

THE MEDIUM FORESEEING THE FUTURE: THE ROLE OF NHRIS IN CREATING RHRIIS IN THE ASIA-PACIFIC REGION

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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.¹

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 mechanisms²...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.³

I. INTRODUCTION	38
II. NATIONAL HUMAN RIGHTS INSTITUTIONS (NHRIs).....	43
1. Definition of NHRIs and their Role	43
2. NHRIs in the Asia-Pacific Region.....	51

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1 Louise Arbour, *Opening Address at the 12th Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions* (2007), <http://www.asiapacificforum.net/about/annual-meetings/12th-australia-2007/downloads/un-statements/Statement%20-%20HC%20for%20HR.pdf>.

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

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

3. Case Study: NHRIs and the Experience of Korea.....	56
a. <i>Background</i>	56
b. <i>The legislative process for the establishment of the NHRCK</i>	57
c. <i>Structure of the NHRCK: All-inclusive system</i>	58
d. <i>Interdependency of the NHRCK</i>	59
e. <i>NHRCK's main achievements</i>	60
f. <i>The NHRCK and International Cooperation</i>	63
g. <i>Conclusion</i>	64
h. <i>Postscript</i>	64
III. WHY NHRIS CAN BE AN EMINENT ACTOR IN SETTING UP RHRI IN ASIA.....	66
1. Bridging the Gap: Negotiating Sovereignty and Human Rights.....	67
2. The Nature of NHRIs: Existing as Mediators	72
3. Cooperation between NHRIs and the APF.....	75
IV. HOW NHRIS CAN BE A DRIVING FORCE FOR ESTABLISHING RHRI IN ASIA ...	77
1. Encouraging Regional Arrangements on Common Issues of Human Rights in the Asia-Pacific Region	77
a. <i>Human Rights Trafficking</i>	78
b. <i>Women's Rights</i>	81
c. <i>Rights of People with Disabilities</i>	82
d. <i>Rights of Human Rights Defenders</i>	84
e. <i>Prevention of Torture</i>	87
f. <i>Internally Displaced Persons</i>	88
g. <i>Migrants</i>	91
h. <i>The Environment</i>	93
i. <i>Summary</i>	94
2. Establishing RHRI at the Sub-Regional Level	95
a. <i>The South-East Asia Region</i>	97
b. <i>The South Asia Region</i>	102
c. <i>The Pacific Region</i>	104
3. Strengthening the Role of the AFP.....	106
4. Beginning with Countries in Favour of Establishing RHRI.....	109
V. CONCLUSION	109

I. INTRODUCTION

Unlike their counterparts in Africa, the Americas, and Europe, countries in the Asia-Pacific region⁴ 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 paper 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.

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

4 Before proceed further, let me explain how this paper understands *the Asia-Pacific region*. It is impossible to define this 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. 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. The 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. This paper recognizes 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, which is, in other words, a flexible and fluid notion rather than one with a strict boundary. For human rights discussion purposes, the general scope of this region is followed but not limited to the UNOHCHR regional categories. Therefore, this paper refers the Asia-Pacific region or Asia as one that embraces countries in four sub-regions: the South Asia, the South-East Asia, the Pacific, and the East Asia. See The Asia Pacific Forum (APF), *The Region* (date), <http://www.asiapacificforum.net/about/the-region>.

“the need for international cooperation to address problems of massive and systematic violations of human rights.”⁵ Most 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 approach to human rights.

It is necessary first and foremost to strengthen the domestic system for the promotion and protection of human rights in order to change the reluctant attitude of governments towards 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, while RHRIs can work as intermediaries, thus reflecting regional specificity and meeting international human rights standards. At the same time, this new actor should gradually raise public awareness of human rights through active cooperation with human rights NGOs and civil society. Overall, NHRIs can play this role of a driving force behind the establishment of RHRIs in the Asia-Pacific region; and this is the main argument of this paper.

