the protection of human rights, and it is considered the first attempt to create a unified form of national human rights institutions.²⁰ Based on this resolution, the first seminar on national institutions (NI) was held in Geneva in 1978 with 25 U.N. member

¹⁴ Anna-Elina Pohjolainen, *THE EVOLUTION OF NATIONAL HUMAN RIGHTS INSTITUTIONS: THE ROLE OF THE UNITED NATIONS*, The Danish Institute for Human Rights, 118 (2006).

¹⁵ *Id.*, at 30-117.

¹⁶ U.N. Commission on Human Rights, *Resolution on National Advisory Committees on Human Rights*, (Mar. 27, 1962), CHR Res. 9(XVIII) of 1962.

¹⁷ *Id.*, cited in Anna-Elina Pohjolainen, *supra* note 14, at 37.

¹⁸ Anna-Elina Pohjolainen, *supra* note 14, at 121.

¹⁹ U.N. Commission on Human Rights, *Resolution on National Institutions in the Field of Human Rights; Annex: Some possible functions which could be performed by national institutions in the field of human rights, if so decided by the Government concerned*, (Mar. 8, 1978), CHR Res. 23(XXXIV) of 1978. See also, U.N. General Assembly *Resolution on National Institutions for the promotion and protection of human rights*, (Dec. 14, 1978.) UN Doc. A/RES/33/46 (1978). Available at <http://www.un.org/documents/ga/res/33/ares33r46.pdf>

²⁰ Anna-Elina Pohjolainen, *supra* note 14, at 43-7.

states to discuss the guidelines and share information of already existing NI, such as anti-discrimination related commissions in most Commonwealth countries since the 1950s and ombudsman offices since the late 1970s.²¹ In the 1980s, however, with the reawakening of the Cold War, there were no more discussions on national human rights institutions at the U.N.²² until the Paris Principles were adopted in 1993 at the U.N. General Assembly by the consensus of 171 member states. Finally, governments came to accept the idea of setting up national human rights institutions as an essential addition to domestic human rights systems, based on certain unified minimum standards and mandates in accordance with the Paris Principles.²³

At present, almost 118 countries have NHRIs or similar bodies. The U.N. suggests the major working areas of NHRIs should be “racism and discrimination, disability, rights of minorities, indigenous people, standards and principles that relate to anti-terrorism measures, conflict prevention, prevention of torture, migration, children, and economic, social and cultural rights.”²⁴ NHRIs have indeed been increasingly active in various fields. From the official investigation into the forced disappearances in Mexico²⁵ to the probe of key past trials in Northern Ireland²⁶ and the securing of the rights of the Tsaatans, the smallest ethnic minority in Mongolia,²⁷ to the rescue project for child soldiers in Uganda,²⁸ all NHRIs have played a

²¹ *Id.*

²² *Id.*

²³ *Id.*, at 122-3.

²⁴ NHRIs: A Handbook, *supra* note 4, at 4-6.

²⁵ See Mireille Roccatti, HUMAN RIGHTS AND THE OMBUDSMAN’S EXPERIENCE IN MEXICO (1999)

²⁶ See Stephen Livingstone, *supra* note 7.

²⁷ See Committee on the Elimination of Racial Discrimination Annual Report in 2006: Mongolia, UN Doc. CERD/C/MING/18 (Aug. 17, 2006)

²⁸ See U.N. Human Rights Council, Information Note National Human Rights Institutions, No.11, Sep. 2008.

prominent role in the protection and promotion of human rights. Jeong-Woo Koo and Francisco O. Ramirez describe the positive contribution of NHRIs in the following way:

*The formation of NHRIs comes closer to the nationalization of international human rights standards than the ratification of a human rights treaty or the increase in national membership in international human rights organizations. Though not organized at the level of national ministries, these NHRIs have the potential of becoming the sites or targets of human rights mobilization efforts. This potential stems not only from their mandate of receiving and investigating the allegations of human rights abuses, but also from their increasing connection with human rights NGOs.*²⁹

NHRIs are, however, new actors in the U.N. structures and there are no U.N. bodies which fully guarantee the adoption of NHRIs under the U.N. framework.³⁰ As Rachel Murray argues, “it is still very much open to debate what role NHRIs will play” in national, regional, and international human rights arenas.³¹

Article 3 of the Paris Principles provides the functions and responsibility of NHRIs as a minimum guideline.³² In general, these can be placed in five categories. The first one is

²⁹ Jeong-Woo Koo and Francisco O. Ramirez, *National Incorporation of Global Human Rights: Worldwide Expansion of National Human Rights Institutions, 1966-2004*, 87 *Social Forces* Vol.3 1321, 1342, (Mar. 2009).

³⁰ RACHEL MURRAY, *supra* note 2, at 27-44.

³¹ *Id.* at 44.

³² See The Paris Principles, *supra* note 12. Annex (Competence and responsibilities) Article 3.

3. A national institution shall, *inter alia*, have the following responsibilities:

(a) **To submit** to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, **opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights**; the national institution may decide to publicize them; these opinions, recommendations, proposals and reports, as well as any prerogative of the national institution, shall relate to the following areas:

(i) **Any legislative or administrative provisions, as well as provisions relating to judicial organizations, intended to preserve and extend the protection of human rights**; in that connection, the national institution shall examine the legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights; it shall, if necessary, recommend the

investigation and remedy. Anyone whose human rights are violated (mostly by governments), can bring their case to an NHRI, which has the power to effectively investigate individual complaints concerning human rights violations, though its authority and the types of complaints it can investigate depend on the legislative mandate in each individual state.

The second category is monitoring, research, and advice on compliance of individual governments and government agencies with international human rights norms to which the state is a party. As stipulated in Article 3 (a), (b), (c) and (d) of the Paris Principles, NHRIs can issue policy recommendations and advice to a government, Congress and/or court. Basically, NHRIs can engage, with other governmental agencies, on any human rights related legislation or proposed legislation, administrative practices, programs and policies within their jurisdiction, with necessary consultations, to enhance the compliance with the obligations of ratified

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- adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures;*
- (ii) Any situation of violation of human rights which it decides to take up;*
- (iii) The preparation of reports on the national situation with regard to human rights in general, and on more specific matters;*
- (iv) Drawing the attention of the Government to situations in any part of the country where human rights are violated and making proposals to it for initiatives to put an end to such situations and, where necessary, expressing an opinion on the positions and reactions of the Government;*
- (b) To promote and ensure the harmonization of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation;**
- (c) To encourage ratification of the above-mentioned instruments or accession to those instruments, and to ensure their implementation;**
- (d) To contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations and, where necessary, to express an opinion on the subject, with due respect for their independence;**
- (e) To cooperate with the United Nations and any other organization in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the protection and promotion of human rights;**
- (f) To assist in the formulation of programmes for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional circles;**
- (g) To publicize human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of all press organs. (emphasis added).**

international human rights treaties and conventions. Some may argue that existing national institutions are enough to do the same work and there is no need to establish NHRIs. NHRIs are, however, not designed to compete with the executive, legislative or judiciary powers. Rather, they can work effectively solely focusing on human rights related issues without violating the independence of those national institutions, as will be shown in detail through the case study in Section 4.2.3.

The third category is cooperation with the U.N. and other international human rights institutions and, at the same time, interaction with other national organizations, which is stipulated in Article 3 (e) of the Paris Principles. NHRIs can serve as an advisor to government delegations to the U.N. Human Rights Council and other international human rights treaty bodies. Such involvement makes their governments reveal evidence of human rights violations to international human rights institutions because a more transparent and truthful statement can be derived from the participation of the NHRIs in the preparation of an individual state report. Also, NHRIs can urge their governments to ratify international human rights treaties, while reflecting both the national specificity and public opinion.

The fourth category is human rights education and public awareness campaigns as stated in Article 3 (f) and (g) of the Paris Principles. NHRIs can provide human rights education programs both to formal educational institutions and the general public. Such work is important to raise public awareness of human rights because it is a long process to understand what human rights is, detect whether there is a human rights violation, and finally know where the remedy for violations can be sought, especially for people who have lived under authoritarian governments for a long time. NHRIs can also prepare and deliver educational materials and programs to the

police, prison officials, the military, the judiciary and other governmental agencies, which should be a main obligor of human rights standards.

The last category is the cooperation with civil society. As the vast majority of human rights NGOs and other rights stakeholders in civil society are not directly affiliated with any national government, NHRIs can work with and through these NGOs by providing an official channel for meeting their needs. Especially in countries with a history of authoritarian rule, the transition to a more democratic society requires a broad degree of citizen participation in government policymaking, which can be accomplished if NHRIs effectively interact with civil society.

All the functions and responsibilities of NHRIs discussed above show the important role, both at the international and national levels, which they can play for the protection and promotion of human rights.

Regarding the role of NHRIs at the international level, they can assist the U.N.-based international human rights monitoring system by effectively implementing its goals in the human rights area, and at the same time, serving as local counterparts to international human rights institutions³³ because they can be used as a mechanism for improving human rights enforcement. How can NHRIs then work to bring human rights to the mainstream, to protect human rights locally and to accept and enforce international human rights norms to individual states? If a state ratifies an international treaty, there is an obligation to implement the provisions of the treaty at the national level. There is also an obligation to submit reports periodically to the treaty bodies on the ways the state has ensured the enjoyment of the rights provided for in the treaties. After

³³ See NHRIs: A Handbook, *supra* note 4, at 4-6.

the submission and examination of the report by the treaty bodies, they present their concerns and specific recommendations to individual states that are expected to undertake the necessary measures to implement such recommendations.³⁴ NHRIs can intervene in this process by preparing and submitting their own report to the international treaty bodies and also by supporting and advising governments during the preparation of the national report. Such an intervention and monitoring can enhance the transparency and sincerity of the government report and, at the same time, reflect the concerns from local human rights NGOs. As a result, NHRIs can play an important role in ensuring that national legislation and related government policies are in harmony with international human rights standards.³⁵

Regarding the role of NHRIs at the national level, it is important to highlight the relationship between NHRIs and civil society including local human rights NGOs.³⁶ NHRIs are established based on national legislation while such legitimacy is usually not given to human rights NGOs. The cooperation between NHRIs and NGOs can give human rights NGOs a public legitimacy which cannot otherwise be enjoyed. It can also make it difficult for the government to restrain the activities of human rights NGOs, especially in authoritarian countries, where many of the NGOs are constantly persecuted. In addition, as there are many different human rights NGOs which represent, for example, children, women, prisoners, workers, and migrants, the cooperation with various NGOs enables NHRIs to provide a wide spectrum of human rights problems to discuss, a process which will ensure an effective protection of fundamental human

³⁴ See Harold Hongju Koh, *How is International Human Rights Law Enforced?* 74 IND. L.J. 1397, 1408-1416 (1999): States, NGOs and individuals all can play a role in enforcing international human rights norms. *Id.*

³⁵ See Paris Principles, *supra* note 12, Annex (Competence and responsibilities) Art.3(d), (e) and Annex (Methods of Operation) Art.(f), (g).

³⁶ Developing good relationships with NGOs can provide NHRIs with information on local issues relating to human rights, inquiries on their works and partnerships for joint activities. *Id.*

rights. Overall, NHRIs can play an important role as an effective communication channel with civil society for human rights violations at the national level.

My argument on NHRIs as a driving force for establishing RHRIs in the Asia-Pacific region is based on the assumption that they are well constituted and managed based on the Paris Principles. Thus, the question of how NHRIs can effectively work for the protection and promotion of human rights is certainly not the main concern of my study. But as this question also remains a precondition of my research, I will briefly review the most essential elements in determining the effectiveness of NHRIs, as discussed in the academic literature for over a decade now. Brian Burdekin provides five most critical factors in determining the effectiveness of an NHRI: 1) independence, 2) accessibility, 3) adequate resources, 4) the membership of the institution (i.e., appointment process for Commissioners), and 5) cooperation with NGOs.³⁷ Stephen Livingstone and Rachel Murray divide the major key points for NHRIs' effectiveness into three categories: 1) capacity – independence, legal status, financial resources, 2) performance – a clear strategic plan, full powers, authority, and coherent management, and 3) legitimacy – the relationship with the government, accountability, interaction with civil society and NGOs, accessibility.³⁸ In its report, Amnesty International also suggests six recommendations to NHRIs for effective protection of human rights: 1) independence – founding legislation of NHRIs, 2) membership – qualities and representation of members of the NHRI, 3) mandate and powers – jurisdiction of NHRI, accountability, 4) innovation and inquiries – methodologies of investigation, scope of complaints and complainant, 5) publicity – relationship

³⁷ Brian Burdekin, NATIONAL HUMAN RIGHTS INSTITUTIONS IN THE ASIA-PACIFIC REGION, 43-62 (2007).

³⁸ Stephen Livingstone and Rachel Murray, *The Effectiveness of National Human Rights Institutions* in HUMAN RIGHTS BROUGHT HOME: SOCIO-LEGAL PERSPECTIVES ON HUMAN RIGHTS IN THE NATIONAL CONTEXT, 137 (Simon Halliday and Patrick Schmidt ed., 2004).

with the media, and 6) accessibility.³⁹ The U.N. Centre for Human Rights enumerates six main effectiveness factors including 1) independence, 2) defined jurisdiction and adequate power, 3) accessibility, 4) cooperation, 5) operational efficiency, and 6) accountability.⁴⁰

I will summarize the effectiveness factors for NHRIs into five elements. First, a NHRI should be established on a strong legal basis with clear mandates and adequate powers. Legislation itself may not guarantee the independence of NHRI, but it is the starting point toward its independence. Second, there should be transparent appointment procedures for the members of an NHRI like commissioners and a chairperson, “to ensure the pluralist representation of the social forces involved in the protection and promotion of human rights.”⁴¹ The reason for this is because professional human rights experts of diverse background will increase its capacity without interference from the outside. In addition, an NHRI should have independent power to appoint its own staff. Third, there should be independent financial resources for an NHRI which is not under direct government control. Fourth, an NHRI must be accessible, i.e., it should be easy to reach its office and to submit complaints. Lastly, NHRIs must cooperate with other governmental agencies and also work actively with civil society because such interactions can enhance their public legitimacy, and at the same time, ensure the reflecting of public concerns. In addition, there should be a close relationship with international and regional human rights bodies which can strengthen an NHRI’s capacity by setting up international human rights standards, sharing information and best practices, facilitating networking among NHRIs and other human

³⁹ Amnesty International, *National Human Rights Institutions: Amnesty International’s recommendations for effective protection and promotion of human rights* (Oct. 2001)
<http://www.amnesty.org/en/library/info/IO40/007/2001>

⁴⁰ NHRIs: A Handbook, *supra* note 4, at para.63-138.

⁴¹ The Paris Principles, *supra* note 12, Annex (Composition and guarantees of independence and pluralism) Art.1

rights institutions, and granting its membership.⁴²

4.2.2. NHRIs in the Asia-Pacific Region

Currently, seventeen countries in the Asia-Pacific region have established NHRIs.⁴³ They are five countries from the South Asia region (Afghanistan, India, the Maldives, Nepal and Sri Lanka), five from the South-East Asia region (Indonesia, Malaysia, the Philippines, Thailand, and Timor-Leste), two from the East Asia region (Mongolia and the Republic of Korea), two from the Pacific region (Australia and New Zealand) and three from the West Asia region (Jordan, Qatar, and Palestine).

While only two out of the sixteen countries in the Pacific region have NHRIs, statistics show that more than half of the countries in the other sub-Asia regions: the South, South-East, and East Asia regions, have NHRIs (thirteen out of twenty-four) since the adoption of the 1993 Paris Principles. Furthermore, fifteen countries that have NHRIs are in compliance with the Paris Principles. The Maldives and Sri Lanka have an observer status in the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) and, in addition, Hong Kong, Iran, and Fiji have NHRIs, albeit not recognized for complying with the U.N. standards.⁴⁴ Based on the report of the U.N. Secretary-General in 2010, the current status of national institutions accredited by ICC is the following.⁴⁵

⁴² Sonia Cardenas, *Emerging Global Actors: The United Nations and National Human Rights Institutions*, 9 *Global Governance* 23, 27-34, (2003).

⁴³ See also the Website of National Human Rights Institutions Forum. <http://www.nhri.net/nationaldatalist.asp>

⁴⁴ *Id.* The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) under the U.N. Human Rights Council determines the status of NHRIs. Observer status is given to

National Institution	Status	APF membership	Year established	Year reviewed
<i>Afghanistan</i> : Independent Human Rights Commission	A	Full member, 2005	2002	2007, 2008.
<i>Australia</i> : Australian Human Rights and Equal Opportunity Commission	A	Full member, 1996 (Founding member)	1986	1999, 2006.
<i>India</i> : National Human Rights Commission of India	A	Full member, 1996 (Founding member)	1993	1999, 2006.
<i>Indonesia</i> : National Human Rights Commission of Indonesia	A	Full member, 1996 (Founding member)	1993, re-established 1999	2000, 2007.
<i>Jordan</i> : National Centre for Human Rights	A	Full member, 2007	2002	2006, 2007, 2010.
<i>Malaysia</i> : Human Rights Commission of Malaysia (SUHAKAM)	A	Full member, 2002	1999	2002, 2008, 2010
<i>Mongolia</i> : National Human Rights Commission of Mongolia	A	Full member, 2001	2000	2002, 2003, 2008.
<i>Nepal</i> : National Human Rights Commission of Nepal	A	Full member, 2000	2000	2001, 2002, Special review started in 2006. 2007, 2008. In Mar. 2010 recommended to be accredited with B.
<i>New Zealand</i> : New Zealand Human Rights Commission	A	Full member, 1996 (Founding member)	1993	1999, 2006.
<i>Palestine</i> : Palestinian Independent Commission for Citizen's Rights	A	Full member, 2004	1993	2005, 2009.
<i>The Philippines</i> : Philippines Commission on Human	A	Full member, 1996 (Founding member)	1987	1999, 2007.

states which provided insufficient information to make a determination on compliance. *See* U.N. Human Rights Council, Information for National Human Rights Institutions, <http://www2.ohchr.org/english/bodies/hrcouncil/nhri.htm> ; *See also* Brian Burdekin, *supra* note 37, at 98-101, 120.

⁴⁵ *See* U.N. Human Rights Council, *Id.* In accordance with the Paris Principles and the Statute of the International Coordinating Committee, the following classifications for accreditation are used by ICC:

A: Compliance with the Paris Principles.

B: Not fully in compliance with the Paris Principles.

C: Non-compliance with the Paris Principles.

Rights				
<i>Qatar</i> : National Committee for Human Rights	A	Full member, 2005	2002	2008: deferral to March 2009. Reviewed in 2010 (first session), March 2010: deferral to October 2010.
<i>Timor-Leste</i> : Provedor for Human Rights and Justice	A	Full member, 2007	2004	2008.
<i>Republic of Korea</i> : National Human Rights Commission of the Republic of Korea	A	Full member, 2001	2001	2004, 2008.
<i>Thailand</i> : National Human Rights Commission	A	Full member, 2002	2001	2004, 2008.
<i>Maldives</i> : Human Rights Commission	B	Associate member, 2007	2003	2008, 2010.
<i>Sri Lanka</i> : Human Rights Commission of Sri Lanka	B	Associate member (Was a Full member until 2009)	1997	2000, A status placed under review 2007. Reviewed in 2009.
<i>Hong Kong, China</i> : Hong Kong Equal Opportunities Commission	C		1996	2000
<i>Islamic Republic of Iran</i> : Commission Islamique des droits de l'homme	C			2000
<i>Fiji</i> : Human Rights Commission of Fiji	Suspended	Note: Fiji resigned from ICC on 2 April 2007	Re-established 2009	2000 Accreditation suspended in 2007.

Table 5: Chart of the Status of National Institutions in the Asia-Pacific region (accredited by the ICC as of June 2010)⁴⁶

⁴⁶ See U.N., *Report of the Secretary-General: The role of the Ombudsman, mediator and other national human rights institutions in the promotion and protection of human rights*, (Sep.1, 2010) UN Doc. A/65/340 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/501/78/PDF/N1050178.pdf?OpenElement>; See also the Asia-Pacific Forum, Membership of the APF, <http://www.nhri.net/NationalDataList.asp?MODE=1&ID=2>; See also National Human Rights Institutions Forum, List of NHRIs in the Asia-Pacific region <http://www.nhri.net/NationalDataList.asp?MODE=1&ID=2>

Some argue that NHRIs may just be political tools of oppressive and authoritarian governments for legitimizing human rights violations.⁴⁷ Governments with little respect for human rights establish NHRIs to appear legitimately concerned with the protection of human rights and to lessen domestic and international pressure.⁴⁸ Even the states which are overly concerned with their sovereignty may support the establishment of NHRIs with similar purposes.⁴⁹ However, as shown in the table above, the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) under the Human Rights Council award an A status to NHRIs which meet the international standard at its annual meeting, to prevent such misuse and to establish proper NHRIs that are compliant with the Paris Principles.⁵⁰ The Asia Pacific Forum of National Human Rights Institutions (APF) also gives full membership only to an NHRI which complies with the Paris Principles.⁵¹

The following tables show the legislative mandate and the interpretation of *human-rights* in the establishing legislation of nine NHRIs with an A status in the Asia-Pacific region: New Zealand, the Philippines, South Korea, Thailand, Australia, India, Indonesia, Malaysia, and

⁴⁷ See Human Rights Watch, *Protectors or Pretenders? Government Human Rights Commissions in Africa* (2001).

⁴⁸ With the finding that the number of countries with NHRIs has increased significantly between 1989 and 2000, Human Rights Watch further asserts that there are many NHRIs set up in Africa that ignore the human rights abuses in their respective states. *Id.*

⁴⁹ Cecilia E. Jimenez, *The Proliferation of National Human Rights Institutions: For Other Ends?* in HUMAN RIGHTS INSTITUTIONS: LESSONS AND PROSPECTS 23 (Philippines Human Rights Information Centre, 1994) In this article, she also argues that "... human rights commissions have the potential to become merely cosmetic exercises aimed at boosting the government's human rights image in the eyes of the global community." *Id.*

⁵⁰ See UN Human Rights Council, Information for National Human Rights Institutions, *supra* note 44; See also Rachel Murray, *supra* note 2, 30-3.

⁵¹ Art.11.1 of Asia Pacific Forum of National Human Rights Institutions Constitutions.

11.1 Full members

(a) Qualifications of full members

Each full member must be a national human rights institution in the Asia Pacific region which in the opinion of the Forum councillors complies with the Paris Principles.

<http://www.asiapacificforum.net/about/governance/downloads/constitution.pdf>

Mongolia. All nine NHRIs were established based on national legislation or constitutions. In accordance with the Paris Principles, they also have the power to receive and investigate complaints on human rights violations and the power to advise, assist, and make recommendations to a government, Congress and/or court. In addition, the establishing legislations of nine NHRIs define human-rights as guaranteed under the Constitution, other domestic legislation, and/or ratified international human rights treaties.

	<i>New Zealand</i>	<i>The Philippines</i>	<i>South Korea</i>	<i>Thailand</i>	<i>Australia</i>	<i>India</i>	<i>Indonesia</i>	<i>Malaysia</i>	<i>Mongolia</i>
Legal Mandate	Human Rights Act (No 82), 1993	Executive Order No. 163, 1987	National Human Rights Commission Act (No. 6481), 2001	National Human Rights Commission Act, B.E. 2542, 1999	Human Rights and Equal Opportunity Commission Act, 1986	The Protection of Human Rights Act, 1993	Legislation Number 39 of 1999 Concerning Human Rights	Human Rights Commission of Malaysia Act, 1999	The National Human Rights Commission of Mongolia Act, 2000
Established in the National Constitution		Yes		Yes					
Power to receive and investigate complaints	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Power to make recommendations to government and /or Parliament on laws, policies or international treaties	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes

Power to intervene or assist in court proceedings related to human rights (with permission of the court)	Yes		Yes		Yes	Yes	Yes		Yes
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Table 6: Legislative Mandates of Nine NHRIs with an A status in the Asia-Pacific Region⁵²

New Zealand	Does not expressly define the term human rights, but the long title of the Act states that it is an “Act to consolidate and amend the Race Relations Act 1971 and the Human Rights Commission Act 1977 and to provide better protection of human rights in New Zealand <i>in general accordance with United Nations Covenants or Conventions on Human Rights</i> ” (The title of the Human Rights Act (No. 82), 1993).
South Korea	“[A]ny of human dignity, worth, liberties and rights which are <i>guaranteed by the Constitution and Acts of the Republic of Korea or recognized by international human rights treaties entered into and ratified by the Republic of Korea and international customary law</i> ” (Article 2 of the National Human Rights Commission Act (No.6481), 2001).
Mongolia	Does not expressly define the term human rights, but states that “The Commission is an institution mandated with the promotion and protection of human rights and charged with monitoring over the implementation of the provisions on human rights and freedoms, <i>provided in the Constitution of Mongolia, laws and international treaties of Mongolia</i> ” (Article 3.1. of the National Human Rights Commission of Mongolia Act, 2000).
Thailand	“Human dignity, right, liberty and equality of people which are <i>guaranteed or protected under the Constitution of the Kingdom of Thailand or under Thai laws or under treaties which Thailand has obligations to comply with</i> ” (Section 3 of the National Human Rights Commission Act, B.E. 2542, 1999).
India	“[T]he rights relating to life, liberty, equality and dignity of the individual <i>guaranteed by the Constitution or embodied in the international Covenants and enforceable by courts in India</i> ” (Section 2 (d) of the Protection of Human Rights Act, 1993). * International Covenants means the ICCPR and ICESCR. (Section 2 (f) of the Protection of Human Rights Act, 1993).
Australia	“[T]he rights and freedoms <i>recognized in the Covenant, declared by the Declarations or recognized or declared by any relevant international instrument</i> ” (Part I, 3 of Human Rights and Equal Opportunity Commission Act, 1986).
Indonesia	Does not expressly define the term human rights, but defines human rights violations: “Human rights violations mean all actions by individuals or groups of individuals, including the state apparatus, both intentional and unintentional, that unlawfully diminish, oppress, limit and/or revoke the human rights of an individual or group of individuals <i>guaranteed by the provisions set forth in this Act</i> , and who do not or may not obtain fair and total legal restitution under the prevailing legal mechanism” (Article 1(6) of Legislation Number 39 of 1999 Concerning Human Rights).

⁵² See Brian Burdekin, *supra* note 37, at 27-42.

Malaysia	<p>“Fundamental liberties as <i>enshrined in Part II of the Federal Constitution</i>” (Section 2 of Human Rights Commission of Malaysia Act, 1999)</p> <p>* Part II of the Constitution contains: the right to life and liberty of the person, freedom from slavery and forced labor, equality, freedom of movement, freedom of speech, assembly and association, freedom of religion, and rights related to property and education.</p>
The Philippines	<p>Does not expressly define the term human rights, but limits the scope of the investigation powers of the Commission to complaints involving civil and political rights: “The Commission on Human Rights shall have the following powers and functions: Investigate, on its own or on complaint by any party, <i>all forms of human rights violations involving civil and political rights</i>” (Section 3 of Executive Order No. 163, 1987).</p>

Table 7: Definitions of Human Rights in the Establishing Legislation of Nine NHRIs⁵³
(*emphasis added*).

Most countries in Asia have experienced many similar circumstances such as monarchy, authoritarian governments, and economic difficulties. As discussed in the previous chapters, these experiences have for a long time made most countries’ legal and social climate hostile to the promotion of human rights ideas and their implementation.⁵⁴ However, after the establishment of the NHRIs in the Asia-Pacific region, they have played an important role in the protection and promotion of human rights even at the risk of their own existence because of the confrontational relationship with their governments,⁵⁵ which will be discussed in the next section. Unlike Europe, the Americas, and Africa, Asia does not have any regional human rights conventions, commissions, and courts. Therefore, NHRIs can be the best tool to monitor, promote and protect human rights in Asia⁵⁶ because, as Brian Burdekin argues, “[e]ffective implementation and monitoring of international human rights standards must primarily be

⁵³ See Brian Burdekin, *supra* note 37, at 27-42.

⁵⁴ See Albert H.Y. Chen, *Conclusion: comparative reflections on human rights in Asia* in HUMAN RIGHTS IN ASIA: A COMPARATIVE LEGAL STUDY OF TWELVE ASIAN JURISDICTIONS, FRANCE AND THE USA, 487-516 (RANDALL PEERENBOOM, et.el. ed., 2006)

⁵⁵ Park Kyeongseo, *Evolution of the National Human Rights Institutions in Asia Pacific region during 10 years after Vienna World Conference on Human Rights*, Final Proceeding at Asian Consultation on Vienna plus 10, at 2 (Dec. 15-6, 2003).

⁵⁶ *Id.* at 4-11.

accomplished at the national level.”⁵⁷ In that sense, the Asia-Pacific Human Rights Framework adopted at the U.N. Workshop in Tehran (1998) also stresses that to strengthen national human rights capacities is the strongest foundation of effective regional cooperation for the promotion and protection of human rights, and the key element for it is to create and support NHRIs in the region.⁵⁸

4.2.3. Case Study: NHRIs and the Experience of Korea⁵⁹

a. Background:

Korea is a good example of how an NHRI can be a prominent actor for the promotion and protection of human rights. It has experienced the drastic transformation of the ‘rule of law.’⁶⁰ For a great deal of its history, the country had a monarchy, and democracy was far from

⁵⁷ *Id.*, at 5.

⁵⁸ Regional Arrangements for the Promotion and Protection of Human Rights in the Asian and Pacific Region, Report of the Secretary-General submitted in accordance with Paragraph 27 of Commission on Human Rights Resolution 1997/45 Annex I (Mar. 12, 1998). UN Doc. E/CN.4/1998/50; [C]ommitted to developing and strengthening national capacities, in accordance with national conditions, for the promotion and protection of human rights through regional cooperation and the sharing of experiences, the workshop hereby adopts a Framework for Regional Technical Cooperation in the Asia-Pacific to develop, *inter alia*:
- National plans of action for the promotion and protection of human rights and the strengthening of national capacities;
- Human rights education;
- National institutions for the promotion and protection of human rights; and
- Strategies for the realization of the right to development and economic, social and cultural rights; *Id.*

⁵⁹ This case study was mainly conducted in the summer of 2009 during my work at the National Human Rights Commission of Korea as a research fellow.

