Bridging the Gap?:
The Role of Regional and National Human Rights Institutions in the Asia Pacific#

Carole J. Petersen*

I. “UNIVERSAL” NOEMS AND THE INFLUENCE OF WESTPHALIAN SOVEREIGNTY IN THE ASIA PACIFIC ................................................. 176

II. REGIONAL HUMAN RIGHTS MECHANISMS: BRIDGING THE GAP?..... 184
A. The European Human Rights System ........................................ 184
B. The Inter-American Human Rights System ................................. 187
C. The African Human Rights System ........................................... 188

III. ATTEMPTS TO BUILD A REGIONAL OR SUB-REGIONAL MECHANISM IN THE ASIA PACIFIC ..................................................... 191

IV. NATIONAL HUMAN RIGHTS INSTITUTIONS AND THE PARIS PRINCIPLES ........................................................................ 197

V. CONCLUSION ................................................................................. 209

Although the United Nations has been encouraging the development of regional human rights mechanisms for decades,¹ there is still no regional human rights commission or human rights court in the Asia Pacific region. The lack of such a mechanism is often attributed to the region’s vast size and to the diversity of political, economic, and religious traditions. Yet it also reflects the region’s strong commitment to Westphalian concepts of sovereignty and the principle of non-interference in the internal affairs of neighboring countries. Taken together, these factors make it difficult to persuade governments in the Asia Pacific to give independent investigatory or judicial power to a regional (or even sub-regional) human rights institution.² Thus, for the foreseeable future,

---

¹ This is an updated and expanded version of a paper presented at the William S. Richardson School of Law & Sydney Law School Inaugural Joint Symposium on Asian Law, held at the University of Hawai‘i at Mānoa on April 15-16, 2011. The author thanks the organizers and participants at the conference for their comments on the draft paper, particularly Alison Conner and Andrew Byrnes. Thanks are also due to Lindsey Coffey and the editors at the Asian-Pacific Law & Policy Journal. The William S. Richardson School of Law supported the research for this article.

² Carole J. Petersen is a Professor and Director of the Spark M. Matsunaga Institute for Peace & Conflict Resolution and teaches international human rights at the William S. Richardson School of Law, University of Hawai‘i at Mānoa. Please email comments to: carolep@hawaii.edu.

¹ See generally DINAH SHELTON, REGIONAL PROTECTION OF HUMAN RIGHTS (2008).

² See, e.g., Sou Chiam, Reports From Regional Human Rights Mechanisms: Asia's Experience in the Quest for a Regional Human Rights Mechanism, 40 VICTORIA U.
the obligation to implement human rights treaties will continue to fall primarily on domestic institutions, including governments, domestic courts, and national human rights institutions (“NHRIs”), which are independent statutory bodies with a mandate to promote and protect human rights. The United Nations and human rights treaty bodies have encouraged governments to establish NHRIs and there has been a dramatic increase in the number of such bodies, including in the Asia Pacific region.3

NHRIs face numerous challenges and they require substantial support, not only from their local governments and civil society but also from the international community and from regional associations, such as the Asia Pacific Forum of Human Rights Institutions (“APF”).4 In addition to providing technical assistance, the APF encourages independence by limiting membership to those NHRIs that have been accredited by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (“ICC”).5 The ICC’s accreditation sub-committee6 assesses the extent to which an NHRI complies with United Nations Principles relating to the Status of National Institutions (“the Paris Principles”).7 The Paris Principles set forth numerous important requirements, including that every NHRI should enjoy independence from its government, have a broad human rights mandate, and be given sufficient resources to carry out its functions. The ICC’s accreditation sub-committee takes its responsibilities seriously and the process has become increasingly strict in recent years.8 This article

---


5 For a general introduction to the ICC, see the ICC website, http://nhri.ohchr.org/EN/Pages/default.aspx.


8 Brodie, supra note 6, at 164.
argues that the Paris Principles, while laudable in many respects, do not, however, provide adequate criteria for assessing an NHRI’s functions and powers. As a result, the ICC accreditation process may create the wrong incentives for governments. This is particularly true in the Asia Pacific region, where many governments have a strong desire to gain international approval by creating an accredited NHRI but are reluctant to endow NHRIIs with meaningful powers.

Part I of this article reviews the impact of international human rights norms on modern concepts of state sovereignty and the development of international enforcement processes, which are often criticized for being too soft on governments that violate human rights. Part II then demonstrates the comparative advantages of regional human rights mechanisms, drawing upon examples from the European system, the Inter-American system, and the African system. Part III analyzes why the effort to develop a regional system for the Asia Pacific has not succeeded and considers the potential impact of sub-regional mechanisms, including the Association of Southeast Asian Nations (“ASEAN”) Intergovernmental Commission on Human Rights, which was established in 2009. This section concludes that sub-regional mechanisms have the potential to promote human rights, but there is also a danger that they will undermine, rather than complement, international norms. A weak sub-regional mechanism will do little, if anything, to close the gap between international norms and domestic enforcement.

Part IV of the paper analyzes the role of domestic human rights bodies in the Asia Pacific region and critiques the ICC process of accreditation, which now also determines membership in the APF. Because this process relies almost entirely upon the ICC’s interpretation of the Paris Principles, it gives governments an incentive to establish general human rights commissions with wide terms of reference but no serious enforcement powers. Part V recommends that the APF should consider conducting its own assessment of potential members and that it should include additional factors, beyond the ICC’s interpretation of the Paris Principles. In some parts of the Asia Pacific region, the government will only agree to create a general human rights commission if it can ensure that the commission lacks any real power. In such situations, it may be more meaningful to create a human rights body with a somewhat narrower mandate than desired by the ICC but with genuine enforcement powers.

I. “UNIVERSAL” NORMS AND THE INFLUENCE OF WESTPHALIAN SOVEREIGNTY IN THE ASIA PACIFIC

Although the term “sovereignty” is often used differently in the domestic and international spheres, the two concepts are related. The Western theory of state sovereignty arose in Europe during the sixteenth and seventeenth centuries. The Thirty Years War concluded with the Peace of Westphalia, which was a key development in the establishment of the European state system. Under the Westphalian model, sovereignty
denoted absolute power and states were entitled to exclude external actors from interfering in their territories. The small body of international law that existed in this period was created by states and for states, and it did not purport to dictate how a state should treat its own citizens.

The second half of the twentieth century brought about fundamental changes to the role of international law and to the theory and practice of state sovereignty. At the conclusion of World War II, the United Nations (“U.N.”) was established, marking the beginning of the U.N. Charter order. The U.N. Charter still emphasizes (in Article 2) the principle of non-interference in matters that are traditionally within the domestic jurisdiction of states. It also emphasizes, however, collective security, international cooperation, and the protection of human rights. The Charter requires all members of the U.N. to promote and respect human rights, thus bringing a state’s treatment of its citizens within the realm of international law. Article 55 establishes the principle of universal respect for human rights, without distinction as to race, sex, language or religion, and Article 56 obligates members to take joint and separate actions to fulfill Article 55. This shift in focus constituted a “small but clear derogation” from the state-centric view of sovereignty. Instead of absolute power, sovereignty is now best described as a dual responsibility, consisting of an external duty to respect the sovereignty of other states and an internal duty to respect the basic rights of all people within the state. This does not mandate uniformity and the “accommodation of diversity in modes of internal political organization remains a durable theme in the international order.” However, the international system of states may decline to recognize a national government that fails to meet its most basic obligations under international law, including human rights law.

This principle has become more powerful in recent years because the body of established human rights norms has greatly expanded since the U.N. was established, thus imposing increasingly detailed obligations upon states. The Convention on the Prevention and Punishment of the

---


Crime of Genocide\(^\text{14}\) and the Universal Declaration of Human Rights ("UDHR")\(^\text{15}\) were both adopted in December 1948. The nonbinding UDHR established the principles of universality and indivisibility of rights, proclaiming not only the rights to life and liberty but also the rights to education, decent work, and an adequate standard of living. These rights were later translated into treaty form through the International Covenant on Civil and Political Rights ("ICCPR")\(^\text{16}\) and the International Covenant on Economic Social and Cultural Rights ("ICESCR")\(^\text{17}\). The U.N. human rights system also includes numerous specialized treaties: the Convention on the Elimination of All Forms of Racial Discrimination ("CERD")\(^\text{18}\), the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW")\(^\text{19}\), the Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment ("CAT")\(^\text{20}\), the Convention on the Rights of the Child ("CRC")\(^\text{21}\), the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ("MWC")\(^\text{22}\), and the Convention on the Rights of Persons with Disabilities ("CRPD")\(^\text{23}\). The most recent multilateral human rights treaty is the International Convention for the Protection of the Crime of Genocide, G.A. Res. 260 A (III), 78 U.N.T.S. 277 (Dec. 9, 1948), available at http://www.unhcr.org/refworld/docid/3ae6b3ac0.html.