Therefore, this paper will examine how NHRIs can be an eminent actor in the setting up of 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 that regard. 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

5 See, for example, Press Release, General Assembly, Questions of Sovereignty, the State System, the Future of the Organization Raised by General Debate Speakers, U.N. Press Release GA/9606 (Sept. 24, 1999) (including Singapore, Iraq, Dominican Republic, Kazakhstan, and Iran); Press Release, General Assembly, General Assembly Begins Discussion on Secretary-General’s Annual Report on Work of Organization U.N. Press Release GA/9627 (Oct. 6, 1999) (including Colombia, Kuwait, Mongolia, China, Bangladesh, India, Venezuela); Press Release, General Assembly, Importance of State Sovereignty, Need to Address Human Rights Violations, Council Reform, Discussed in Assembly U.N. Press Release GA/9633 (Oct. 8, 1999) (including Cuba, Algeria, Oman, Pakistan, Peru, the Philippines, Senegal, and the Sudan).

in the process. In order that NHRIs play a major role in the creation of RHRIs, they must 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.

Then, I will provide three reasons why NHRIs can be a driving force behind the establishment of RHRIs in the region. First, NHRIs can bridge the gap between the international community, including the U.N., and individual governments 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 of National Human Rights Institutions (APF): the networks of NHRIs in this region. By sharing information, exchanging staff members and identifying human rights issues of common concern, they have enhanced the capacity of individual member NHRIs for a better human rights practice at the national level, and have also encouraged the establishment of NHRIs in Asian countries that do not have 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.

Lastly, 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 least at first. Through the UN 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 in researching, sharing information and reporting 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. It 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 role of the APF, which is to enhance the functioning of NHRIs such that they meet international standards and coordinate their operations so that they 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 in the Paris Principles. Also, the APF annual meeting should not remain a forum for NHRIs only, but be developed as a place that can bring all 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 soft law, in the form of informal and non-legally binding agreements signed by representatives of individual NHRIs. 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 that 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, an alternative solution could be to establish RHRI with small number of countries consisting of NHRIs that are already willing to collaborate with an understanding of 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, as we can see from the development of RHRI in Europe. 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.

Overall, NHRIs can be a driving force for the establishment of a regional human rights system in the Asia-Pacific region. 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. Further, with the following four suggestions, NHRIs and their network in the APF can play a vital role and provide a breakthrough in the process of setting up RHRIs in this region.

II. NATIONAL HUMAN RIGHTS INSTITUTIONS (NHRIs)

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.”⁶ 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.⁷ NHRIs have been established in Africa,⁸ Europe,⁹ Latin America,¹⁰ the Commonwealth of Independent States (CIS),¹¹ and Asian

6 U.N. CEN. 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, U.N. Doc. HR/P/PT/4, U.N. Sales No. E.95.XIV.2 (1995). [hereafter NHRIs: A Handbook]

7 *Id.*

8 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 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).

9 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).

10 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).

11 See Cynthia Alkon, *The Cookie Cutter Syndrome: Legal Reform Assistance under Post-Communist Democratization Programs*, 2002 J. DISP. RESOL. 327 (2002).

countries.¹² The contemporary development of the human rights discourse from UN initiatives¹³ like the 1993 Paris Principles¹⁴ 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 as well as a d broad mandate.¹⁵

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 rights regime.”¹⁶ 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.¹⁷

The first one is the resolution of the U.N. Commission on Human Rights in 1962,¹⁸ 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

12 See Amanda Whiting, *Situating Subakam: 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 Sripati, *India's National Human Rights Commission: A Shackled Commission?* 18 B.U. INT'L L.J. 1 (1997).

13 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).

14 G.A. Res. 134, ¶ 85, U.N. GAOR, 48th Sess., U.N. Doc. A.RES.48/134 (1993).

15 See *Id.*

16 ANNA-ELINA POHJOLA, THE EVOLUTION OF NATIONAL HUMAN RIGHTS INSTITUTIONS: THE ROLE OF THE UNITED NATIONS 118 (The Danish Institute for Human Rights 2006).

17 *Id.*, at 30-117.