⁶⁰ See ChoHyo-je, *Human Rights in Korea at the Crossroads: A Critical Overview*, Korea Journal, Vol.42, no.1., 204 (Spring 2002); Hahm Chaihark, *Human Rights in Korea* in HUMAN RIGHTS IN ASIA: A COMPARATIVE LEGAL STUDY OF TWELVE ASIAN JURISDICTIONS, FRANCE AND THE USA, 265 (RANDALL PEERENBOOM, et.al. ed., 2006) ; IAN NEARY, HUMAN RIGHTS IN JAPAN, SOUTH KOREA AND TAIWAN, 68-98 (2002); Jinsok Jun, *South Korea: Consolidating Democratic Civilian Control* in COERCION AND GOVERNANCE: THE DECLINING POLITICAL ROLE OF

the Korean collective consciousness.⁶¹ During the colonization era, it was nearly impossible for Koreans to foster appropriate human rights.⁶² After it, the Korean War further damaged seriously the human rights consciousness in Korea: after all no one expected a poor, starving people to protect human rights.⁶³ Then, there was a military coup by General Jung-hee Park, an authoritarian and dictatorial leader. Military governments ruled the country for 30 years, and it was not until the end of the 1980s that democracy returned.⁶⁴ However, due to the financial crisis in Asia towards the end of the 1990s, little progress was made in the field of human rights.⁶⁵ In 1998, Dae-Jung Kim who was persecuted under the former military regime, was elected President and now exemplifies the progression “from a victim of human rights violations to a human rights leader.”⁶⁶ Following President Dae-Jung Kim’s election promises on human rights, representatives of the numerous human rights NGOs gathered and established the National NGO Coalition for the Establishment of an Independent National Human Rights Commission (NHRCK).⁶⁷ There have been various public hearings to formulate a draft bill for the creation of NHRCK by the National NGO Coalition.⁶⁸ In 2001, the National Human Rights Commission

THE MILITARY IN ASIA, 121 (Muthiah Alagappa ed., 2001); SunHyuk Kim, *South Korea: Confrontational Legacy and Democratic Contributions* in CIVIL SOCIETY AND POLITICAL CHANGE IN ASIA: EXPANDING AND CONTRACTING DEMOCRATIC SPACE, 138 (Muthiah Alagappa ed., 2004).

⁶¹ Ian Neary, *Id.*, at 68-9.

⁶² Hahm Chaihark, *supra* note 60, at 267.

⁶³ Ian Neary, *supra* note 60, at 71-2.

⁶⁴ *Id.*, at 71-9. See also Byunghoon Oh, *Civil Society and the National Human Rights Commission in Republic of Korea*, 2-4, Santa Clara Summer Human Rights Program (Jun. 27, 2007).

⁶⁵ ChoHyo-je, *supra* note 60, at 214-5.

⁶⁶ HURIGHTS OSAKA, *Not for the People! National NGO Coalition for the Establishment of an Independent NHRC*, Asia-Pacific News No.18 (Dec. 1999). http://www.hurights.or.jp/asia-pacific/no_18/no18_korea.htm

⁶⁷ *Id.*

⁶⁸ The first public hearing on the draft bill of the National Human Rights Commission of Korea was held in October 1998 by the Ministry of Justice. Mr. Brian Burdekin, the Special Advisor of UNOHCHR on national institutions, also met the representatives of the Ministry of Justice and asked whether the draft bill would secure NHRCK’s

was finally established under the 2001 National Human Rights Commission Act. As an independent national institution with the sole purpose of promoting and protecting human rights, the National Human Rights Commission of Korea has had several remarkable achievements and contributions.

b. The legislative process for the establishment of the NHRCK:

Compared to the other legislative processes in Korea, the process to adopt the 2001 National Human Rights Commission Act is recognized as a very unusual one because of an active participation by and debate between civil society, government officials, and politicians.⁶⁹ For example, there were many proposals from various actors which inevitably drew public attention, caused tensions between political parties and lastly, took three years until the 2001 NHRCK Act was adopted.⁷⁰ This was the first time in the legislative history of Korea that the civil society had been actively involved in the legislative process from the draft to the adoption.⁷¹ The first draft bill by the Ministry of Justice to establish the NHRCK under its full jurisdiction was given up because of the severe resistance from the Korean civil society.⁷² It is also unusual that many other countries and international human rights organizations had shown their concerns and interest in the process.⁷³

independence or not. The controversial issues in the first draft bill were: 1) subordination to the Ministry of Justice, 2) enactment of a Presidential Decree, 3) limited jurisdiction for the investigation of human rights violations, 4) lack of power in the commission's decision and recommendations. *Id.*

⁶⁹ See Woon-Jo, Baek, A STUDY OF THE LEGISLATIVE PROCESS BEHIND THE LAW OF THE NATIONAL HUMAN RIGHTS COMMISSION IN THE REPUBLIC OF KOREA, Doctoral Dissertation, Inha University (2002). [written in Korean]

⁷⁰ *Id.*

⁷¹ *Id.* at 259.

⁷² Byunghoon Oh, *supra* note 64, at 5.

⁷³ *Id.*

It is my contention that, at the very least, the whole legislative process for the establishment of the NHRCK shows the possibility of *social change* in the human rights issue in Korea. Through their experiences in this active legislative process, the various actors like the civil movement activists, politicians, and government officials learned what the achievements and limits of the NHRCK in the future might be and also realized the necessity to consolidate in the NHRCKs for the efficient protection and promotion of human rights.

c. Structure of the NHRCK: *All-inclusive* system:

The NHRCK has jurisdiction over all types of human rights violations and discrimination.⁷⁴ As Nohyun Kwak, former Secretary General, pointed out, the NHRCK is “an all-in-one human rights institution.”⁷⁵ In 2009, there were 164 staff members in the following divisions:⁷⁶ human rights policy, human rights education, and communication and cooperation under the Policy and Education Bureau; investigation coordination, civil rights, anti-discrimination and disability rights under the Investigation Bureau. There are also three regional offices in Busan, Gwangju and Daegu. Because of insufficient staffing, the NHRCK cannot fully and efficiently investigate all human rights violations and discrimination cases: since its establishment, it has received over 30,000 complaints.⁷⁷ Its *all-inclusive* system, however, is preferable for countries new to the protection of human rights because it can deliver and apply

⁷⁴ See The 2001 National Human Rights Commission Act, Art. 2, 19 and 30.

⁷⁵ Nohyun Kwak, *The Dilemma and Vision of an All-inOne NI: NHRC-Korea's experience*, 1-2, Conference Paper, National Human Rights Commission of Korea (Dec. 4, 2006). In countries like Canada, Australia and the U.K., the jurisdiction of NHRIs is rather limited as they already have specialized human rights protection systems such as the police and the military ombudsman, equal employment opportunity commissions, gender discrimination commissions, disability rights commissions, etc. *Id.*

⁷⁶ Human Rights Commission of the Republic of Korea, ANNUAL REPORT 2008 (hereafter The Annual Report).

⁷⁷ *Id.*

unified and coherent human rights policy to a wide variety of human rights violation cases. In addition, it is more economical than creating several new human rights bodies, especially for developing countries.⁷⁸

d. Interdependency of the NHRCK:

As a national institution, it is hard for the NHRCK to directly reflect the opinions from the civil society in Korea in its policy-building and decision-making process. It is also difficult for it to naively follow the government's human rights policy, given the fact that most human rights violations are still committed by various governmental institutions.⁷⁹ Thus, the experience of the NHRCK since its establishment shows that it is very hard to set up the appropriate relationship with the civil society and the government: somehow a tension with both groups appears natural. Seonghoon Lee, former Director-General of the NHRCK, also emphasizes NHRI's *interdependence* with the civil society and government institutions.⁸⁰ As he puts it, the National Assembly, the mass media, the human rights NGOs, and the academia, for example, all have different interests and voices. Thus, in reality, what is important for the NHRCK is its interdependence with other human rights actors rather than its complete independence. Furthermore, the independence of the Commission itself does not mean isolation.⁸¹ I also believe that one of the important conditions for NHRCK's effectiveness is not so much its neutrality

⁷⁸ Nohyun Kwak, *supra* note 75, at 5.

⁷⁹ Byunghoon Oh, *supra* note 64, at 8.

⁸⁰ Interview with Seonghoon Lee, Director-General of NHRCK, conducted in Jun. 12, 2009.

⁸¹ *Id.*

from both the civil society and the government institutions in Korea, but its impartiality to all related human rights actors.⁸²

The NHRCK is subject to another tension: that between the international human rights standard under the U.N. structure and Korea's national interest and public opinion.⁸³ Since its establishment, the NHRCK has raised its capacity to creatively interpret and apply international human rights conventions and treaties to meet the domestic situation. There have been severe criticisms both at the international and the national level, however.⁸⁴ The NHRCK has dealt with many controversial issues, like human rights of migrant workers,⁸⁵ and has developed an aptitude for applying international human rights standards and simultaneously responding to public opinion.⁸⁶

e. NHRCK's main achievements:

Since its establishment in 2001, the NHRCK has been a driving force in enhancing the human rights situation in Korea. Some of its most significant achievements are highlighted below. First, there have been more than 30,000 complaints submitted and investigated.⁸⁷ The number of cases increased every year as the following table shows.

⁸² *Id.* See also Seonghonn Lee, *the Universal Declaration of Human Rights and the Commission's Future*, Window: Human Rights Policy Dialogue (NHRCK, Sept. 2008); Hyoje Cho, *A LANDSCAPE OF HUMAN RIGHTS*, (2008). [written in Korea]

⁸³ Interview with Byunghoon Oh, Senior Consultant on Foreigners, NHRCK, conducted in Jun. 3, 2009.

⁸⁴ Interview with Seonghonn Lee, *supra* note 82.

⁸⁵ The Annual Report, *supra* note 76.

⁸⁶ Interview with Seonghonn Lee, *supra* note 82.

⁸⁷ As of November 2008, the total number of complaint cases was 35,163: 27,993 on human rights (civil and political rights) violations (79.6%), 5,380 on discrimination (15.3%) and 1,790 on other issues (5.1%). See The Annual Report, *supra* note 76.

Year	# of Complaint	Counseling	Guide/Civil Petition	Total
2008	6,309	16,302	30,043	52,654
2007	6,274	13,387	20,780	40,441
2006	4,187	10,737	19,558	34,482
2005	5,617	9,136	18,684	33,437
Total	35,163	63,889	121,971	221,023

Table 8: Complaints, Counseling, Guide and Civil Appeal Cases in the NHRCK by Year (Number of Cases) ⁸⁸

It is clear that the NHRCK has provided not only accurate information on legal and institutional solutions to victims of human rights violations, but has also actually assisted the victims to recover from their sufferings and to get effective remedies. Specifically, it has dramatically improved the prisoners' and detainees' human rights in detention and protective facilities by operating a special task force team to handle in-person complaints on-site.⁸⁹

Second, it has issued more than 170 recommendations and opinions since its establishment in 2001 to improve the human rights related legislation and government policies.⁹⁰ What is more, almost 85% of its recommendations have been accepted.⁹¹ For instance, the Commission opposed the enactment of the anti-terrorism legislation by the National Assembly.⁹² To eliminate any forms of discrimination on the ground of gender, the Commission also submitted its opinion to the Constitutional Court to review the unconstitutionality of the traditional Family Registry System of Korea (Ho-Ju jedo) which has been debated in Korea for a

⁸⁸ *Id.*

⁸⁹ See National Human Rights Commission of Korea, FIVE YEARS EXPERIENCE, ACHIEVEMENT AND CHALLENGES 85-144, (Feb. 2007). [written in Korea]

⁹⁰ The Annual Report, *supra* note 76.

⁹¹ *Id.*

⁹² Park Kyeongseo, *Evolution of the National Human Rights Institutions in the Asia Pacific Region during 10 years after Vienna World Conference on Human Rights*, 3, Final Proceeding at Asian Consultation on Vienna plus 10 (Dec. 15-6, 2003).

long time.⁹³ In 2006, the NHRCK presented the National Human Rights Commission's Action Plan to Promote Human Rights (2006-2008) to provide founding guidelines to draft the National Human Rights Action Plan (NAP)⁹⁴ and also to publicize in detail its obligation to promote human rights in Korea.⁹⁵ Under its Action Plan, the Human Rights Education Act was enacted in 2006 and the Anti-discrimination Act against Persons with Disability in 2007.⁹⁶

Other major recommendations and opinions by the NHRCK cover controversial issues like the death penalty, the amendment to the National Security Law, the inspection of elementary school students' diaries, legislation on non-regular workers, the practice of restricting students' hairstyles, the amendment to the National Education Information System (NEIS), the reservation and implementation of Article 21 of the U.N. Convention on the Rights of the Child (CRC), the legislation of the Anti-discrimination Act, the set-up of a national policy for the protection of refugees, the amendment to the AIDS Prevention Act, remedies for the Persons with Disabilities Act, the amendment to the Communications Confidentiality Protection Act, the rights of North Korean refugees, the amendment to the Migrant Workers Act, etc.⁹⁷

In addition, the NHRCK can issue its opinions to courts.⁹⁸ Though not legally binding, they have played an important role and have influenced court decisions⁹⁹ in public-policy-related

⁹³ *Id.*, at 4.

⁹⁴ NAP was finalized in May 2007 by the Ministry of Justice and is currently under implementation.

⁹⁵ National Human Rights Commission of Korea, ANNUAL REPORT 2006, at 27-32.

⁹⁶ *Id.*

⁹⁷ See National Human Rights Commission of Korea, ANNUAL REPORTS 2002-2008.

⁹⁸ See Art. 28 (Presentation of Opinions to Courts and Constitutional Court) of the 2001 National Human Rights of Commission Act:

(1) In case a trial, which significantly affects the protection and promotion of human rights, is pending, the Commission may, if requested by a court or the Constitutional Court or if deemed necessary by the Commission, present its opinion on de jure matters to the competent division of the court or the

cases in the Supreme Court or the Constitutional Court such as the Family Registry System (Ho-Ju jedo) mentioned above. Overall, at the very least, one thing is clear: legal frameworks and the judicial enforcement of Korea's constitutional rights will contribute to the growth of international human rights, and NHRCK's quasi-judicial nature becomes a part of such a contribution.

Lastly, NHRCK's most important achievement is the gradual change in the public awareness of the issue of human rights.¹⁰⁰ When there are human rights violations by the government, now, people have come to think of the Commission as the institution to solve their problem.¹⁰¹ While its recommendations and opinions against the government's human rights policy do not have a legally binding power, in most cases they have been respected or, at least seriously considered by the government. The reason is not only the strong advocacy by the civil society, but also NHRCK's *publishing power* to release them to the public through the mass media.¹⁰² Through its recommendations and opinions, even if they are not accepted by the government, people can understand why there is a human rights issue in a certain case and gradually recognize what the fundamental human rights are.

Constitutional Court.

(2) *In case a trial with respect to matters investigated or dealt with by the Commission under the provisions of Chapter is pending, it may, if requested by a court or the Constitutional Court or if deemed necessary by the Commission, present the opinions on de facto and de jure matters to the competent division of the court or the Constitutional Court.*

⁹⁹ See Kwak No-hyun, *National Human Rights Commission at Work: A Critical Reflection*, Korea Journal, Vol.42, No.3, 194-218 (Autumn, 2002).

¹⁰⁰ Interview with Myung-Jai Lee, Director of the Communications and Cooperation Division, NHRCK, conducted in Jun. 10, 2009.

¹⁰¹ *Id.*

¹⁰² See Art. 25 (4) of the 2001 National Human Rights of Commission Act.

f. The NHRCK and International Cooperation:

The NHRCK has been actively involved in the work of the International Coordinating Committee of National Human Rights Institutions (ICC), for example, as a vice Chair in 2007, through its participation in the ICC conferences, its assistance in establishing the role of the ICC in the Human Rights Council, its attendance to the ICC Sub-Committee on Accreditation to review the accreditation and re-accreditation of other NHRIs. With the firm belief that the Asia-Pacific Forum of the National Human Rights Institutions (APF) can be an effective networking tool that promotes the domestic implementation of international human rights norms by each NHRI in Asia-Pacific region, the NHRCK has also eagerly cooperated with the APF.

Furthermore, networking between NHRIs can give each NHRI a chance to share human rights information and practices in other countries. Thus, the NHRCK has regularly exchanged staff with other NHRIs to work and conduct research in best practices and has sought appropriate ways to apply them to Korea.¹⁰³ It has invited government officials from other developing countries, for example, East Timor, Afghanistan and Iraq, for a training program designed to provide an opportunity for the Commission to deliver its experiences and knowledge to NHRIs of developing countries or those considering the setting up of an NHRI.¹⁰⁴ Such cooperation can bring in the grassroots experience of those fighting for human rights and also give other NHRIs the added advantage of learning from others' practices, and thus strengthening the campaign.

g. Conclusion:

¹⁰³ Interview with Yunkul Jung, International Cooperation Officer, NHRCK, conducted on Jun. 17, 2009.

¹⁰⁴ *Id.*

I believe that just as the civil society movement in 1987 became the tipping point in the democratization process in Korea, the establishment of the NHRCK in 2001 was the tipping point for human rights. While there are still problems in the Commission, it has gradually changed the government's top-down approach toward human rights policy to a more horizontal and cooperative one.¹⁰⁵ Overall, the Commission has become an active driver for the promotion and protection of human rights in Korea.

h. Postscript:

Since I finished my initial case study on NHRCK in 2009, there has been an increasing concern about the current Lee Myung-Bak administration's move to downsize the National Human Rights Commission.¹⁰⁶ The government reduced the Commission's staff by 21%, most of whom were recruited from civil society and the academics. It is also planning to close three regional offices of the NHRCK which will critically limit the accessibility of complaint mechanisms. In 2009 before Mr. Kyung-Whan Ahn, the former chairperson of the NHRCK resigned, the Commission filed a complaint with the Constitutional Court of Korea against the government's hostile actions. But the Constitutional Court dismissed the petition on October 28, 2010 based on the findings that the NHRCK is not a constitutional body and therefore is not qualified to file such a petition to the Constitutional Court. It clearly confirmed that the Commission was only established based on weak legal grounds, and is regarded as a non-regular

¹⁰⁵ Yi-Young Cho, *Human Rights Commission's Controversial Advice*, The Dong-A Ilbo (Apr. 15, 2005).

¹⁰⁶ See Forum-Asia, *South Korea Government Announces Personnel Reductions for NHRCK*, Asian NI Watch, (Mar. 1, 2009). http://www.forum-asia.org/news/press_releases/pdfs/NI%20Watch_Issue1.pdf; *NHRCK strongly opposes government's plan to reduce their personnel*, The Hankyoreh (Mar. 24, 2009). http://english.hani.co.kr/arti/english_edition/e_national/345846.html; *Editorial: Plan to reduce NHRCK should be withdrawn*, The Hankyoreh (Mar. 24, 2009). http://english.hani.co.kr/arti/english_edition/e_editorial/346305.html; Asia Pacific Forum, *South Korea: NHRCK staff cut by 21 per cent, bureaus reduced*, <http://www.asiapacificforum.net/news/south-korea-nhrck-staff-cut-by-21-per-cent-bureaus-reduced.html>.

state institution that does not even have the power to make a constitutional lawsuit on competence dispute with other state agencies.¹⁰⁷

To make matters worse, after Mr. Byung-Chul, Hyun was appointed the new Chairperson of the NHRCK in July 2009, the NHRCK has increasingly been subordinated to the government. As a result, since then, the NHRCK has kept silent on sensitive human rights violations issues that are directly related to the current government. Many national and regional human rights organizations including 15 former NHRCK commissioners, 334 legal scholars and lawyers, and 660 NGOs have expressed their concerns that the new Chairperson is not qualified to take the position, and have urged him to resign.¹⁰⁸ No-Hyun Kwak describes this appointment as an illustration of the President's clear intention to neglect human rights issues.¹⁰⁹ In his Statement of Resignation, Nam-Young You, former Commissioner of the National Human Rights Commission of Korea, describes the crisis in the NHRCK thus:

Generally, national human rights institutions are destined to form a relationship of tension with any Government for the protection of human rights and at the same time, to cooperate with the Government in order to promote human rights. As is clear from the South Korean state organs' surveillance activities and infringement on the freedom of expression, however, the NHRCK has failed to monitor the government in terms of freedom and human rights.¹¹⁰

¹⁰⁷ The Constitutional Court of Korea, Summary of Decision on Case No. 2009HunRa9, (Oct. 28, 2010) http://www.ccourt.go.kr/home/storybook/storybook.jsp?eventNo=2009%C7%E5%B6%F36&mainseq=102&seq=6&list_type=05

¹⁰⁸ See The Asian NGOs Network on National Human Rights Institutions (ANNI), *SOUTH KOREA - Asian NGOs demand special review on National Human Rights Commission of Korea*, FORUM-ASIA, (Oct. 6, 2009). http://www.forum-asia.org/index.php?option=com_content&task=view&id=2346&Itemid=129

¹⁰⁹ No-Hyun Kwak, *Commentary: MB administration ignoring human rights*, PRESSIAN (Jul. 19, 2009). http://www.pressian.com/article/article.asp?article_num=60090719135534§ion=03

¹¹⁰ Statement of resignation from Mr. Nam-Young You, former standing commissioner of the NHRCK (Nov. 23, 2010). <http://www.ahrchk.net/statements/mainfile.php/2010statements/2949/>

He also points out the major problems which have seriously challenged the independence of the NHRCK, related to the current Chairperson, Byun-Chul Hyun. These are, first, the fact that the Chairperson's remarks in the National Assembly threatened the Commission's independence. He has also unjustly refused to reflect the other existing Commissioners' opinions in an official statement of the NHRCK in various human rights violation cases. To strengthen the chairperson's authority, an amendment of the NHRCK's managerial regulations was proposed, which allows only the Chairperson to decide which agendas will be presented to the Standing Committee or the Plenary Committee of the NHRCK and when.¹¹¹

All those problems arose basically from the indifference of the current Lee Myung-Bak's government to human rights. Some Commissioners, including the Chairperson were selected without having met the qualifications stipulated in Article 5 (2) of the NHRCK Act: "professional knowledge of and experience with human rights matters," basically ignoring the provisions of the Paris Principles which require an open and transparent appointment process. Overall, the government which has the power to appoint them has intentionally ignored all these standards.

I, however, think it is still too early to evaluate the current crisis within the NHRCK. As discussed, there are concerns that all ongoing troubles in the Commission may be a set-back in the development of human rights in Korea so far. However, there are also increasing number of efforts by all rights stakeholders including civil society and NGOs to regain and ensure the Commission's independence and effectiveness with more dynamic discussions on its credibility and legitimacy as a national institution. Such interactions may prove to have a significant effect

¹¹¹ *Id.*

on raising the capacity of the Commission in the future for a better protection and promotion of human rights in Korea. Thus, I will leave the further study of the ongoing crisis in the NHRCK for the future.

4.3. WHY NHRIS CAN BE A DRIVING FORCE FOR SETTING-UP RHRIS IN ASIA

So far, I have examined what NHRIs are, how they have emerged with the development of an international human rights monitoring system, what their role, functions and responsibilities are, and how they interact with other national institutions, international human rights organizations, and civil society including human rights NGOs. I also reviewed current existing NHRIs in the Asia-Pacific region and provided a case study on the National Human Rights Commission of Korea to reveal essential characteristics of NHRIs. And, in this section, based on the discussions above, I will show why NHRIs can be eminent actors for establishing RHRIs in this region.

4.3.1. Bridging the Gap: Negotiating Sovereignty and Human Rights

As reviewed in Chapter Three, one of the major obstacles for RHRIs is the Asian values debate along with the traditional concept of sovereignty. As a first reason for the promise contained in NHRIs, I broadly maintain that they can bridge the gap between individual Asian governments and the international community on the understanding of fundamental human rights, sovereignty and Asian values.

Asian values have been advocated mostly by authoritarian governments and their leaders in the region as an excuse for their undemocratic policy.¹¹² Most of these governments have proclaimed that in Asia, “it is impossible to have full enjoyment of civil and political rights without economic development.”¹¹³ As Kofi Annan stressed, however, most people do not categorize their human rights in terms of *Asian vs. international ones*¹¹⁴ or, into those that can be protected within the boundary of sovereignty and the others that cannot be protected even though they are within the framework of international human rights norms. From their personal experience, most people come to learn what is needed and should be protected for their living. The NHRI is established as an independent national agency with the goal of protecting those people who are most vulnerable to basic human rights violations under the international standards, at the same time, considering the cause of the problems in light of the local culture and tradition.¹¹⁵ Even if each NHRI does not have a domestic legislation to investigate specific human rights violations by its government, NHRIs still have a responsibility to monitor government compliance with international human rights treaty obligations based on Article 3 of the Paris Principles.¹¹⁶ The importance of NHRIs in advocating international human rights norms

¹¹² Hidetoshi Hashimoto, *THE PROSPECTS FOR A REGIONAL HUMAN RIGHTS MECHANISM IN EAST ASIA*, 140-1 (2004); “In contrast to what some Asian leaders claim, ‘Asian values’ are not necessarily incompatible with liberal or human rights.....The spread of democracy throughout Asia is becoming almost irresistible now that there are several examples of Asian democracies from which ‘lessons’ can be learned. This is a promising development for the entire world and it is likely that the future of democracy lies in Asia.” International Centre for Human Rights and Democratic Development, *CONFERENCE REPORT: NEW NETWORKS AND PARTNERSHIPS FOR HUMAN RIGHTS AND THE RULE OF LAW*, 26-8 (Toronto, Jun. 14-5, 2006) http://www.dd-rd.ca/site/_PDF/publications/asia/asia-conf-report-2006.pdf

¹¹³ International Council on Human Rights Policy, *PERFORMANCE & LEGITIMACY: NATIONAL HUMAN RIGHTS INSTITUTIONS*, 74 (2004).

¹¹⁴ Kofi Annan, *Address to the Facing History and Ourselves benefit*, New York, (15 October, 1997) Press Release, SG/SM/6359.

¹¹⁵ International Council on Human Rights Policy, *supra* note 113, at 74-6.

¹¹⁶ Brian Burdekin, *supra* note 37, at 24-5.

cannot be overstated at least considering such a public accountability. With the progress in democratization in Asia, NHRIs have indeed been strong critics of Asian values.¹¹⁷

The international human rights system challenges state sovereignty in the sense that human rights treaties limit what a ratifying state party is permitted to do within its borders and sometimes empower other countries to intervene in a state's internal affairs when there are gross human rights violations. Thus, NHRIs, one of whose main roles is to monitor a state's compliance with international human rights norms at the national level, "moreover, inevitably challenge state sovereignty."¹¹⁸ More effective NHRIs will then pose a greater challenge to state sovereignty. In the same vein, the Chief Commissioner of the New Zealand Human Rights Commission states:

*[W]e profess to believe in free markets that have no boundaries, but we place boundaries on human rights in the name of sovereignty..... [T]he ignoring of child poverty, youth suicide, low participation in elections and democratic processes, and the failure to deliver equal social and economic rights is a blight on nations who profess to be leaders in human rights.*¹¹⁹

But, as discussed in the previous chapters, I believe that respect for state sovereignty should be realized by protecting the fundamental rights of a state's nationals through the

¹¹⁷ See C. Raj Kumar, *National Human Rights Institutions (NHRIs) and Economic, Social and Cultural Rights: Toward the Institutionalization and Developmentalization of Human Rights*, 28HUM. RTS. Q. 755 (2006).

¹¹⁸ Sonia Cardenas, *Sovereignty Transformed? The Role of National Human Rights Institutions* in NEGOTIATING SOVEREIGNTY AND HUMAN RIGHTS: ACTORS AND ISSUES IN CONTEMPORARY HUMAN RIGHTS POLITICS 27, 33 (Noha Shawki and Michaelene Cox eds., 2009).

¹¹⁹ *Chief Commissioner identifies human rights challenges*, Tirohia, New Zealand Human Rights Commission, Dec. 1998 cited from INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, PERFORMANCE & LEGITIMACY: NATIONAL HUMAN RIGHTS INSTITUTIONS, 75 (2004).

domestic legislation,¹²⁰ because as Jack Donnelly maintains, “dominant understanding of sovereignty (and human rights) has indeed been significantly reshaped...[and]... human rights, far from undermining or eroding sovereignty, are embedded within sovereignty.”¹²¹ Describing the Cold War as an era of the internationalization of human rights norms and the post-Cold War period as their internalization, Sonia Cardenas also argues that:

*Neither human rights nor NHRIs displaces state sovereignty, or serves as an alternative focal point of authority. Rather, human rights and NHRIs constitute historically evolving and contested standards, infusing the state’s sovereign legitimacy and authority with new meaning in a post-Cold War world.*¹²²

Indeed, state sovereignty should serve not as a hurdle to, but as a guarantee for, the realization of the fundamental human rights of the state’s nationals.¹²³ Most implementation and enforcement of international human rights norms is still made at the national level.¹²⁴ And, as national institutions, NHRIs have a major role to play in such responsibilities. As the following diagram demonstrates, in their work, NHRIs can mediate between national sovereignty and

¹²⁰ Jianming Shen, *National Sovereignty and Human Rights in a Positive Law Context*, 26 BROOK. J. INT’L L. 417, 428-9 (2000).

¹²¹ Jack Donnelly, *State Sovereignty and Human Rights*, HUMAN RIGHTS & HUMAN WELFARE, Working Paper no.21 (2004) cited in Sonia Cardenas, *supra* note 118, at 37.

¹²² Sonia Cardenas, *Id.*, at 27 and 38.

¹²³ See Jarat Chopra and Thomas G. Weiss, *Sovereignty Is No Longer Sacrosanct: Codifying Humanitarian Intervention*, 6 ETHICS & INT’L AFF. 95 (1992); Anne Bodley, *Weakening the Principle of Sovereignty in International Law: The International Criminal Tribunal for the Former Yugoslavia*, 31 N.Y.U. J. INT’L L. & POL. 417 (1999); Jianming Shen, *supra* note 120, at 434.

¹²⁴ States, NGOs and individuals can all play a role in enforcing international human rights norms. See Harold Hongju Koh, *supra* note 34, at 1408-1416.

internationally recognized standards and principles of human rights as illustrated by the Paris Principles.¹²⁵

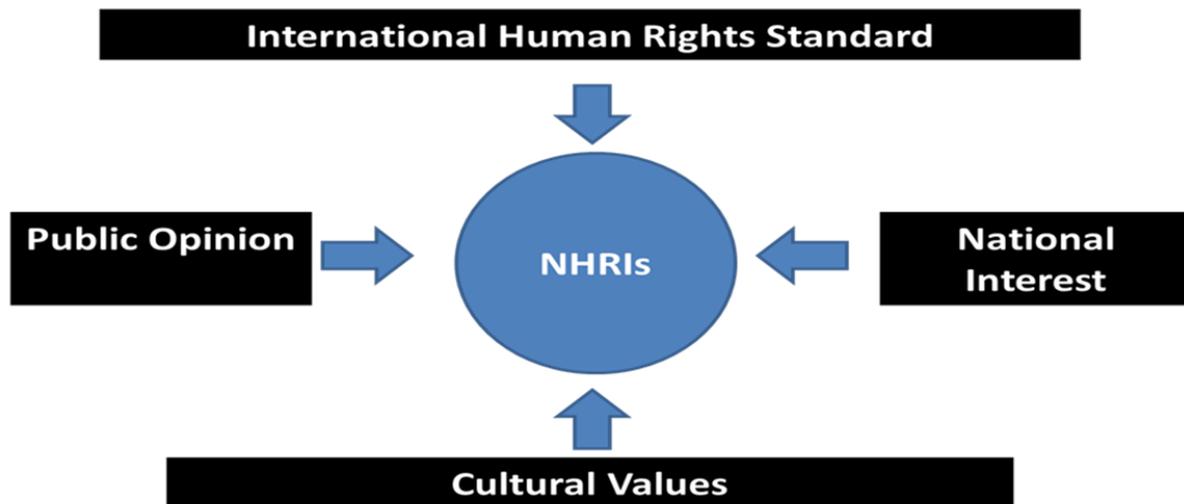


Figure 1. NHRI's relationship diagram at the international level

They can be set up to meet not only the national interest and regional priorities, but also the international human rights standard.¹²⁶ Furthermore, in collaboration with its NHRI, each individual state can cooperate with other neighboring states in the region in order to carry out their obligations based on both state sovereignty and international human rights law.¹²⁷ As a result, this process will gradually decrease individual states' reluctance to ratify major

¹²⁵ See NHRIs: a Handbook, *supra* note 4, at 4-6; See also the Paris Principles, *supra* note 12, Annex (Competence and responsibilities) Art.3(d), (e) and Annex (Methods of operation) Art.(f), (g).