All Persons from Enforced Disappearance, which was adopted in 2006 but only came into force in December 2010.\textsuperscript{24}

The U.N. has also strived to create effective international enforcement processes. At the heart of this system is the international reporting process: when a state ratifies one of the “core” human rights treaties it obligates itself to regularly report to the treaty-monitoring body, which is a committee of independent experts.\textsuperscript{25} The committee conducts a public review of each state’s periodic report, seeks additional information where necessary, and issues concluding observations advising the state on how to better implement the treaty. Civil society can participate in the process by submitting “alternative reports” commenting on a government’s official report. Optional complaints mechanisms invite the state to go further and recognize the competence of the monitoring body to adjudicate certain disputes between the state and individual citizens. An optional complaints mechanism exists for the ICCPR, CERD, CRPD, and CEDAW.\textsuperscript{26} In December 2008, the General Assembly unanimously adopted an Optional Protocol to the ICESCR. When it comes into force, it will empower the Committee on Economic, Social and Cultural Rights to receive and consider communications, enhancing the justiciability of economic, social and cultural rights.\textsuperscript{27} In practice, however, the reporting process remains the most prevalent enforcement mechanism.

Although the obligation of governments to report on human rights is often criticized as a “soft” enforcement mechanism, it constitutes an important modification to traditional concepts of state sovereignty. Helen Stacy has argued that sovereignty is now best viewed as the “measure of care” by a government for its citizens, which, in the conditions of globalization, necessarily includes interactions with the international


\textsuperscript{26} The Optional Protocol to CAT, which entered into force in June 2006, creates the Subcommittee on Prevention of Torture (“SPT”) with a mandate to visit places where states parties deprive persons of their liberty. This example further demonstrates how states have modified their traditional views of sovereignty to improve the enforcement of international human rights law.

community.\footnote{28} Thus, sovereignty has become conditional upon the ruler fulfilling its responsibility of care. In a democracy, it is the citizens who primarily assess whether a government is meeting that duty of care and deserves to stay in power. Yet the expanding system of international human rights monitoring processes ensures that the international community also plays a role, one that is particularly important for nondemocratic societies and for minority groups with little political power in their home states. As one commentator succinctly put it, “[t]he social contract between the ruler and the ruled does not hold up if the sovereign fails to treat citizens within the bounds of human decency—an assessment that becomes a tripartite negotiation between sovereign, citizens, and the world.”\footnote{29} The traditional Westphalian concept of sovereignty, by which a state had the right to exercise power over its citizens without external limitations or interference, has been “so whittled away as to be unrecognizable.”\footnote{30}

The expanding role of international law is sometimes portrayed in a negative light, as an encroachment on sovereignty and democracy.\footnote{31} A more nuanced view is that sovereignty has simply evolved into a new concept, one that places less emphasis on the ability of a ruler to “exclude” the world and more emphasis on international legal recognition and participation. This development is not limited to the field of human rights; indeed, it is arguably more pronounced in the fields of trade, finance, and environmental regulation, where there has been a rapid proliferation of international organizations and legal norms. It is now almost impossible for a state or state-like entity to function effectively while ignoring international organizations.\footnote{32} The status of statehood remains so important because it is normally necessary for participation in international organizations.\footnote{33} Thus, in the globalized world, sovereignty is largely defined as the capacity of a state to participate in international institutions; modern states are now “bound in a tightly woven fabric of international agreements, organizations, and institutions that shape their

\footnotesize{\begin{itemize}
\item Helen Stacy, \textit{supra} note 9, at 2045.
\item \textit{Id.} at 960.
\item \textit{Id.} at 226-31.
\end{itemize}}
relations with each other and penetrate deeply into their internal economies and policies.” 34 Within this conceptual framework, sovereignty is not undermined but rather enhanced when a national government ratifies a human rights treaty and participates actively in international human rights institutions and enforcement processes.

In theory, widespread ratification of an international human rights treaty reflects nearly universal acceptance of the rights stated in the treaty. It must be acknowledged, however, that the concept of universal human rights is regularly challenged, leading to passionate debates on the meaning and the relative importance of rights stated in human rights treaties. During the Cold War, disputes focused on the relative importance of civil liberties as compared to economic and social rights. In recent years, however, the critique has increasingly reflected theories of cultural relativity. It is often argued that international human rights law places Western individualism on a pedestal, while ignoring the more communal values of Asia and Africa. 35 Some governments in the Asia Pacific have claimed the right to prioritize social stability above the “individualistic ethos” of the West. 36 This position was strongly articulated in the Bangkok Declaration, issued at a 1993 preparatory meeting of Asian governments for the Vienna World Conference on Human Rights. 37 The Bangkok Declaration condemned the West’s tendency to disregard cultural differences and the right to development. 38 Although the Vienna Declaration that was ultimately adopted at the 1993 World Conference affirmed the universality principle, it also recognized the indivisibility of rights and thus the importance of giving equal value to economic, social and cultural rights. 39


35 See Josian A. M. Cobbah, African Values and the Human Rights Debate, 9(3) Hum. Rts. Q. 309, 320-29 (1987) (noting that the “worldview that predominates African societies provides an approach to human dignity that is not only different from the natural rights approach but may indeed serve to improve the quality” of human rights discussions).


38 Id.

The Bangkok Declaration further reflects the importance of territorial integrity in the Asia Pacific and an underlying suspicion that Western powers will attempt to use the discourse of human rights to undermine governments in developing nations. Although the Westphalian model was a European invention, its approach to sovereignty spread to other parts of the world and many governments in the Asia Pacific continue to stress the importance of state autonomy and nonintervention in domestic affairs. This adherence to traditional concepts of sovereignty is often attributed to the collective memory of the colonial past and a desire to build nationalism. Asia Pacific governments that are still building coherent nations out of disparate ethnic and religious groups may view Westphalian principles as a form of protection from separatist movements and from interference by foreign powers.

Although one still hears the rhetoric of the Bangkok Declaration, in recent years, governments in the Asia Pacific region have participated more actively in the U.N. human rights system. For example, governments (and also non-governmental organizations) from the Asia Pacific played a significant role in drafting and promoting the CRPD. China provides a particularly interesting example because it dramatically changed its official attitudes toward international human rights treaties and monitoring processes. In the 1980s, Beijing openly condemned any international commentary on its human rights record as an infringement upon state sovereignty. Yet over the years, the Chinese government gradually has engaged in the U.N. human rights treaty system. By 1992, China had become a state party to four of the eight core human rights treaties: CERD, CEDAW, CAT, and CRC. It signed the ICESCR in 1997

---


41 Inoue Tatsuo, Liberal Democracy and Asian Orientalism, in THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS 30-31 (Joanne R. Bauer and Daniel Bell eds., 1999).


and became a state party in 2001. In 2008, China ratified the CRPD, becoming the first state party from East Asia to that treaty. Although China is not yet a state party to the ICCPR, Beijing has signed it and started reporting on some of the rights protected in the ICCPR. China also promised to undertake reforms to “prepare the ground for approval of the ICCPR.” The Chinese government’s interactions with human rights treaty-monitoring committees are often strained and Beijing has rejected many of their concluding comments, sometimes with strong words. Certain commentators have thus questioned whether China’s recent engagement with international human rights treaties can be expected to bring about any meaningful reforms. This concern reflects an inherent

47 Internal politics, international law, and international politics, 29 hum. RTS. Q. 727, 730, Table 1 (2007).

48 Id.


50 Id. at V(1). China would need to make significant changes to criminal procedure, as well as to government policies on freedom of expression, assembly, association, and religion in order to comply with the ICCPR.


52 For example, the Chinese government claimed that the country rapporteurs for the Committee Against Torture made “slanderous and untrue allegations.” Comments by the Government of the People’s Republic of China to the concluding observations and recommendations of the Committee Against Torture, CAT/C/CHN/CO/4/Add.1, p. 2 (Dec. 17, 2008).