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

respect for human rights.”¹⁹ 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.²⁰

The second important moment was the 1978 Resolution of the U.N. Commission on Human Rights.²¹ 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.²² Based on this resolution, the first seminar on national institutions (NI) was held in Geneva in 1978 with 25 U.N. member 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.²³ 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.²⁴ 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.²⁵

At present, almost 118 countries have NHRIs or similar bodies. The U.N. suggests that 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

19 *Id.*, cited in Anna-Elina Pohjolainen, *supra* note 16, at 37.

20 Anna-Elina Pohjolainen, *supra* note 16, at 121.

21 U.N. Comm. 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*, CHR Res. 23(XXXIV) of 1978 (Mar. 8, 1978). *See also*, G.A. Res. 46, ¶ 83, U.N. GAOR, 33rd Sess., UN Doc. A/RES/33/46 (1978).

22 Anna-Elina Pohjolainen, *supra* note 16, at 43-7.

23 *Id.*

24 *Id.*

25 *Id.*, at 122-3.

of torture, migration, children, and economic, social and cultural rights.”²⁶ NHRIs have indeed been increasingly active in various fields. From the official investigation into the forced disappearances in Mexico²⁷ to the probe of key past trials in Northern Ireland²⁸ and the securing of the rights of the Tsaatans, the smallest ethnic minority in Mongolia,²⁹ to the rescue project for child soldiers in Uganda,³⁰ all NHRIs have played a 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.*³¹

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.³² 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.³³

Article 3 of the Paris Principles provides the functions and responsibility of NHRIs as a minimum guideline.³⁴ In general, these can be placed in five categories.

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

27 See MIREILLE ROCCATTI, HUMAN RIGHTS AND THE OMBUDSMAN’S EXPERIENCE IN MEXICO (1999).

28 See Stephen Livingstone, *supra* note 9.

29 See U.N. High Commissioner for Human Rights, Committee on the Elimination of Racial Discrimination, *Annual Report in 2006*, UN Doc. CERD/C/MING/18 (Aug. 17, 2006).

30 See U.N. Human Rights Council, *Information Note National Human Rights Institutions*, Document No. 7 No.11, (Sep. 2008).

31 Jeong-Woo Koo and Francisco O. Ramirez, *National Incorporation of Global Human Rights: Worldwide Expansion of National Human Rights Institutions, 1966-2004*, 3 SOCIAL FORCES 1321, 1342 (Mar. 2009).

32 Rachel Murray, *supra* note 3, at 27-44.

33 *Id.* at 44.

34 See The Paris Principles, *supra* note 14. Annex (Competence and responsibilities) Article 3.

The first one is 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 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 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 advisors to government delegations to the U.N. Human Rights Council and other international human rights treaty bodies. Such involvement forces their governments to 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 obligation 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 great 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 in 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 institutions³⁵ 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 in 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 the submission and examination of the report by the treaty bodies, they present their

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

concerns and specific recommendations to individual states that are expected to undertake the necessary measures to implement such recommendations.³⁶ 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.³⁷

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.³⁸ 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 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 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 the establishment of 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

36 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.*

37 See Paris Principles, *supra* note 14, Annex (Competence and responsibilities) Art.3(d), (e) and Annex (Methods of Operation) Art.(f), (g).

38 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.*

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 the 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.³⁹

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.⁴⁰ 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 with the media, and 6) accessibility.⁴¹ 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.⁴²

Noting that there are similarities in the effectiveness factors for NHRIs discussed in the academic literature, I will summarize them 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

39 BRIAN BURDEKIN, NATIONAL HUMAN RIGHTS INSTITUTIONS IN THE ASIA-PACIFIC REGION, 43-62 (2007).

40 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).

41 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/IOH40/007/2001>.

42 NHRIs: A Handbook, *supra* note 6, at para.63-138.

NHRI, but it is the starting point toward its independence. Second, there should be transparent appointment procedures for the members of an NHRI, such as commissioners and a chairperson, “to ensure the pluralist representation of the social forces involved in the protection and promotion of human rights.”⁴³ The reason for this is that the presence of professional human rights experts of diverse background will increase the body’s capacity without causing 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 are 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 that public concerns are reflected. In addition, there should be a close relationship with international and regional human rights bodies that 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 rights institutions, and granting it membership.⁴⁴

2. NHRIs in the Asia-Pacific Region

Currently, seventeen countries in the Asia-Pacific region have established NHRIs.⁴⁵ 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).