¹²⁶They "act as a channel between action at the international level-through international treaty bodies, the special procedures, human rights resolutions and other mechanisms-and action at the national level." The Copenhagen Declaration from the Sixth International Conference of National Institutions for the Promotion and Protection of Human Rights (Copenhagen and Lund, 10-3 April, 2002), para 2a. *cited in* Rachel Murray, *supra* note 2, at 23.

¹²⁷ See, for example, Press Release, *Questions of Sovereignty, the State System, the Future of the Organization Raised by General Debate Speakers*, UN Doc. GA/9606 (Sept. 24, 1999) (including Singapore, Iraq, Dominican Republic, Kazakhstan, and Iran); Press Release, *General Assembly Begins Discussion on Secretary-General's Annual Report on Work of Organization*, UN Doc. GA/9627, (Oct. 6, 1999) (including Colombia, Kuwait, Mongolia, China, Bangladesh, India, Venezuela); Press Release, *Importance of State Sovereignty, Need to Address Human Rights Violations, Council Reform, Discussed in Assembly*, UN Doc. GA/9633 (Oct. 8, 1999) (including Cuba, Algeria, Oman, Pakistan, Peru, the Philippines, Senegal, and the Sudan).

international human rights treaties and also change each government's attitude against setting up RHRIs in the region.

Overall, the gap between sovereignty and human rights can be filled by NHRIs, which can revitalize traditional cultures in individual states and the region by providing clues to developing proper human rights norms and political moralities, and ultimately defining Asian identities consolidating with international human rights standards.¹²⁸ NHRIs also can fill the gap between individual Asian governments and international human rights institutions in their perspectives on the universality of human rights and Asian values, which have hindered the establishment of RHRIs for over two decades. As discussed, NHRIs can serve as an advisor to government delegations to the U.N. Human Rights Council and other international bodies on the major human rights conventions.¹²⁹ Such involvement may make their governments reveal domestic human-rights conditions and even evidence of human rights violations to international human rights bodies because a more transparent and truthful statement can be derived from the participation of the NHRIs in the preparation of an individual state's national report. NHRIs also can encourage their government to participate in international and regional human rights arrangements. As NHRIs have a special status in the international human rights system, having both the characteristics of governmental institutions and agencies of international bodies,¹³⁰ such a unique position can make their opinions more valuable and, as a result, they can enhance the implementation of an individual state's human rights conditions, by both reflecting the international standards and the national interest.

¹²⁸ See Orest Nowosad, *National Institutions and the Protection of Economic, Social and Cultural Rights*, in *THE PROTECTION ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS* 179-92 (Bertrand G. Ramcharan ed., 2005)

¹²⁹ See Brian Burdekin, *supra* note 37, at 89-93; Rachel Murray, *supra* note 2, at 11-18.

¹³⁰ See Brian Burdekin, *Id.*; Rachel Murray, *Id.*, at 36-43.

There are concerns that some national human rights institutions, especially in developing countries, tend to be passive in monitoring the state's power, and only focus on cultural activities or cases that are not against government policies. Then they simply remain as formal institutions which pretend that there are no human rights violations. The APF, however, requires its member NHRIs to comply both with the Paris Principles and with basic human rights norms.¹³¹ Such a monitoring system keeps NHRIs immune from corruption and makes it hard for them to intertwine with their governments behind the principle of sovereignty.

4.3.2. The Nature of NHRIs: Existing as Mediators

As illustrated in Chapter Three, the failure of all the initiatives to establish RHRIs in the Asia-Pacific region clearly shows there is a lack of individual Asian governments political will toward regional human rights arrangements. Below I focus on the second reason why NHRIs can be an eminent actor for establishing RHRIs in the region: their very nature as a channeling institution that can gradually change a government's position on RHRIs through the dynamic interactions with all rights stakeholders in their country.

With the increasing number of NHRIs, many human rights activists and scholars have focused on whether NHRIs are becoming prominent actors in the national, regional, and international human rights arenas, or whether they have any impact on the protection of human rights in individual countries.¹³² They suggest that the nature of NHRIs shows they can be

¹³¹ See Brian Buurdekin, *Id.*, at 98-101.

¹³² See Bertrand G. Ramcharan ed., *THE PROTECTION ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS* (2005); Kamal Hossain, et al. ed., *HUMAN RIGHTS COMMISSIONS AND OMBUDSMAN OFFICES: NATIONAL EXPERIENCES*

prominent actors in the human rights protection mechanism. Rachel Murray describes the nature of NHRIs as follows:

*Requiring at the very least the commitment by the state to establish NHRIs in some official status, leaving aside whether the state then funds them or appoints their members, NHRIs are elevated into a position beyond an NGO. Yet, their effectiveness and their functions require them to operate separately from the government and not be subject to its influence or control and therefore not to be viewed simply as part of the state machinery. ... Unlike NGOs, which fit more easily into the mould of a non-state actor, NHRIs can and are seen as both state and non-state actors.*¹³³

Indeed, the Paris Principles articulate this characteristic of NHRIs based on *pluralist representation*, in the sense that they should be composed of human rights experts and activists from different sectors of society.

1. The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of:

- (a) Non-governmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists;*
- (b) Trends in philosophical or religious thought;*
- (c) Universities and qualified experts;*
- (d) Parliament;*

THROUGHOUT THE WORLD (2000); Linda C. Reif, *THE OMBUDSMAN, GOOD GOVERNANCE AND THE INTERNATIONAL HUMAN RIGHTS SYSTEM* (2004); Brian Burdekin, *Id.*, at 22-6; Reenu Paul, *NATIONAL HUMAN RIGHTS COMMISSION OF INDIA: A HUMAN RIGHTS EVALUATION*, Dissertation (The London School of Economics & Political Science, 2003).

¹³³ Rachel Murray, *supra* note 2, at 89.

(e) Government departments (if these are included, their representatives should participate in the deliberations only in an advisory capacity).¹³⁴

That is, in NHRIs, there should be an effective cooperation through the presence of other governmental institutions, Congress, academic, and civil society, including human rights NGOs as the following diagram describes.

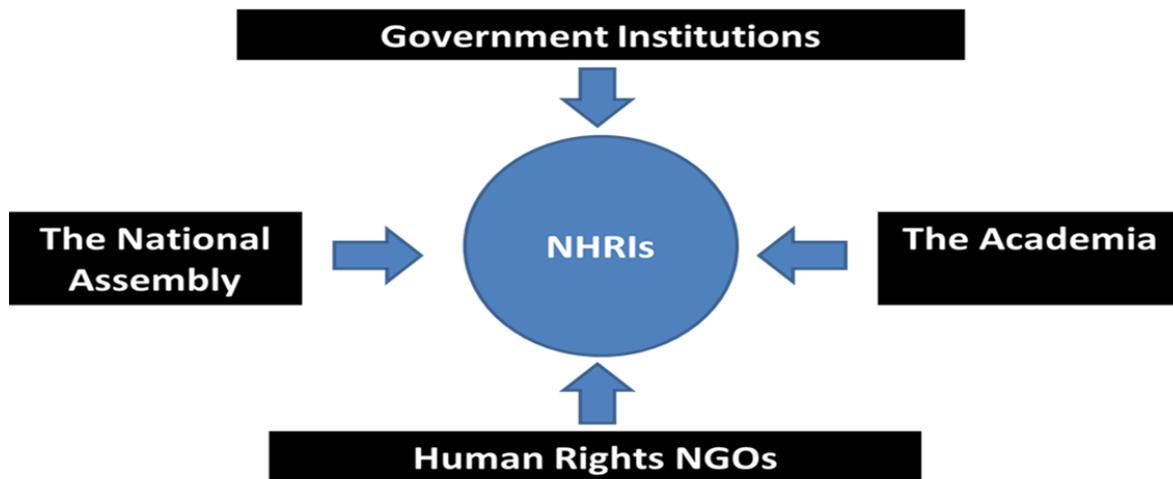


Figure 2. NHRI's relationship diagram at the national level

The pluralism of NHRIs can prevent them from becoming politically biased in their work. Such a pluralist representation can not only ensure independence from the government, but also ensure similar independence from any other interest groups within the society.¹³⁵ Morten Kjærum explains it as:

The pluralist representation ensures input from different sectors in society and thus offers an opportunity for the institution to detect possible human rights violations as well as different perspectives offer an opportunity to broaden the inventiveness in responding to the

¹³⁴ The Paris Principles, *supra* note 12, Article 1of Annex (Composition and guarantees of independence and pluralism).

¹³⁵ Morten Kjærum, NATIONAL HUMAN RIGHTS INSTITUTIONS IMPLEMENTING HUMAN RIGHTS, 12 (the Danish Institute for Human Rights, 2003).

*violations. Furthermore, it provides channels for information and education to specific target groups.*¹³⁶

This element of NHRIs is especially important for human rights NGOs, because as most of the NGOs should and are not directly related with any national government, NHRIs can cooperate with them. NHRIs' providing an official channel between the government and NGOs will enhance NGOs' capacity for the protection of human rights and also fulfill their needs.¹³⁷ The African Commission on Human and People's Rights describes the nature of NHRIs regarding this aspect as follows:

*[C]lose links with national institutions and NGOs, not only within that country but also internationally, is a very important aspect of the work of the national institutions because they can give support to the work of the NGOs and work in collaboration with them and NGOs can also strengthen work by national institutions and all this can be done in an atmosphere of dialogue and respect of competence of institutions and NGOs.*¹³⁸

Overall, NHRIs can play a role as a formal institution to reflect and apply voices from below to change a government's policies and practices for better human rights practices by "courting [all rights] stakeholders to take an increasingly active role in the creation and operation of NHRIs."¹³⁹ I believe that such changes will ultimately lead individual governments' political positions to be converted not against but in favor of establishing RHRIs in the Asia-Pacific region.

¹³⁶ *Id.*, at 8.

¹³⁷ Rachel Murray, *supra* note 2, at 23-5.

¹³⁸ Report of the 30th session of the African Commission on Human and Peoples' Rights *cited in* Rachel Murray, *supra* note 2, at 24.

¹³⁹ Julie A. Mertus, HUMAN RIGHTS MATTERS: LOCAL POLITICS AND NATIONAL HUMAN RIGHTS INSTITUTIONS, 139 (2009).

In addition, two other characteristics of NHRIs, as a promoter of human rights education and a quasi-judicial institution for the protection of human rights, can raise public awareness of human rights, which will finally mobilize civil society to pressure a government moving forward to establish RHRIs in the region. It is a long process to understand what human rights are, detect why there are human rights violations and finally be able to mount a sustainable campaign against these violations. As discussed in the previous section on the role of NHRIs, they can integrate human rights education into primary, secondary, and university curricula and into informal education, which will increase public understanding of human rights issues.¹⁴⁰ Further, they can provide human rights education programs for government officials, judges, the police, and prison and detention facilities officers to deepen the human rights capacity among the administration and the judiciary.¹⁴¹ The quasi-judicial nature of NHRIs can also enhance the facilitation of human rights protection and promotion, because, for the public, they can provide quicker and cheaper redress for human rights violations through the adoption of easier to access, lower cost, and speedier resolutions compared to the traditional judicial system.¹⁴² In that sense, the Asian Human Rights NGO Charter also stresses the significance of NHRIs as stipulated in Article 15.4 (c):

All states should establish Human Rights Commissions and specialized institutions for the protection of rights, particularly of vulnerable members of society. They can provide easy, friendly and inexpensive access to justice for victims of human rights violations. These bodies can supplement the role of the judiciary. They enjoy special advantages: they can help establish standards for the implementation of human rights norms; they can disseminate information about human rights; they can investigate allegations of violation of

¹⁴⁰ *Id.*, at 140.

¹⁴¹ *Id.*

¹⁴² Brian Burdekin, *supra* note 37, at 22-6; Reenu Paul, *supra* note 133, at 46.

*rights; they can promote conciliation and mediation; and they can seek to enforce human rights through administrative or judicial means. They can act on their own initiative, as well on complaints from members of the public.*¹⁴³

4.3.3. Cooperation of NHRIs and the APF

The third reason for NHRIs being an eminent actor toward establishing RHRIs in the region is the way in which they work and cooperate within the framework of the APF. So far, the networks of NHRIs in this region have elected to focus on cooperation among NHRIs to strengthen their role at the national level. Yet, they have a potential power at the regional level to take concrete steps to set up regional human rights arrangements, too. As discussed in Chapter Three, NHRIs and their network through the APF have not only enhanced the capacity of individual NHRIs, but also shown some positive signs at least at the sub-regional level to establish human rights bodies with their active cooperation. As Vitit Muntarbhorn points out, “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.”¹⁴⁴

Regarding the role of the networking among NHRIs at the national level, it has provided each individual NHRI a chance to share human rights information and practices with those in other countries. Such a forum can bring in the grassroots experiences of those fighting for human

¹⁴³ Asian Human Rights Charter, adopted in Kwangju, South Korea, 1998. <http://material.ahrchk.net/charter>

¹⁴⁴ Vitit Muntarbhorn, *In Search of the Rights Track: Evolving a Regional Framework for the Promotion and Protection of Human Rights in the Asia-Pacific Region*, 14, Discussion Paper (UNOHCHR, Jun. 2005). http://bangkok.ohchr.org/news/events/asia-pacific-regional-framework-workshop-2010/files/Discussion_Paper_Vitit_Muntarbhorn_June_2005.pdf

rights and also give other NHRIs the added advantage of learning from others' practices, and thus strengthen the campaign.

Regarding the role of the networks of NHRIs at the regional and international level, its importance in the Asia-Pacific region was already emphasized at several U.N. Annual Workshops on Regional Cooperation for the Promotion and Protection of Human Rights in the Asia-Pacific Region as discussed in Chapter Three.¹⁴⁵ Indeed, the APF was created as a regional network of NHRIs to enhance cooperation among NHRIs for the best human rights practices and address common issues of human rights which cannot be handled by a single NHRI. Since its first annual meeting in 1996, the role of the APF has been expanding and it has gradually become a more prominent actor in the development of regional human rights mechanisms in the Asia-Pacific region. The network of NHRIs under the APF has facilitated the implementation of international human rights standards, at the same time, considering national and regional specificity and culture, enhanced member states' compliance with international norms, and deepened regional cooperation among states with NHRIs on common issues of human rights. In addition, the APF has brought together not only member NHRIs, but also all other stakeholders in the region, such as the U.N. agencies, government delegations, and international, regional and local human rights NGOs at its annual meeting. Thus, the APF annual meeting has been a place "to discuss and share expertise on the pressing human rights issues facing the region" through the dynamic cooperation among all stakeholders on human rights in the Asia-Pacific region.¹⁴⁶

Anne-Marie Slaughter emphasizes the role of transgovernmental networks as eminent actors in the promotion of global governance and a new world order in an era where more and

¹⁴⁵ Hidetoshi Hashimoto, *supra* note 112, at 112-6.

¹⁴⁶ The Asia-Pacific Forum, *About: Annual Meetings*, <http://www.asiapacificforum.net/about/annual-meetings>

more global problems and pressing issues are emerging that no single government can address on its own.¹⁴⁷ In the area of human rights, the network of NHRIs within the APF has been “especially promising transgovernmental networks that have the potential to diffuse human rights norms and standards” in this region.¹⁴⁸

Overall, the APF can be an effective networking tool that promotes the domestic implementation of international human rights norms by each NHRI in the region. And ultimately, with the increasing number of NHRIs in the future, it will facilitate the establishment of regional human rights arrangements, as Andrea Durbach, Catherine Renshaw and Andrew Byrnes conclude:

*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.*¹⁴⁹

4.4. CONCLUSION

In this Chapter, I examined 1) what NHRIs are, 2) their role, responsibility, and functions at the national, regional and international level, and 3) NHRIs in the Asia-Pacific region and their network in the APF. Then, I reviewed, as a case study, the National Human Rights

¹⁴⁷ See Anne-Marie Slaughter, *A NEW WORLD ORDER*, (2004).

¹⁴⁸ Noha Shawki, *A New Actor in Human Rights Politics? Transgovernmental Networks of National Human Rights Institutions* in *NEGOTIATING SOVEREIGNTY AND HUMAN RIGHTS: ACTORS AND ISSUES IN CONTEMPORARY HUMAN RIGHTS POLITICS*, 47 (Noha Shawki and Michaelene Cox eds., 2009).

¹⁴⁹ Andrea Durbach, Catherine Renshaw and Andrew Byrnes, *A tongue but no teeth? The emergence of a regional human rights mechanism in the Asia-Pacific*, 31 *Sydney Law Review* 211, 238 (2009).

Commission of Korea to show the basic characteristics of NHRIs. Lastly, based upon my analysis on them, I provided three reasons why NHRIs can be a driving force for establishing RHRIs in the Asia-Pacific region: 1) NHRIs as bridging the gap between sovereignty and human rights, 2) NHRIs as mediators, and 3) NHRIs' networks.

Noha Shawki categorizes the basic functions of NHRIs as regulative one and constitutive one:

[R]egulative functions include promoting the ratification of international human rights treaties, legal assistance to victims of human rights violations, conducting investigations and inspections, and documenting the human rights record. In short, the focus of regulative functions is on protection from human rights violations. Constitutive functions, by contrast, are geared towards promoting a political culture that is favorable to upholding of human rights issues, to cooperate with and strengthen NGOs, and to conduct research at the national level. They also include efforts to network and cooperate with other NHRIs at the international level.¹⁵⁰

As discussed, I believe that these important functions of NHRIs make them a driving force for establishing RHRIs in this region, especially considering that they can make *social changes* through strengthening the domestic human rights system by bridging the gap between sovereignty and human rights, and also *political changes* through working together with all human rights related actors as intermediate institutions. Because NHRIs are national institutions established by the domestic legislation or the constitution, their work for promoting and protecting human rights is less likely to raise the issue of sovereignty compared to that of international actors. Along the same lines, NHRIs in the region can mitigate Asian states' overwhelming concern with the universality of human rights related to Asian values, because

¹⁵⁰ Noha Shawki, *supra* note 148, at 43.

their voices for international human rights norms and against Asian values do not come from the outside, but from the inside of the Asia-Pacific region. NHRIs and their networks in this region are indeed in a good position to diffuse international human standards and increase the commitment of individual Asian countries to these standards. They can translate international principles into domestic policies and practices that are compatible with national and regional cultures and values, and, at the same time, reflect all rights stakeholders' concerns of human rights issues both at the national and the regional level. Overall, if NHRIs are properly constituted and managed, they have a far-reaching potential to protect human rights in individual states in Asia. And their work will be a touchstone for Asian countries' growing willingness to establish regional human rights arrangements. Furthermore, even if regional arrangements were established based on a state-central outlook, for example, lacking accountability, transparency and effectiveness, NHRIs will expose these institutional deficiencies.

There may be a concern that it is too early to prove any systematic link between NHRIs and the establishment of regional arrangements. There are, however, some positive signs. First, the U.N. and the international community have supported and promoted the creation of NHRIs and their networks for a long time. As reviewed in the previous chapters, the U.N. Annual Workshop on Regional Cooperation for the Promotion and Protection of Human Rights in the Asia-Pacific Region has frequently recognized the development of NHRIs as an important factor in the growth of institutionalized regional cooperation in the field of human rights.¹⁵¹ Second, the increasing number of NHRIs in Asia has stimulated each government to make a commitment to

¹⁵¹ See Regional Arrangements for the Promotion and Protection of Human Rights in the Asian and Pacific Region: Report of the Secretary-General submitted in accordance with Commission resolution 1998/44 para.4-7. (Mar. 15, 1999) UN Doc. E/CN.4/1999/94; See also Regional Arrangements for the Promotion and Protection of Human Rights in the Asian and Pacific Region: Report of the Secretary-General submitted in accordance with Commission Resolution 1997/34 para.28-30. (Feb. 19, 1999) UN Doc. E/CN.4/1999/93.

be bound by international human rights norms, and, as a result, the ratification rates of major international human rights treaties have increased in the region.¹⁵² Third, the active cooperation among NHRIs at the sub-regional level has led to the establishment of the ASEAN human rights body and also the ongoing movement toward sub-regional human rights arrangements in the South Asia and the Pacific region, which will be discussed in depth in Chapter Five.

I conclude that NHRIs and their networks can be prominent actors in the establishment of a regional human rights protection mechanism in Asia. As the very nature, role and functions of NHRIs show, the way in which NHRIs work and cooperate at the national, regional, and international level has profound implications for the resolution of the problems that hinder regional human rights arrangements in this region. The next question then is: how can NHRIs work together to take specific steps toward establishing RHRIs in this region? It will be answered in the next chapter.

¹⁵² See Chapter Three, Section 3.2.4.

CHAPTER FIVE:

How can NHRIs be a driving force for establishing RHRIs in Asia?

The question of whether or not one is moving progressively towards an inter-governmental Asian human rights charter cannot be truly answered unless Asia responds to this challenge comprehensively and holistically... such regional or sub-regional developments will be legitimate only if they help to support or enrich, rather than undermine, international human rights standards and mechanisms.¹

Still today, the Asia Pacific region faces very particular challenges in terms of human rights, as well as in terms of the existing structures available to address human rights violations ... Moreover, structures of support, either at the national or regional level are often absent in the Asia-Pacific region. The region ... has no comprehensive human rights instrument and no human rights mechanism yet. Governments in the region are often reluctant to cooperate with the international human rights system ... Therefore we strongly support national human rights institutions to play an effective role in developing and consolidating credible human rights systems in the region. ... Once firmly in place, national human rights institutions should as much as possible seek to develop regional and sub-regional ties with sister institutions.²

5.1. INTRODUCTION

In Chapter Four, I reviewed the reasons why NHRIs can be a driving force for establishing RHRIs in the Asia-Pacific region. Their functions, responsibilities and the very nature of NHRIs show that they can overcome major difficulties that have prevented the creation

¹ Vitit Muntarbhorn, *Asia, Human Rights and the New Millennium: Time for a Regional Human Rights Charter?* 8 *Transnat'l L. & Contemp. Probs.* 407, 418 (1998).

² Louise Arbour, Opening Address at the 12th Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions, (Sep. 24, 2007). <http://www.asiapacificforum.net/about/annual-meetings/12th-australia-2007/downloads/un-statements/Statement%20-%20HC%20for%20HR.pdf>

of regional human rights system in this region. Then, in this chapter, I will suggest four specific ways in which NHRIs can work together for the establishment of RHRIs.

The first one is to support setting up regional arrangements on human rights issues of common concern. If it is hard to build up regional human rights arrangements that govern all human rights areas at once, it would be a good idea to establish legally binding agreements on specific human rights issues, at first. Through the U.N. workshops and the APF annual meetings, there has been an effort to identify human rights issues of common concern, which should be handled together with neighboring countries. In order to propose the most viable solutions to identified regional human rights problems, NHRIs have cooperated together to research, share information and report those issues to their governments and international communities. Such a process will lead to the adoption of regional agreements on human rights issues of common concern, which meet international human rights standards and at the same time, reflect regional specificity and needs. I believe that the increasing number of such agreements will ultimately lead to the adoption of a regional human rights charter.

The second suggestion is to establish sub-regional human rights bodies in advance. The APF and member NHRIs have already worked together and supported the setting up of sub-regional human rights arrangements in the South-East Asia, South Asia, and Pacific regions. For this, they have cooperated with already existing sub-regional organizations like the South Asian Association for Regional Cooperation (SAARC), the Association of South-East Asian Nations (ASEAN), and the Pacific Islands Forum (PIF), even though these sub-regional bodies were originally established for political and economic cooperation. I maintain that sub-regional mechanisms will be a good starting point for establishing RHRIs in the region, because once sub-

regional organizations are created, it would be much easier for them to build an institution from the sub-regional to the regional level. That is, they can facilitate the integration of several sub-regions under the unified regional human rights mechanism.

My third suggestion is to strengthen the role of the APF. As reviewed above, the APF has emerged as the most cohesive regional human rights body in the region so far. Since Asia has no RHRIs comparable to Europe, the Americas and Africa, NHRIs still represent the best tools to monitor, investigate and seek remedies for human rights violations in this region. Thus, it is difficult to overstate the important role of the APF, which is to enhance the functions of NHRIs to meet international standards and coordinate their operation to accord with the best human rights practices. In this section, I will present three ways to enhance the role of the APF. By strengthening its own mandate, the APF should raise member NHRIs' operational powers and capacities based on the standards of the Paris Principles. Also, the APF annual meeting should not remain as a forum for NHRIs only, but be developed as a place that can bring all rights stakeholders in this region together to discuss human rights issues. Lastly, through the APF, NHRIs should urge their governments to adopt legally binding regional human rights arrangements. At the initial stage, NHRIs can draft human rights declarations on common issues during the APF annual meetings. Such statements can be developed, as a soft law, in the form of informal and non-legally binding agreements when representatives of individual NHRIs sign them. As NHRIs are national institutions, such agreements can finally be developed into formal and legally binding resolutions when ratified by high ranking officials from countries with member NHRIs.

The fourth suggestion is to start establishing RHRI among the countries, which favour them in the first place. Realistically, the odds of Asia having a single unified human rights system that all Asian states across the region participate in are rather low. But, the APF and a network of NHRIs have shown that there are many human rights issues of common concern which cannot be handled by any individual state alone. So, it could be an alternative solution to establish RHRI with small number of countries with NHRIs that understand the necessity to solve complicated human rights issues together. Once they are established, their practices will attract other countries in the region, because it is not at all impossible to encourage other states to accept the regional human rights system by increasing the benefits of membership. Thus, the founding countries can, in the long run, extend membership in these small but strong human rights bodies in the Asia-Pacific region to other neighbouring countries.

The quest for establishing a regional human rights system in the Asia-Pacific region is a significant timely issue in progress. I believe that with the following four suggestions, NHRIs and their network in the APF can play a vital role as a breakthrough for moving forward to setting up RHRI in this region.

5.2. ENCOURAGING REGIONAL ARRANGEMENTS ON COMMON ISSUES OF HUMAN RIGHTS IN THE ASIA-PACIFIC REGION

As reviewed in Chapter Three, at the participants in the U.N. workshops and the APF annual meetings have attempted to identify human rights areas of common concern, such as human trafficking, gender and racial discrimination, the prevention of torture, the fight against

corruption, climate change, the death penalty, the rule of law and terrorism, child pornography, HIV, the right to development, and the rights of women, people with disabilities, human rights defenders, and migrant workers. These issues have been actively discussed with the understanding that they cannot be solved by individual countries alone, and should be addressed through the cooperation among neighboring countries. Thus, even though it is hard to establish unified regional human rights arrangements, most Asian countries are willing to make regional arrangements on specific areas of human rights in their need to cooperate. Then, the increasing number of regional human rights arrangements on common issues will ultimately lead to integrated regional arrangements on human rights, because the growing cooperation among states will gradually lessen their reluctance to accept human rights arrangement in the region as a whole.

For example, the Advisory Council of Jurists (ACJ), established by the APF to provide jurisprudential guidance to the Forum and member NHRIs,³ has published reports, issued recommendations, and introduced international principles on basic human rights issues of common concern. Based on the work of the ACJ and through the discussions at the annual meetings, the APF encourages member NHRIs to urge their governments to ratify related international human rights conventions, adopt regional declarations on human rights issues, and finally mount sustainable regional arrangements to bolster those rights.

In this section, I will illustrate how the APF and NHRIs have worked together in eight selected areas of human rights of common concern, with the potential to take practical steps for

³ See the Advisory Council of Jurists of the Asia-Pacific Forum of National Human Rights Institutions, <http://www.asiapacificforum.net/acj>; “ACJ reports present a thorough examination of each issue, as well as practical recommendations to assist APF members protect and promote human rights in their own countries and in partnership across the region.” *Id.*; See also Reference of the ACJ, <http://www.asiapacificforum.net/acj/references>

regional arrangements. These areas are human trafficking; women's rights; the rights of people with disabilities; the rights of human rights defenders; the prevention of torture; the rights of internally displaced persons; the rights of migrants; and the environment.

5.2.1. Human Trafficking

Human trafficking is a widespread problem across national borders in the Asia-Pacific region. Every year, thousands of men, women and children in Asia are exploited, coerced and suffer under this “contemporary form of slavery.”⁴ The U.S. Department of State Report on Human Trafficking points out that the ratio of trafficking victims in the Asia-Pacific region is 3:1,000 inhabitants, significantly over the global average of 1.8:1,000 inhabitants.⁵

Article 3 (a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons defines trafficking as:

[T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the

⁴ Kyung-Wha Kang, Deputy High Commissioner for Human Rights, *Opening Statement* at a Special Human Rights Council Panel Discussion: Giving Voice to the Victims and Survivors of Human Trafficking (Jun.7, 2010) <http://www.ohchr.org/EN/NewsEvents/Pages/SurvivorstraffickingBreakingthesilence.aspx>

⁵ The U.S. Department of State, *TRAFFICKING IN PERSONS REPORT*, 7 (Jun. 2010) <http://www.state.gov/g/tip/rls/tiprpt/2010/> cited in Suraina Pasha, *Regional Cooperation to Prevent Human Trafficking in Asia: The Role of National Human Rights Institutions*, 2, The Asia-Pacific Forum (Seoul International Conference Against Trafficking in Migrant Women, Jun. 28, 2010).

*prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.*⁶

The most commonly cited factors contributing to trafficking include poverty, gender discrimination in the family and the community, violence against women, lack of appropriate migration policies and restrictive immigration legislation, and internal conflict.⁷ Unsurprisingly, all those factors are not irrelevant in most countries in this region.

For a long time, most Asian countries have focused on criminalizing traffickers rather than protecting victims. In her report, Joy Ngozi Ezeilo, the U.N. Special Rapporteur on Trafficking in Persons, however, claims that national and regional efforts against trafficking should be grounded in a human-rights based approach and should focus more on preventing victimization and assisting victims because “it is only by properly protecting and assisting victims that you can effectively prosecute traffickers.”⁸ She also maintains that “regional and sub-regional mechanisms play a key role in providing a response that is both multilateral and sufficiently close to countries’ realities and specificities within a certain region.”⁹ In that sense, NHRIs and their network can play a critical role. They can provide training programs, recommendations and guidelines to other key players including public officials such as police, prosecutors, the judiciary, the consulate staff and immigration officials. They also can share information with local NGOs, monitor relevant domestic laws, promote the adoption of anti-

⁶ Art.3, para.(a) of The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the U.N. Convention against Transnational Organized Crime, (2001), UN Doc. A/RES/55/25.

⁷ Anne Gallagher, *The Role of National Institutions in Advancing the Human Rights of Women: A Case Study on Trafficking in the Asia-Pacific Region*, 3, The Fourth APF Annual Meeting, (The Philippines, 1999).

⁸ See Joy Ngozi Ezeilo, Report Submitted by the Special Rapporteur on Trafficking in Persons, Especially Women and Children, The U.N. Human Rights Council, (May. 4, 2010), UN Doc. A/HRC/14/32.