53 Ming Wan, Human Rights Lawmaking in China: Domestic Politics, International Law, and International Politics, 29 Hum. RTS. Q. 727 (2007). Professor Wan concluded that China’s engagement with international human rights law has had some positive impact on domestic policies, although Beijing views the treaties primarily as a tool of foreign policy, a way to “meet the West half way” while avoiding any genuine
limitation in the reporting process as an enforcement mechanism: treaty-monitoring bodies are not super-national courts and they cannot compel governments to accept their recommendations. That is why international committees regularly request governments (particularly those from dualist legal systems) to incorporate international treaties by enacting statutes that translate the treaty obligations into domestic law that can be directly enforced in local courts. As discussed in the next section, regional human rights mechanisms may also provide an additional layer of enforceability and help to bridge the gap between international treaty obligations and domestic laws and policies.

II. REGIONAL HUMAN RIGHTS MECHANISMS: BRIDGING THE GAP?

Regional human rights mechanisms offer many advantages. First, governments have a strong incentive to promote and protect human rights within their region, as severe violations of people’s rights can lead to conflicts and destabilize neighboring countries. Moreover, countries within the same region often share similar cultural traditions and political histories; thus governments may find it easier to reach consensus on the content of rights and to endow a regional court with meaningful enforcement powers. The United Nations has long encouraged the development of regional human rights treaties, commissions, and courts. It is important, however, that regional mechanisms complement the U.N. human rights system and do not detract from the obligations that states have already undertaken when they ratified the core international human rights treaties. As there is currently no regional system for the Asia Pacific region, this section of the article briefly reviews the strengths and potential weaknesses of regional mechanisms in the context of the European, Inter-American, and African systems. Part III of the article will then consider the potential for building an effective regional human rights system in the Asia Pacific (which is a much larger and less cohesive region than those discussed below) and the recent decision by ASEAN nations to establish a sub-regional system.

A. The European Human Rights System

The European Human Rights system is, without doubt, the most highly evolved and effective regional human rights system, with a large body of jurisprudence and strong enforcement mechanisms. The Council of Europe was established in 1949 in the wake of World War II. Its

53 For discussion of incorporation of treaties in the Hong Kong legal system, see Carole J. Petersen, Embracing Universal Standards? The Role of International Human Rights Treaties in Hong Kong’s Constitutional Jurisprudence, ch. 2, in INTERPRETING HONG KONG’S BASIC LAW: THE STRUGGLE FOR COHERENCE 33-53 (Fu Hualing, Lison Harris, and Simon N. M. Young eds., 2007).
primary purposes were to bring about reconciliation among European nations and to help promote the rule of law and human rights. Although member states retain their separate political systems, they commit themselves to certain common standards through binding conventions. In the field of human rights, the Council of Europe’s greatest achievement is the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), which established a highly effective regional system for protecting (and not just promoting) human rights.\(^4^\) If domestic remedies have been exhausted, an individual who has suffered a violation of rights protected by the ECHR may file a case against her government.\(^5^\)

The European system originally had a two-tier structure, in which the European Commission of Human Rights screened applications from individuals and ruled on their admissibility. Since the Eleventh Protocol came into force in 1998, individuals have had direct access to the European Court of Human Rights\(^6^\) and it has adjudicated more than 10,000 complaints.\(^7^\) The judges in the European Court of Human Rights are elected by the Council of Europe’s Parliamentary Assembly\(^8^\) and considered highly independent of their governments.

The Council of Europe initially consisted of Western European countries. Since the end of the Cold War, its membership has expanded to include countries that were formally part of the Soviet bloc. New member states are required to sign the ECHR when they join and to ratify the treaty within one year. The large number of countries now subject to the compulsory jurisdiction of the ECHR has significantly increased the caseload of the European Court of Human Rights and the diversity of legal systems from which complaints arise. The European system has achieved such a high degree of regional integration that it might be described as a case of shared sovereignty in the field of human rights. Although states enjoy a “margin of appreciation” in implementing the treaty, they cannot use local cultural preferences as a general excuse for failing to protect the rights stated in the ECHR. An early example of this principle is the 1981 case of Dudgeon v. United Kingdom, in which the European Court of Human Rights held that Northern Ireland’s criminal laws prohibiting consensual sex between consenting adult males violated the right to


\(^5^\) Id. at art. 35.

\(^6^\) Id. at art. 34.

\(^7^\) For general information, see the website of the European Court of Human Rights [hereinafter “ECHR”]; http://www.echr.coe.int/ECHR/homepage_en.

\(^8^\) Pursuant to ECHR art. 22, the judges are elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party.
privacy, as protected by Article 8 of the ECHR.\textsuperscript{59} This case was highly influential, not only as a precedent within Europe but also as a persuasive authority around the world. For example, in 1990, the Hong Kong Legislative Council reluctantly agreed to decriminalize gay sex, largely because Hong Kong’s Attorney General advised the local legislature that Hong Kong’s criminal laws prohibiting homosexual conduct (which were very similar to Northern Ireland’s former laws) would likely violate the right to privacy in Hong Kong’s proposed Bill of Rights Ordinance. In reaching this conclusion, the Attorney General relied directly on the decision of the European Court of Human Rights in the \textit{Dudgeon} case.\textsuperscript{60}

It is not sufficient for European states to simply enact domestic legislation as a means of implementing the ECHR. National governments also have an obligation to enforce the relevant laws and to affirmatively protect the rights of their citizens. This duty was recently affirmed in the 2009 case of \textit{Opuz v. Turkey}, which held that Turkey violated its obligation to protect women from domestic violence.\textsuperscript{61} The Turkish authorities had been aware of numerous attacks on the complainant by her violent spouse (including beatings and stabbings) but they issued only minor punishments and did not detain the husband when the applicant and her mother requested protection. The husband attacked again and ultimately killed the applicant’s mother. The European Court ruled that Turkey had violated Article 2 of the ECHR (right to life), as well as Article 3 (prohibition on torture and inhuman treatment) and Article 14 (prohibition of discrimination). The Court affirmed that violence against women is a form of gender discrimination and that European states have an obligation to prevent and remedy it. Although the Court welcomed Turkey’s decision to enact a law prohibiting domestic violence, it held that legislation is not sufficient if state authorities consistently fail to enforce it. Turkey was thus ordered to pay damages to the applicant to compensate her for her suffering and for the loss of her mother. One particularly interesting feature of this judgment is that the European Court relied in part upon the Concluding Comments of the CEDAW Committee to support its conclusion that “the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence.”\textsuperscript{62} This case demonstrates how a regional court can serve as a bridge between international law and national governments. By relying upon the CEDAW


\textsuperscript{62} \textit{Id.} at para. 109.
Committee’s Concluding Comments, the European Court gave those comments a more enforceable quality than they would normally enjoy under the international reporting process.

B. The Inter-American Human Rights System

The Inter-American system is also highly evolved from a jurisprudential perspective, although it has not been as effective as the European system when it comes to compliance and enforcement. The Organization of American States (“OAS”) endorsed the nonbinding American Declaration of the Rights and Duties of Man (“Declaration”) in 1948, even before the U.N. General Assembly approved the UDHR. The Inter-American Commission on Human Rights (“Commission”) was established in 1959 and held its first session in 1960. The Commission has authority to examine communications alleging violations of the Declaration and to publish observations on the general human rights situations of member states. In 1969, OAS adopted a binding regional treaty, the American Convention on Human Rights (ACHR). The ACHR gave the Commission additional enforcement powers and established the Inter-American Court of Human Rights, which held its first hearing in 1979. Only states and the Inter-American Commission on Human Rights can submit cases to the Inter-American Court of Human Rights, however, which means that the Commission is the gateway to the Court for individuals who wish to file complaints against their governments.

Currently twenty-four of the thirty-five members of the OAS are states parties to the ACHR and twenty-one have acknowledged the jurisdiction of the Inter-American Court of Human Rights in contentious cases. In addition, the Inter-American Court, can review other members of the OAS as part of its advisory jurisdiction. While involuntary disappearances have constituted a significant part of the Court’s docket, it also has established precedents regarding the treatment of people with mental disabilities, homeless children, undocumented migrants, and women in detention. In extreme cases, the Court can order provisional measures to prevent irreparable damage. Compliance has been a challenge, however, and only a minority of the Inter-American Court’s judgments have been fully implemented. A noteworthy example of

---


65 See generally James L. Cavallaro and Stephanie Erin Brewer, Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-
compliance is the case of *Awas Tingni v. Nicaragua*. In August 2001, the Inter-American Court found that Nicaragua violated the rights of the Awas Tingni community by granting concessions to log within the community’s traditional lands and by failing to recognize Awas Tingni property rights in those lands. The Court held that the right to property, as affirmed in the Inter-American Convention on Human Rights, protects the traditional land tenure of indigenous peoples. It established that a national government can be held accountable for violating the collective land rights of an indigenous group. Although it took time to implement, in December 2008, the Government of Nicaragua finally delivered to the Awas Tingni community the title to its ancestral territory.