43 The Paris Principles, *supra* note 14, Annex (Composition and guarantees of independence and pluralism) Art.1

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

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

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 set up 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.⁴⁶ Based on the report of the U.N. Secretary-General in 2010, the current status of national institutions accredited by ICC is the following.⁴⁷

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.

46 *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 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 39, at 98-101, 120.

47 *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.

The Medium Foreseeing the Future: The Role of NHRIs in Creating RHRIs in the Asia-Pacific Region

<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 Rights	A	Full member, 1996 (Founding member)	1987	1999, 2007.
<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	<i>Note</i> : Fiji resigned from ICC on 2 April 2007	Re-established 2009	2000 Accreditation suspended in 2007.

Table1: Chart of the Status of National Institutions in the Asia-Pacific region (Accredited by the ICC as of June 2010)⁴⁸

Some argue that NHRIs may just be political tools of oppressive and authoritarian governments created to legitimize human rights violations.⁴⁹ 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.⁵⁰ Even the states which are overly concerned with their sovereignty may support the establishment of NHRIs with similar purposes.⁵¹ However, as shown in the table above, the ICC under the Human Rights Council awards an A status to NHRIs which meet the international standard at its annual

48 See The Secretary General., *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*, UN Doc. A/65/340 (Sep.1, 2010).; 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>

49 See HUMAN RIGHTS WATCH, *PROTECTOR OR PRETENDERS? GOVERNMENT HUMAN RIGHTS COMMISSIONS IN AFRICA* (2001).

50 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.*

51 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.*

meeting, to prevent such misuse and to establish proper NHRIs that are compliant with the Paris Principles.⁵² The Asia Pacific Forum of National Human Rights Institutions (APF) also gives full membership only to an NHRI which complies with the Paris Principles.⁵³

Most countries in Asia have experienced many similar circumstances such as monarchy, authoritarian governments, and economic difficulties. And 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 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

52 See U.N. Human Rights Council, *Information for National Human Rights Institutions*, *supra* note 46; see also Rachel Murray, *supra* note 3, 30-3.

53 Art.11.1 of Asia Pacific Forum of National Human Rights Institutions Constitutions *available at* <http://www.asiapacificforum.net/about/governance/downloads/constitution.pdf>

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.

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. al. 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.

57 *Ibid.* at 5.

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

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 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

58 The Secretary General, *Report of the Secretary General on Regional Arrangements for the Promotion and Protection of Human Rights in the Asian and Pacific Region*, delivered to the Commission on Human Rights UN Doc. E/CN.4/1998/50 (Jan. 26th, 1996);

[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*, 42 KOREA JOURNAL, 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 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.

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 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 made 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

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*, (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 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.*

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 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

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, (2002) (Doctoral Dissertation, Inha University). [written in Korean]

70 *Id.*

71 *Id.* at 259.

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

73 *Id.*

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

75 Nohyun Kwak, *The Dilemma and Vision of an All-in One 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).

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 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

77 *Id.*

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.*

so much its neutrality 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.

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

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); Hyejo Cho, A LANDSCAPE OF HUMAN RIGHTS, (2008). [written in Korean?]

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

84 Interview with Seonghonn Lee, *supra* note 80.

85 The Annual Report, *supra* note 76.

86 Interview with Seonghonn Lee, *supra* note 80.

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%). *Also see* The Annual Report, *supra* note 76.

Table2: 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 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

88 *Id.*

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

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).

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.*

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 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

97 See National Human Rights Commission of Korea, *Annual Report* (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 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*, 42 KOREA JOURNAL, 194-218 (Autumn, 2002).

100 Interview with Myung-Jai Lee, Director of the Communications and Cooperation Division, NHRCK, conducted in Jun. 10, 2009.