⁹ Joy Ngozi Ezeilo, *supra* note 8.

trafficking legislation, and investigate human rights issues linked to trafficking.¹⁰ Indeed, member NHRIs in the region have actively addressed this issue and emphasized their regional cooperation against trafficking within the APF framework at the annual meetings: the Fourth (Manila, 1999),¹¹ the Sixth (Colombo, 2001),¹² the Seventh (New Delhi, 2002),¹³ the Ninth (Seoul, 2004)¹⁴ and the Fourteenth (Amman, 2009). At two regional conferences on trafficking in Australia (2005) and Korea (2010), member NHRIs discussed ways to contribute to the combat against trafficking both at the national and regional level. At these conferences and the annual meetings, the NHRIs not only adopted the regional report and recommendations on human trafficking, but also promoted the cooperation of member NHRIs at the bilateral and sub-regional level.¹⁵ Along the same lines, in 2002 the SAARC adopted a Regional Convention on Combating the Crime of Trafficking in Women and Children for Prostitution in South Asia. In 2004, the ASEAN also adopted the ASEAN Declaration against Trafficking in Persons, Especially Women and Children with a Work Plan to Implement the Declaration for South-East Asia.¹⁶

¹⁰ Asia Pacific Human Rights Network, *Tackling Trafficking: Progress Paper on the Role of NHRIs*, 2-3, (Feb. 2004).

¹¹ See Anne Gallagher, *supra* note 7. Participants discussed the role of NHRIs in addressing trafficking of women and children. *Id.*

¹² See The APF, *Gender Issues for National Institutions: Trafficking*, The Sixth APF Annual Meeting (Sep. 2001). Participants decided to hold a regional workshop on human trafficking and develop related practical projects. *Id.*

¹³ See The APF, *Summary of the Advisory Council of Jurists: Background Paper on Trafficking* (Nov. 2002). Participants adopted the trafficking report and recommendations by the ACJ and agreed to strengthen regional cooperation on trafficking. *Id.*

¹⁴ See Suraina Pasha, *supra* note 5, at 5-6.

¹⁵ *Id.*

¹⁶ Joy Ngozi Ezeilo, *supra* note 8, at 6-7.

Overall, the role of NHRIs and their cooperation are vital for the protection and promotion of the rights of victims of trafficking, because, as Suraina Pasha describes, “[b]y its very nature, trafficking is a cross-border problem which will require not only actions at the national level, but also cooperation at the regional and international levels.”

5.2.2. Women’s Rights

In the Asia-Pacific region, women have continuously suffered and been discriminated against in most societies and have especially been the main victim of domestic violence and trafficking. The APF recognizes “addressing the unequal status of women [as] one of the region’s most important human rights challenges... [and as] one of the primary responsibilities of national human rights institutions.”¹⁷ Similarly, the Committee of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) emphasizes the role of NHRIs in the effective implementation of the Convention at the national level by enhancing public awareness of women’s rights through education programs and through monitoring individual governments’ legislation and public policies in compliance with the standards of the Convention.¹⁸ The Committee, moreover, stresses its relationship with NHRIs as:

National human rights institutions may also provide assistance to alleged victims of human rights violations under the Convention to submit individual communications to the Committee or, when the situation arises, provide reliable information in relation to the mandate of the Committee to conduct an inquiry... National human rights institutions may

¹⁷ See The APF, Issues: Women’s Rights, <http://www.asiapacificforum.net/issues/womens-rights>

¹⁸ Committee on the Elimination of Discrimination against Women, Statement by the Committee on the Elimination of Discrimination against Women on its Relationship with National Human Rights Institutions, (Jan 14, 2008) UN Doc. CEDAW/C/2008/I/CRP.1

*also physically attend and provide information orally in the meetings allocated to them in the pre-session working groups and sessions of the Committee.*¹⁹

The issue of women's rights as a regional human rights issue has been actively discussed at the APF annual meetings in order to develop best practices. . At the Third Annual Meeting, member NHRIs suggested a range of activities to protect and promote the rights of women, for example, ensuring that their governments ratify the CEDAW and subsequent monitoring of compliance.²⁰ At its Fourth Annual meeting, the APF elaborated further on how NHRIs can work individually and collectively to enhance the human rights of women by stressing the vulnerability of women in the wake of the Asian economic crisis and the women's right to education at a level equal to that of men.²¹ Member NHRIs also agreed to hold a workshop on the advancement of women's human rights in consultation with human rights NGOs in 2000,²² and at the Fifth Annual Meeting, they discussed the recommendations of the workshop.²³ Since then, the APF and member NHRIs have worked cooperatively to strengthen women's rights both at the national and regional level, for example, improving women's legal status and raising public awareness for the recognition of women's rights as human rights in collaboration with human rights NGOs. At the same time, they have made an effort to increase their direct and independent participation in international human rights regimes "for a voice on women's rights,"

¹⁹ *Id.*

²⁰ See The APF, *Background Paper: The Role of National Institutions in Addressing Discrimination against Women*, (Jakarta, 1998).

²¹ See The APF, *The Role of National Institutions in Advancing the Human Rights of Women* (Manila, 1999).

²² *Id.*

²³ See The APF, *The Role of National Human Rights Institutions in Advancing the International Human Rights of Women* (Rotorua, 2000).

such as, at the U.N. Human Rights Council, the Committee of CEDAW, and especially at the U.N. Commission on the Status of Women (CSW).²⁴

5.2.3. *Rights of People with Disabilities*

About ten percent of the world's population as a whole and around twenty percent of the world's poorest people live with some kind of disability, and are thus regarded as the most disadvantaged and vulnerable to human rights abuse.²⁵ They are considered “the world's largest minority.”²⁶ For a long time, however, there were no comprehensive and legally binding international norms for the protection of the rights of persons with disabilities. Most major U.N. human rights treaties indirectly relate to these rights except the U.N. Convention on the Rights of the Child (CRC), which explicitly stipulates, in its Articles 2 and 23, the principle of non-discrimination irrespective of disability and the rights of the disabled child.²⁷ The U.N. adopted the Declaration on the Rights of Disabled Persons in 1975 and the Standard Rules on Equalisation of Opportunities for Persons with Disabilities in 1993, but those international instruments are not legally binding. In 2000, international NGOs working for people with disabilities issued the Beijing Declaration on the Rights of People with Disabilities to call on the U.N. and governments to support and adopt an international convention to protect the rights of

²⁴ See The APF, *NHRIs to lobby for a voice on women's rights*, <http://www.asiapacificforum.net/news/nhris-to-lobby-for-a-voice-on-women2019s-rights.html> See also Human Rights and Equal Opportunity Commission of Australia, *Report on the Role of National Human Rights Institutions in the United Nations Commission on the Status of Women* (2008).

²⁵ U.N. Enable, Factsheet on Persons with Disabilities, <http://www.un.org/disabilities/default.asp?id=18>

²⁶ *Id.*

²⁷ The APF, *Report on the Proposed UN Convention on the Rights of People with Disabilities*, 2 (New Delhi, 2002).

people with disabilities.²⁸ The following year, the U.N. established an Ad Hoc Committee “to consider proposals for a comprehensive and integral convention to promote and protect the rights and dignity of persons with disabilities, based on the holistic approach.”²⁹ To keep up with such developments, the APF and member NHRIs have included disability issues as one of the main agenda items since the Seventh Annual Meeting in 2002, and in 2003, held the International Workshop on Promoting the Rights of People with Disabilities to develop a consensus position for the newly proposed U.N. Convention. They have also been actively involved at the Ad Hoc Committee in drafting the Convention on the Rights of Persons with Disabilities.³⁰ The Convention on the Rights of Persons with Disabilities (CRPD) was adopted in 2006 and came into force in 2008 with 147 signatories and 98 state parties. The APF, especially, played a crucial role in including a specific Article on national implementation and monitoring in the Convention, which emphasizes the existence of NHRIs as “an acceptance ... of the importance of national monitoring mechanisms as a part of the implementation of human rights obligations entered into by those States [with NHRIs].”³¹ Article 33 of the CRPD stipulates national implementation and monitoring as:

1. States Parties, in accordance with their system of organization, shall designate one or more focal points within government for matters relating to the implementation of the present Convention, and shall give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels.

²⁸ *Id.*

²⁹ U.N. G.A. Resolution for Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities, (Dec. 19, 2001), UN Doc. A/RES/56/168.

³⁰ See The APF, Issues: Disability, <http://www.asiapacificforum.net/issues/disability>

³¹ The APF, *Disability Issues Paper: NHRIs and National Implementation & Monitoring of the Convention on the Rights of Persons with Disabilities*, 3-4, (Sydney, 2007).

2. States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, **a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention.** When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights.

3. Civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process.³² (emphasis added).

As set out in this Article, though implementation is the responsibility of each government, the protection, promotion and monitoring functions should be undertaken within a framework of independent national institutions. The Article requires this national institution to promote the involvement and participation of persons with disabilities in the monitoring process. As the Paris Principles clearly mandate the guarantees for the independence and pluralism of NHRIs, the latter are ideally placed to perform this role.

5.2.4. Rights of Human Rights Defenders

The term *human rights defenders* describes any individuals or groups of people who promote and protect human rights.³³ In the Asia-Pacific region, human rights defenders have continuously been “subjected to assassinations, disappearances, illegal arrest and detention, and torture,”³⁴ even in democratic countries with the excuse of national security and public order.³⁵

³² Art. 33 of the Convention on the Rights of Persons with Disabilities, (Dec. 13, 2006), UN Doc. A/61/611.

³³ UNOHCHR, Special Rapporteur on the Situation of Human Rights Defenders: Who are Human Rights Defenders? <http://www2.ohchr.org/english/issues/defenders/who.htm>; See also, The U.N., Human Rights Day 2010: What is a Human Rights Defender? <http://www.un.org/en/events/humanrightsday/2010/about.shtml>

³⁴ U.N. General Assembly, Annual Reports by the Special Rapporteur, 9, (Jul. 2002), UN Doc. A/57/182.

³⁵ See Asia Pacific Human Rights Network, *Background Paper: Human Rights Defenders* (Feb. 2004).

In 1999, the U.N. adopted the Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (aka the Declaration on Human Rights Defenders).³⁶ However, the Declaration is not a legally binding instrument and is not widely recognized in most Asian countries.³⁷ There is not even a regional system to defend human rights defenders in this region yet.

The issue of the rights of human rights defenders first appeared at the APF's Regional Workshop on National Institutions and Non-Governmental Organizations: *Working in Partnership* which was held in Kandy, Sri Lanka in 1999.³⁸ The Workshop was designed to promote the development of partnerships between the APF, NHRIs and the regional human rights NGOs and recognized the protection of the rights of human rights defenders as one of the main areas that need an active cooperation with NGOs. The 2006 APF Annual Meeting included interactive discussions between member NHRIs and human rights NGOs on the rights of human rights defenders in order to explore strategies for the protection and promotion of the rights of defenders more effectively at the regional and national levels.³⁹ At the Twelfth APF Annual Meeting in 2007, the participating twenty-five NGOs urged member NHRIs to take actions to improve their protection mechanisms for human rights defenders, noting that there was an

³⁶ U.N. Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, (Mar. 8, 1999), UN Doc. A/RES/53/144.

³⁷ See Asia Pacific Human Rights Network, *supra* note 35.

³⁸ See The APF, Thematic Regional Workshops: Cooperation between NGOs and NHRIs, <http://www.asiapacificforum.net/services/training/regional-workshops/non-government-organisations>

³⁹ The APF, *Concluding Statement of the 11th Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions* (Aug. 2006).

increase in attacks against human rights defenders in at least half of the APF member countries.⁴⁰ In parallel with this APF Annual Meeting, an International Human Rights Defenders Seminar was held to promote practical knowledge about international, regional and national mechanisms for the protection of human rights defenders in the Asia-Pacific region and to explore the role that NHRIs can play as protection mechanisms for human rights defenders.⁴¹ The following year, at the Thirteenth APF Annual Meeting, more than forty NGOs joined together to discuss the situation facing human rights defenders in the Asia-Pacific region by sharing specific information about member states. NGO representatives requested the APF to take practical steps to integrate the issue of human rights defenders into reference topics made to the ACJ as well as to cooperate with the U.N. Special Rapporteur on Human Rights Defenders for NHRIs effective engagement with her mandate.⁴² They also stressed the need to strengthen NHRIs' capacity for providing immediate protection against human rights violations at the national level. Further, at the Fourteenth APF Annual Meeting, NGOs expressed their concerns and shared information about the precarious situation of human rights defenders in specific countries in the region, such as Iran, Fiji, Sri Lanka, the Palestine, Myanmar, Syria, Lebanon, Cambodia, Yemen, Tibet, and Malaysia. They requested the APF to cooperate with member NHRIs and international institutions and investigate and report incidents of human rights violations against human rights defenders, including those that had been killed, injured, imprisoned, or had disappeared. ⁴³ In response, the APF organized human rights defenders training programs for member NHRIs at the

⁴⁰ The APF, *Concluding Statement of the 12th Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions* (Sep. 2007).

⁴¹ *Id.*

⁴² The APF, *Report of the 13th Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions*, 24 (Jul. 2008).

⁴³ See The APF, *NGO Statement of Human Rights Defenders at the 14th Annual Meeting* (Aug. 2009).

sub-regional level, workshops for South East Asia NHRIs (2007), for West Asia NHRIs (2008), and for South Asia NHRIs (2009).⁴⁴

All those active discussions and cooperation under the APF show that it is necessary to promote cooperation and exchange of information between NHRIs and human rights NGOs on issues related to human rights defenders and that this is the key for improving the protection of defenders in this region.

5.2.5. Prevention of Torture

Torture is prohibited in a number of international human rights treaties including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),⁴⁵ which contains a series of provisions on prevention measures. Except for Asia, other regional human rights arrangements, like the European Convention on Human Rights, the America Convention on Human Rights, and the Africa Charter on Human and People's Rights, include specific provisions that prohibit torture. Currently, more than 140 nations are parties to CAT, which places an absolute prohibition on torture. Article 2 of CAT stipulates that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”⁴⁶

⁴⁴ See The APF, Training Program: Human Rights Defenders <http://www.asiapacificforum.net/services/training/hr-defenders>

⁴⁵ U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Assembly Resolution 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984).

⁴⁶ *Id.*

In reality, however, torture is widespread in many Asian countries, especially, in their detention facilities. Anti-terrorism related legislations and national security laws have also undermined the prohibition against torture in the region. In Asia, NHRIs and the APF have played an important role in opposing torture. In 2003, at the Eighth Annual Meeting, the APF and member NHRIs agreed to develop a reference on the prevention of torture during detention by the Advisory Council of Jurists. Two years later, at the Tenth Annual Meeting, based on the ACJ's report and recommendations, they discussed the role of national human rights institutions in the prevention of torture as the major theme of the meeting.⁴⁷

The APF emphasized the role that NHRIs can play against torture in seven areas.⁴⁸ First, NHRIs can promote the ratification of relevant international human rights treaties including the CAT and its Optional Protocol designed to establish an international inspection system for places of detention. By advocating the ratification and participating in such international instruments, NHRIs can contribute to the establishment of appropriate National Prevention Mechanisms (NPMs). Second, they can promote their government's legislative implementation of international obligations in domestic law, such as adopting national legislations against torture. They can also promote reform of detention procedures. Third, they can investigate allegations of torture and conduct interviews with victims. All information gathered by NHRIs should be provided to the relevant government authorities. Fourth, they can be involved in developing training programs on torture prevention for public officials including armed forces personnel, the police, the military, senior public officials, the judiciary and legislators. Fifth, NHRIs can

⁴⁷ See The APF, *Report of the 10th Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions* (Aug. 2005).

⁴⁸ See The APF, *PREVENTING TORTURE: AN OPERATIONAL GUIDE FOR NHRIS* (May. 2010); See also The ACJ, *Final Report: Reference on Torture* (Dec. 2005).

cooperate with the international bodies such as the U.N. Human Rights Council, and the Committee against Torture, by providing independent and credible information on an individual state. Sixth, NHRIs can take an active role in monitoring detention facilities through regular visits. In order to facilitate this role, the ACJ stresses that NHRIs should have free access to all detention facilities and be able to interview detainees in private. Finally, NHRIs can promote public awareness of the prevention of torture with their public education campaigns.

In addition, the APF has organized several regional workshops and developed practical training programs for the prevention of torture in collaboration with an international NGO, the Association for the Prevention of Torture (APT), to provide member NHRIs with the knowledge, skills and processes to effectively monitor places of detention, interview detainees and investigate allegations of torture.⁴⁹

5.2.6. Internally Displaced Persons

Internally displaced persons (IDPs) are defined as:

[P]ersons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.⁵⁰

⁴⁹ See The APF, Training Program: Prevention of Torture, <http://www.asiapacificforum.net/services/training/prevention-of-torture>

⁵⁰ Para.2 of Introduction of The Guiding Principles on Internal Displacement (Feb. 11, 1998), UN Doc. E/CN.4/1998/53/Add.2.

Compared to the legal status of refugees who have crossed national borders to seek an asylum, IDPs have remained inside their countries even though they have fled their homes for similar reasons as refugees. This mere difference, however, bars IDPs from being protected under any international human rights treaties including the 1951 Convention Relating to the Status of Refugees.⁵¹ They remain under the legal protection of their own government, even though the government itself might be the cause of their flight. Recognizing this gap, the U.N. adopted the Guiding Principles on Internal Displacement in 1999, but, again, it is a non-legally binding instrument.

There are more than 27 million IDPs around the world. With more than 4.3 million IDPs, South and South-East Asia are the regions with the largest relative increase in the number of IDPs in recent years.⁵² For example, the biggest new displacement in 2009 came in the Philippines, where an estimated 0.4 million people fled fighting between the government and Muslim armed groups in Mindanao.⁵³

The Asian Forum for Human Rights and Development (Forum Asia), one of the major regional human rights NGOs in Asia, organized a Regional Conference on Internal Displacement in Asia, with the support from the Office of the U.N. High Commissioner for Refugees (UNHCR). While a large number of human rights NGOs in the region took part in the conference, no delegations from the intergovernmental regional organizations, such as, the Association of Southeast Asian Nations (ASEAN), or the South Asian Association for Regional

⁵¹ U.N. Convention Relating to the Status of Refugees, (Jul. 28, 1951), the U.N. Treaty Series, vol. 189, at 137.

⁵² The Internal Displacement Monitoring Centre (IDMC), INTERNAL DISPLACEMENT: GLOBAL OVERVIEW OF TRENDS AND DEVELOPMENTS IN 2009, 72-5 (2009); *See also* The Office of the U.N. High Commissioner for Refugees (UNHCR), Internally Displaced People Figures <http://www.unhcr.org/pages/49c3646c23.html>

⁵³ The Internal Displacement Monitoring Centre (IDMC), *id.*, at 83.

Cooperation (SAARC), participated. However, as Roberta Cohen points out, their absence was not unexpected because most Asian governments consider the issue of IDPs a purely domestic one, and at the same line, those intergovernmental regional organizations try to avoid taking positions on internal affairs of member states.⁵⁴ During the conference, the participants agreed to set up a regional network of NGOs to work together for the rights of IDPs and stressed that the problems of IDPs should be included in the agendas of the ASEAN and SAARC.⁵⁵ They also pointed out the potential role of NHRIs in preventing situations of forced displacement and promoting equitable return and reintegration.⁵⁶

The same year, the APF discussed for the first time the situation of internally displaced persons in the Asia-Pacific region at its Fifth Annual Meeting in Rotorua, New Zealand. At the Tenth APF Annual Meeting, IDPs were introduced as one of the main agenda items and the discussion was developed through the 2005 Regional Workshop on National Human Rights Institutions and Internally Displaced Persons, organized jointly by the APF and the Brookings Institution. The APF and the participants in the workshop emphasized that NHRIs should have “a comprehensive approach to the problem of internal displacement, that is one that extends to persons displaced by conflict, by natural disasters and by development projects,” because “[p]ersons forcibly uprooted, whatever the cause, must compel the attention of NHRIs, and this attention must encompass the full range of civil, political, economic, social and cultural rights.”⁵⁷

⁵⁴ See Roberta Cohen, *Addressing Internal Displacement in Asia: A Role for Regional Organizations* in REFUGEE AND MIGRATORY MOVEMENTS RESEARCH UNIT (C. Abrar & M. Lama, eds., 2003)

⁵⁵ See Summary Report, Regional Conference on Internal Displacement in Asia, (Bangkok, Feb. 22-24, 2000).

⁵⁶ *Id.*

⁵⁷ Roberta Cohen, Concluding Statement at the APF Regional Workshop on NHRIs and Internally Displaced Persons, Sri Lanka (Oct. 28, 2005) http://www.brookings.edu/speeches/2005/1028_nhris.aspx See also, The APF,

The role of NHRIs in recognizing IDPs as a human rights issue within their mandate is important especially because the issue of IDPs is a serious human rights problem in Asia and IDPs are not often recognized as a category of persons requiring protection and assistance from governments. Therefore, for the protection of the human rights of IDPs, it is necessary to have an active cooperation among NHRIs at the regional level, as well as cooperation with local NGOs, which can be an essential source of information on IDPs.

5.2.7. Migrants

There are over 190 million migrants including migrant workers, permanent immigrants and others who live and work in a country other than their homeland. The figure represents three percent of the world's population.⁵⁸ The U.N. International Migration Report in 2006 shows that Asia is home to hosts more than 53 million of these global migrants.⁵⁹

Compared to the 1970s and 80s, when migration was mainly from Asia to North America, Australia, and the Middle East, since the 1990s, there has been a dramatic increasing in migration within Asia, mostly “from less-developed countries with massive labor surpluses to fast-growing newly industrializing countries.”⁶⁰ Most Asian governments maintain temporary-

Thematic Regional Workshops: Internally Displaced Persons
<http://www.asiapacificforum.net/services/training/regional-workshops/idp>

⁵⁸ Bertrand G. Ramcharan, *Keynote Speech: Strategies for Preventing Violations of the Human Rights of Migrant Workers*, International Conference on Human Rights of Migrants and Multicultural Society (Seoul. Nov. 2008).

⁵⁹ U.N. Department of Economic and Social Affairs, *International Migration Report 2006: A global Assessment* http://www.un.org/esa/population/publications/2006_MigrationRep/report.htm

⁶⁰ Stephen Castles, and Mark J. Miller, *Migration Information Source: Migration in the Asia-Pacific Region*, Migration Policy Institute (MPI), (Jul. 2009).

labor-migration policies which strictly control the right of migration and forbid permanent settlement and family visits, thus denying basic human rights.⁶¹ Even in countries where migrant workers receive legal protection, their “marginalized status” makes them vulnerable to “to be abused by their employers, trafficked for sexual exploitation, and denied their wages for long periods.”⁶² In 1990, the U.N. adopted the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (entered into force in 2003: MWC)⁶³ to foster respect for migrants’ human rights from a more comprehensive perspective. However, only three countries in the Asia-Pacific region have ratified the convention so far.

Since the First APF Annual Meeting in 1996, the APF and member NHRIs have recognized the necessity for the effective protection of migrants’ rights.⁶⁴ Through the subsequent APF annual meetings, and specifically, the Third, Eleventh, and Thirteenth, the APF has discussed migrants’ rights and the role of NHRIs in encouraging their governments to address these issues more effectively, considering the relevance of the ILO and its conventions to their work, and setting up regional standards on the human rights of migrants.⁶⁵ As a result, the National Human Rights Commission of Korea (NHRCK) initiated the 2008 International Conference on the Human Rights of Migrants, where participants adopted the Seoul Guidelines on the Cooperation of NHRIs for the Promotion and Protection of Human Rights of Migrants in

⁶¹ *Id.*

⁶² Amnesty International, *Report 2010: Asia and the Pacific* <http://thereport.amnesty.org/regions/asia-pacific>

⁶³ U.N. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, UN Doc. A/45/49 (1990).

⁶⁴ The APF, *Concluding Statement of the First APF Annual Meeting* (Australia, 1996). The decisions of this statement emphasize the cooperation and joint activity through “responding promptly and effectively to requests from other national institutions to investigate violations of the human rights of their nationals present in a country that has a national institution.” *Id.*

⁶⁵ Suraina Pasha, Presentation: Asia-Pacific Forum for National Human Rights Institutions (APF) Perspectives and Experiences, International Conference on Human Rights of Migrants and Multicultural Society (Seoul. Nov. 2008).

Asia (the Seoul Guidelines).⁶⁶ They include practical steps for NHRIs to take for the protection of migrants' rights: urging their government to ratify the MWC, undertaking joint research projects among NHRIs on "causes, processes and consequences of migration" in Asia, developing remedies to address human rights violations especially against "undocumented and irregular migrants," conducting human rights training programs for immigration officers, the police and other law enforcement agencies, and providing education program for migrants "at pre-departure in their country of origin and post-arrival in their country of destination."⁶⁷ Based on the Guidelines, the APF and member NHRIs also agreed to establish a Working Group on Migration with the APF and have worked to refine the terms of reference for this working group at the two most recent APF meetings.

The protection and promotion of the rights of migrants in the Asia-Pacific region requires greater collaboration between source and destination countries at the regional level, both bi- and multi-laterally. At the same time, building capacity by adopting strategies and related legislation for the rights of migrants in the receiving countries and the countries of origin is needed at the national level, too. These should be in compliance with international norms like the ILO standards and should engage with the U.N. monitoring instruments such as the treaty body reporting process and the UPR. As the Soul Guidelines show, a network of NHRIs and the APF can and have played an important role for the protection and promotion of migrants' human rights both at the regional and national level. Moreover, such an agreement among NHRIs can be

⁶⁶ Seoul Guidelines on the Cooperation of NHRIs for the Promotion and Protection of Human Rights of Migrants in Asia, International Conference on Human Rights of Migrants and Multicultural Society: Dignity and Justice for All Migrants, Seoul, Korea (Nov. 12, 2008). <http://www1.umn.edu/humanrts/instree/Seoul-Guidelines.html>

⁶⁷ *Id.*

a starting point for building legally binding regional arrangements on the rights of migrants in Asia in the future.

5.2.8. *The Environment*

Beginning with the 1972 U.N. Conference on the Human Environment (the Stockholm Conference), the following establishment of the U.N. Environmental Program (UNEP), and the subsequent resolutions and declarations, including the 1989 Hague Declaration on the Environment, the 1992 Rio Declaration, and the 2002 Johannesburg Declaration,⁶⁸ the international environmental law has significantly developed.⁶⁹ At the same time, the close relationship between environmental protection and the protection of human rights, mostly the economic, social and cultural rights, has been gradually recognized. In other words, a rights-based approach has been affirmatively introduced in the international environment law to help most vulnerable populations speak out, take action and influence responses for their basic human rights, i.e., right to life, food, adequate housing, clean water, health, and even the right of self-determination.⁷⁰ At the regional level, there are a number of arrangements dealing with human rights in Europe, Africa,⁷¹ and the Americas.⁷² There are, however, no regional instruments applicable in the Asia-Pacific region that contain a human right to environment provision.

⁶⁸ See The Advisory Council of Jurists, *Background Paper: Human Rights and the Environment*, The Asia-Pacific Forum (Sep. 2007).

⁶⁹ William Beardslee, *International Law and the Environment: The Need for an Aggregate Organization*, 5 J. Int'l L & Prac. 379, 380 (1996).

⁷⁰ See The APF, Issues: Environment, <http://www.asiapacificforum.net/issues/environment>

⁷¹ The African Charter on Human and Peoples' Rights stipulates environmental rights in its Article 24 as "All peoples shall have the right to a general satisfactory environment favorable to their development." African Charter

At the Eleventh Annual Meeting in 2006, the APF and member NHRIs agreed to formulate an ACJ reference on the issue of human rights and the environment in the Asia-Pacific region. The following year, at the Twelfth Annual Meeting, the ACJ report highlighted human rights challenges in the region, especially due to pollution and climate change:

Rising sea levels have the potential to displace up to three million people in the Asia Pacific, while polluted air and unsafe water currently contribute to almost a third of deaths and diseases in some developing countries [in the region].⁷³

The ACJ also emphasized the role NHRIs play in encouraging their governments to adopt specific rights to the environment in domestic legislation. While the environment is still not on the main agenda of human rights issues in this region, by pursuing the human rights dimensions of the environment, NHRIs can both protect the human rights of affected populations and ensure that their governments establish appropriate policies and legislation.

5.2.9. Summary

So far I have reviewed eight human rights issues of common concern in this region, which have a potential to be developed into a legally binding regional arrangement. In some

on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev 5, 21 I.L.M. 58 (1982), (entered into force Oct. 21, 1986).

⁷² The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (the Protocol of San Salvador) stipulates the right to environment in its Article 11 as "Everyone shall have the right to live in a healthy environment and to have access to basic public services... The States Parties shall promote the protection, preservation, and improvement of the environment." Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (the Protocol of San Salvador), OAS Treaty Series 69.

⁷³ See The APF, Annual Meetings: 12th Annual Meeting, Sydney, Australia, 2007 <http://www.asiapacificforum.net/about/annual-meetings/12th-australia-2007>

areas, NHRIs and the APF have already taken practical steps to encourage their governments to adopt regional instruments, but in most cases, they have only focused on strengthening their own capacity and cooperating with other NHRIs both at the national and regional level to protect and promote those human rights issues.

The first step should be to recognize the problem and refine the related international human rights instruments. The next step is to research and share relevant information and experiences in active collaboration with local and regional human rights NGOs. Through such a report, then, NHRIs can discuss their role in the effective implementation of already existing international norms, as well as best practices at the national level. Recognizing that most issues cannot be solved by individual countries alone, NHRIs and the APF, as a final step, should actively advocate for their governments to cooperate with other governments in the region, or at least, at the sub- regional level, for the inclusion of those issues on the main agenda of the inter-governmental organizations.

I believe such an effort by NHRIs and the APF will result in the adoption of regional instruments leading to the establishment of integrated regional human rights arrangements in this region.

5.3. ESTABLISHING RHRIS AT THE SUB-REGIONAL LEVEL

My second suggestion for how NHRIs can be a driving force for the establishment of RHRIs in the Asia-Pacific region is for them to work together for setting up initially of sub-

regional human rights arrangements.⁷⁴ Once there are sub-regional arrangements, I believe, they can build a human rights institution from the sub-regional to the regional level.

Indeed, Asia may be too large to have a regional human rights institution.⁷⁵ As Virginia Leary points out, an “approach which considers the whole of Asia as one region for the purpose of international human rights institutions is unrealistic.”⁷⁶ Or, as Clarence Dias argues, it might be true that “there is no such thing as Asia but there are different sub-regions,”⁷⁷ and each sub-region has a common context in terms of history, religion, culture, or level of economic development.⁷⁸ Therefore, as a starting point, the establishment of sub-regional human rights mechanisms is important for the protection of human rights in this region.⁷⁹ In Asia as a whole, there is no all-encompassing regional political organization such as the European Union, the Organization of American States, or the Organization of African Unity. However, there are sub-regional organizations: the South Asian Association for Regional Cooperation (SAARC)⁸⁰ in

⁷⁴ Some scholars argue that the emergence of NHRIs throughout the Asia-Pacific region could eventually result in - what Rawls describes as an- “overlapping consensus” on human rights in the region, which will lead to the establishment of at least a sub-regional human rights mechanism. See Abul Hasnat Monjurul Kabir, *Establishing National Human Rights Commissions in South Asia: A Critical Analysis of the Processes and the Prospects*, 2 Asia. Pac. J.HR & L. 1, 52 (2001). See also Charles Taylor, *Conditions of an Unforced Consensus on Human Rights*, 124 in THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS (Joanne R. Bauer and Daniel A. Bell eds., 1999)

⁷⁵ Hidetoshi Hashimoto, THE PROSPECTS FOR A REGIONAL HUMAN RIGHTS MECHANISM IN EAST ASIA, 134-5 (2004).