C. *The African Human Rights System*

The Organization of African Unity (“OAU”) adopted the African Charter on Human and Peoples’ Rights (also known as the Banjul Charter) in 1981 and it came into force in 1986. The OAU has since disbanded and was replaced, in 2001, by the African Union (“AU”), which now oversees the African regional human rights system.

The African Charter provides a particularly interesting example of how a regional human rights treaty can incorporate regional views on the content of rights and the relationship between rights and duties. In addition to individual rights, the African Charter gives special protection to the family and recognizes certain collective (peoples’) rights, including the right to equality, the right to development, and the right to peace and security. In addition to rights, it expressly recognizes duties, including duties to one’s family, the duty to protect state security, and the duty to promote African unity. Article 27 attempts to balance these individual and collective interests by stating that the rights and freedoms of each individual shall be exercised with “due regards” to the rights of others, collective security, morality, and common interest.

On the other hand, the African Charter has been strongly criticized for failing to adequately address gender equality and the rights of women.

---


In response to this critique, the Protocol on the Rights of Women in Africa (the Maputo Protocol) was adopted in 2003 and entered into force in 2005.\textsuperscript{70} The Protocol contains many of the same rights set forth in CEDAW but includes more detail regarding the protection of women in armed conflict, the rights of widows, and the obligation of states to punish domestic violence. Article 5 expressly obligates states to eliminate harmful practices and requires the “prohibition through legislative measures backed by sanctions, of all forms of female genital mutilation” and any attempts to medicalize the practice. In 2010, Uganda became the twenty-eighth member of the African Union to ratify the Protocol. A coalition of civil society organizations, known as Solidarity for African Women’s Rights (“SOAWR”), continues to lobby governments to ratify and implement the Protocol.\textsuperscript{71} There is, however, a competing movement against ratification, largely organized by Christian groups who oppose the Protocol because Article 14 protects women’s right to reproductive freedom and arguably establishes access to abortion as a human right.\textsuperscript{72}

The African Charter established the African Commission on Human and Peoples’ Rights, which is a quasi-judicial body charged with promoting and interpreting the Charter and reviewing state compliance.\textsuperscript{73} Pursuant to Article 62, states parties are required to submit to the Commission a biannual report on the legislative and other measures taken to implement the African Charter.\textsuperscript{74} The African Commission also receives communications and has issued some important decisions demonstrating the indivisibility of rights and the justiciability of economic, social, and cultural rights.\textsuperscript{75} It has also established a Special Rapporteur on the Rights of Women in Africa with a mandate to assist


\textsuperscript{71} For general information on Solidarity for African Women’s Rights, see the SOAWR website, http://www.soawr.org/en/.

\textsuperscript{72} For an analysis of Article 14 (and how it compares to relevant provisions in other human rights treaties), see Charles G. Ngwena, \textit{Inscribing Abortion as a Human Right: Significance of the Protocol on the Rights of Women in Africa}, 32 HUM. RTS. Q. 783 (2010).


\textsuperscript{74} For general information on the work of the Commission and the status of initial and periodic reports by states parties, see AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS, News, http://www.achpr.org/english/_info/news_en.html.

governments to implement the Protocol on the Rights of Women in Africa and to harmonize national legislation.\textsuperscript{76}

The OAU member states originally rejected a proposal to establish a regional human rights court. This decision has been attributed in part to an African preference for negotiation as a method of dispute resolution, as well as to the desire to preserve state sovereignty and discourage outside intervention. Governments can ignore the decisions of the African Commission and it is therefore less threatening to governments than a court with the power to issue binding decisions.\textsuperscript{77} As the principle objectives of the OAU were to defend the sovereignty and territorial integrity of the member states and rid Africa of colonialism, the OAU considered noninterference in domestic affairs to be a central principle. Outside condemnation of human rights was viewed suspiciously, as a “pretext for undermining” states’ sovereignty.\textsuperscript{78}

In 1998, the OAU nonetheless adopted a Protocol to the Charter establishing an African Court on Human and People’s Rights (which eventually will be merged into an African Court of Human Rights and Justice). The Court has the power to issue binding decisions regarding alleged violations of the Charter by African states that acknowledge its jurisdiction.\textsuperscript{79} Although the AU appointed Judges in 2006, the Court has not yet developed a significant body of jurisprudence.\textsuperscript{80} In a recent case from March 2011, the Court ordered provisional measures against the government of Libya. The order called upon the Libyan government to “refrain from any action that would result in loss of life or violation of physical integrity of persons, which could be a breach of the provisions of the [African] Charter or of other international human rights instruments to which it is a party.”\textsuperscript{81} The case helps to illustrate the important role played

\textsuperscript{76} For general information on the Protocol on the Rights of Women and the work of the mandate of the Special Rapporteur, see AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS, Special Rapporteur on Women’s Rights, http://www.achpr.org/english/_info/index_women_en.html.


\textsuperscript{79} For general information on the jurisdiction of the African Court, see AFRICAN COURT OF HUMAN AND PEOPLES’ RIGHTS, Home, http://www.african-court.org/en/.

\textsuperscript{80} The African Court issued its first judgment on Dec. 15, 2009, but decided that it did not have jurisdiction because the respondent, the Republic of Senegal, had not made a declaration recognizing the jurisdiction of the African Court to hear applications by individuals. See AFRICAN COURT ON HUMAN AND PEOPLES’ RIGHTS, http://www.african-court.org/en/.

\textsuperscript{81} In the matter of African Commission on Human and Peoples’ Rights v. Great
by NGOs in the African system, as the Court relied heavily upon evidence of human rights violations that were initially gathered by international NGOs.82 Domestic human rights institutions and activists working within their own states have also made significant and creative use of the African system, particularly when lobbying for domestic law and policy reforms.83

III. ATTEMPTS TO BUILD A REGIONAL OR SUB-REGIONAL MECHANISM IN THE ASIA PACIFIC

The U.N. and nongovernmental organizations have long advocated for the development of a regional human rights mechanism for the Asia Pacific. Yet there is currently no Asia Pacific human rights treaty, no regional human rights commission, and no regional human rights court that is even remotely comparable to the institutions in the European, Inter-American, and African systems. In addition to the state-centered concept of sovereignty that is still prevalent in much of the region, there are many additional challenges to developing a regional system in the Asia Pacific, including its enormous size and its somewhat unclear geographic boundaries. There are huge variations in cultural traditions and political systems, ranging from vibrant democracies to one-party states. Virtually every major religion is represented in the region, which includes many religious states (several of which have filed reservations for religious laws when ratifying CEDAW and other treaties that protect women’s right to equality). Moreover, governments in the region have been somewhat slow to ratify international human rights treaties and they have been particularly reluctant to ratify the optional individual complaints mechanisms that would give individuals the right to file complaints with treaty monitoring bodies. For all of these reasons, it is challenging for governments in the Asia Pacific to agree upon a regional standard of human rights and a common approach to enforcement.

Despite these obstacles, nongovernmental organizations have continued to lobby for a regional mechanism. As a result, in the past two decades, states in the region have met regularly to discuss possibilities for greater cooperation on human rights. The Office of the High Commissioner for Human Rights has organized at least fifteen workshops to discuss “regional cooperation for the promotion and protection of human rights in the Asia Pacific.”84 In the first workshop, held in Manila

---


84 For a summary of workshops and other events through 2005, see Sou Chiam,
in 1990, government officials debated the advantages of regional human rights mechanisms. Subsequent workshops were based upon the assumption that some level of regional integration would be desirable but there has been no rush to establish a comprehensive system. Rather, governments have endorsed a rather slow “building block” approach, which focuses more on actions at the national level.

The 1998 workshop (held in Tehran) was arguably an important move forward because participants adopted a Framework for Regional Technical Cooperation in the Asia Pacific Region. The Framework included four main “pillars,” which (in theory) would help to build a regional human rights system. The four pillars are: (1) national human rights action plans; (2) human rights education programs; (3) national human rights institutions; and (4) strategies for the realization of the right to development and economic, social and cultural rights. It was also agreed that governments would partner with U.N. agencies through technical cooperation programs to achieve these goals. Subsequent workshops have reported on these efforts and addressed certain thematic issues (such as poverty, racism, or human trafficking). The reports from the annual meetings are all moderately positive, listing numerous accomplishments and points of agreement. However, most of these achievements relate primarily to domestic efforts to promote human rights rather than to increased regional integration. While these steps are positive and worthy of mention, they fail to put the region on a path towards a human rights system comparable to the systems established in Europe, the Americas, or Africa.