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 which the fundamental human rights are.

f. The NHRCK and International Cooperation

The NHRCK has been actively involved in the work of the 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 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, thus strengthening the campaign.

101 *Id.*

102 *See* Art. 25 (4) of the 2001 National Human Rights of Commission Act.

103 Interview with Yunkul Jung, International Cooperation Officer, NHRCK, conducted on Jun. 17, 2009.

104 *Id.*

g. Conclusion

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

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*, (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 available at 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 available at 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>.

regarded as a non-regular 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

He also points out the major problems that 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

107 The Constitutional Court of Korea, *Summary of Decision on Case No. 2009HunRa9*, (Oct. 28, 2010) http://www.court.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/>

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 would allow only the Chairperson to decide which agendas would 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 and this maybe an example of how NHRIs can be co-opted by state interests. 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 human rights institution. Such interactions may prove, as an example to other Asian countries, to have a significant effect on raising the capacity of NHRIs in the future for better protection and promotion of human rights in this region. Thus, I will leave the further study of the ongoing crisis in the NHRCK for the future.

II. WHY NHRIs CAN BE AN EMINENT ACTOR 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

111 *Id.*

national institutions, international human rights organizations, and civil society including human rights NGOs. I have 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.

1. Bridging the Gap: Negotiating Sovereignty and Human Rights

One of the major obstacles for RHRIs has been 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 policies.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.

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, (Oct. 15th, 1997); Press Release, General Assembly, Secretary General Updates Assembly on United Nations Reform, SG/SM/6359 (Apr. 25th, 1998).

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 cannot be overstated, at least considering such 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

115 International Council on Human Rights Policy, *supra* note 113, at 74-6.

116 Brian Burdekin, *supra* note 39, at 24-5.

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).

Further, the respect for state sovereignty should be realized by protecting the fundamental rights of a state's nationals through the 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 internationally recognized standards and principles of human rights as illustrated by the Paris Principles.¹²⁵

120 Jianming Shen, *National Sovereignty and Human Rights in a Positive Law Context*, 26 BROOK. J. INT'L L. 417 428-9 (2000).

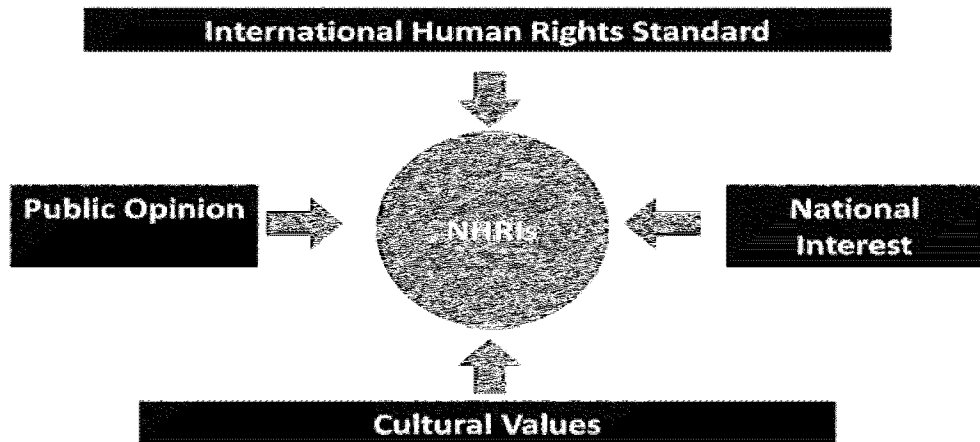
121 Jack Donnelly, *State Sovereignty and Human Rights* (Human Rights & Human Welfare, Working Paper No.21, 2004) cited in Sonia Cardenas, *supra* note 118, at 37.

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 36, at 1408-1416.

125 See NHRIs: a Handbook, *supra* note 6, at 4-6; See also the Paris Principles, *supra* note 14, Annex (Competence and responsibilities) Art.3(d), (e) and Annex (Methods of operation) Art.(f), (g).