⁷⁶ Virginia Leary, *The Asian Region and the International Human Rights Movement* in ASIAN PERSPECTIVES ON HUMAN RIGHTS, 16 (Virginia A. Leary and Claude E. Wlech eds., 1990).

⁷⁷ Hidetoshi Hashimoto, *supra* note 75, at 134-5.

⁷⁸ *Id.*

⁷⁹ *Id.* See also Dinah L. Shelton, REGIONAL PROTECTION OF HUMAN RIGHTS, 1055-6 (2008).

⁸⁰ The SAARC is a political and economic organization established in 1985. Currently there are eight member states: Afghanistan, Bangladesh, Bhutan, India, the Maldives, Nepal, Pakistan, Sri Lanka, and nine observers: Australia, China, the E.U., the U.S., Iran, Japan, South Korea, Mauritius, Myanmar. <http://www.saarc-sec.org>

South Asia, the Association of Southeast Asian Nations (ASEAN)⁸¹ in South-East Asia, and the Pacific Islands Forum (PIF)⁸² in the Pacific region. In addition to the geographical proximity, their shared historical and cultural heritage, combined with increasing economic ties, has been intensifying the interdependence of the states through these sub-regional organizations.⁸³

In the sections below, I will review how each sub-regional organization has worked, in cooperation with NHRIs, for the establishment of a sub-regional human rights body, which can be the most positive and important development for a human rights protection mechanism in this region.

5.3.1. The South-East Asia Region

In 2009, with the long and active cooperation of the ASEAN member states, NHRIs and human rights NGOs, the ASEAN established a human rights body in South-East Asia: the ASEAN Intergovernmental Commission on Human Rights (AICHR). Its genesis began in 1993 at the Twenty-Sixth ASEAN Ministerial Meeting in Singapore, with its Joint Communiqué to “agree that ASEAN should also consider the establishment of an appropriate regional mechanism

⁸¹ The ASEAN is a political and economic organization established in 1967. Currently there are ten member states: Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam. In addition, the East Asia Summit (EAS) was set up under the ASEAN in 2005. This is a forum held after the annual ASEAN summit. It includes 16 countries: the 10 ASEAN member states, plus China, Japan, South Korea, India, Australia, and New Zealand. <http://www.aseansec.org>

⁸² The PIF is a political and economic organization established in 1971 as the South Pacific Forum. The name was changed to the Pacific Islands Forum in 2000. Currently, there are 16 member states: Australia, the Cook Islands, the Federated States of Micronesia, Fiji, Kiribati, Nauru, New Zealand, Niue, Palau, the Marshall Islands, Papua New Guinea, Samoa, the Solomon Islands, Tonga, Tuvalu, and Vanuatu. <http://www.forumsec.org>

⁸³ Hidetoshi Hashimoto, *supra* note 75, at 134-5.

on human rights”.⁸⁴ Based on this statement, the Working Group for an ASEAN Human Rights Mechanism (Working Group) was established in 1995 and was acknowledged by the Foreign Ministers in ASEAN at the Thirty-First ASEAN Ministerial Meeting in Manila, 1998.⁸⁵ 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,” and its aim is to recommend the structure, form and content of intergovernmental human rights commission for ASEAN.⁸⁶ Specifically, it provided three options for the ASEAN human rights body: 1) a declaration of principles, 2) a commission with monitoring, promotional, and recommendatory functions, and. 3) a court with rendering binding decisions.⁸⁷ Since 2001, a workshop on an ASEAN Human Rights Mechanism has been held annually with representatives of the member states, NHRIs, and NGOs in this region.⁸⁸ The ASEAN, however, has long faced disagreements on how to cooperate on human rights, because of its increased political diversity as four new countries joined: Vietnam (1995), Laos and Myanmar (1997), and Cambodia (1999).⁸⁹ In 2007, member states finally adopted the ASEAN Charter at the thirteenth ASEAN Summit,⁹⁰ which contains a commitment to establish a regional human rights body as an organ of ASEAN under Article 14 of its Charter:

⁸⁴ Joint Communique of the Twenty-Sixth ASEAN Ministerial Meeting, Para.18, Singapore (Jul. 23-4, 1993).

⁸⁵ Joint Communique of the Thirty-First ASEAN Ministerial Meeting, Para.28, Manila, Philippines (Jul. 24-5, 1998).

⁸⁶ See Working Group for an ASEAN Human Rights Mechanism, <http://www.aseanhrmech.org/aboutus.html>

⁸⁷ *Id.*

⁸⁸ The workshop was held in Jakarta (2001), Manila (2002), Bangkok (2003), Jakarta (2004), Kuala Lumpur (2006), Manila (2007), Singapore (2008) and Bangkok (2009). See website of Working Group for an ASEAN Human Rights Mechanism, <http://www.aseanhrmech.org/conferences/index.html>

⁸⁹ Termsak Chalermpanupap, 10 Facts about ASEAN Human Rights Cooperation, ASEAN <http://www.aseansec.org/HLP-OtherDoc-1.pdf>

⁹⁰ ASEAN finalises historic charter, BBC News (Nov. 19, 2007).

1. *In conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN human rights body.*
2. *This ASEAN human rights body shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting.*⁹¹ (emphasis added).

In 2008, the Charter came into force with the full ratification by all ten ASEAN member states. A High Level Panel (HLP) was appointed to refine the term of references (ToR) for an ASEAN human rights body (AHRB).⁹² The HLP proposed the AHRB to be institutionalized as a commission and as a result, in 2009, during the ASEAN Summit, member states launched the ASEAN Intergovernmental Commission on Human Rights (AICHR) by appointing their representatives to the Commission.

It should be noted that NHRIs have been actively involved in the establishment of the human rights body in the South-East Asia region since 1993,⁹³ when there were four ASEAN countries with NHRIs.⁹⁴ In 2007, they made an official commitment, the Declaration of Cooperation, to work together in the enforcement of the promotion and protection of human rights and the establishment of an ASEAN human rights mechanism through active work with their respective governments.⁹⁵ The Declaration includes the role of NHRIs to advise their

⁹¹ See Association of Southeast Asian Nations, THE ASEAN CHARTER, (ASEAN Secretariat, 2008).
<http://www.aseansec.org/ASEAN-Charter.pdf>

⁹² ASEAN Secretariat: *ASEAN Charter Fully Ratified*, The China View, (Oct. 21, 2008).
http://news.xinhuanet.com/english/2008-10/21/content_10229587.htm

⁹³ See Summary of Proceedings, First Workshop for an ASEAN Regional Mechanism on Human Rights, Para.4, 12.1) vi), 13.iii), Jakarta, (Jul. 5-6, 2001). See also ASEAN National Working Groups,
<http://www.aseanhrmech.org/nwgs/index.html>

⁹⁴ The Philippines, Indonesia, Malaysia, and Thailand have NHRIs. They were established respectively in 1987, 1993, 1998 and 1999.

⁹⁵ See Declaration of Cooperation for the Protection and Promotion of Human Rights in South East Asia, (Jun. 26, 2007) <http://www.aseannhriforum.org/en/home/declarations.html> See also Position Paper of the National Human

governments on the steps that can be taken in establishing an ASEAN human rights mechanism.⁹⁶ Based on it, those four NHRIs have held periodic meetings under the name of ASEAN NHRI Forum, to develop the concepts for sub-regional human rights mechanism under a project entitled *Enhancing the Role of National Human Rights Institutions in the Development of an ASEAN Human Rights Mechanism*.⁹⁷ The Working Group also emphasized the role of NHRIs in establishing an ASEAN human rights arrangement at its annual meetings⁹⁸ by stating that the “Working Group believes that cooperation among NHRIs is a precursor to an intergovernmental human rights mechanism.”⁹⁹ Indeed, from the draft of the ASEAN Charter to the mandate of AICHR, those four NHRIs have actively interacted with the HLP to convey their common position stipulated in the Charter and later in the term of references for an AHRB.¹⁰⁰

It is too early to evaluate the role of AICHR under the ASEAN for the protection and promotion of human rights in the South-East Asia region. There have been concerns from the civil society and human rights NGOs during the process of establishing this sub-regional human

Rights Institutions of Indonesia, Malaysia, the Philippines, and Thailand on Human Rights Aspects of the ASEAN Charter, (Jun. 26, 2007).

⁹⁶ *Id.*

⁹⁷ See The ASEAN National Human Rights Institutions (NHRI) Forum, <http://www.aseannhriforum.org/en/about-us.html> ; See also Vitit Muntarbhorn, *In Search of the Rights Track: Evolving a Regional Framework for the Promotion and Protection of Human Rights in the Asia-Pacific Region*, UNOHCHR (2005).

⁹⁸ See *i.e.*, Summary of Proceedings, Sixth Workshop on the ASEAN Regional Mechanism on Human Rights, Para.7, Manila, Philippines (Jul. 16-7, 2007).

⁹⁹ Working Group for an ASEAN Human Rights Mechanism, *The promise of an ASEAN human rights mechanism*, <http://www.aseanhrmech.org/aboutus.html>

¹⁰⁰ For example, four NHRIs in ASEAN jointly wrote and finalized a draft ToR for an AHRB at the Technical Working Group (TWG) Meeting of ASEAN NHRI Forum in 2008 and 2009. The proposed ToR for an AHRB were submitted to the High Level Panel (HLP), in which they emphasizes that the AHRB should have a complementary role and work in partnership with existing NHRIs particularly in monitoring human rights situations and treaty compliance at the national level. See ASEAN NHRI Forum, Position Paper on Terms of Reference of the ASEAN Human Rights Body, <http://www.aseannhriforum.org/en/home/joint-statements.html>

rights body on two points: Article 14 of the ASEAN Charter and the functions and mandate of the AICHR.

First, the ASEAN Charter does not stipulate the details of the human rights body such as its functions, mandate, or authority. However, Termsak Chalermpananupap, Special Assistant to the Secretary-General of ASEAN, disappointingly defends that position:

AHRB is never intended to be any independent watchdog ... [it] shall operate through consultation and consensus, with firm respect for sovereign equality of all Member states... no biting is ever required. ASEAN would not have come this far if its Member states want to bite one another with sharp teeth just to get things done their own way.¹⁰¹

In that sense, many human rights NGOs have criticized Article 14 of the Charter as “the legitimization of the continuous use of ASEAN’s existing values, norms, and principles, including non-intervention, Asian values, and others, in the ASEAN Charter.”¹⁰² Furthermore, in spite of the adoption of the Charter, the creditability of the ASEAN on human rights issues has been criticized in connection to constant human rights violations in one of its members, Myanmar.¹⁰³

Second, the term of reference of the AICHR stipulates its functions and mandate as: to develop an ASEAN Human Rights Declaration, enhance public awareness of human rights, promote capacity building to government agencies and ASEAN bodies, encourage member states to ratify international human rights instruments, obtain information from member states on the

¹⁰¹ Termsak Chalermpananupap, *supra* note 89, at 4.

¹⁰² Alexander C. Chandra and Rafendi Djamin, *ASEAN ‘People’s Charter’ to Advance Civil Society*, The Jakarta Post (Nov. 19, 2007).

¹⁰³ *Id.* See also, *Burma Warned over ASEAN Charter*, BBC News (Nov. 19, 2007); Amnesty International, *ASEAN: Human Rights in the Charter and Beyond* (Nov. 21, 2007).

promotion and protection of human rights, conducting studies on thematic issues as well as preparing reports to the ASEAN Foreign Ministers Meeting.¹⁰⁴ Its mandate clearly shows that the main function of the AICHR is focused on the promotion of human rights rather than their protection, because the Commission has no power to investigate or implicate individuals or countries that have committed human rights violations for which victims need redress. It means that the principle of non-intervention along with the so-called Asian values may still remain in this region as the main obstacles, as Azmi Sharon describes: “The ASEAN way is where we don't disturb each other, and just love others.”¹⁰⁵ Similarly, stressing that “the ASEAN is after all intergovernmental...not inter-people,”¹⁰⁶ Vitit Muntarbhorn maintains that while governmental channels are important, inter-government actions alone are not sufficient to promote and protect human rights, and that a broad range of actors and institutions such as independent institutions, civil society, the judiciary, parliamentary committees and the media also have important roles to play.¹⁰⁷

It is, however, undeniable that launching the AICHR is a milestone for the establishment of regional human rights mechanisms in the South-East Asia region and Asia in general. There had never been such a blueprint in the region. As the Working Group stated, it is a

¹⁰⁴ See Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights, Mandate and Functions <http://www.aseansec.org/publications/TOR-of-AICHR.pdf>

¹⁰⁵ Pravit Rojanaphruk, *Human Rights in ASEAN Seen as a Paper Tiger*, The Nation (Oct. 15, 2010).

¹⁰⁶ *Id.*

¹⁰⁷ Vitit Muntarbhorn, *Discussion Paper on Exploring the Window of Opportunities: Evolving a Framework for the Promotion and Protection of Human Rights in the Asia-Pacific Region*, UNOHCHR, (Jul. 2007). This paper is for the Fourteenth U.N. Annual Workshop of the Framework of Regional Cooperation for the Promotion and Protection of Human Rights in the Asia-Pacific Region, Bali (2007). *Id.*

transformation “into a rules-based, legal entity through the adoption of an ASEAN Charter,”¹⁰⁸ because human rights issues in the region are now totally legitimate.¹⁰⁹ As hard as the work to adopt this framework for a regional human rights body has been, there should be more active cooperation among governments, NGOs and NHRIs for an effective implementation of human rights in the future.¹¹⁰ I believe that even though there might be an insincere motivation among the ASEAN member states for the establishment of the AICHR, once it is established, it can now be used as an effective tool for all rights stakeholders in the region to intervene in their governments’ human rights policies and practices and also be an accessible channel to reflect their voices from below. To make this happen, therefore, the role of NHRIs and their network is more important than ever.

5.3.2. *The South Asia Region*

Though in South Asia there has not been any commitment for the establishment of a sub-regional human rights mechanism or adoption of general human rights treaties yet, the South Asian Association on Regional Cooperation (SSARC) has moved towards specifying more concrete areas of human rights by adopting a number of regional treaties. In 2002, the SAARC adopted the Regional Convention on Preventing and Combating Trafficking in Women and Children for Prostitution and the Convention on Regional Arrangements for the Promotion of

¹⁰⁸ Working Group for an ASEAN Human Rights Mechanism Statement on the ASEAN Charter (Nov. 21, 2007). <http://www.aseanhrmech.org/news/working-group-statement-on-asean-charter.html>

¹⁰⁹ Pravit Rojanaphruk, *supra* note 105.

¹¹⁰ See Li-ann Thio, *Implementing Human Rights in ASEAN Countries: “Promises to keep and miles to go before I sleep”* 2 YALE HUM. RTS. & DEV. L. J. 1 (1999).

Child Welfare in South Asia.¹¹¹ The former stresses cross-border cooperation of member states for the care, treatment, rehabilitation and repatriation of the victims with the possibility of bilateral arrangements in its Articles 8 and 9.¹¹² The latter provides for regional arrangements among member states in the arena of child rights and development in its Article 5.¹¹³ In 2004, the SAARC adopted the SAARC Social Charter, which addresses poverty and development issues in the context of global targets such as the Millennium Development Goals.¹¹⁴ In particular, Article 2 (xii) opens the door for setting up sub-regional mechanisms on general human rights issues in the future:

*xii. Promote universal respect for and observance and protection of human rights and fundamental freedoms for all, in particular the right to development; promote the effective exercise of rights and the discharge of responsibilities in a balanced manner at all levels of society; promote gender equity; promote the welfare and interest of children and youth; promote social integration and strengthen civil society.*¹¹⁵

In addition, for the effective implementation of the Charter, its Article 10 stresses that member states should build National Coordination Committees (NCCs) to complement national implementation efforts and “mobilize civil society organizations to achieve this end.”¹¹⁶

¹¹¹ See South Asian Association on Regional Cooperation, SAARC Conventions <http://www.saarc-sec.org/SAARC-Conventions/63/>

¹¹² SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution <http://www.saarc-sec.org/userfiles/conv-trafficking.pdf>

¹¹³ SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia <http://www.saarc-sec.org/userfiles/conv-children.pdf>

¹¹⁴ Vitit Muntarbhorn, *Discussion Paper on Exploring the Window of Opportunities*, *supra* note 107, at 3.

¹¹⁵ SAARC Social Charter, <http://www.eias.org/luncheons/saarc220104/socialcharter.pdf>

¹¹⁶ See SAARC, Area of Cooperation: SAARC Social Charter http://www.saarc-sec.org/areaofcooperation/detail.php?activity_id=7

The first non-governmental sub-regional Workshop on a South Asian Human Rights Mechanism was held in 2010 with 70 NGO participants.¹¹⁷ During the Workshop, they adopted the Kathmandu Declaration calling on the governments of South Asia to establish an independent, effective and accountable regional human rights mechanism in this region.¹¹⁸ In particular, for the development of regional human rights system, the declaration calls for cooperation among NHRIs in the region and for the establishment of NHRIs in SAARC member states which do not have one yet. It calls:

...on the national human rights institutions in Bangladesh, India, Nepal, Sri Lanka, Maldives and Afghanistan to forge closer and more systematic cooperation among themselves to address cross border human rights violations and support the development of regional human rights mechanism in South Asia;

... on Pakistan and Bhutan to form as soon as possible national human rights institutions in conformity with the Paris Principles.¹¹⁹

I believe such a positive development of civil society movements in this region will lead to convincing the SAARC to adopt its regional human rights mechanism in the future. It is indeed important to point out that while intergovernmental engagement is essential, NGOs and civil societies should actively participate in the formulation of a regional mechanism, and that it can be realized only with the sufficient coordination among and solidarity from NHRIs in member states across the region.

¹¹⁷ Forum-Asia, *SAARC must set up a human rights mechanism in South Asia* (Mar. 25, 2010).

¹¹⁸ Forum-Asia, *Kathmandu Declaration 2010* (Mar. 25, 2010). This Declaration is the outcome document of the First Sub-Regional Workshop on a South Asian Human Rights Mechanism held in Kathmandu, Nepal on 24-25 March 2010. *Id.*

¹¹⁹ *Id.*

5.3.3. *The Pacific Region*

In the Pacific region, there are no sub-regional human rights arrangements yet. What is more, no A-status-accredited NHRIs exist in small Pacific countries. As discussed in Chapter Three, this region also has the lowest level of ratification of major international human rights treaties in the world by far.

The first attempt to explore the possibilities of establishing regional human rights arrangements in the Pacific region was started by LAWASIA, international NGOs of lawyers in the Asia-Pacific region¹²⁰ in 1985 at a meeting in Fiji. A draft Pacific Charter of Human Rights was adopted at a subsequent meeting in Samoa in 1989.¹²¹ However, there has not been any strong or unified political support from the Pacific countries for a regional charter for decades, though the last ten years have seen some small changes in this region.

The Pacific Islands Forum (PIF), a regional economic and political intergovernmental organization founded in 1971,¹²² has become more open to sub-regional and national human rights mechanism since its adoption of the 2000 Biketawa Declaration and the 2004 Auckland Declaration. In those declarations, the Forum specifically included human rights and acknowledged that the protection and promotion of human rights is clearly critical to the region. The Biketawa Declaration expressed:

Belief in the liberty of the individual under the law, in equal rights for all citizens regardless of gender, race, colour, creed or political belief and in the individual's inalienable right to

¹²⁰ The Law Association for Asia and the Pacific, <http://lawasia.asn.au/>

¹²¹ See Fernand de Varennes ed., *Pacific Charter of Human Rights*, ASIA-PACIFIC HUMAN RIGHTS DOCUMENTS AND RESOURCES VOL. 1, (1998).

¹²² The Pacific Islands Forum Secretariat, <http://www.forumsec.org.fj/>

*participate by means of free and democratic political process in framing the society in which he or she lives.*¹²³

The Auckland Declaration stated:

*We seek a Pacific region that is respected for the quality of its governance, the sustainable management of its resources, the full observance of democratic values, and for its defense and promotion of human rights.*¹²⁴

Furthermore, the 2004 Eminent Persons' Group Review of the Pacific Islands Forum encouraged member states to establish national human rights machinery, specifically in cooperation with the APF.¹²⁵ In 2005, the Forum endorsed the Pacific Plan for Strengthening Regional Cooperation and Integration, which clearly supported the development of regional human rights machinery as the Forum's strategic objective.¹²⁶

Similarly, the APF organized the 2004 Pacific Human Rights Consultation with the cooperation of UNOHCHR, UNDP and the Commonwealth Secretariat. It was attended by more than eighty regional participants including representatives of Pacific Island governments, NHRIs and NGOs.¹²⁷ The meeting emphasized the importance of developing a regional human rights arrangement for the Pacific, at the same time recognizing that there are some traditional and cultural practices and customary rights unique to the Pacific, which may impact the enjoyment of

¹²³ The Biketawa Declaration, Kiribati (Oct. 2000).

¹²⁴ The Auckland Declaration, Pacific Islands Forum Special Leaders' Retreat, Auckland (Apr. 6, 2004).

¹²⁵ The Eminent Persons' Group Review of the Pacific Islands Forum (Apr. 2004).

¹²⁶ The Pacific Plan for Strengthening Regional Cooperation and Integration, 18-9 (Nov. 2007).

¹²⁷ The APF, *Pacific Islands Human Rights Consultation* <http://www.asiapacificforum.net/services/training/regional-workshops/pacific-islands>

human rights negatively.¹²⁸ In 2009, the APF organized the Regional Workshop on the Establishment of National Human Rights Mechanisms in the Pacific with the support of the PIF. During the Workshop, a number of participating countries like Nauru, Palau, the Solomon Islands, and Samoa, sought concrete advice on how to promote the establishment of NHRI in their countries and requested APF's technical assistance.¹²⁹

All those recent developments show that there have been two main obstacles for the development of human rights in this region: 1) the limited availability of financial and human resources to establish and operate an NHRI and 2) the customary rights based on tradition and culture which are unique in the Pacific. With the support of the APF and other member NHRIs, an increasing number of Pacific countries, however, are exploring the establishment of NHRIs, recognizing that they are key actors in strengthening human rights protection at the national level and that, further, a strong national human rights system will foster strong regional human rights mechanisms in the future. There have also been discussions and research projects by the APF and member NHRIs to find a way for custom and tradition in the region to be harmonized with existing human rights norms and at the same time, not denigrate international minimum human rights standards. Compared to the time when LAWASIA adopted a Draft Pacific Charter of Human Rights, there has been a gradual movement on human rights issues in the region both by the governments and the civil society actors. As Petra Butler maintains, "the time might be ripe

¹²⁸ Pacific Islands Human Rights Consultation, *Concluding Statement and Recommendations*, Suva, Fiji Islands, (Jun. 2004).

¹²⁹ See Benjamin Lee, *Regional Workshop on the Establishment of National Human Rights Mechanisms in the Pacific: Aims and Outcomes*, 40 *Vict. U. Wellington L. Rev.* 413 (2009).

to unite human rights efforts of each individual Pacific Island State and for them to learn and to help each other” for a regional human rights arrangement in the Pacific region.¹³⁰

5.4. STRENGTHENING THE ROLE OF THE APF

My third suggestion of how NHRIs can be a driving force for the establishment of RHRIs in this region is strengthening the role of the APF and its network of NHRIs, which are considered “the closest that the Asia-Pacific region has come to a regional arrangement or machinery for the promotion and protection of human rights.”¹³¹

Indeed, as reviewed in Chapter Four, the APF has emerged as the most cohesive regional human rights body in the region so far. The functions of a regional human rights mechanism are distinct from those of the regional network of NHRIs and the APF. The fact that, compared to other regions, Asia has no RHRIs, however, makes NHRIs and their network the best complementary tools for the protection and promotion of human rights at both the national and regional level. As individual NHRIs can monitor, investigate and seek remedies for human rights violations in their countries with the active cooperation of civil societies and local human rights NGOs, the network of NHRIs and their formal meetings can be a place to report, discuss and share information of human rights violation in the region, based on international human rights standards. Further, they can be a forum for all stakeholders to intervene and reflect their concern

¹³⁰ Petra Butler, *A Human Rights Charter for the Pacific*, Human Rights Research Journal Vol.3, (Victoria University of Wellington, 2005).

¹³¹ Report on Activities Presented by the Asia Pacific Forum of National Human Rights Institutions, *Effective Functioning of Human Rights Mechanisms: National Institutions and Regional Arrangements*, 15-6, The U.N. Commission of Human Rights (Mar. 24, 2006) UN Doc. E/CN.4/2006/NI/1.

on human rights problems across the region, something that is hard to handle by Asian countries individually, and to develop strategies for best human rights practices. Therefore, the important role of the APF cannot be overstated, because it was established to provide a framework in which member NHRIs can work together and learn from each other, and as a result, improve their own capacity for human rights protection, monitoring and promotion. In addition, another main task of the APF is to promote and support Asian countries in building NHRIs where none exist.

My broad argument is that strengthening the capacity of the APF is directly linked to the enhancement of individual member NHRIs' effectiveness, which will lead to a better domestic human rights system and ultimately move their governments to establish RHRIs in the region. The development of the APF and its network of member NHRIs will also mobilize civil societies across the region to recognize the need for RHRIs and to achieve regional consensus for establishing human rights arrangements in the Asia-Pacific region.

In that sense, there are three ways to enhance the role of the APF. First, by strengthening its own mandate, the APF should raise member NHRIs' operational powers and capacities in compliance with the standards of the Paris Principles. As the annual reports of the Asian NGOs Network on National Human Rights Institutions (ANNI) point out,¹³² NHRIs in most Asian countries have not fully worked as independent institutions, especially in their selection and appointment processes. That is, in most countries, members of NHRIs are appointed exclusively by the government without any transparency and sufficient consultation with civil society, which

¹³² ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia; Annual Report of ANNI -2008, 2009 and 2010 - can be accessed through the website of Asian Forum for Human Rights Development, Publications: Reports, http://www.forum-asia.org/index.php?option=com_content&task=blogcategory&id=0&Itemid=95

results in ignoring the mandate of the Paris Principles: pluralism in the composition of the NHRI. The ANNI also reveals that most NHRIs in the region have not handled complaints effectively, even though the number of these complaints has risen significantly since their establishment. In order to develop and establish effective and independent NHRIs, a need which cannot be emphasized enough in this region, the APF should cooperate with its member NHRIs and provide a strategy for them to ensure compliance with the Paris Principles.

Second, the APF annual meeting should not remain a forum for NHRIs only, but be developed as a place for all rights stakeholders across the region to participate in and to raise their concerns and problems. Along these lines, the APF recently announced that starting in 2011, it will host a conference, “which brings together a wide range of stakeholders to discuss human rights issues in the Asia Pacific region” on a biennial basis, separate from the APF annual meetings which will focus on enhancing effectiveness of member NHRIs by discussing their work, sharing experiences and developing relationships among peer institutions.¹³³ There have been opportunities for human rights NGOs, international organizations, and other government delegations to observe and intervene during the APF annual meetings, but under this newly established APF conference, the APF can more actively promote regional cooperation and coordination for human rights issues in the region, with additional financial and institutional support from relevant actors.

Third, through the APF, NHRIs should promote the adoption of legally binding regional human rights arrangements by their governments. Since its establishment, the APF and its member NHRIs have drafted and adopted various declarations, statements, and resolutions on

¹³³ The APF, *APF Members to Consider Five-year Strategic Plan*, <http://www.asiapacificforum.net/news/apf-members-to-consider-five-year-strategic-plan.html>

human rights issues at the APF annual meetings and thematic workshops. When signed by representatives of individual NHRIs, such agreements exist as a soft law in the form of informal and non-legally binding documents. However, as NHRIs are national institutions, they can interact with their governments for the implementation of those agreed-upon instruments and invite high level government representatives to their meetings to get feedback. I believe that such an active and dynamic process can, in the long run, make these initiatives formal and legally binding through the ratification by high ranking officials from countries with member NHRIs.

5.5. BEGINNING WITH COUNTRIES IN FAVOR OF ESTABLISHING RHRIS

My last suggestion on how NHRIs can be eminent actors in the establishment of regional human rights arrangements in the Asia-Pacific region is to initiate regional human rights instruments with a few favourably disposed countries at first. The main reason for that is that it is unlikely to achieve a single integrated human rights arrangement for all Asian countries at once.

As discussed, there is growing recognition that there are many human rights issues of common concern which cannot be handled by individual states alone, and need to be dealt with by the cooperation among neighbouring countries across the region. Therefore, building RHRIs among the countries, which understand the necessity to solve complicated human rights issues together, can be a good starting point that emulates the way Europe evolved its regional human rights system under the auspices of the Council of Europe. It started with ten founding member

countries but now all forty-seven member states are parties to the European Convention on Human Rights.

Once RHRIs are established and can show how effectively those small but strong regional mechanisms can handle regional human rights problems, the increasing benefit of membership will attract other countries and as a result, those multilateral arrangements can be developed as unified RHRIs in the region.

5.6. CONCLUSION

In this chapter, I examined the way in which NHRIs and their network can be a driving force for the establishment of RHRIs in the Asia-Pacific region, and provided four specific suggestions toward it.

The first one is the creation of regional arrangements on common issues of human rights in the region. I reviewed eight human rights issues of common concern, which have the potential to be developed into a legally binding regional arrangement: the rights of women, people with disabilities, human rights defenders, internally displaced persons, and migrants, as well as human trafficking, the environment, and prevention of torture. Recognizing that most human rights issues in the region cannot be solved by a single country on its own, NHRIs should actively advocate for their governments to cooperate with other governments in the region. Such efforts will result in the adoption of regional instruments on the issues above. I believe that increasing the number of such instruments will lead to the establishment of integrated regional human rights arrangements in this region.

The second one is establishing RHRIs at the sub-regional level through the active cooperation of the South Asian Association for Regional Cooperation (SAARC) in South Asia, the Association of Southeast Asian Nations (ASEAN) in South-East Asia, and the Pacific Islands Forum (PIF) in the Pacific region. As a starting point, the establishment of sub-regional human rights mechanisms is important for the protection of human rights in the region, and once there are sub-regional arrangements, they can work toward a human rights institution on the regional level.

The third one is strengthening the role of the APF. The APF was established to enhance the capacity of member NHRIs for better human rights practices at the national level and a strengthened domestic environment for effective implementation of international human rights standards. It will ultimately move governments to establish RHRIs in the region. The development of the APF and its network of member NHRIs will also mobilize civil societies across the region to reach regional consensus for establishing RHRIs and the recognition that it is necessary to have a regional human rights protection system.

The last suggestion is to begin establishing RHRIs with a small number of countries with NHRIs that understand the necessity of solving complicated human rights issues together. Once established, the practices of these small but strong human rights bodies will provide an incentive for other countries in the region to participate in these instruments because of the increased benefits of membership.