In 2005, Louise Arbour (the U.N.’s High Commissioner for Human Rights at the time) suggested that it was time for the group to “re-orient our strategy” and work more at the sub-regional level, while still pursuing the long-term goal of a regional framework. The more recent workshops have endorsed the concept of sub-regional mechanisms as a “building block” for a truly regional system. If nothing else, reducing the number of states and the scope of the geographic territory should make it easier for

---


*85* Id.

*86* See Ms. Louise Arbour, former High Commissioner for Human Rights, Address at the 13th Workshop on Regional Cooperation for the Promotion and Protection of Human Rights in the Asia-Pacific region, Beijing (Aug. 30, 2005).

states to agree on the content of rights and the mechanisms for enforcement.

The longstanding campaign to develop a human rights system for ASEAN is the leading example of this sub-regional approach.\(^{88}\) The first step was to persuade the member states of ASEAN to place more emphasis on human rights in the ASEAN Charter. In 2008, after years of persistent lobbying by nongovernmental organizations, a new Charter was ratified by the members of ASEAN (Singapore, Malaysia, Thailand, Philippines, Indonesia, Vietnam, Laos, Cambodia, Myanmar, and Brunei Darussalam). The new Charter identifies “promotion and protection of human rights” as a core purpose of the organization and commits members to create an ASEAN human rights body.\(^{89}\) The ASEAN Charter does not, however, appear to provide for any effective regional enforcement mechanism. This omission is not surprising because the ten members of ASEAN have widely different political systems and some members (such as Myanmar) have extremely poor human rights records. The one unifying characteristic of ASEAN nations has always been a strong commitment to “the cardinal principle of nonintervention in the internal affairs of member states.”\(^{90}\) Thus the new ASEAN Charter continues to emphasize sovereignty, territorial integrity, and non-interference in domestic affairs.\(^{91}\)

In 2009, ASEAN formally established an Intergovernmental Commission on Human Rights (“AICHR”).\(^{92}\) The terms of reference for the AICHR, however, clarify that it will be primarily promotional and advisory in nature; it will not receive individual complaints and it lacks any significant enforcement powers. Moreover, as an inter-governmental commission, the AICHR is not independent of the governments that established it. This was a disappointment for the nongovernmental Working Group for an ASEAN Human Rights Mechanism and other activists that lobbied for the ASEAN human rights mechanism.\(^{93}\)

\(^{88}\) For the history of efforts to establish an ASEAN human rights mechanism, see generally the website of the Working Group for an ASEAN Human Rights Mechanism, http://www.aseanhrmech.org/; see also Andrea Durbach, Catherine Renshaw & Andrew C. Byrnes, A Tongue But No Teeth? The Emergence of a Regional Human Rights Mechanism in the Asia Pacific, 31 SYDNEY L. REV. 211 (2009) (discussing ASEAN and also efforts to establish a sub-regional mechanism for the Pacific islands).

\(^{89}\) ASEAN Charter, Art. 1, para 7, and Art. 14.

\(^{90}\) Li-ann Theo, Implementing Rights in ASEAN Countries: ‘Promises to keep and miles to go before I sleep’, 2 YALE HUM. RTS. & DEV. L.J. 1, 2 (1999).

\(^{91}\) ASEAN Charter, Preamble.


\(^{93}\) Ms. Pooja Patel, Asian Forum for Human Rights and Development (FORUM-ASIA), Statement delivered at the 16th Reg. Sess. of the U.N. Human Rights Council (Mar. 22, 2011) (criticizing the lack of protection measures in the terms of reference of
AICHR has moved at a fairly slow pace, which is not surprising given that it is not a stand-alone body but rather consists of government representatives. The first year was consumed almost entirely by procedural matters and preparatory work. The press release, issued after its fourth meeting (held in Indonesia in February 2011), reported that the AICHR had adopted Guidelines of Operations and met with nongovernmental organizations. They were also planning studies and trips, including a visit to learn about the European human rights system. The AICHR promised that 2011 would be a more active year: a period of “implementation” for human rights in ASEAN.  

One of the primary responsibilities of the AICHR is to develop an ASEAN Human Rights Declaration. At its fifth meeting (held in Jakarta in April 2011), the AICHR adopted the Terms of Reference for AICHR’s Drafting Group for the ASEAN Human Rights Declaration. During its Sixth Meeting (held in Vientiane, Laos), the AICHR appointed the members of the Drafting Group, which started meeting in July 2011. The AICHR hopes to receive a draft of the ASEAN Human Rights Declaration by December 2011 and to adopt it sometime in 2012. While the Declaration will almost certainly be nonbinding on member states, it could ultimately lead to the adoption of a binding ASEAN treaty on human rights.  

There is some concern that the drafting project may cause the debate on “Asian values” to resurface or give ASEAN governments an excuse for declining to implement well-established international norms. For example, an ASEAN Human Rights Declaration might endorse strong “emergency powers” for governments or generally incorporate language from reservations that were filed by ASEAN governments when they ratified international human rights treaties. Nongovernmental organizations are working hard to ensure that the drafting process includes

---


97 Id.

98 For an analysis of the reservations that ASEAN governments have filed when ratifying international human rights treaties, see generally Suzannah Linton, ASEAN States, Their Reservations to Human Rights Treaties and the Proposed ASEAN Commission on Women and Children, 30(2) HUM. RTS. Q. 436-93 (2008).
civil society and is not dominated by governments. The inclusion of civil society in the drafting process, however, will be difficult as many of the most important discussions are being held behind closed doors. A regional association of forty-eight nongovernmental human rights organizations recently criticized AICHR’s general lack of transparency and called for more dialogue with representatives of civil society.99

Activists have good reason to worry that an ASEAN Declaration on Human Rights could undermine international standards. The potential for this to occur in a sub-regional system has already been demonstrated by the Arab Charter on Human Rights (“Arab Charter”). The creation of the Arab Charter, covering some countries in Western Asia, began with a 1994 document, which was widely criticized for not complying with international human rights treaties, and it never came into force.100 The League of Arab States eventually appointed independent experts to draft a revised version of the 1994 Charter. A commentator described the revised draft as “mostly consistent with international human rights law” and as “largely welcomed by the human rights movement in Arab countries.”101 However, conservative Arab states successfully lobbied for changes to the draft, primarily with respect to the death penalty, women’s rights, and the freedoms of expression and religion.102 As a result, the version that was adopted by the Council of the League of Arab States in May 2004 does not fully comply with international human rights law.103

The Arab Charter came into force in March 2008; by 2009 it had been accepted by ten Arab states (Algeria, Bahrain, Jordan, Libya, Palestine, Qatar, Saudi Arabia, Syria, the United Arab Emirates, and Yemen).104 Article 45(1) provides for the establishment of the Arab Human Rights Committee, a body of experts who are elected by secret ballot from nominees proposed by the state parties. Pursuant to Article 48(1), states parties are required to report to the Committee on the measures they have taken to give effect to the Charter. There are, however, no provisions in the Arab Charter for individual communications

99 Patel, supra note 93.
102 Id.
or complaints.\textsuperscript{105}

To be fair, the Arab Charter on Human Rights is not all bad. It purports to affirm the universality and indivisibility of human rights and recognizes many rights that are included in international instruments, including the rights to liberty, health, education, fair trial, freedom from torture, and security of person. However, the Arab Charter is highly problematic from the perspective of gender equality. It provides only for “effective equality” between men and women and it expressly endorses what it refers to as “positive discrimination established in favour of women by the Islamic Shariah [and] other divine laws.”\textsuperscript{106} The Arab Charter allows national governments to define the rights and responsibilities of men and women in marriage and divorce (Article 33) and to decide whether a child will be entitled to the nationality of its mother (Article 29). Allowing a government to discriminate against women in these fields directly contradicts the CEDAW treaty. Many of the states parties to the Arab Charter have already filed reservations for Article 16 of CEDAW (which provides for equal rights within marriage) and the text of the Arab Charter makes it less likely that they will withdraw those reservations. The Arab Charter also expressly allows national governments to adopt significant legal restrictions on the exercise of freedom of thought, conscience, and religion (Article 30).