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 international human rights treaties and also change each government's attitude against setting up RHRI 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

126 They "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 3, at 23.

127 *See, for example*, Press Release, General Assembly, 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, 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, General Assembly, 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).

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.

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.

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 39, at 89-93; Rachel Murray, *supra* note 3, at 11-18.

130 See Brian Buurdekin, *Id.*; Rachel Murray, *Id.* at 36-43.

131 See Brian Buurdekin, *Id.*, at 98-101.

2. The Nature of NHRIs: Existing as Mediators

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 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.¹³⁴ That is, in NHRIs, there should be an effective cooperation through the presence of other governmental

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 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*, (2003) (Dissertation, The London School of Economics & Political Science).

133 Rachel Murray, *supra* note 3, at 89.

134 The Paris Principles, *supra* note 14, Article 1 of Annex (Composition and guarantees of independence and pluralism).

institutions, Congress, academic, and civil society, including human rights NGOs as the following diagram describes.



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 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

135 Morten Kjærum, NATIONAL HUMAN RIGHTS INSTITUTIONS IMPLEMENTING HUMAN RIGHTS, 12 (The Danish Institute for Human Rights, 2003).

136 *Id.*, at 8.

137 Rachel Murray, *supra* note 3, at 23-5.

*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.

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 governments to establish RHRIs in the region. 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

138 Report of the 30th session of the African Commission on Human and Peoples' Rights cited in Rachel Murray, *id.*, at 24.

139 Julie A. Mertus, HUMAN RIGHTS MATTERS: LOCAL POLITICS AND NATIONAL HUMAN RIGHTS INSTITUTIONS, 139 (2009).

140 *Id.*, at 140.

141 *Id.*

142 Brian Burdekin, *supra* note 39, at 22-6; Reenu Paul, *supra* note 132, at 46.

*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 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

3. Cooperation of NHRIs and the APF

The third reason for NHRIs being an eminent actor toward establishing RHRI 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 as well. 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 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.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

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) available at http://bangkok.ohchr.org/news/events/asia-pacific-regional-framework-workshop-2010/files/Discussion_Paper_Vitit_Muntarbhorn_June_2005.pdf

145 Hidetoshi Hashimoto, *supra* note 112, at 112-6.

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 no single government can address the multitudes of global problems on its own.¹⁴⁷ In the area of human rights, the network of NHRIs within the APF has been "especially promising trans-governmental 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:

146 The Asia-Pacific Forum, *About: Annual Meetings*, <http://www.asiapacificforum.net/about/annual-meetings>.

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).

*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

IV. HOW NHRIs CAN BE A DRIVING FORCE FOR ESTABLISHING RHRIs IN ASIA

1. Encouraging Regional Arrangements on Common Issues of Human Rights in the Asia-Pacific Region

The participants in the U.N. workshops¹⁵⁰ 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 at least 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

149 Andrea Durbach et al, *A Tongue but No Teeth? The Emergence of a Regional Human Rights Mechanism in the Asia-Pacific*, 31 SYDNEY L. REV. 211, 238 (2009).

150 Since 1990, the OHCHR has organized 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, international organizations, including U.N. agencies and human rights NGOs. See 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 The High Commissioner, *Report of the High Commissioner Containing the Conclusion of the Workshop on Regional Cooperation for the Promotion and Protection of Human Rights in the Asia-Pacific Region*, UN Doc. A/HRC/7/35 (2007), A/HRC/15/39 (2010).

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,¹⁵¹ 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 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.

a. 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."¹⁵² 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.¹⁵³

151 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>

152 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>

153 The U.S. Department of State, *Trafficking in Persons Report*, 7 (Jun. 2010) available at <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).

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 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.¹⁵⁴

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.¹⁵⁵ 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.”¹⁵⁶ 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.”¹⁵⁷ In that sense, NHRIs and their network can play a critical role. They can provide training programs, recommendations and guidelines to other

154 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.

155 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).

156 See The Special Rapporteur, *Report Submitted by the Special Rapporteur on Trafficking in Persons, Especially Women and Children, delivered to the U.N. Human Rights Council*, UN Doc. A/HRC/14/32 (May. 4, 2010),.