Since their establishments, NHRIs have worked as a key player in strengthening domestic human rights protection systems by supporting and enriching international human rights standards and at the same time, reflecting local culture, tradition, and national specificities. Their

networks have also played an important role in urging Asian countries to cooperate with the international human rights mechanism and also with neighboring states for the better protection and promotion of human rights in the region. Based on the suggestions above, NHRIs can be eminent actors in developing a credible regional human rights system, and in the long run, establishing RHRIs in the Asia-Pacific region.

CHAPTER SIX:

RHRIs, NHRIs and Human Rights NGOs

Governments and NGOs need each other: governments, because they can use the information supplied by NGOs; NGOs, because their objective – the promotion and protection of human rights in the world – can only be attained through the activities of governments. They are, as it were, two sides of the same coin.¹

[R]eaffirmed faith in the crucial importance of cooperation between national human rights institutions and NGOs and recognized they should work together on the basis of their common commitment to the universality and indivisibility of human rights as expressed in the Universal Declaration of Human Rights, international human rights instruments and the Vienna Declaration... also recognized that national human rights institutions and NGOs have different roles in the promotion and protection of human rights and that the independence and autonomy of civil society and NGOs and of national human rights institutions must be respected and upheld.²

6.1. INTRODUCTION

It is no more a new phenomenon, and indeed, undeniable fact that human rights NGOs have played a crucial role for the promotion and protection of human rights in the world. Especially, since the 1990s, their transnational character³ and increasing intervention on and participation in human rights issues at the national, regional and international level has been

¹ Peter R. Baehr, *NON-GOVERNMENTAL HUMAN RIGHTS ORGANIZATIONS IN INTERNATIONAL RELATIONS*, 124, (2009).

² The APF, *The Kandy Program of Action: Cooperation Between National Institutions and Non-Governmental Organizations*, Para.1.5., Workshop on National Institutions and Non-Governmental Organizations: Working in Partnership (Jul. 28, 1999).

³ See Mary Kaldor, *Transnational Civil Society* in *HUMAN RIGHTS IN GLOBAL POLITICS* 195 (Tim Dunne and Nicholas J. Wheeler eds., 1999).

emphasized in a large number of studies.⁴ That is, civil societies, including NGOs, have externalized their human rights claims by seeking support from regional and international allies, when they are frustrated with their inability to attain redress from their own governments,⁵ and their transnational activism has been empowered and legitimized by the international human rights norms.⁶ Margaret Keck and Kathryn Sikkink call such an externalization of their claims by networks of NGOs *the boomerang effect*:

[W]hen channels between state and its domestic actors are blocked, the boomerang pattern of influence characteristic of transnational actors may occur: domestic NGOs bypass their state and directly search out international allies to try to bring pressure on their states from outside. This is most obviously the case in human rights campaigns.⁷

Keck and Kathryn, however, focus on only one form of pressure, namely *informational politics*, in which external allies “diffuse information about abuses to sympathetic governments and public opinion abroad ... then *boomerang* into pressure on repressive states,” and leave unspecified other pathways of externalization, including the use of *institutionalized access*, in which NGOs bring domestic human rights claims to external institutions in authority and those institutions can transform the complaints received into binding rules for the correction of abuses.⁸ I believe RHRI, which are the main focus of my dissertation, can play such a role as an

⁴ See generally Thomas Risse, Stephen C. Ropp and Kathryn Sikkink eds., *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE*, (1999). See also Margaret E. Keck and Kathryn Sikkink, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS*, (1998); H. Steiner, P. Alston and R. Goodman, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS*, 1421 (Third Edition, 2008).

⁵ Sidney Tarrow, *THE NEW TRANSNATIONAL ACTIVISM*, 145 (2006).

⁶ See Kathryn Sikkink and Jackie Smith, *Infrastructures for Change: Transnational Organizations: 1953-1993* in *RESTRUCTURING WORLD POLITICS: THE POWER OF TRANSNATIONAL AGENCY AND NORMS*, 24-44 (Sanjeev Khagram, James V. Riker, and Kathryn Sikkink eds., 2002).

⁷ Margaret E. Keck and Kathryn Sikkink, *supra* note 4, at 12-3.

⁸ Sidney Tarrow, *supra* note 5, at 146, 158-160.

intermediate institution to link regional human rights NGOs' advocacy network to social change and legal mobilization at the national level for better human rights practices.

At the same time, while the transnational human rights movement by NGOs plays a critical role in the national and regional human rights mechanisms, the traditional role of national governments still “remains central to the lives of citizens,”⁹ because, as Sidney Tarrow maintains, “sustainable change will only be achieved when national governments are continually pushed to live up to their claims and when the pressure *from below* and *from above* continues.”¹⁰ Therefore, NHRIs and their networks are also vital as a channeling institution with an active cooperation and collaboration both with international and regional human rights institutions and human rights NGOs.

In this chapter, I will review the characteristics of human rights NGOs and their evolving role within the existing international and regional human rights mechanisms, and further, in Asia, the way in which they have worked together for better human rights practices and the establishment of RHRIs in this region. Then, I will examine the role of human rights NGOs in strengthening human rights protection systems at the national level, especially in cooperation with NHRIs. In addition, the process of establishing NHRIs in selected countries in Asia and more specifically, how human rights NGOs have influenced this process will be briefly discussed.

⁹ Helen M. Stacy, HUMAN RIGHTS FOR THE 21ST CENTURY: SOVEREIGNTY, CIVIL SOCIETY, CULTURE, 118, (2009).

¹⁰ Sidney Tarrow, *supra* note 5, at 159; See also Thomas Risse, Stephen C. Ropp and Kathryn Sikkink, *supra* note 4, at 33.

6.2. NON-GOVERNMENTAL HUMAN RIGHTS ORGANIZATIONS IN THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK

The number of NGOs has dramatically increased for the last century, i.e., from 1,083 in 1914 to more than 37,000 in 2000, with about one quarter of them established after 1990.¹¹ There are over 300 international human rights NGOs which operate across national borders and two-thirds of them are based in Western countries: forty-six percent in Western Europe and seventeen percent in North America.¹² While Western-based major international NGOs are more focused on civil and political rights, NGOs from the Third World (or the Global South) are generally reported to work more on development and social, economic, and cultural rights.¹³ Southern human rights NGOs are also more likely to cooperate with other NGOs and to influence domestic institutions.¹⁴ As Henry Steiner points out, this shows the regional differences in priorities and even reflects understandable tensions within the international human rights movement.¹⁵ However, the margin of differences is, while significant, nominal, and the growing emergence of human rights NGOs in the Third World has contributed to strengthening the indivisibility of international human rights norms because most of them “assume the universality

¹¹ Helmut Anheier, Marlies Glasius and Mary Kaldor, *GLOBAL CIVIL SOCIETY*, 4 (2001) *cited* in Peter R. Baehr, *supra* note 1, at 6.

¹² Peter R. Baehr, *id.*, at 7. *See* also Jackie Smith, Ron Pagnucco and George A. Lopez, *Globalizing Human Rights: The Work of Transnational Human Rights NGOs in the 1990s*, 20 *Hum. Rts. Q.* 379, 387 (1998).

¹³ Jackie Smith, Ron Pagnucco and George A. Lopez, *id.*,

¹⁴ *Id.*, at 411.

¹⁵ *See* Henry J. Steiner, *DIVERSE PARTNERS: NON-GOVERNMENTAL ORGANIZATIONS IN THE HUMAN RIGHTS MOVEMENT, THE REPORT OF A RETREAT OF HUMAN RIGHTS ACTIVISTS* (1991).

of human rights as a point of departure... [and] this assumption provides them with the right to challenge governments' performance in the field of human rights."¹⁶

Given this background, the section below examines how human rights NGOs can be defined and what their role has been within the development of the international human rights system.

6.2.1. *Human Rights NGOs: What are they?*

There is no international law which provides an authoritative definition of non-governmental organizations in general and there is even no generally agreed upon definition of human rights NGOs among scholars, either.¹⁷ I broadly maintain that human rights NGOs should have four basic elements, i.e. they should be: 1) non-profit, 2) independent – specifically without interference from governments, 3) people-based, and 4) devoted for the promotion and protection of human rights. The first three aspects are not necessarily limited to human rights NGOs, but apply to NGOs in general. The first element is clearly suggested in the 1994 report of the Secretary-General for the U.N. Economic and Social Council (ECOSOC), which was prepared to

¹⁶ Peter R. Baehr, *supra* note 1, at 120. At the same time, he also recognizes the different perspectives between Western-based NGOs and those from Southern countries and describes their tension as: “[a]t the U.N. World Conference on Human Rights in 1993, differences of view arose between large, well-organized NGOs, usually based in Western countries, on the one hand, and relatively poor, less well-organized organizations often from Southern countries, on the other. The latter showed some irritation that the former assumed that they could speak on behalf of all NGOs. The claim of different cultural approaches, as well as different interests, does not seem to be limited to governments alone.” *Id.*, at 5.

¹⁷ Menno T. Kamminga, *The Evolving Status of NGOs under International Law: A Threat to the Inter-State System?* in NON-STATE ACTORS AND HUMAN RIGHTS 93, 95 (Philip Alston ed., 2005).

make *suitable arrangements* for consultation with NGOs based on Article 71 of the U.N. Charter¹⁸ and further, to decide which organizations are granted consultative status with the U.N.:

*An NGO is a non-profit entity whose members are citizens or associations of citizens of one or more countries and whose activities are determined by the collective will of its members in response to the needs of the members or of one or more communities with which the NGO cooperates.*¹⁹

Such a non-profit aspect is an essential element that constitutes NGOs as credible and accountable entities pursuing non-material goals. The second element comes from the very title of NGOs. That is, they are not governmental institutions, but independent and impartial organizations. Most NGOs, indeed, reject support from government sources in the belief that states cannot adequately represent the interests of local groups and individuals. The third aspect is closely related to the *social movement*, which is the foundation of NGOs, as defined by Dianne Otto:

*[O]rganizations that aim to represent values and aspirations associated with peoples rather than with states, including the promotion of human rights, gender and race equality, environmental protection, sustainable development, indigenous rights, nonviolent conflict resolution, participatory democracy, social diversity, and social and economic justice.*²⁰

The last element comes from human rights NGOs' own activities and their aims: the promotion and protection of human rights. There can be general human rights organizations and

¹⁸ Article 71 of the U.N. Charter stipulates that “[t]he Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.”

¹⁹ U.N. Economic and Social Council, *Report of the Secretary-General: General Review of Arrangements for Consultations with Non-Governmental Organizations*, para.9, UN DOC. E/AC.70/1994/5 (1994), cited in Dianne Otto, *Nongovernmental Organizations in the United Nations System: The Emerging Role of International Civil Society*, 18 Hum. Rts. Q. 107, 111 (1996).

²⁰ Dianne Otto, *supra* note 19, at 112.

ones that specialize in a particular human rights issue. Laurie Wiseberg clearly distinguishes them from other NGOs by defining human rights NGO as:

*... a private organization which devotes significant resources to the promotion and protection of human rights, which is independent of both governmental and political groups that seek direct political power, and which itself does not seek such power.*²¹

Overall, while there is no authoritative definition, human rights NGOs should be understood - based on their activities, aims, transnational networks, and social movements - as independent, non-profit, and peoples-based organizations, which seek to make individual governments at least reconsider their people's rights and interests that previously have been neglected.

6.2.2. Role of Human Rights NGOs in the International Human Rights Mechanism

As Hidetoshi Hashimoto maintains, “NGOs have strengths where governments have weaknesses.”²² As impartial and credible people-based organizations, they freely criticize the individual countries' human rights situations at the international level and their criticism is taken ever more seriously by international human rights monitoring bodies. Indeed, human rights NGOs are increasingly recognized as important independent actors in the international human rights system and have extended the discourse of international human rights norms “beyond the interests of states to hear the many voices currently excluded.”²³ Here, I define the areas in which

²¹ Laurie Wiseberg, *Protecting Human Rights Activists and NGOs: What More Can Be Done?* 13 Hum. Rts. Q. 524, 529 (1991).

²² Hidetoshi Hashimoto, *THE PROSPECTS FOR A REGIONAL HUMAN RIGHTS MECHANISM IN EAST ASIA*, 39 (2004).

²³ Dianne Otto, *supra* note 19, at 107-9, and 140-1.

human rights NGOs have had a significant impact in the international human rights mechanism in four categories.

The first one is that human rights NGOs monitor individual countries' compliance with ratified international human rights treaties, and report on the domestic human rights situation to the international community using for example, the Internet, mass media and social media. They also expose each government's human rights violations to international civil societies in order to mobilize them for active prevention of such abuses.

The second one is that they provide reliable, objective, and up-to-date essential human rights information at the local, national and regional level to the U.N., including human rights treaty bodies for effective implementation of international human rights norms. Their oral and written interventions through NGO briefs, petitions, documentary evidence, and reports, have played a crucial role as "the eyes and ears" of the U.N. human rights system.²⁴ The Economic and Social Council (ECOSOC),²⁵ the International Labor Organization (ILO),²⁶ and the Educational, Scientific and Cultural Organization (UNESCO),²⁷ for example, offer human rights NGOs *consultative status*, which allows them to attend meetings, and make and circulate their own statements.

²⁴ Irwin Cotler, *The Role of Non-Governmental Organizations in the Promotion and Protection of Human Rights in a Revolutionary Age: The Helsinki Process as a Case Study* in INTERNATIONAL HUMAN RIGHTS: THEORY AND PRACTICE, 463 (Irwin Cotler and F. Pearl Eliadis eds., 1992).

²⁵ See Dianne Otto, *supra* note 19.

²⁶ See Nicolas Valticos, *The International Labor Organization* in THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS, 363-400 (Karel Vasak ed., 1982).

²⁷ See Hanna Saba, *UNESCO and Human Rights* in Karel Vasak, *Id.*, at 401-426.

The third one is that human rights NGOs contribute to setting up international norms in various human rights areas through their constant efforts to identify still unveiled human rights areas and require the adoption of related international treaties and resolutions. Further, in many cases, they participate in or provide input into the process of drafting international human rights standards like the Universal Declaration of Human Rights,²⁸ the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment²⁹ and the Convention on the Rights of the Child.³⁰

The last point is that when there are gross human rights violations in certain countries, human rights NGOs can provide humanitarian assistance to target states and, if possible, indirectly intervene to mobilize public opinion against their governments, because the U.N. and member states rarely take any concrete action to intervene in most of the cases with their complicated political and diplomatic interests. In addition, NGOs can report and reveal the human rights situation in target countries, especially when the U.N. cannot conduct fact-finding missions in the countries because of limited accessibility.³¹

Overall, human rights NGOs have contributed to strengthening the international human rights system and effectively implementing international norms at the national and regional level.

²⁸ Theo Van Boven, *The Role of Non-Governmental Organizations in International Human Rights Standard-Setting: A Prerequisite of Democracy*, 20 Cal. W. Int'l L.J. 207, 211 (1990).

²⁹ *Id.*, at 217-220. See also Virginia Leary, *A New Role for Non-Governmental Organizations in Human Rights: A Case Study of Non-Governmental Participation in the Development of International Norms on Torture* in U.N. LAW, FUNDAMENTAL RIGHTS: TWO TOPICS IN INTERNATIONAL LAW, 197-210 (Antonio Cassese ed., 1979).

³⁰ Theo Van Boven, *supra* note 28, at 217-220. See also Cynthia Price Cohen, *The Role of Nongovernmental Organizations in the Drafting of the Convention of the Child*, 12 Hum. Rts. Q. 137 (1990).

³¹ See David Weissbrodt and James McCarthy, *Fact-Finding by International Nongovernmental Human Rights Organizations*, 22 Va. J. Int'l L. 1 (1981).

However, they also face many challenges. First of all, many governments, and not only authoritarian ones, have hampered human rights NGOs' activities which expose governments' wrong-doings to the international community and pressure them to change their human rights policies.³² Most NGOs in Third World countries also struggle with limited financial resources, and if they are funded by Western donors, a common practice, governments restrict their activities in suspicion of the foreign funders' motivation.³³ Moreover, with the increasing number of NGOs, it has been difficult to effectively reflect their concerns and address their interests at the U.N.³⁴ and other international institutions, as Michael Posner describes:

[B]ecause so many governments and NGOs want to speak, NGOs are frequently allotted the least popular time, late at night, when the great majority of government representatives have gone home. As a result, the impact of months of research and information-gathering of NGOs may be virtually nil.³⁵

All those challenges show that it is necessary to have institutions as medium -NHRIs and RHRIs- for human rights NGOs to effectively play their role for the promotion and protection of human rights. The former can work as an official channel between governments and NGOs to lessen their conflict and enhance their relationship because NHRIs have both governmental and non-governmental characteristics as discussed in Chapters Four and Five. The latter can provide much more opportunities for NGOs to present their concerns and cases and a relatively easier accessibility for them than international institutions. Therefore, in the following two sections, I

³² See the Section 4.2.4. Rights of Human Rights Defenders in Ch. 4.

³³ See Clarence J. Dias, *Relationships between Human Rights NGOs in the Third World* in HUMAN RIGHTS PERSPECTIVE AND CHALLENGES: IN 1990 AND BEYOND, 105-128 (K.P. Saksena ed., 1994).

³⁴ For example, the number of NGOs that receive consultative status at the U.N. increased from several in 1945 to 3,249 today. See The U.N. Department for Economic and Social Affairs 2009 Report.

³⁵ Michael Posner, *The Establishment of the Right of Nongovernmental Human Rights Groups to Operate* in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY, 415 (Louis Henkin and John Lawrence Hargrove eds., 1994).

will review the role of human rights NGOs at the regional and national level and their relationship with RHRIs and NHRIs.

6.3. RHRIs AND HUMAN RIGHTS NGOS

Human rights NGOs are increasingly becoming not only international but also regional. Their activities are not limited within the boundary of national borders in order to pursue the promotion and protection of human rights issues in common concern in the region as “sovereign-free-actors.”³⁶ That is, to achieve their aims, they promote regional integration, active transnational cooperation, and collaboration with other NGOs across national borders. Thus, in this section, I will first examine the role of human rights NGOs and their impact on the existing regional human rights system in Europe, the Americas, and Africa. Then I will focus on how human rights NGOs have worked together to foster a human rights culture in the Asia-Pacific region and the way in which they take concrete steps towards establishing RHRIs in this region.

6.3.1. Role of Human Rights NGOs in Regional Human Rights Mechanisms

In the European human rights system, human rights NGOs have made significant contributions in the following five main ways.

First, they have been actively involved in drafting regional human rights treaties like the European Convention on the Legal Status of Migrant Workers, the European Convention for the

³⁶ Hidetoshi Hashimoto, *supra* note 22, at 43.

Prevention of Torture, the European Cultural Convention and the European Charter for Regional or Minority Languages.³⁷ For example, the text of the European Convention for the Prevention of Torture was prepared by two human rights NGOs: the Swiss Committee against Torture and the International Commission of Jurists.³⁸ Further, following guidelines for granting consultative status to a group of NGOs in 1954 under the Committee of Ministers' Resolution, the Council of Europe has offered NGOs consultative status. With it, they can address their concerns and activities to the Council of Europe and at the same time, the Parliamentary Assembly and its committees can seek advice from them.³⁹ Currently, around 400 NGOs have been granted consultative status.⁴⁰ Second, they can file direct complaints before the European Court of Human Rights (ECtHR) based on Article 34 of the European Convention on Human Rights (ECHR).⁴¹ In other words, similarly to private individuals, human rights NGOs have the right to lodge an application before the ECtHR, if they are victims of violations of the Convention. Moreover, they can act as witnesses before the Court. For example, in 1968, when the European Commission of Human Rights reviewed the case submitted by member states in the Council of Europe against widespread torture in Greece, representatives of Amnesty International, which had conducted a fact-finding mission to Greece a year before, presented as witnesses during the

³⁷ See The Council of Europe, *The Council of Europe Open to Voluntary Organizations* <http://www.coe.ro/nog.html>

³⁸ See The Council of Europe, *Historical background and main features of the European Torture Convention*, CoE Doc. CPT/Inf/C (89) 2 (1989). <http://www.cpt.coe.int/en/documents/historical-background.htm>

³⁹ *Id.*

⁴⁰ *Id.*, See also Marek Antoni Nowicki, *NGOs before the European Commission and the Court of Human Rights*, 14 Neth Q Hum Right 289, 292 (1996).

⁴¹ Article 34 of the European Convention on Human Rights stipulates:

The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

proceedings.⁴² Third, human rights NGOs can provide legal advice to the victims who wish to bring their cases before the ECtHR by completing their application, consulting the ECHR procedures, and assisting them in formulating competent arguments. In addition, they can stand before the Court as lawyers to represent the victims or find adequate attorneys for them. Fourth, as Article 36 (2) of the Convention allows, human rights NGOs can get involved in the proceedings by third-party intervention, namely, Amicus Curiae briefs.⁴³ This is the only way NGOs can participate in sensitive human rights cases not as the original parties to the cases. Through such participation, they can address unrepresented public interests in the case and also raise public awareness of related human rights issues.⁴⁴ Lastly, they can disseminate knowledge of the European Human Rights Convention and the Court to newly-joined member countries, especially from Central and Eastern Europe.⁴⁵

While the European system does not permit access to non-victim representatives, in the Inter-America human rights system, human rights NGOs can bring their cases - even if they are not the victims of violations - before the Inter-American Commission on Human Rights based on Article 44 of the American Convention of Human Rights (ACHR).⁴⁶ Though there is no specific

⁴² Dean Zagorac, *International Courts and Compliance Bodies: The Experience of Amnesty International* in CIVIL SOCIETY, INTERNATIONAL COURTS AND COMPLIANCE BODIES, 11, 18 (Tullio Treves et al eds., 2005).

⁴³ Article 36 (2) of the European Convention on Human Rights stipulates: *The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.*

⁴⁴ Luisa Vierucci, *NGOs before International Courts and Tribunals* in NGOs IN INTERNATIONAL LAW: EFFICIENCY IN FLEXIBILITY? 155, 165-6 (Pierre-Marie Dupuy and Luisa Vierucci eds., 2008). See also Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AJIL 611, 630-40 (1994).

⁴⁵ Hidetoshi Hashimoto, *supra* note 22, at 94.

⁴⁶ Article 44 of the American Convention on Human Rights stipulates:

provision regulating their submission, they can also file Amicus Curiae briefs to advisory proceedings by the Inter-American Court of Human Rights, just as the ECHR permits.⁴⁷ For example, the Center for Justice and International Law (CEJIL), one of the most active human rights NGOs in the region, directly intervened in more than two hundred cases before the Inter-American Commission and Court of Human Rights to represent over ten thousand victims, including human rights violations such as forced disappearances, extrajudicial executions, due process violations, conditions of detention, freedom of expression, and inhumane treatment.⁴⁸ Further, many human rights NGOs in the Inter-America region have actively worked for the documentation of the human rights situation there through visiting countries regularly, collecting information on human rights violations by member states, and publishing periodic state reports.⁴⁹

In contrast to Europe or the Americas, in the African human rights system, human rights NGOs cannot bring individual cases of human rights violations because the case must reveal the “existence of a series of serious or massive violations of human and peoples' rights” as Article 58 of the African Charter on Human and Peoples' Rights points out. The African Commission on Human and Peoples' Rights, however, grants observer status to NGOs, which provides them with the opportunity to be present in public sessions of the Commission and its subsidiary bodies, and propose items for the Commission's agenda.⁵⁰ Every two years, they also submit a report to

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.

⁴⁷ Dinah Shelton, *supra* note 44.

⁴⁸ The Center for Justice and International Law, <http://cejil.org/>

⁴⁹ Hidetoshi Hashimoto, *supra* note 22, at 96.

⁵⁰ The African Commission on Human and Peoples' Rights, Resolution on the Criteria Granting and Enjoying Observer Status to Non-Governmental Organizations Working in the Field of Human Rights with the African

the Commission on their human rights activities, which can provide an alternative view to the official state reports.⁵¹ As discussed in Chapter Two,⁵² the African human rights system, however, is based on state-centric perspectives with the consistent respect for the principle of national sovereignty. Thus, compared to other regional systems, which have advanced a judicial settlement, in the African region, human rights violations cases are handled mainly through diplomatic settlement and, as a result, so far there has not been much room for human rights NGOs to intervene in the cases directly or indirectly.

Overall, all three regional human rights systems are more readily accepted and accessible for human rights NGOs to address their concerns and problems in the region than the international system. Within the system, NGOs have contributed to enhancing the human rights situation in their regions through their active participation and cooperation.

There is one more thing to be noted here: all three regional systems also share the same limitations. That is, the primary responsibility for implementation of international human rights norms rests on individual member states and the regional system can serve a complimentary role only, after local remedies have been exhausted. . This leads to the conclusion that, for NGOs to contribute to the further development of human rights in the region, it is important for them first

Commission on Human and Peoples' Rights, 25th Ordinary Session, in Bujumbura, Burundi, (May. 5, 1999).

http://www.achpr.org/english/info/observer_en.html ; Chapter II of its Annex stipulates:

All observers shall be invited to be present at the opening and closing sessions of all Sessions of the African Commission...

Observers may be authorized by the Chairman of the African Commission to make a statement on an issue that concerns them, subject to the text of the statement having been provided, with sufficient lead-time, to the Chairman of the Commission through the Secretary to the Commission...

Observers may request to have issues of a particular interest to them included in the provisional agenda of the African Commission, in accordance with the provisions of the Rules of Procedure.

⁵¹ *Id.*, Chapter III of Annex: Relations between the African Commission and Observers.

⁵² See Section 2.4 of Chapter Two.

to strengthen the domestic human rights systems and consequently, to cooperate with NHRIs at the national level. I will discuss this point further in Section 6.4.

6.3.2. Human Rights NGOs in the Asia-Pacific Region

As reviewed in Chapter Three, in the absence of a regional human rights system in the Asia-Pacific region, NGOs have discussed the establishment of an NGO-led regional human rights system in the region for over two decades.⁵³ Once RHRIs are established in the Asia-Pacific region, NGOs can play a crucial role for them. What is more, these NGOs' own initiatives are extremely important in the sense that their capacity is indeed a vital consideration in setting up RHRIs in the region. That is, human rights NGOs are in a position to witness and advocate for victims of abuses and are best placed to accurately report and discern the latest human rights violations in the target states. Similarly, the adequate cooperation among individual governments and human rights NGOs toward the establishment of RHRIs can make regional bodies more legitimate, independent and effective institutions for the promotion and protection of human rights.

Human rights NGOs in the region have also constantly maintained the universality of international human rights norms, and pressured individual governments to ratify major international human rights treaties and to comply with them. For example, before the 1993 World Conference on Human Rights, numerous NGOs in Asia gathered and expressed their position in the Non-Governmental Bangkok Declaration as:

⁵³ See Section 3.1.2 of Chapter Three.

Universal human rights standards are rooted in many cultures. We affirm the basis of universality of human rights which afford protection to all of humanity, including special groups such as women, children, minorities and indigenous peoples, workers, refugees and displaced persons, the disabled and the elderly. While advocating cultural pluralism, those cultural practices which derogate from universally accepted human rights including women's rights, must not be tolerated. As human rights are of universal concern and are universal in value, the advocacy of human rights cannot be considered to be an encroachment upon national sovereignty.⁵⁴

In the same vein, numerous Asian NGOs actively discussed and worked together for the drafting of the regional human rights charter for three years prior to 1998, when more than 200 human rights NGOs in the region gathered in Kwangju, South Korea, and declared the Asian Human Rights Charter: Our Common Humanity.⁵⁵ The Charter rejects Asian values debates and strongly stresses the indivisibility and universality of human rights. It especially emphasizes the role of human rights NGOs related to establishing RHRIs in the region as Article 16.2 of the Charter stipulates:

16.2 Asian states should adopt regional or sub-regional institutions for the promotion and protection of rights. There should be an inter-state Convention on Human Rights, formulated in regional forums with the collaboration of national and regional NGOs. The Convention must address the realities of Asia, particularly the obstacles that impede the enjoyment of rights. At the same time it must be fully consistent with international norms and standards. It should cover violations of rights by groups and corporations in addition to state institutions. An independent commission or a court must be established to enforce the

⁵⁴ Asian Cultural Forum on Development, OUR VOICE: BANGKOK NGO DECLARATION ON HUMAN RIGHTS, 199 (1993).

⁵⁵ Amnesty International, *Charter Reflects Growing Strength and Determination of Human Rights Movement in Asia and Pacific*, Public Statement on the Occasion of Declaration of Asian Human Rights Charter (May. 15, 1998); See also U.N. Human Rights Council, Progress Report on the Right of Peoples to Peace by Advisory Committee, Para.14., (Dec. 22, 2010) UN Doc. A/HRC/AC/6/CRP.3.

*Convention. Access to the commission or the court must be open to NGOs and other social organizations.*⁵⁶

In addition, as discussed in Chapter Five,⁵⁷ human rights NGOs have effectively operated at the regional level particularly for the human rights problems of common concern in the region like human trafficking, prevention of torture, rights of women, people with disabilities, internally displaced persons, migrant workers, and human rights defenders.

Overall, NGOs' initiatives, input and endeavors have become the foundation for formulating regional human rights arrangements in the Asia-Pacific region. Further, the emergence of an increasing number of human rights NGOs accelerates the development of a human rights culture and of strong civil societies in this region.

6.4. NHRIS AND HUMAN RIGHTS NGOS

As discussed in Chapters Four and Five, NHRIs can play a crucial role in promoting and protecting human rights within the domestic human rights system, and their very nature shows they hold a unique position among all stakeholders including the government, civil society and human rights NGOs. Especially, as the Paris Principles stress, the cooperation among NGOs is vital for the effectiveness of NHRIs, because NGOs can monitor the institutions' performance and at the same time, NHRIs benefits from using the knowledge, experience and expertise of human rights NGOs. Thus, this section will show how both actors can mutually benefit within their cooperative relationship.

⁵⁶ See Asian Human Rights Commission, *The Asian Human Rights Charter*, <http://material.ahrchk.net/charter/>

⁵⁷ See Section 5.2 of Chapter Five.