Although the Drafting Group for the ASEAN Declaration on Human Rights has not yet completed its work, the women’s movement can be confident that the ASEAN Declaration will be superior to the Arab Charter in the area of women’s rights. ASEAN recently established a separate Commission on the Promotion and Protection of the Rights of Women and Children; its terms of reference expressly refer to CEDAW and the need to encourage ASEAN governments to comply with the concluding comments of the CEDAW Committee.\textsuperscript{107} There is a danger, however, that the AICHR may endorse an ASEAN Declaration that undermines other well-established international human rights—particularly in the areas of preventative detention and freedom of expression, association, and assembly.\textsuperscript{108} Some ASEAN governments

---

\textsuperscript{105} The Arab Human Rights Committee should not be confused with the Arab Commission for Human Rights, which is a nongovernmental organization.

\textsuperscript{106} Arab Charter on Human Rights, supra note 103, art. 3.


\textsuperscript{108} For examples of laws in ASEAN nations that restrict these rights beyond what would normally be permitted under the ICCPR, see Li-Ann Thio, Taking Rights Seriously? Human Rights in Singapore (especially pp. 164-70), H.P. Lee, Human Rights
have a strong interest in maintaining laws that make it difficult for political parties to challenge the ruling party. ASEAN officials have also been known to actively promote stereotypical views of their local communities in order to justify greater restrictions on human rights. For example, the Secretary General of ASEAN once maintained that “[g]enerally speaking, an ASEAN citizen is family oriented, tradition-minded, respectful of authority, consensus-seeking and tolerant.” Such generalizations tend to disregard the views of trade unions, feminists, sexual minorities, and other social movements within ASEAN nations. They also reinforce concerns that the ASEAN sub-regional system may undermine, rather than complement, international human rights. In light of these concerns, it may be that the Asia Pacific Forum of Human Rights Institutions (“APF”), an association of national human rights institutions operating in the Asia Pacific region, offers the best hope of developing an effective regional approach to human rights. The role of the APF and domestic human rights bodies generally is analyzed in the next section of this article.

IV. NATIONAL HUMAN RIGHTS INSTITUTIONS AND THE PARIS PRINCIPLES

As noted above, national human rights institutions (“NHRIs”) have been endorsed as one of the “four pillars” that are necessary to build what may eventually become a regional system (or at least a regional framework) for promoting and protecting human rights. An NHRI is an administrative body that is established within a domestic legal system. They are typically referred to as “human rights commissions” but bear other names as well (human rights committees, offices of human rights, or human rights ombuds). Although sometimes governments establish NHRIs to satisfy domestic demand, often the underlying motivation is to appease the international community. U.N. human rights treaty-monitoring bodies regularly request that national governments establish NHRIs in order to help fulfill obligations under the core human rights treaties. By 2000, approximately eighty NHRIs had been established around the world, seventeen of which are located in the Asia Pacific region.


109 H.E. On King Yong, Secretary-General of ASEAN, Address at the Public Relations Academy of Singapore (Nov. 12, 2003), available at http://www.aseansec.org.


111 OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, 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
NHRIs are supposed to comply with the United Nations Principles relating to the Status of National Institutions, more commonly referred to as the Paris Principles. Among other things, the Paris Principles require that a NHRI be given as broad a mandate as possible, that it be adequately funded and enjoy independence from the executive branch, and that its membership be pluralistic, representing diverse groups within society. The Paris Principles are, however, less clear about the functions and powers of an NHRI; many possible functions are suggested but there is no clear list of essential powers. Unsurprisingly, there is huge variation among NHIRIs in this respect. Some NHIRIs can investigate complaints and assist complainants to litigate; others are essentially promotional and advisory bodies, with no (or very few) substantive enforcement powers. Regardless of what powers are given to the NHRI, its mandate should be clearly set forth in legislation that specifies the jurisdiction, powers, and appointment process for commission members.

There is always a danger that a government may establish a “fake” NHRI, one that is not independent but rather serves as an apologist for an authoritarian system. For that reason, the international community has devised mechanisms for assessing and accrediting NHIRIs based upon the extent to which they comply with the Paris Principles. Only accredited NHIRIs are eligible for full membership in the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (“ICC”). The ICC is not a U.N. agency but rather a global association of NHIRIs that coordinates the relationship between NHIRIs and the U.N. human rights system. A sub-committee of the ICC operates an internal accreditation system that is based on the Paris Principles. In essence, this internal accreditation system is a form of peer review because NHIRIs are assessing other NHIRIs. The ICC Statute provides (at Article 1.1) that the ICC Sub-Committee on Accreditation has the mandate to review and analyze accreditation applications and to make recommendations to the ICC on the extent to which a NHRI is in compliance of with the Paris Principles.

Compliance with the Paris Principles is required for full membership in the Asia Pacific Forum of Human Rights Institutions (“APF”). The APF was established in 1996 after the first regional meeting of national human rights institutions from Asia Pacific countries. APF

\[
\]

112 See note 7.

113 See generally Brodie, supra note 6.

114 The Statute is published as Annex III to NATIONAL HUMAN RIGHTS INSTITUTIONS: HISTORY, PRINCIPLES, ROLES AND RESPONSIBILITIES, pp. 174-86, supra note 3.

115 See Asian Pacific Forum of National Human Rights Institutions, supra note
originally performed its own assessment of NHRI to determine whether they were eligible for membership. It developed a graduated membership scale: full membership for institutions that complied with the Paris Principles; candidate membership for those that were not compliant at the time of application but could become compliant in a reasonable period of time; and associate membership for institutions that were unlikely to become compliant within a reasonable period.

In 2008, three experts published the first formal study of the APF accreditation process, drawing upon public records and the reviews of several NHRI (including the commissions from Afghanistan, Qatar, Timor-Leste, Saudia Arabia, the Maldives, Malaysia, and Palestine). The authors drew the following conclusions: (1) the prospect of membership in the APF normally does provide an incentive for governments to address problems identified during the review (although the National Society for Human Rights of Saudia Arabia did not respond and was therefore not accredited); (2) the graduated membership scale has helped to guide institutions on the necessary steps to full membership; (3) APF applied its criteria transparently and rigorously; and (4) the APF assessment results were normally consistent with those of the ICC’s Sub-Committee on Accreditation.

The fourth conclusion was an important finding because the APF no longer conducts its own assessment; instead, it now relies upon the findings of the ICC’s Sub-Committee on Accreditation, on which the APF has one of the four regional seats (the other three seats are allocated to the regional networks of NHRI from the Americas, Europe, and Africa). The APF’s nominee on the Sub-Committee for 2011 is the representative from the National Human Rights Commission of the Republic of Korea.

The APF publishes guidance on the ICC’s accreditation process and announces the results concerning institutions from the Asia Pacific; this information helps new regional institutions understand the process, and makes the process more transparent to the public. Although the

---


117 Id. at 19.


ICC process has three levels of classification, they are slightly different from the APF’s original categories of membership. According to the rules of procedure, the Sub-Committee on Accreditation applies the following classifications:

A: voting member – the NHRI is considered fully compliant with each of the Paris Principles. (At one time, the ICC also had an A(R) category, which represented “accreditation with reserve” and indicated that there was insufficient information for full accreditation. However, the ICC reformed the accreditation process in 2008 and ceased to use the A(R) category.)

B: non-voting member – the NHRI is not fully compliant with the Paris Principles or provided insufficient information to make a determination;

C: no status – the NHRI is considered noncompliant with the Paris Principles; it can only participate as an observer.

Applicants for accreditation need to provide a written statement showing that the NHRI complies with the Paris Principles and supporting documentation (e.g. the empowering legislation, the organizational structure of the NHRI, the annual budget and annual reports). Although the ICC Accreditation Sub-Committee originally relied primarily upon information submitted by the NHRI, it now seeks and receives information from other sources including U.N. agencies and non-governmental organizations. The initial recommendation of the Sub-Committee is sent to the NHRI, which is then given an opportunity to respond before the recommendation is sent to the voting members of the ICC (together with any feedback from the NHRI). The Sub-Committee reviews institutions that receive an A or B status every five years, unless special circumstances justify a special review.