157 *Id.*

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-trafficking legislation, and investigate human rights issues linked to trafficking.¹⁵⁸

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),¹⁵⁹ the Sixth (Colombo, 2001),¹⁶⁰ the Seventh (New Delhi, 2002),¹⁶¹ the Ninth (Seoul, 2004)¹⁶² 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 fight 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.¹⁶³ 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.¹⁶⁴

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

158 Asia Pacific Human Rights Network, *Tackling Trafficking: Progress Paper on the Role of NHRIs*, 2-3, (Feb. 2004).

159 See Anne Gallagher, *supra* note 155. Participants discussed the role of NHRIs in addressing trafficking of women and children. *Id.*

160 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.*

161 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.*

162 See Suraina Pasha, *supra* note 153, at 5-6.

163 *Id.*

164 The Special Rapporteur, *supra* note 156, at 6-7.

require not only actions at the national level, but also cooperation at the regional and international levels.”

b. 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 victims 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.”¹⁶⁵ 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.¹⁶⁶ 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 also physically attend and provide information orally in the meetings allocated to them in the pre-session working groups and sessions of the Committee.*¹⁶⁷

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.¹⁶⁸

165 See The APF, *Issues: Women’s Rights*, <http://www.asiapacificforum.net/issues/womens-rights>.

166 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*, UN Doc. CEDAW/C/2008/1/CRP.1 (Jan 14, 2008).

167 *Id.*

168 See The Asia Pacific Forum [APF], *Background Paper: The Role of National Institutions in Addressing Discrimination against Women*, (Jakarta, 1998).

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.¹⁶⁹

Member NHRIs also agreed to hold a workshop on the advancement of women's human rights in consultation with human rights NGOs in 2000,¹⁷⁰ and at the Fifth Annual Meeting, they discussed the recommendations of the workshop.¹⁷¹ 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," 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).¹⁷²

c. 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.¹⁷³ They are considered "the world's largest minority."¹⁷⁴ 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

169 See The APF, *The Role of National Institutions in Advancing the Human Rights of Women* (Manila, 1999).

170 *Id.*

171 See The APF, *The Role of National Human Rights Institutions in Advancing the International Human Rights of Women* (Rotorua, 2000).

172 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).

173 U.N. Enable, *Factsheet on Persons with Disabilities*, <http://www.un.org/disabilities/default.asp?id=18>.

174 *Id.*

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.¹⁷⁵ 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 people with disabilities.¹⁷⁶

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.”¹⁷⁷ 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.¹⁷⁸

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].”¹⁷⁹ Article 33 of the CRPD stipulates national implementation and monitoring as:

175 The APF, *Report on the Proposed UN Convention on the Rights of People with Disabilities*, 2 (New Delhi, 2002).

176 *Id.*

177 G.A. Res. 168, U.N. GAOR, 56th Sess., Supp. No.?, U.N. Doc. A/RES/56/168 (Dec. 19, 2001)..

178 See The APF, *Issues: Disability*, <http://www.asiapacificforum.net/issues/disability>.

179 The APF, *Disability Issues Paper: NHRIs and National Implementation & Monitoring of the Convention on the Rights of Persons with Disabilities*, 3-4, (Sydney, 2007).

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.

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.*¹⁸⁰ (*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.

d. Rights of Human Rights Defenders

The term ‘human rights defenders’ describes any individuals or groups of people who promote and protect human rights.¹⁸¹ In the Asia-Pacific region, human rights defenders have continuously been “subjected to assassinations, disappearances, illegal arrest and detention, and torture,”¹⁸² even in democratic

180 Art. 33 of the Convention on the Rights of Persons with Disabilities, (Dec. 13, 2006), UN Doc. A/61/611.

181 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/humanrightsdays/2010/about.shtml>.