First, the cooperation between NHRIs and NGOs can give human rights NGOs a public legitimacy which cannot otherwise be enjoyed, because NHRIs are established based on national legislation and such legitimacy is usually not given to human rights NGOs.⁵⁸

Second, in authoritarian governments, there exist numerous human rights NGOs under constant persecution. Local human rights advocates and activists are detained for years and sometimes deported to foreign countries. International human rights delegations also find it hard to enter countries which prevent an effective human rights protection. But cooperation with NHRIs can make it difficult for the government to restrain the activities of human rights NGOs and international human rights bodies.⁵⁹

Third, NGOs can recommend and advise the government on the initial establishment of NHRIs which may give them public accountability.⁶⁰ In fact, NGOs have been a touchstone for the creation of NHRIs in individual states. As Dong Wook Kim argues, “human rights NGOs have systematic and robust effects on the occurrence and depth of the global diffusion of NHRIs.”⁶¹ Borrowing the concepts of *rooted cosmopolitans* from Sidney Tarrow’s 2005 book, New Transnational Activism, Kim analyzes ninety-six cases of NHRIs creation from 1978 to 2004, and then concludes that human rights NGOs significantly influenced the individual

⁵⁸ See Brian Burdekin, NATIONAL HUMAN RIGHTS INSTITUTIONS IN THE ASIA-PACIFIC REGION, 60-62 (2007); Rachel Murray, THE ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS AT THE INTERNATIONAL AND REGIONAL LEVELS: THE EXPERIENCE OF AFRICA, 59-68 (2007). See also International Council on Human Rights Policy, PERFORMANCE & LEGITIMACY: NATIONAL HUMAN RIGHTS INSTITUTIONS, 97-99 (2004).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See Dong Wook Kim, INSTITUTIONALIZING HUMAN RIGHTS: THE UNITED NATIONS, NONGOVERNMENTAL ORGANIZATIONS AND NATIONAL HUMAN RIGHTS INSTITUTIONS, 232-7, PhD Dissertation, (University of Wisconsin-Madison, 2009).

governments' decision to establish NHRIs and at the same time, contributed to ensuring the independence and accountability of NHRIs.⁶²

Fourth, human rights NGOs can be a source of information for NHRIs by providing expertise on the human rights conditions in the local communities.⁶³ In addition, there are many different human rights NGOs which represent children, women, prisoners, workers, migrants, minority groups, and so on. Cooperation between these various NGOs and NHRIs can provide a wide spectrum of human rights problems to discuss and such a process ensures an effective protection of fundamental human rights.⁶⁴

Lastly, for the people in remote regions of large countries, sometimes it is hard to access and submit their complaints to NHRIs. In this case, the local NGOs can be an effective communication channel for human rights violations.⁶⁵

However, as pointed out through the case study of the National Human Rights Commission of Korea (NHRCK) in Chapter Four, it is also necessary for NHRIs to be independent from NGOs and civil societies and thus, not overly influenced by certain interest groups, as well as to balance and reflect all stakeholders' interests and concerns on various domestic human rights issues, as Anne Smith stresses:

[I]n establishing a close relationship with NGOs, NHRIs should be conscious that NGOs are not representative of the public, they are not appointed by the people or parliament, and as

⁶² *Id.*

⁶³ See Brian Buurdekin, *supra* note 58, at 60-62; Rachel Murray, *supra* note 58, at 59-68. See also International Council on Human Rights Policy, *supra* note 58, at 97-99.

⁶⁴ *Id.*

⁶⁵ *Id.*

*such may be perceived as lacking some form of the legitimacy that a NHRI may have ... [and at the same time] civil society groups need to continue to be vocal, criticizing a NHRI's action that undermines human rights protection and promotion, without interfering with the NHRI's independence.*⁶⁶

Overall, human rights NGOs' collaboration with NHRIs is indispensable in making them operate effectively. Such a close relationship between NHRIs and NGOs can ultimately contribute to the strengthening of the national system for the protection and promotion of human rights.

6.4.1. The APF, NHRIs and Human Rights NGOs in the Asia-Pacific Region

In the Asia-Pacific region, ever since its establishment, the Asia Pacific Forum of National Human Rights Institution (APF) has stressed the important role of human rights NGOs and their engagement with the member NHRIs, a point that was especially emphasized at the 1999 Workshop on National Institutions and Non-Governmental Organizations: Working in Partnership.⁶⁷

As reviewed in Chapter Five, the APF actively cooperates with human rights NGOs to deal with various human rights issues of common concern in the Asia-Pacific region. The APF also facilitates NGO participation in the planning, implementation and evaluation of member NHRIs activities, for example, by providing an opportunity for the Asian NGOs Network on

⁶⁶ Anne Smith, *The Unique Position of National Human Rights Institutions: A Mixed Blessing?* 28 Hum. Rts. Q. 904, 941, 945 (2006).

⁶⁷ See The APF, *The Kandy Program of Action: Cooperation Between National Institutions and Non-Governmental Organizations*, *supra* note 2.

National Institutions (ANNI) to present their annual Report on the Performance and Establishment of NHRIs in Asia at the APF annual meetings. Further, the APF encourages member NHRIs to collaborate with NGOs in monitoring their respective governments' implementation of the ratified human rights norms and publishing shadow reports for the human rights treaty bodies and other international human rights institutions as a complement to the state report. Lastly, in active consultation with NGOs, the APF urges countries with no NHRI to create it and supports countries in the process of establishing an NHRI.

6.4.2. Case Study: The Establishment of NHRIs in Asian Countries and Human Rights NGOs

In this section, I will briefly review the process of establishing NHRIs in individual countries in Asia and how civil society, including human rights NGOs, in these states and the human rights culture formulated by them, have influenced this process. Focusing on the interaction between NHRIs and human rights NGOs, I will also examine what, if anything, they have achieved in the promotion and protection of human rights.

For this, I selected seven countries with or without NHRIs and grouped them into three categories based mainly on the relationship of human rights NGOs and individual governments: Legitimate Civil Society, Controlled and Communalized Civil Society, and Repressed Civil Society.⁶⁸ This categorization is based on Muthiah Alagappa's 2004 book, Civil Society and Political Change in Asia. He describes the first category, Legitimate Civil Society, as countries

⁶⁸ Muthiah Alagappa ed., CIVIL SOCIETY AND POLITICAL CHANGE IN ASIA: EXPANDING AND CONTRACTING DEMOCRATIC SPACE, 1-19 (2004). See also Muthiah Alagappa ed., COERCION AND GOVERNANCE: THE DECLINING POLITICAL ROLE OF THE MILITARY IN ASIA (2001).

with “a growing acknowledgment . . . of the legitimacy of the non-state public realm;” the second category, Controlled and Communalized Civil Society, as states in “quasi-democracies with relatively stable political systems that display strong authoritarian features;” and the third category, Repressed Civil Society, as countries with a military regime where civil society is severely suppressed in limited political liberalization.⁶⁹

a. Legitimate Civil Society

1. Thailand

Since the early 2000s, Thailand has achieved great economic success at least in Southeast Asia.⁷⁰ There have also been noticeable human rights movements against poverty and unemployment.⁷¹ The history of human rights in Thailand is closely linked to the history of its continuous contention for democracy. Between the overturn of the monarchy in 1932 and 1992, there were fifteen constitutions, mainly under the military government.⁷² For sixty years, military governments held power by periodic coups. Following the May 1992 bloody demonstrations against the military government and the subsequent social and academic movements especially between 1996 and 1997, a civilian government was established through a national election.⁷³ The sixteenth constitution, enacted in 1997, is the most democratic one.⁷⁴ It stipulates all

⁶⁹ *Id.*, at 18-9.

⁷⁰ Vitit Muntarbhorn, *Human Rights in the Era of “Thailand Inc.”* in HUMAN RIGHTS IN ASIA: A COMPARATIVE LEGAL STUDY OF TWELVE ASIAN JURISDICTIONS, FRANCE AND THE USA, 320 (Randall Peerenboom, et.el. ed., 2006).

⁷¹ *Id.*

⁷² James Ockey, *Thailand: The Struggle to Redefine Civil-Military Relations* in COERCION AND GOVERNANCE: THE DECLINING POLITICAL ROLE OF THE MILITARY IN ASIA, 187, 190-8 (Muthiah Alagappa ed., 2001).

⁷³ *Id.*, at 196-200.

⁷⁴ Vitit Muntarbhorn, *supra* note 70, at 321.

internationally recognized basic human rights as well as people's fundamental freedoms.⁷⁵ Despite the democratically elected government and the democratic constitution in Thailand, it has been argued that, in itself, this "does not automatically imply that it will promote and protect human rights in a comprehensive manner."⁷⁶ Increasingly, there has been a public push from the civil society for the necessity of an independent institution established by the constitution which can provide checks against abuses of state power.⁷⁷

Finally, in 1999, the National Human Rights Commission of Thailand (NHRCT) was established under the National Human Rights Commission Act and Sections 199 & 200 of the 1997 Constitution. Since then, as stated in the 1999 NHRC Act, the NHRCT has worked to maximize the checks and balances against the power of the state with the intense cooperation of NGOs and local community leaders.⁷⁸ Further, the Commission is trusted by many human rights NGOs which partly stems from the fact that half the number of Commissioners had worked with NGOs prior to their appointment.

In 2006, there was a military coup to overthrow Prime Minister Thaksin Shinawatra's administration which was followed by numerous protests and demonstrations. The Commission had to face human rights issues related to the persistent and occasionally violent mass anti-government demonstrations questioning the legality and legitimacy of successive governments. In 2007, 2008, and April 2009, the NHRCT issued recommendations against the government opposing the enforcement of the 2005 Emergency Decree on Public Administration which

⁷⁵ *Id.*, at 322-325.

⁷⁶ *Id.*, at 325-344.

⁷⁷ *Id.*

⁷⁸ See The Asia-Pacific Forum: Thailand, <http://www.asiapacificforum.net/members/apf-member-categories/full-members/thailand>

authorizes the use of massive violence to disperse demonstrators.⁷⁹ In the statement, the Commission criticized the government and stated that “the application of the state of emergency overrides the role and responsibility of the Parliament and politicians in checking and balancing the administrative power to ensure that it uses the state power legitimately in accordance with the spirit of the Constitution,” and as a result, it was able to hinder the government’s harsh repression of the demonstrators.⁸⁰

The NHRCT also faced the issue of its own status following the coup. The new military government abrogated the 1997 Constitution which had mandated the establishment of the NHRCT including the number, qualifications, and selection process of Commissioners.⁸¹ Then, the present Constitution, ratified by a referendum in 2007, introduced important changes in the selection procedure for Commissioners of the NHRCT. Many human rights NGOs criticized the selection of the new Commissioners in 2009 under the new Constitution as seriously flawed in both process and results.⁸² Thus, the effectiveness and independence of the new Commission in the future remains an open question.

2. India

India became independent in 1950 after a long period of colonial rule.⁸³ It has more than one billion people, eighteen major languages, twenty eight states, and more than six major

⁷⁹ See Office of the National Human Rights Commission of Thailand: News <http://www.nhrc.or.th/index.php>

⁸⁰ *Id.*

⁸¹ See ANNI Annual Report 2008: *Turbulence in Thailand*, and 2009: *Thailand in a Period of Polarization*.

⁸² See ANNI Annual Report 2010: *Setbacks in Thai Democracy Impact NHRCT*.

⁸³ Amitabh Behar and Aseem Prakash, *India: Expanding and Contracting Democratic Space* in CIVIL SOCIETY AND POLITICAL CHANGE IN ASIA: EXPANDING AND CONTRACTING DEMOCRATIC SPACE, 191, 191-3 (Muthiah Alagappa ed., 2004).

religions.⁸⁴ With such a diversity and plurality, in 60 years, India has achieved a remarkable success in technology and economic development.⁸⁵ There is, however, a comprehensive inequality in India “between rural and urban areas, within communities and castes, and between women and men.”⁸⁶ For example, more than half of the children under the age of five remain anorexic, two thirds of women are illiterate and 34% of the total population still lives below the poverty line.⁸⁷ Overall, this reflects the difficulties in the promotion and protection of human rights in India in spite of its noticeable economic growth,⁸⁸ even though the country is generally not considered a state of human rights concern compared to other countries in South Asia.⁸⁹

Since the early 1980s, India has established a number of national human rights institutions such as the National Commission for Women, the Minorities Commission, and a Child Rights Commission.⁹⁰ In 1993, the National Human Rights Commission of India (NHRCI) was established under the 1993 Protection of Human Rights Act.⁹¹ Such an NHRIs network has lessened the judicatory burdens of the Supreme Court of India by handing over human rights

⁸⁴ *India Today*, Aug. 19, 2002 cited in Amitabh Behar, *Id.*, at 192.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Census of India 1991 cited in Amitabh Behar, *Id.*, at 193.

⁸⁸ Upendra Baxi, *Protection of Human Rights and Production of Human Rightlessness in Indi* in HUMAN RIGHTS IN ASIA: A COMPARATIVE LEGAL STUDY OF TWELVE ASIAN JURISDICTIONS, FRANCE AND THE USA, 384, 384-390 (Randall Peerenboom, et.el. ed., 2006).

⁸⁹ Country Profile: India, 25, Library of Congress- U.S. Federal Research Division.

⁹⁰ Upendra Baxi, *supra* note 88, at 385.

⁹¹ See The Asia-Pacific Forum: India <http://www.asiapacificforum.net/members/apf-member-categories/full-members/india>. Subsequent to the establishment of the NHRCI, a number of State Human Rights Commissions (SHRCs) have come into existence, for example, in Andhra Pradesh, Assam, Chhatisgarh, Himachal Pradesh, Jammu and Kashmir, Kerala, Madhya Pradesh, Manipur, Maharashtra, Orissa, Punjab, Rajasthan, Tamil Nadu, Uttar Pradesh and West Bengal, Karnataka, Gujarat. See ANNI Annual Report 2008: *India – Time to Raise the Benchmark*.

violations cases.⁹² For example, in 2008, more than 94,000 complaints against human rights violations were submitted to the NHRCI.⁹³

The Commission formed a National Core Group of NGOs. It has coordinated their monitoring of human rights violations and ensuring the credible and accurate reports on human rights abuses. The Protection of Human Rights Act 1993 stresses in its Section 12(i) that the NHRCI has the responsibility to “encourage the efforts of non-governmental organizations and institutions working in the field of human rights.”

Some human rights NGOs criticized the NHRCI as a “*toothless tiger* and a mere *post office* to provide a certificate of *good behavior* to the Government for its *wrong-doings* rather than to ensure *better* protection of human rights,”⁹⁴ in the sense that the NHRCI has operated as a recommendation rather than a binding orders body.⁹⁵ However, numerous cases show that the Commission has made *de facto* changes and reforms needed, especially, in the police and the prison system.⁹⁶ Further, with the increasing number of human rights violation complaints and the growing complementarities between the judiciary and the NHRCI, the Commission has become, as Justice A.S. Annand argues, the conscience of the nation.⁹⁷ Currently more than 150

⁹² Upendra Baxi, *supra* note 88, at 385. See also Justice A.S. Annand, *The Protection Role of the Indian Human Rights Commission* in THE PROTECTION ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS, 87 (BERTRAND G. RAMCHARAN ed., 2005).

⁹³ Hindustan Times, *Human Rights Violation Maximum in UP, Delhi*, Mar. 15, 2009.

⁹⁴ Justice A.S. Annand, *supra* note 92, at 88.

⁹⁵ See ANNI Annual Report 2009: *India losing its long established standards*.

⁹⁶ *Id.*, at 96-98.

⁹⁷ *Id.*, at 104-105.

statutory human rights institutions are operational in India and in the future, the NHRCI should be able to provide effective leadership for them in active cooperation with civil society groups.⁹⁸

3. *The Philippines*

The Philippines were one of the wealthiest countries in Asia in the 1960s. The human rights situation in the country, however, has worsened since 1972 after President Ferdinand Marcos enforced martial law to seek his third term.⁹⁹ International human rights NGOs such as Amnesty International and the International Commission of Jurists issued a report against the increasing human rights violations by the Philippine government.¹⁰⁰ After a series of public demonstrations in 1986 (the so-called EDSA Revolution or People Power Revolution of 1986), Corazon Aquino was elected President and the authoritarian government was overthrown.¹⁰¹ In 1987, the current constitution was adopted under the Aquino administration. It codifies the democratic goals and clearly takes a stand against former President Marcos' trailing economic and social rights as an excuse for the cutback on political liberties.¹⁰² In 2001, there was another peaceful public demonstration (so-called EDSA 2 or the Second People Power Revolution of 2001) against the corruption of President Joseph Estrada's administration, led by numerous human rights activists and NGOs. Gloria Arroyo became President following the impeachment

⁹⁸ See ANNI Annual Report 2010: *The NHRC in India - Another Department of the Government of India*.

⁹⁹ Anja Jetschke, *Linking the Unlinkable? International Norms and Nationalism in Indonesia and the Philippines* in *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* 134, 139 (Thomas Risse et al. ed., 2008); Jennifer C. Franco, *The Philippines: Fractious Civil Society and Competing Visions of Democracy* in *CIVIL SOCIETY AND POLITICAL CHANGE IN ASIA: EXPANDING AND CONTRACTING DEMOCRATIC SPACE*, 97, 97-8 (Muthiah Alagappa ed., 2004).

¹⁰⁰ Anja Jetschke, *id.*, at 142.

¹⁰¹ Jennifer C. Franco, *supra* note 99, at 106-117.

¹⁰² Raul C. Pangalangan, *The Philippines: The Persistence of Rights Discourse vis-à-vis Substantive Social Claims*, in *HUMAN RIGHTS IN ASIA: A COMPARATIVE LEGAL STUDY OF TWELVE ASIAN JURISDICTIONS, FRANCE AND THE USA*, 346, 346-7 (Randall Peerenboom, et. al. ed., 2006).

of the Estrada administration.¹⁰³ Overall, the continuous historical resistance against authoritarian governments and their human rights abuses has increased the discussion of human rights in the Philippines.¹⁰⁴

The Commission on Human Rights of the Philippines (CHRP) was established in 1987 under the 1987 Philippine Constitution (Article XIII, Section 17) with the operative decree of Executive Order No.163.¹⁰⁵ The CHRP was one of the founding member state institutions of the *Paris Principles* and the Asia-Pacific Forum.¹⁰⁶ Its focus areas are not only the protection of human rights itself but also the interconnection with all stakeholders including the government, civil society, and the media.¹⁰⁷ It had the important role of drafting human rights legislation such as the Anti-Trafficking in Prison Act of 2003 and the Anti-Violence against Women and their Children Act of 2004.¹⁰⁸ It also worked actively to enact legislation against human rights violations during the 2001 demonstrations in which at least 900 human rights activists and members of left-wing groups were supposedly killed and tortured and 300 are still missing.¹⁰⁹ Despite its lack of prosecutorial or quasi-judicial functions, the CHRP also made use of its investigative power to bring human rights violations to the fore through holding public inquiries, fact-finding missions, and special operations on cases like extra-judicial killings, enforced

¹⁰³ Jennifer C. Franco, *supra* note 99, at 120-127.

¹⁰⁴ *Id.*, at 346-347.

¹⁰⁵ Dr. Purification C.V. Quisumbing, *The Protection Role of the Philippines Human Rights Commission* in THE PROTECTION ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS, 155, 156 (BERTRAND G. RAMCHARAN ed., 2005) . See also The Asia-Pacific Forum: Philippines <http://www.asiapacificforum.net/members/apf-member-categories/full-members/philippines>. Commission on Human Rights of the Philippines, <http://www.chr.gov.ph>

¹⁰⁶ See Brian Burdekin, *supra* note 58, at 98-101; Pamela A. Jefferies, *Human Rights, Foreign Policy, and Religious Belief: An Asia/Pacific Perspective*, 2000 BYU L. REV. 885 (2000).

¹⁰⁷ Dr. Purification C.V. Quisumbing, *supra* note 105, at 156-158.

¹⁰⁸ *Id.*

¹⁰⁹ GMA News TV, *CHR urges Arroyo to certify human rights bills*, (Mar. 14, 2009).

disappearances, and illegal and arbitrary arrests.¹¹⁰ When several natural disasters hit the country, the Commission also released an Advisory reminding the government to demonstrate its positive obligation to prepare, respond, and rehabilitate when disasters occur.¹¹¹ Further, the Commission proactively launched a campaign for the right to political participation of vulnerable groups including youth, internally displaced persons, indigenous peoples, and persons with disabilities.¹¹²

No specific provisions on the cooperation and consultation with NGOs are provided in the CHRPs operative decree of Executive Order No.163. There has not been any periodic regular consultation with human rights NGOs even though consultative meetings are sometimes held on certain issues.¹¹³ While the CHRPs has an NGO, Civil Society and Media Linkages Cooperation Office, operationally, this office is not involved in consultation for policy or program formulations and serves as a public relations unit of the Commission to popularize its advocacy messages through the collaboration with NGOs. Compared to the Commission's active involvement in the area of international and regional cooperation, the CHRPs rocky relationship with human rights NGOs has been considered one of its weakest points,¹¹⁴ though the current Commission has gradually forged close working relationships with civil society.¹¹⁵

¹¹⁰ See ANNI Annual Report 2010: *Philippines: A Time of Great Irony*.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See ANNI Annual Report 2009: *Old Challenges for a New Commission*.

¹¹⁴ See ANNI Annual Report 2008: *Philippines: A Hamstrung Commission*.

¹¹⁵ See ANNI Annual Report 2010: *Philippines: A Time of Great Irony*.

4. Japan

Under the name of *fundamental human rights*, the basic rights of the Japanese people are protected under the 1946 Japanese Constitution.¹¹⁶ Various legal scholars of Japan see the current human rights system in Japan as having been heavily influenced by American constitutionalism after WWII but also argue that the Japanese Constitution “is inappropriate for Japanese society where individual freedom and individual wishes must yield to group harmony.”¹¹⁷ There are more than a thousand registered NGOs in Japan.¹¹⁸ They are working in various human rights fields including one of the biggest human rights problems in Japan, the minority discrimination against the Zainichi,¹¹⁹ the Burakumin,¹²⁰ and the Ainu.¹²¹

The movement toward the establishment of an NHRI started during the late 1990s, and it was initiated both by international institutions and domestic human rights NGOs.¹²² They argue that while there are existing human rights protection systems in Japan like the Human Rights Bureau and human rights volunteers under the Ministry of Justice, those systems are neither

¹¹⁶ Shingenori Matsui, *The Protection of “Fundamental Human Rights” in Japan* in HUMAN RIGHTS IN ASIA: A COMPARATIVE LEGAL STUDY OF TWELVE ASIAN JURISDICTIONS, FRANCE AND THE USA, 121, 121-8 (Randall Peerenboom, et.el. ed., 2006).

¹¹⁷ *Id.*, at 145-146, 150.

¹¹⁸ Hidetoshi Hashimoto, *supra* note 22, at 107-108. See also Robert Pekkanen, *Japan: Social Capital without Advocacy* in CIVIL SOCIETY AND POLITICAL CHANGE IN ASIA: EXPANDING AND CONTRACTING DEMOCRATIC SPACE, 223 (Muthiah Alagappa ed., 2004).

¹¹⁹ Zainichi is a Japanese term which means “foreigner residing in Japan.” It refers mainly to Korean Japanese. Hidetoshi Hashimoto, *Id.*

¹²⁰ Burakumin (or Hisabetsu buraku) are descendants of feudal-era outcasts and take up approximately 2.5% of the population. *Id.*

¹²¹ Ainu are indigenous people in Japan. *Id.*

¹²² See ANNI Annual Report 2008: *Situation of Japan – Working Towards the Establishment of an Independent NI.*

independent, nor effective, and it is necessary to create an NHRI in Japan.¹²³ In early 2002, the Human Rights Protection Bill to set up a national human rights commission was drafted and submitted to the Japanese government.¹²⁴ This draft bill, however, was dropped under the strong opposition of NGOs, the media, and lawyers.¹²⁵ Their main concerns can be summarized in the following way: first, the lack of independence of the human rights commission which is stipulated under the jurisdiction of the Minister of Justice; second, the lack of procedures against human rights abuses by public officials; and lastly, the omission of a clear definition of human rights.¹²⁶ In 2005, a modified draft Human Rights Protection Bill was proposed but, again, many human rights NGOs and the media strongly objected to the submission of the bill, because the key issues that had been criticized, had not been changed.¹²⁷ In 2008, the Japan Federation of Bar Associations, one of the major human rights NGOs, proposed the Outline of National Human Rights Institution (JFBA Outline) which lays down the framework and principles of the NHRI to be created in Japan: independence, mandate, scope of covering violations, functions, composition, resources, efficiency, and accessibility.¹²⁸ This outline was publicized and submitted to the Minister of Justice too. The following year, the Democratic Party of Japan (DPJ) took power away from the Liberal Democratic Party (LDP) which had been the ruling party for fifty- four years, and the new Minister of Justice Keiko Chiba emphasized in her inaugural

¹²³ *Id.*

¹²⁴ Human Rights Forum 21, *Japanese National Human Rights Commission*, Asia-Pacific News Vol.28 (Jun. 2002).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Koshi Ymazaki, *Proposed Human Rights Commission in Japan: A Critique*, Asia-Pacific News, Vol.39 (Mar. 2005).

¹²⁸ See ANNI Annual Report 2009: *A Look at the Human Rights Protection Bill of Japan*.

statement that the establishment of NHRI is one of the crucial issues to be achieved in Japan.¹²⁹ It seems that under the new administration, there has been rapid progress in the establishment of an NHRI¹³⁰ and indeed, the Japanese government should work together with civil society groups, including human rights NGOs, to make an NHRI in Japan a reality. Further, as the most developed country in the Asia-Pacific region, Japan should show positive leadership not only in the economic sphere but also in the human rights area in this region,¹³¹ because many human rights scholars indicate that the Japanese government's constant refusal to provide an apology and compensation to WWII victims such as comfort women and forced conscripts from various countries in Asia, and to address the Nanking Massacre, has prevented the establishment of a regional human rights mechanism in Asia, as discussed in Chapter Three.¹³²

b. Controlled and Communalized Civil Society

5. *Malaysia*

Since Malaysia won its independence in 1957, the opposition parties have not succeeded in winning the national elections and the ruling party, the National Front Coalition, has always been in power.¹³³ Most Malaysian leaders, including the longest serving Prime Minister Mahathir bin Mohamad, have constantly argued that Malaysia's diverse and multiethnic uniqueness has inevitably restricted basic human rights such as freedom of expression, assembly, and due

¹²⁹ See ANNI Annual Report 2010: *Rapid Developments in Japan*.

¹³⁰ *Id.*

¹³¹ Hidetoshi Hashimoto, *supra* note 22, at 130.

¹³² *Id.*, at 129.

¹³³ H.P. Lee, *Human Rights in Malaysia* in HUMAN RIGHTS IN ASIA: A COMPARATIVE LEGAL STUDY OF TWELVE ASIAN JURISDICTIONS, FRANCE AND THE USA, 191, 191-194 (Randall Peerenboom, et.el. ed., 2006); Human Rights Watch, *World Report: Malaysia*, (Jan. 2009) http://www.hrw.org/sites/default/files/related_material/malaysia.pdf

process.¹³⁴ The Malaysian Constitution guarantees various basic human rights, but it also contains *traditional* factors, for example, declaring Islam as the religion of the Federation and the Malay language as the national language.¹³⁵ Unlike other developing countries in Asia, Malaysia has not fully changed its 1957 Constitution since independence.¹³⁶ International Human Rights NGOs like Human Rights Watch have criticized the human rights situation of Malaysia since “the government continues to use outdated repressive laws and regulations to silence its critics and extend its rule ... [especially] ... to commit abuses against undocumented migrants, refugees, and asylum seekers.”¹³⁷ Domestic human rights NGOs, lawyers, and other human rights activists have worked hard for the protection of human rights in spite of serious personal risks.¹³⁸ The Malaysian government has consistently insisted that to maintain economic progress, it is necessary to downgrade the full exercise of civil and political rights.¹³⁹ It also argues that national security and stability are essential for economic development and are thus the priority.¹⁴⁰ However, unlike in other Asian countries like Indonesia, the Philippines and South Korea, there has been no threat to national security, for instance, an attempt by the military to overturn the civil power or to intervene in the national political area.¹⁴¹ In addition, the ruling party, the

¹³⁴ *Id.*

¹³⁵ See Tun Haji Mohd & Salleh bin Abas, *Traditional elements of the Malaysian Constitution* in THE CONSTITUTION OF MALAYSIA: FURTHER PERSPECTIVES AND DEVELOPMENTS, 1-17 (F.A. Trindade and H.P. Lee, eds., 1986).

¹³⁶ H.P. Lee, *supra* note 133, at 215.

¹³⁷ Human Rights Watch, *supra* note 133.

¹³⁸ *Id.* See also Meredith L. Weiss, *Malaysia: Construction of Counterhegemonic Narratives and Agendas* in CIVIL SOCIETY AND POLITICAL CHANGE IN ASIA: EXPANDING AND CONTRACTING DEMOCRATIC SPACE, 259, 278-80, 284-5 (Muthiah Alagappa ed., 2004).

¹³⁹ H.P. Lee, *supra* note 133, at 216. See also Amnesty International, *Malaysia - Human Rights Undermined: Restrictive Laws in a Parliamentary Democracy*, 1 (1999) ASA 28/06/99.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

National Front Coalition, has always enjoyed the majority support of the Malaysian people, even though there has been criticism of the national electoral system.¹⁴²

The Human Rights Commission of Malaysia (SUHAKAM) was established by Congress under the 1999 Human Rights Commission of Malaysia Act (Act 597).¹⁴³ The creation of the SUHAKAM was initially influenced by Malaysia's involvement in the United Nations Commission on Human Rights (UNHCR) from 1993 to 1995, and then by the fact that other ASEAN member countries, like the Philippines, Indonesia and Thailand, established NHRIs.¹⁴⁴ Since its establishment, SUHAKAM's effectiveness, independence and compliance with international standards has been debated among human rights NGOs. Supporters argue that having a Commission is better than not having one and actually the Commission has been a strong critic of the government's policies and on many occasions has been recognized as an anti-government NGO.¹⁴⁵ For example, on its recommendation, gender was included in Article 8(2) of Part II of the Malaysian Constitution as a ground for discrimination and primary education became compulsory by amending the Education Act.¹⁴⁶ However, there has also been undeniable criticism from human rights NGOs and even from SUHAKAM officials that the appointment process is not transparent, and that many recommendations have been ignored by the government.¹⁴⁷ As a result, they argue that the Commission has been operated for the purpose of

¹⁴² *Id.*, at 217.

¹⁴³ The Asia-Pacific Forum: Malaysia <http://www.asiapacificforum.net/members/apf-member-categories/full-members/malaysia>. See also Human Rights Commission of Malaysia: History <http://www.suhakam.org.my/web/guest/info/profil>

¹⁴⁴ *Id.*

¹⁴⁵ Chiam Heng Keng, Human Rights Commission – Malaysian Scenario, Asia-Pacific News, No.26 (Dec. 2001).

¹⁴⁶ *Id.*

¹⁴⁷ See ANNI Annual Report 2008: *Malaysia, Empowerment from Within?*

window-dressing the government's poor human rights practices. Overall, the SUHAKAM has had an ambivalent relationship with human rights NGOs, but still many of them see the importance of the Commission and continue to cooperate with it, for example, because the Commission has access to locations like detention facilities where human rights violations frequently occur and which are not easily accessible to NGOs.¹⁴⁸

SUHAKAM's operational capacity has been questioned not only by human rights NGOs but also by international institutions like the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC).¹⁴⁹ In the same vein, some argue that it may be hard to maintain an A status in the future.¹⁵⁰ In 2009, the 1999 Human Rights Commission of Malaysia Act was amended in an attempt to avoid international embarrassment by the Commission's impending downgrading by the ICC.¹⁵¹ The amendment was done solely by the government and was passed just one day before the ICC convened to decide on the status of the SUHAKAM. There was no consultation with any civil society group during the process.

6. Singapore

After its independence from Malaysia in 1965, Singapore has become one of the highly developed countries in Asia under the strong leadership of its first Prime Minister Lee Kuan Yew

¹⁴⁸ See ANNI Annual Report 2009: *Longstanding Concerns under the International Spotlight*.

¹⁴⁹ Regarding accreditation system for NHRIs, see Section 4.2.2 in Chapter Four.