Although the ICC accreditation and review process is essentially a process of peer review, there are cases in which full members have been downgraded by their peers. For example, the Human Rights Commission of Sri Lanka was initially accredited as a full member of the APF but was later downgraded to Associate membership because the ICC downgraded it from A to B status. Similarly, in 2007 (following a coup in Fiji), the ICC suspended the Fiji Commission’s A status and requested information concerning its independence from the Fijian government. The Fiji Commission chose to resign rather than engage and attempt to reassure the

---

120 See Brodie, supra note 6, at 155-63.

121 See Asia Pacific Forum, Sri Lanka, http://www.asiapacificforum.net/members/apf-member-categories/associate-members/sri-lanka. For analysis of the process by which Sri Lanka was downgraded, see Byrnes, Durbach, and Renshaw, supra note 116.
ICC of its ability to comply with the Paris Principles.\(^\text{122}\) The Human Rights Commission of Malaysia ("SUHAKAM") was also given a warning at one point and was required to submit to an additional review.\(^\text{123}\) SUHAKAM, however, managed to retain its A status after the Malaysian Parliament approved amendments to its empowering legislation in 2009.\(^\text{124}\)

These examples demonstrate that the ICC accreditation has become a serious process. As one study concluded, "[g]one are the days of 'encouraging' NHRIs to submit information" on their compliance with the Paris Principles; rather, NHRIs now “fail to submit at their peril.”\(^\text{125}\) It also appears that the desire to be accredited by the ICC (and thus be eligible for membership in the APF) can create positive incentives for governments to establish NHRIs with broad jurisdiction and the legislative framework for formal independence. Nonetheless, one cannot assume that a national human rights institution with an A rating is fully compliant with the Paris Principles, especially if the commission lacks independence from its government or is operating in times of domestic turmoil. The Nepal Human Rights Commission, which was established in 2000, is arguably an example of the failure of the ICC accreditation process. Although it was initially granted only A(R) status (because it failed to submit an annual report or budget information with its accreditation application), it received full A status in 2002. Subsequently, concerns arose regarding the absence of a governing body, delays in the appointment of Commissioners, and other developments associated with the conflict between the Maoist rebels and the government of Nepal.\(^\text{126}\) While these concerns have triggered several reviews and have undermined the efficacy of the Nepal Human Rights Commission in the eyes of the international community, the ICC


\(^{125}\) Brodie, *supra* note 6, at 164.

continued to accord it full A status for several years.\textsuperscript{127}

The other problem with the ICC accreditation process is that there are inherent weaknesses in its criteria. First, the Paris Principles were not really designed to serve as an accreditation system. Although some of the requirements in the Paris Principles are fairly straightforward, others are phrased in open-ended language. For example, the Paris Principles require that an NHRI should have as “broad a mandate as possible” but do not define this term or explain how much weight should be given to this factor in determining whether an NHRI should be accredited. Originally, commissions and ombudsmen with narrower functions (such as promoting gender or racial equality) were eligible for full membership in the ICC. More recently, the ICC has interpreted the Paris Principles as disapproving of commissions with narrow jurisdictions, even if a nation has several such commissions.\textsuperscript{128} One can see why the ICC and U.N. agencies might prefer that every country have just one large human rights commission (voting rights in the ICC are difficult to divide among more than one national institution). Moreover, a broad and general human rights commission helps to ensure that certain issues do not fall “between the cracks” of specialized bodies’ jurisdiction. It is not clear, however, that one large consolidated commission will be superior to specialized commissions in all contexts. Some governments may be willing to give greater enforcement powers to a specialized commission – and stronger enforcement powers normally translate to better remedies for victims.

Another concern regarding the Paris Principles is that they are exceedingly vague when it comes to powers and functions and fail to set any criteria for general effectiveness in protecting human rights or remedying violations. The Paris Principles contain a long list of suggested responsibilities but do not require that an NHRI be endowed with any particular powers. Interestingly, the ICC itself has interpreted the Paris Principles and now places heavy emphasis on three main functions: (1) encouraging the state to ratify human rights treaties; (2) interacting with the international human rights system (e.g. submitting reports to treaty-


\textsuperscript{128} See Brodie, supra note 6, at 165-82, for a detailed discussion of how this shift in emphasis affected Sweden.
monitoring bodies and being active in the ICC itself); and (3) interacting with other human rights bodies.\textsuperscript{129} While these are valuable functions, they are not necessarily the most important, particularly from the perspective of victims of human rights violations. Arguably, an institution with the power to receive complaints and litigate (even in a fairly narrow field) will be more effective than a broad commission that primarily promotes treaty ratification and interacts with other international and local organizations.

The requirement that an NHRI be independent from government, which almost everyone agrees is an important part of the Paris Principles, is also very difficult to apply in practice. The guidelines for assessing independence are fairly basic and formalistic (such as the requirements that NHRI have a secure budget and that members of a national commission be immune from suit).\textsuperscript{130} These guidelines do not adequately address the subtle pressures that can be brought to bear on an NHRI. Indeed, it is difficult to imagine how guidelines could confront this delicate issue. The Sub-Committee on Accreditation will naturally receive conflicting views on the question of an NHRI’s independence because nongovernmental organizations almost never think that their national NHRI is sufficiently independent, and most NRIs are reluctant to admit that they are vulnerable to pressures from their local government.

It is also important to recognize that a lack of government interference in the actions of an NHRI does not necessarily mean that the NHRI is fiercely independent; it may indicate that the NHRI has never bothered to challenge the government and thus has never incurred its wrath. In contrast, institutions that have taken a controversial position are more likely to attract government (and sometimes public) anger. Since the ICC is essentially a group of NRIs, many of which have felt government pressures from time to time, it would be perfectly understandable if the Sub-Committee on Accreditation were somewhat flexible when assessing independence. After all, the roles will inevitably rotate: an NHRI that is doing the assessing this year may find itself in the hot seat during next year’s meeting. Moreover, independence is not necessarily a static state; it may ebb and flow with the appointment of new commission members or with the election of a new government.

The challenge of conducting meaningful assessments of NRIs is evident when one examines the ICC’s ratings of the institutions from the Asia Pacific region, which now determine membership in the APF. At

\textsuperscript{129} ICC Sub-Committee on Accreditation, \textit{General Observations} (adopted by the International Coordinating Committee of National Human Rights Institutions for the Promotion and Protection of Human Rights (ICC) by email after the SCA meeting of March 2009) (June 2009) (on file with author).

\textsuperscript{130} See \textit{NATIONAL HUMAN RIGHTS INSTITUTIONS: HISTORY, PRINCIPLES, ROLES AND RESPONSIBILITIES}, supra note 3, at 52 (the independence section of the Checklist for Assessing Conformity with the Paris Principles).
present, the full members in the APF are the national human rights bodies from Afghanistan, Australia, India, Indonesia, Jordan, Malaysia, Mongolia, Nepal, New Zealand, the Palestinian Territories, the Philippines, Qatar, the Republic of Korea, Thailand, and Timor Leste. Nongovernmental organizations have expressed concerns regarding the independence of a number of these organizations, as well as their unwillingness (or inability) to take on meaningful issues. These institutions, however, continue to receive A ratings from the ICC Accreditation Committee.

The ICC lists only five human rights institutions from the Asia Pacific that received less than an A rating from the ICC Accreditation Subcommittee. The Human Rights Commission of the Maldives and the Human Rights Commission of Sri Lanka received a B rating and are thus non-voting members of the ICC and only Associate Members of the APF. The relatively new National Human Rights Commission of Bangladesh was given a B rating in 2011 and admitted as an Associate Member of APF. Two human rights bodies from the region received a dismal C rating: Iran’s Islamic Human Rights Commission and Hong Kong’s Equal Opportunities Commission (“EOC”). One might ask: what does the Hong Kong EOC have in common with Iran’s Islamic Human Rights Commission? The answer is virtually nothing, except that they were both put into the dungeon by the ICC accreditation process.

This odd grouping demonstrates one of the problems in the accreditation process: it places heavy emphasis on the scope of an NHRI’s mandate and the formal rules governing its establishment while placing relatively little weight on an institution’s enforcement powers and

---

131 See Asia Pacific Forum, Full Members, supra note 127.


133 For example, Malaysia, Jordan, and Qatar received an A ranking in late 2010. See ICC SCA REPORT, supra note 124.


accomplishments. From the perspective of the ICC accreditation process, the Hong Kong EOC has at least two problems regarding its mandate. First, it is not a national body because Hong Kong is a Special Administrative Region of China. Hong Kong, however, is governed under the ‘one country two systems’ model and its common law legal system is largely separate from China’s legal system. To some extent, Hong Kong has its own “international legal personality” and it frequently participates in international meetings and organizations under its own name. No doubt the ICC would like to see China create a national human rights commission but at present it lacks one. Moreover, no human rights activist in Hong Kong would want to see the Hong Kong EOC merged with any national human rights commission because the Chinese Communist Party would inevitably dominate it. Thus in the case of Hong Kong (and other autonomous regions around the world), it might be appropriate for the ICC to fully accredit sub-national human rights bodies that otherwise comply with the Paris Principles.