¹⁵⁰ Chiam Heng Keng, *supra* note 145. See also Aniza Damis, *Suhakam treads an arduous path*, New Sunday Times (Aug. 3, 2008).

¹⁵¹ See ANNI Annual Report 2010: *Malaysia – Substantial Reforms Still Elusive*.

and the People's Action Party (APA).¹⁵² As the World Bank states, Singapore has “the highest standard of living in Asia” and is one of the Four Asian Tiger countries with huge economic success.¹⁵³ Though there are no specific reports by international human rights organizations of gross human rights violations by the Singapore government, it has broad power to limit its citizens' human rights as an excuse for economic development and national stability, especially, based on the Internal Security Act.¹⁵⁴ Singapore is the initiator of advocating Asian values and Neo-Confucianism based on the economics-first-discourse in order to justify its authoritarian political order to intervene extensively in the public and private arena.¹⁵⁵

Ironically, there has been no strong resistance from the opposition party and the public against the government's human rights policy. Some scholars argue that “the excessive, if not repressive, mechanisms of the state prevent any serious challenge.”¹⁵⁶ In such a restricted political situation, there is limited room for domestic human rights NGOs to work and influence government policy.¹⁵⁷ Therefore, most NGOs have tried to involve the political decision-making

¹⁵² Li-ann Thio, *Taking Rights Seriously? Human Rights Law in Singapore* in HUMAN RIGHTS IN ASIA: A COMPARATIVE LEGAL STUDY OF TWELVE ASIAN JURISDICTIONS, FRANCE AND THE USA, 158-162 (Randall Peerenboom, et.el. ed., 2006); Country Profile: Singapore, Library of Congress –Federal Research Division (Jul. 2006) <http://lcweb2.loc.gov/frd/cs/profiles/Singapore.pdf>

¹⁵³ Li-ann Thio, *Id.*, at 159.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*, at 158-159.

¹⁵⁶ Suzaina Kadir, *Singapore: Engagement and Autonomy Within the Political Status Quo* in CIVIL SOCIETY AND POLITICAL CHANGE IN ASIA: EXPANDING AND CONTRACTING DEMOCRATIC SPACE, 324 (Muthiah Alagappa ed., 2004).

¹⁵⁷ *Id.*, at 328-333.

process in order to address broad human rights concerns rather than to confront the government or to undermine it.¹⁵⁸

Regarding the creation of a human rights commission in Singapore, Lee Kuan Yew maintains that “that was for the younger leaders to decide but ... as long as the Singapore Government remained clean, capable, meritocratic and fair, I don’t see the need for more political policemen.”¹⁵⁹ Yet the question is whether NHRIs are established to act as policemen rather than to enhance the promotion of human rights and good governance for the civil society.¹⁶⁰ One of the opposition party leaders (the Singapore Democratic Party), Dr. Chee Soon Juan, argues that a “human rights commission will not happen in Singapore” because the civil society has not had any will-power to confront the government and to challenge its human rights policy.¹⁶¹ Michael Hwang, President of the Law Society of Singapore, also points out that a human rights commission in Singapore “would study the human rights situation in Singapore, but not actually do anything about it” if the current political system does not change.¹⁶²

c. Repressed Civil Society

7. Myanmar

¹⁵⁸ *Id.*, 350. See also Sinapan Samyodorai, *Singapore: Everyone Matters*, Human Rights Solidarity Vol.10, No.5 (May, 2000); SG Human Rights, *SG Human Rights is no More*, (Jun. 12, 2008) <http://www.sghumanrights.org>

¹⁵⁹ MARUAH Singapore, *A Human Rights Commission for Singapore?* Conference Report by the Institute of Policy Studies at Singapore Perspectives (Feb. 2, 2008) <http://maruahsg.wordpress.com/2008/02/05/a-human-rights-commission-for-singapore>

¹⁶⁰ *Id.*

¹⁶¹ Vernon Lee, *Singapore: Forum on Human Rights*, Human Rights Solidarity Vol.10 No.5 (May, 2000). See also Dr. Chee Soon Juan *Speech: Human Rights in Singapore* <http://www.singapore-window.org/sw00/000310sj.htm>

¹⁶² Gopalan Nair, *Simply Inconceivable: Human Rights Commission* <http://simply-inconceivable.blogspot.com/2008/03/human-rights-commission-for-singapore.html>

Myanmar, formerly known as Burma, has a grim human rights record. There are numerous reports of gross human rights violations by the Burmese military government, such as apartheid, forced labor, and drug trafficking.¹⁶³ Millions of ethnic minorities in Myanmar have fled from economic and political oppression to Bangladesh, India, China, Malaysia and Thailand to seek asylum. More than 170,000 Myanmarers are living in nine refugee camps in Thailand and two in Bangladesh.¹⁶⁴

Myanmar became the object of international reproach after 1988, when the Burmese military junta seized power. This military government formed the State Law and Order Restoration Council (SLORC)¹⁶⁵ after a bloody crackdown on a series of democratic movements led by students.¹⁶⁶ The SLORC nullified the results of the national election in 1990 and arbitrarily detained democracy activists including their leader, Aung San Suu Kyi.¹⁶⁷ It renamed itself the State Peace and Development Council (SPDC) and has since used a repressive military regime and the curbing of civil liberties as a strategy to maintain law and order.¹⁶⁸ While

¹⁶³ Bureau of East Asian and Pacific Affairs, *Background Note: Burma*, U.S. Department of State (2006).

¹⁶⁴ *Id.*

¹⁶⁵ The State Law and Order Restoration Council (SLORC) was the name of the military government of Myanmar from September 1988 to November 1997. See The IRRAWADDY, *Cabinets of Burma since 1948*, <http://www.irrawaddy.org> (The IRRAWADDY is published by the Irrawaddy Publishing Group (IPG). IPG was established in 1992 by Myanmarers living in exile. On its research pages, the website has detailed information and statistics on Burma, e.g. a full list of political prisoners, a list of cease-fire agreements with the Junta, etc.)

¹⁶⁶ GlobalSecurity.org, *SLORC Coup in Burma*, <http://www.globalsecurity.org/military/world/war/slorc.htm>

¹⁶⁷ Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 *Yale J. Int'l L.* 1, 8-9 (2001); Aung San Suu Kyi remained under house arrest for almost 15 of the 21 years from July, 1989 until her release on November 2010. *Burma releases pro-democracy leader Aung San Suu Kyi*, BBC News (Nov. 13, 2010). <http://www.bbc.co.uk/news/world-asia-pacific-11749661>

¹⁶⁸ See Yan Nyein Aye, *ENDEAVOURS OF THE MYANMAR ARMED FORCES GOVERNMENT FOR NATIONAL RECONSOLIDATION* (U Aung Zaw, 2000).

Myanmar is a member state of a number of major human rights treaties,¹⁶⁹ including the Convention on the Rights of the Child, the Convention to Eliminate All Forms of Discrimination against Women, the Convention to Eliminate All Forms of Racial Discrimination, and the Genocide Convention, the Myanmar military government has violated fundamental human rights norms regarding arbitrary detention, torture, extrajudicial execution, forced child labor, and coercive relocation of minorities, for more than 10 years.¹⁷⁰ The SPDC also used coercive tactics to gain complete control over the border regions by systematic forced relocations of villages.¹⁷¹ These repressive policies have contributed to a large extent to Myanmar citizens' fleeing the country.¹⁷² Furthermore, the SPDC is highly suspicious of the role played by Western NGOs. The military regime in Myanmar has made consistent attempts to keep international human rights NGOs away from the Thai-Myanmar border where massive forced relocations of the civilian population have taken place.¹⁷³

For the improvement of human rights in Myanmar, I believe the main force should come from the inside. But the existing civil society and NGOs in Myanmar appear to offer no threat to the government and there remains little prospect of them playing a key role in fostering a human rights culture, because the civil society in Myanmar is very weak and heavily controlled by the government. NGOs are even funded by the government and former military or government

¹⁶⁹ *Id.*

¹⁷⁰ U.S. Department of State, *Report on U.S. Trade Sanctions against Burma*, (Congressionally mandated report submitted to Congress on Apr. 2004).

¹⁷¹ Curtis Lambrecht, *Destruction and Violation: Burma's Border Development Policies*, *Watershed* 5, no.2, 28-32, (2000). [http://www.terraper.org/pic_water/Watershed%205\(2\).pdf](http://www.terraper.org/pic_water/Watershed%205(2).pdf)

¹⁷² See Buhm-Suk Baek and Gauri Subramaniam, *Myanmarese Refugees in Thailand: The Need for Effective Protection*, Cornell Law School J.S.D./Doctoral Student Papers. Paper 1, 2008. http://scholarship.law.cornell.edu/dsp_papers/1/

¹⁷³ *Id.*, See also Maung Aung Myoe, *Neither Friend Nor Foe. Myanmar's Relations with Thailand since 1988. A View from Yangon*, 83, Institute of Defence and Strategic Studies of Singapore, IDSS Monograph no.1. (2002).

officials participate in them. Therefore, it is necessary for the countries, governments, and societies from the outside to support the expansion of civil society groups in Myanmar and mobilize them more effectively. Those with most opportunities to directly influence the development of civil society in Myanmar are probably its neighbors, especially those with relatively close ties like the ASEAN countries.

To enhance the human rights situation in Myanmar, Western countries and international organizations have also constantly imposed sanctions against the gross human rights violations by the Myanmar military government,¹⁷⁴ which has been criticized by many neighboring Asian countries.¹⁷⁵ However, the refusal of those countries like China and the ASEAN states to support the sanctions should be the main target of such criticism, because their rejection comes partly from not losing their own economic interest, considering the fact that the Myanmar economy is heavily dependent on the export of natural resources like natural gas to these neighboring countries in the region.

d. Summary

My broad argument is that NHRIs have an important role in the promotion and protection of human rights in each country to confirm the international human rights standard and at the same time to meet local specificities, traditions, and culture. NHRIs are also the primary institutions within the domestic human rights mechanism and the essential partners for human rights NGOs and human rights defenders working on the ground. Their independence and effectiveness are the key element in determining their capacity. This case study shows that those

¹⁷⁴ Report on U.S. Trade Sanctions Against Burma, *supra* note 170.

¹⁷⁵ Leon T. Hadar, *U.S. Sanctions against Burma: A Failure on All Fronts*, Trade Policy Analysis No.1 (Mar. 26, 1998) <http://www.cato.org/pubs/trade/tpa-001.html>

elements depend mainly on the way in which individual NHRIs interact both with the government and with NGOs, and on the level of relationship between the government and civil society.

Comparing the countries with NHRIs, Thailand, India, the Philippines and Malaysia, the case study shows that the NHRIs in all four states have a tension with human rights NGOs, even though to a different degree. As the ANNI Annual Reports describe, the NHRIs and NGOs in the first category, Legitimate Civil Society, have a “rocky” relationship. The NHRIs cooperate with NGOs on certain human rights issues, but in all three cases, their general consultations with NGOs are irregular and lack follow-up. The NGOs in those countries engage with the NHRIs if they perceive them as independent and effective institutions, and constantly publicize and raise the issue of the selection and appointment process in each NHRI to the public. In Malaysia, which is grouped in the second category, Controlled and Communalized Civil Society, the ICC has shown its concern on SUHAKAM’s independence and effectiveness and in response the government amended its enabling law. The law had been perceived as superficial and flawed since, for example, there was no room at all for NGOs to get involved in the amendment process. Malaysian NGOs have also voiced their concern on SUHAKAM’s limited operational power which can be used just for government’s interest, not for the people.

The comparison of the countries without NHRIs, Japan, Singapore and Myanmar, reveals how civil society in Japan can mobilize pressure to establish NHRI and support it, while Singapore has provided no room for human rights NGOs to influence government policy toward establishing NHRI. In Singapore, NGOs also have no will-power to confront the government within such a restricted political system. In Myanmar, the civil society is heavily controlled by

the government and the support from the outside, especially from neighboring states is essential in fostering the capacity of NGOs inside.

This case study is just the starting point for further research to elaborate a series of benchmarks against which to evaluate countries with or without NHRIs in Asia. Understanding how NHRIs are properly established and the way in which they cooperate with human rights NGOs can enhance their far-reaching potential to protect human rights in individual states in Asia.

6.5. CONCLUSION

In this chapter, I reviewed the way in which human rights NGOs can be defined and, based on the definition, how their role has evolved within the existing international and regional human rights mechanisms. My broad argument is that human rights NGOs should be understood as independent, non-profit, and peoples-based organizations with an end of protecting and promoting human rights. Not only have they contributed to strengthening the international human rights system, but have also been key partners of regional bodies to effectively implement international norms at the regional level. Human rights NGOs are increasingly becoming regional for a better protection and promotion of human rights issues of common concern in the region, and they actively cooperate with other NGOs across national borders. Indeed, NGOs have contributed to enhancing the human rights situation in the region through their active participation and collaboration. All three existing regional human rights systems in Europe, the Americas, and Africa also show how human rights NGOs can interact and effectively address

their concerns and problems under their regional framework. In Asia, their initiatives, input, and efforts have become the strong foundation for the establishment of RHRIs in the region.

Further, I examined the important role of human rights NGOs at the national level, especially in relation to the cooperation with NHRIs. I conclude that such collaboration is vital for the effectiveness of NHRIs and ultimately can lead to strengthening the national system for the protection and promotion of human rights. In the Asia-Pacific region, the APF has supported NGOs' active engagement with the member NHRIs since its establishment. In addition, the case study of seven selected countries in Asia was provided to briefly review the process of establishing NHRIs, both successful and unsuccessful ones, and more specifically, how human rights NGOs have worked together with NHRIs and their governments for the protection and promotion of human rights. It demonstrates that NHRIs' effectiveness for better human rights practices in each individual state depends mainly on how they can properly interact both with the government and NGOs and at the same time, on the level of interaction between governments and civil society.

Overall, NGOs play important roles for the promotion and protection of human rights through their active participation into and cooperation with international, regional, and national human rights institutions. Furthermore, for the accountability, effectiveness, and transparency of all formal human rights bodies, be they national, regional or international, human rights NGOs have constantly monitored and assessed those institutions' performances and operations, i.e. by publishing reports. This is also an important role of NGOs which should be emphasized.

Chapter SEVEN

Conclusion

Since the Universal Declaration of Human Rights was adopted over sixty years ago, human rights have been vigorously internationalized with the emergence of numerous subsequent human rights treaties and conventions to extend their areas of legalization. At the same time, under the evolving international human rights system, human rights norms and principles have been gradually internalized and localized into individual states' domestic legal systems through the active participation of civil societies to effectively implement them. In this progress, the traditional concept of sovereignty has been strongly challenged, and now we recognize that individual states have main responsibilities to protect and promote the human rights of their people. Concurrently, with the advent of the transnational human rights movement and network for the best practice of human rights at the national level, the emerging role of civil society and human rights NGOs cannot be ignored anymore and their voice from below has been taken seriously in the international human rights mechanism. Moreover, all the ongoing human rights discourses, not only the stale debate on cultural relativism in the human rights literature, but also the Third World perspective of human rights in the public international law literature, the norm diffusion theory in the international relations literature and the vernacularization theory in the law and anthropology literature, emphasize the complicated but important issue of the implementation of international human rights law in the sense that the universality of human rights does not mean uniformity of human rights. At this point, I believe regional human rights institutions (RHRIs) and national human rights institutions (NHRIs) are important as intermediate institutions for the implementation of human rights at the regional and national

levels. The reason is that they can serve not as a replacement but also as an effective supplementary human rights protection tool to confirm international human rights norms and at the same time, reflect regional and national specificities with an extensive interaction with governments, civil societies, and international institutions as a channeling institution.

The purpose of my dissertation is to examine whether and how NHRIs can be a driving force for the establishment of RHRIs in the Asia-Pacific region, which remains the only region without such institutions in contrast to Europe, the Americas, and Africa. I first explored the issue of whether RHRIs are desirable in this region, and argued that such a system is desirable. Then, I examined the reasons why RHRIs have not emerged through the discussion on the reception of human rights in Asia and developments over the last few decades, and, more broadly, the emergence of international human rights law and the problematic questions of what the Asian way of human rights and Asian values mean. The analysis of the obstacles that have hampered the creation of RHRIs led me to focus on NHRIs. By reviewing the strengths and weaknesses of NHRIs and their unique characteristics, I maintained that the way in which NHRIs and their network work together shows why they can be eminent actors toward the establishment of RHRIs. Further, examining the role that NHRIs can play in addressing the concerns and inhibitions of Asian states, while furthering the broad policies and aims of international human rights law, I suggested four specific ways to realize it. Lastly, I explored the broader literature on the role that human rights NGOs can play in the creation, implementation, and furtherance of the international human rights system, thus illuminating the particular role of such actors in the Asian human rights context, mainly related to their interaction with RHRIs and NHRIs.

7.1. SUMMARY

In Chapter Two, I argued that regional human rights mechanisms are considered a more effective and efficient tool for the protection and promotion of human rights than the international human rights system under the U.N. structure, and it is indeed desirable to establish RHRIs in the Asia-Pacific region. Surely, RHRIs cannot provide a total solution to human rights violations. A regional human rights system, however, emerges as the result of the frustration with the ineffectiveness of international mechanisms and, at the same time, the hope for a better implementation of international human rights norms as a supplement to human rights mechanisms. RHRIs have unique institutional advantages for the promotion and protection of human rights. If a regional human rights institution is established, Asian states will surely benefit from their geographic proximities, and historical and cultural bonds. Most Asian countries have experienced colonial rules, during which there were abundant human rights violations by the colonizing state or the local collaborators. In many states, the colonial legacy has not been disposed of properly and it often becomes a source of continuing human rights violations. In addition, there are transitional justice problems concerning the principles and mechanisms that can guarantee justice during a transition from an authoritarian regime or internal conflict to a democratic rule. None of these issues in Asia, however, are easy to solve by a single country, which truly shows the necessity of developing a human rights system in the Asia-Pacific region. Considering the continuing debate on Asian values and the Asian way of human rights in the last two decades, the U.N. Charter and the international human rights treaties cannot fully incorporate Asian regional contexts, which is another reason why regional human rights institutions should be established in the region.

In Chapter Three, I reviewed why Asia has not established regional human rights institutions so far. And to answer this question, first, I reviewed all the major initiatives to establish RHRIs in this region, which were divided in three categories: the U.N. initiatives, the NGOs initiatives and the NHRIs initiatives. After examining these initiatives in chronological order, I concluded that though there have been dynamic discussions on various human rights issues in Asia, as well as efforts to identify the human rights areas of common concern in the region, all the major initiatives have failed to take a concrete and specific step toward establishing RHRIs in Asia in the last two decades. Most governments in the region have obviously shown that they still have no sufficient political will to enter into the establishment of RHRIs. There has also been relatively low governmental support for the initiatives by NGOs. The NHRIs initiatives have worked successfully both with the governments and NGOs, and show some positive signs. But, they are limited to the regional cooperation among NHRIs. Through the analysis of all the major initiatives for setting up RHRIs in the Asia-Pacific region, I, then, provided five main reasons that have been the main obstacles for establishing a regional human rights system in Asia: 1) sovereignty, 2) the failures in the recognition of human rights after WWII, 3) the failure of major Asian powers to play a leading role in human rights in Asia, 4) the relatively low ratification rate of major U.N. human rights treaties, and 5) the Asian values debates. I believe, however, that all those obstacles that have hindered the establishment of RHRIs, have not come from a different understanding of fundamental human rights within the already existing international human rights legal system, but mainly from political considerations. Then, the analysis of the obstacles led to my focus on NHRIs.

In Chapter Four, I examined 1) what NHRIs are, 2) their role, responsibility, and functions at the national, regional and international level, and 3) NHRIs in the Asia-Pacific

region and their network in the APF. Then, I reviewed, as a case study, the National Human Rights Commission of Korea to show the basic characteristics of NHRIs. Lastly, based upon my analysis, I provided three reasons why NHRIs can be a driving force for establishing RHRIs in the Asia-Pacific region: 1) NHRIs as bridging the gap between sovereignty and human rights, 2) NHRIs as mediators, and 3) NHRIs' networks. I believe that the unique functions of NHRIs make them a driving force for establishing RHRIs in this region, especially considering that they can make social changes through strengthening the domestic human rights system by bridging the gap between sovereignty and human rights, and also political changes through working together with all human rights related actors as intermediate institutions. Because NHRIs are national institutions established by the domestic legislation or the constitution, their work for promoting and protecting human rights is less likely to raise the issue of sovereignty compared to that of international actors. Along the same lines, NHRIs in the region can mitigate Asian states' overwhelming concern with the universality of human rights related to Asian values, because their voices for international human rights norms and against Asian values do not come from the outside, but from the inside of the Asia-Pacific region. NHRIs and their networks in this region are indeed in a good position to diffuse international human standards and increase the commitment of individual Asian countries to these standards. They can translate international principles into domestic policies and practices that are compatible with national and regional cultures and values, and, at the same time, reflect all rights stakeholders' concerns about human rights issues both at the national and the regional level. My broad argument is that if NHRIs are properly constituted and managed, they have a far-reaching potential to protect human rights in individual states in Asia, and their work will be a touchstone for Asian countries' growing willingness to establish regional human rights arrangements. There may be a concern that it is

too early to prove any systematic link between NHRIs and the establishment of regional arrangements. There are, however, some positive signs. First, the U.N. and the international community have supported and promoted the creation of NHRIs and their networks for a long time. Second, the increasing number of NHRIs in Asia has stimulated each government to make a commitment to be bound by international human rights norms, and, as a result, the ratification rates of major international human rights treaties have increased in the region. Third, the active cooperation among NHRIs at the sub-regional level has led to the establishment of the ASEAN human rights body and also the ongoing movement toward sub-regional human rights arrangements in the South Asia and the Pacific region. Therefore, I conclude that as the very nature, role, and functions of NHRIs show, the way in which NHRIs work and cooperate at the national, regional, and international level has profound implications for the resolution of the problems that hinder regional human rights arrangements in this region.

In Chapter Five, I examined how NHRIs and their network can be a driving force for the establishment of RHRIs in the Asia-Pacific region, and provided four specific suggestions toward it. The first one is the creation of regional arrangements on common issues of human rights in the region. I reviewed eight human rights issues of common concern, which have the potential to be developed into a legally binding regional arrangement: the rights of women, people with disabilities, human rights defenders, internally displaced persons, and migrants, as well as human trafficking, the environment, and the prevention of torture. Recognizing that most human rights issues in the region cannot be solved by a single country on its own, NHRIs should actively advocate for their governments to cooperate with other governments in the region. Such efforts will result in the adoption of regional instruments on the issues above. I believe that increasing the number of such instruments will lead to the establishment of integrated regional

human rights arrangements in this region. The second suggestion is to establish RHRIs at the sub-regional level through the active cooperation of the South Asian Association for Regional Cooperation (SAARC) in South Asia, the Association of Southeast Asian Nations (ASEAN) in South-East Asia, and the Pacific Islands Forum (PIF) in the Pacific region. As a starting point, the establishment of sub-regional human rights mechanisms is important for the protection of human rights in the region, and once there are sub-regional arrangements, they can work toward a human rights institution on the regional level. The third one is strengthening the role of the APF. The APF was established to enhance the capacity of member NHRIs for better human rights practices at the national level and a strengthened domestic environment for effective implementation of international human rights standards, which will ultimately move governments to establish RHRIs in the region. The development of the APF and its network of member NHRIs will also mobilize civil societies across the region to reach regional consensus for establishing RHRIs and the recognition that it is necessary to have a regional human rights protection system. The last suggestion is to begin establishing RHRIs with a small number of countries with NHRIs that understand the necessity of solving complicated human rights issues together. Once established, the practices of these small but strong human rights bodies will provide an incentive for other countries in the region to participate in these instruments because of the increased benefits of membership. Overall, NHRIs have worked as a key player in strengthening domestic human rights protection systems by supporting and enriching international human rights standards and at the same time, reflecting local culture, tradition, and national specificities. Their networks have also played an important role in urging Asian countries to cooperate with the international human rights mechanism and also with neighboring states for the better protection and promotion of human rights in the region. Based on the

suggestions above, NHRIs can be eminent actors in developing a credible regional human rights system, and in the long run, establishing RHRIs in the Asia-Pacific region.

In Chapter Six, I reviewed the way in which human rights NGOs can be defined and, based on the definition, how their role has evolved within the existing international and regional human rights mechanisms. I broadly argue that human rights NGOs should be understood as independent, non-profit, and peoples-based organizations with an end of protecting and promoting human rights. Not only have they contributed to strengthening the international human rights system, but they have also been key partners of regional bodies to effectively implement international norms at the regional level. Human rights NGOs are increasingly becoming regional for a better protection and promotion of human rights issues of common concern in the region, and they actively cooperate with other NGOs across national borders. Indeed, NGOs have contributed to enhancing the human rights situation in the region through their active participation and collaboration. All three existing regional human rights systems in Europe, the Americas, and Africa also show how human rights NGOs can interact and effectively address their concerns and problems under their regional framework. In Asia, their initiatives, input, and efforts have become the strong foundation for the establishment of RHRIs in the region. Further, I examined the important role of human rights NGOs at the national level, especially in relation to the cooperation with NHRIs. I concluded that such collaboration is vital for the effectiveness of NHRIs and ultimately can lead to strengthening the national system for the protection and promotion of human rights. In addition, the case study of seven selected countries in Asia was provided to briefly review the process of establishing NHRIs, both successful and unsuccessful ones, and more specifically, how human rights NGOs have interacted with NHRIs and their governments for the protection and promotion of human rights.

It demonstrates that NHRIs' effectiveness for better human rights practices in each individual state depends mainly on how they can properly interact both with the government and NGOs and at the same time, on the level of interaction between governments and civil society.

7.2. NOTES FOR FUTURE RESEARCH

I recognize the development of human rights system in Asia not as a result of the transplanting of foreign concepts but as the product of its internal dynamics of normative development with the interaction and collaboration among all stakeholders. It is undeniable that the main ideas of international human rights norms are heavily indebted to Western philosophers and the European cultural heritage. More and more Asian countries, however, have chosen to adopt a democratic political system and gradually embrace the standards and principles of international human rights law after their long fight against colonialism or authoritarian regimes. The first stage of the development of human rights mechanisms in Asia can be described as introduction of international human rights norms. That is, the Western oriented international norms and standards are accepted in Asian countries, first by the coercive transplanting under colonial powers or later by voluntarily ratification from individual Asian states. The next stage is the internalization of international human rights norms, i.e., the effective implementation both at the regional and local levels. At this point, the roles of NHRIs and RHRIs are critical as intermediate institutions, which can reflect local tradition, culture, and particular regional needs, at the same time monitoring individual states' practices to meet international standards on human rights. However, in Asia, for a long time without such institutions, this localization process has been conducted and manipulated solely by governments for the effective control over their

people, which has often produced internal conflicts and tension. Moreover, there are no regional human rights bodies in this region yet. Therefore, the role of NHRIs and their regional network is more important than in other regions. That is, they should be a mediator to meet both national and regional specificities and the international standard through extensive contact with individual governments, civil societies, including human rights NGOs, and international institutions. Further, the NHRIs network will enhance an individual NHRI's capacity to promote and protect human rights effectively by sharing information on domestic and regional problems. As a result, with the growing efforts to strengthen domestic human rights systems and foster human rights culture in the region, NHRIs can facilitate Asian countries' increasing willingness to establish regional human rights arrangements. Indeed, NHRIs can be a driving force for the establishment of RHRIs in the Asia-Pacific region.

As discussed, it is unlikely to achieve single integrated RHRIs that include all Asian-Pacific countries at once. I, however, do not believe that it is an unachievable goal. Asia may be too large to have a regional human rights institution which confronts the challenges of complicated political, cultural, and historical issues. But, for example, through the establishment of sub-regional human rights mechanisms which can share a relatively common context in terms of history, religion, culture, or level of economic development, they can build a human rights institution from the sub-regional to the regional level.

In addition, this process should be achieved first by setting up regional or sub-regional human rights commissions or charters as a means of adopting international human rights norms. Then, institutions like regional human rights courts can be created later as tools for enforcing norms adopted by individual member countries in the whole Asia-Pacific region. To create both

the regional human rights instrument and an enforcement mechanism in consecutive order is important because it can promote ownership of the human rights norms. That is, at the normative level, regional human rights conventions and treaties impose obligations to individual states to be bound by after they ratified them. But at the implementation level, those adopted norms establish that there should be regional-based ownership because to undertake these human rights obligations, the member state within the region has already made a step toward recognizing what the region's priorities are. Regional enforcement mechanisms can produce broad consensus in the region about the legitimacy of regional institutions that govern decision making related to human rights issues, as well as an accountability that enables regional arrangements to provide guidance on the question of the types and extent of implementation of norms by identifying regional priorities and reflecting regional specificities. This is because as Abdullahi An-Na'im maintains, all normative principles are founded necessarily on specific cultures and philosophies,¹ and as Makau Mutua argues, ownership of norms remains with those who work for their development and enforcement: *Why is a certain matter important, who thinks it is important, and why.*² Indeed, RHRIs will only be successful in their various stages from adaptation to implementation if they can claim ownership through the widest possible consultations with various rights stakeholders.

One more thing to be noted is that this may seem a reversal of cultural particularism. However, I do not intend to intervene in the traditional philosophical debates over the universalism of human rights and its opposite, cultural relativism. Rather, I focused on the ways in which the universality of international human rights law has been challenged ever since the

¹ Abdullahi An-Na'im, *Conclusion*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 427–28 (Abdullahi An-Na'im ed., 1992).

² Makau Mutua, *Standard Setting in Human Rights: Critique and Prognosis*, 29 Hum. Rts. Q. 547, 578-84 (2007).

adoption of the UDHR to articulate why and how countries in the Asia-Pacific region have responded and interacted with the development of international human rights law, which was discussed at length in Chapter Two, and how those norms can be effectively implemented in individual states in this region through intermediate institutions like RHRIs and NHRIs. As Yash Ghai points out, it is “relativism of forms, not substance” and is indeed “necessary for the establishment of universal values.”³

Lastly then, once RHRIs in the Asia-Pacific region are established, how can we assure the effectiveness of those existing institutions? For example, first, in what ways can we guarantee the independence of RHRIs? Second, how can we have the transparent appointment procedures for the members of RHRIs to ensure the pluralist representation of the stakeholders involved in the protection and promotion of human rights in the region? Third, should there be independent financial resources for RHRIs which are not under the direct member states’ control to avoid reflecting their political interest? Fourth, how can we ensure that RHRIs are accessible to those people who are most vulnerable to basic human rights violations? Fifth, in what ways, can RHRIs cooperate with other regional and national agencies including NHRIs, and also work actively with civil society to enhance their public legitimacy, and at the same time, ensure the reflection of regional human rights issues of common concern? Lastly, how can RHRIs maintain a close relationship with international human rights bodies, which can strengthen their capacity by sharing information for best practices and facilitating networking among other human rights institutions? All those questions should be answered through active and dynamic discussions both in academia and in the field. I will also leave them for my next research project in the hope that by pursuing these questions in the future, I can fill in the important margins between the

³ Yash Ghai, *Human Rights and Governance: The Asia Debate*, 10 *Asia. Pac. J.HR & L.*, 1, 52 (2000).

successful creation and the effective operation of RHRIs, especially through enhancing our understanding of the role, capacity, and potential of NHRIs and their networking in the Asia-Pacific region.

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