The ICC further disapproves of the Hong Kong EOC because its mandate is limited to the enforcement of four anti-discrimination laws. Sadly, the Hong Kong government has been unwilling to create a general human rights commission; nor will it give the EOC the power to enforce the broader equality provisions of the Hong Kong Bill of Rights Ordinance. Yet the jurisdiction of the Hong Kong EOC is still quite broad because the four laws that it enforces prohibit discrimination on many different grounds (including gender, pregnancy, marital status, disability, race, ethnicity, and national origin) and in a wide range of activities (including employment, education, housing, government programs, and the provision of goods and services). Equally important, the Hong Kong EOC is arguably one of the more effective human rights bodies in the region because it has the power to litigate and has won some important cases. Perhaps the most significant case in terms of its systemic impact arose from the EOC’s application for judicial review of the Education Department’s system of allocating students to secondary schools. In 1998-1999, the EOC conducted a formal investigation and determined that the

---


138 For a general introduction to the jurisdiction and powers of the Hong Kong EOC, see Carole J. Petersen, Equal Opportunities: A New Field of Law for Hong Kong, ch. 19 in HONG KONG’S NEW LEGAL ORDER (Raymond Wacks ed., 1999). Hong Kong’s antidiscrimination law was initially confined to gender and disability; race discrimination was not prohibited in the private sector until 2008 and the Race Discrimination Ordinance is, unfortunately, somewhat weaker than the Sex Discrimination Ordinance and the Disability Discrimination Ordinance. For comparison, see Carole J. Petersen, Hong Kong’s Race Discrimination Bill: A Critique and Comparison with the Sex Discrimination and Disability Discrimination Ordinances, Hong Kong Legislative Paper No. CB(2)2232/06-07(01), June 2007, available at http://www.legco.gov.hk/yr06-07/english/bc/bc52/papers/bc52eb2-2232-1-c.pdf.
Education Department had designed three mechanisms to make it easier for boys to enter the top schools: (1) it first scaled the assessment results on the basis of gender; (2) then it banded male and female students separately; and finally, (3) it applied gender quotas for admissions to the higher-ranked schools. The admitted purpose was to prevent girls from obtaining a majority of the places in elite co-educational secondary schools. As a result, fewer girls than boys were being allocated to their first choice of school despite the fact that girls were, on average, outperforming the boys on the assessments.\textsuperscript{139} When the EOC could not persuade the government to change the system, it sought judicial review and the Court of First Instance declared that all three elements of the government’s allocation system were unlawful.\textsuperscript{140} This case exemplifies the kind of strategic litigation that a human rights body should support (if it has the power to do so) because a single case can have systemic impact in society.\textsuperscript{141} This case was also the first time that a Hong Kong court expressly relied upon the CEDAW treaty for guidance in interpreting a domestic law, setting a useful precedent for subsequent litigation.\textsuperscript{142} Unfortunately, the case almost certainly contributed to the government’s decision not to renew the contract of the person who served as the Chairperson of the EOC at the time.\textsuperscript{143} While this decision is a serious blot on Hong Kong’s human rights record, the Hong Kong EOC remains one of the more independent and effective commissions in the region. It has investigated and attempted to conciliate thousands of complaints\textsuperscript{144} and continues to provide legal assistance in selected cases.\textsuperscript{145} It also

\textsuperscript{139} See HONG KONG EQUAL OPPORTUNITIES COMMISSION, FORMAL INVESTIGATION REPORT: SECONDARY SCHOOL PLACES ALLOCATION (SSPA) SYSTEM (1999).


\textsuperscript{142} The Court of First Instance used CEDAW as a guide to interpreting the local Sex Discrimination Ordinance. For an analysis, see Carole J. Petersen and Harriet Samuels, The International Convention on the Elimination of All Forms of Discrimination Against Women: A Comparison of Its Implementation and the Role of Non-Governmental Organizations in the United Kingdom and Hong Kong, 26 HASTINGS INT’L & COMP. L. REV. 1, 42-47 (2002).


\textsuperscript{145} The Annual Reports of the Hong Kong EOC provide data on a small number
recently completed a formal investigation of accessibility,\textsuperscript{146} which has generated promises of significant investment to improve accessibility to Hong Kong’s public spaces.\textsuperscript{147} This promised improvement in accessibility is a real accomplishment as Hong Kong was once deemed to be “singularly the worst city I have visited from a wheelie [wheelchair] point of view.”\textsuperscript{148}

This list of the Hong Kong EOC’s accomplishments is not provided simply to defend its reputation (although the C rating from the ICC may be discouraging for those who struggle to keep the EOC active and independent). Rather, it demonstrates how the ICC’s accreditation decisions may mislead the public regarding the efficacy and relevance of domestic human rights institutions.

The accreditation process may also create the wrong incentives for governments in the Asia Pacific region, encouraging governments to create commissions with a broad formal mandate to promote human rights but with no substantive powers. Indeed, there is cause for concern that Hong Kong may move in this direction. Frequently, nongovernmental organizations bring up the fact that the Hong Kong EOC received a depressing C rating from the ICC; they point to concluding comments by treaty-monitoring bodies that recommend Hong Kong create a broad human rights commission. Of course, these NGOs (and also many legislators) would like to see the government establish a general human rights commission with authority to enforce all of the rights in Hong Kong’s Bill of Rights Ordinance and in the Hong Kong Basic Law.\textsuperscript{149} It is


\textsuperscript{149} In 1994, when Hong Kong was still a British colony, Anna Wu (a member of Hong Kong’s Legislative Council at the time) drafted a bill to create a human rights commission for Hong Kong. Governor Patten used his constitutional powers to prevent it
entirely possible that the Hong Kong government will meet the NGOs halfway. As an unelected government that cares about its international reputation, the Hong Kong government does often look for opportunities to respond to concluding comments by treaty-monitoring bodies.  

For example, if the Hong Kong government wants to create a body that can achieve a higher rating from the ICC, it may propose to consolidate the EOC with the other “human rights” institutions (such as the Privacy Commission, the Women’s Commission, and the Ombudsman) and then name the consolidated body the Hong Kong Human Rights Commission.  

The problem with that scenario is that these other institutions have far fewer powers than the existing EOC and thus the EOC might lose some of its existing powers in the consolidation. There are plenty of government officials and business leaders who would support eliminating the EOC’s power to litigate. Even if the EOC did not lose its formal powers, it would probably find itself strapped for resources and buried in reorganization woes – and thus far less capable to assist with complainants. The power to investigate and mediate complaints would be less effective if there were a smaller litigation budget because many respondents in Hong Kong only offer a settlement when they have a realistic fear of litigation.  

Ironically, a large consolidated body that litigates less frequently than the current EOC might receive an A ranking from the ICC and thus would be admitted into the APF (providing that the APF could accept the fact that Hong Kong is only an autonomous region and not a separate country).  

The Hong Kong government, in such a
circumstance, would expect to receive a higher ranking because it would carefully review the ICC’s accreditation guidelines and ensure that the consolidated body had the necessary formal structure and functions.

V. CONCLUSION

The concerns expressed in this article regarding the ICC’s accreditation criteria and the role it plays in APF membership decisions should not be interpreted as a negative commentary on the APF itself. The substantive reports produced by the APF are excellent and take positions that are probably more progressive than could be taken by many member commissions on their own. It appears that the APF gives member institutions significant support and, from time to time, provides additional backbone on certain controversial issues. Although the APF is primarily an association of NHRIs and looks nothing like the regional mechanisms in Europe, the Americas, or Africa, it currently is the most important regional organization promoting human rights in the Asia Pacific. It would therefore be a shame if the APF membership criteria backfires by encouraging governments to create broad but fairly powerless NHRIs. The time has come to reassess the Paris Principles or at least to reconsider whether the ICC’s interpretation of them is working as a viable test for accreditation and APF membership.

Regardless of its approach to membership, APF can hopefully have a positive relationship with AIHRC, particularly as the AIHRC receives and reviews the draft of an ASEAN Declaration on Human Rights. The content of the draft Declaration is particularly important because the ASEAN sub-regional system may set the standard for other sub-regional systems and this approach is a more realistic option than a human rights system for the entire region. It is important to bring in outside voices so that the process of reviewing and commenting upon the draft Declaration is not dominated by ASEAN governments. The opinions of APF, other NGOs, and civil society should be taken into account so that the ASEAN Declaration on Human Rights complements, rather than undermines, international norms.