182 U.N. General Assembly, *Annual Reports by the Special Rapporteur*, 9, UN Doc. A/57/182, (Jul. 2002).

countries with the excuse of national security and public order.¹⁸³ 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 (the Declaration on Human Rights Defenders).¹⁸⁴ However, the Declaration is not a legally binding instrument and is not widely recognized in most Asian countries.¹⁸⁵ 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 1999.¹⁸⁶ 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.¹⁸⁷

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 increase in attacks against human rights defenders in at least half of the APF member countries.¹⁸⁸ In parallel with this APF Annual Meeting, an International Human

183 See Asia Pacific Human Rights Network, *Background Paper: Human Rights Defenders* (Feb. 2004).

184 G.A. Res. 144, U.N. GAOR 53rd Sess., Supp. No.2 U.N. Doc. A/RES/53/144, (Mar. 8, 1999).

185 See Asia Pacific Human Rights Network, *supra* note 183.

186 See The APF, *Thematic Regional Workshops: Cooperation between NGOs and NHRIs*, <http://www.asiapacificforum.net/services/training/regional-workshops/non-government-organisations>

187 The APF, *Concluding Statement of the 11th Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions* (Aug. 2006).

188 The APF, *Concluding Statement of the 12th Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions* (Sep. 2007).

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.¹⁸⁹ 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.¹⁹⁰

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.¹⁹¹ In response, the APF organized human rights defenders training programs for member NHRIs at the sub-regional level, workshops for South East Asia NHRIs (2007), for West Asia NHRIs (2008), and for South Asia NHRIs (2009).¹⁹²

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.

189 *Id.*

190 The APF, *Report of the 13th Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions*, 24 (Jul. 2008).

191 See The APF, *NGO Statement of Human Rights Defenders at the 14th Annual Meeting* (Aug. 2009).

192 See The APF, *Training Program: Human Rights Defenders* <http://www.asiapacificforum.net/services/training/hr-defenders>.

e. Prevention of Torture

Torture is prohibited under a number of international human rights treaties including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),¹⁹³ 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."¹⁹⁴

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.¹⁹⁵

The APF emphasized the role that NHRIs can play against torture in seven areas.¹⁹⁶ 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

193 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, at 197 U.N. GAOR, Supp. (No. 51), U.N. Doc. A/39/51 (Dec. 10, 1984).

194 *Id.*

195 See The APF, *Report of the 10th Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions* (Aug. 2005).

196 See The APF, *PREVENTING TORTURE: AN OPERATIONAL GUIDE FOR NHRIs* (May. 2010); see also The ACJ, *Final Report: Reference on Torture* (Dec. 2005).

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 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.¹⁹⁷

f. 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.*¹⁹⁸

197 See The APF, Training Program: Prevention of Torture, <http://www.asiapacificforum.net/services/training/prevention-of-torture>.

198 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.¹⁹⁹ 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.²⁰⁰ 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.²⁰¹

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, ASEAN, or the 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 along the same lines, those intergovernmental regional organizations try to avoid taking positions on internal affairs of member states.²⁰²

199 U.N. Convention Relating to the Status of Refugees, (Jul. 28, 1951), the U.N. Treaty Series, Vol. 189, at 137.

200 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>

201 The Internal Displacement Monitoring Centre (IDMC), *Id.*, at 83.

202 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)

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.²⁰³ They also pointed out the potential role of NHRIs in preventing situations of forced displacement and promoting equitable return and reintegration.²⁰⁴

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.”²⁰⁵

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.

203 See Summary Report, *Regional Conference on Internal Displacement in Asia*, (Bangkok, Feb. 22-24, 2000).

204 *Id.*

205 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, *Thematic Regional Workshops: Internally Displaced Persons* <http://www.asiapacificforum.net/services/training/regional-workshops/idp>.

g. 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.²⁰⁶ The U.N. International Migration Report in 2006 shows that Asia is home to more than 53 million of these global migrants.²⁰⁷

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.”²⁰⁸ Most Asian governments maintain temporary labour-migration policies which strictly control the right of migration and forbid permanent settlement and family visits, thus denying basic human rights.²⁰⁹ 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.”²¹⁰ In 1990, the U.N. adopted the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (MWC, entered into force in 2003)²¹¹ 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.

206 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).

207 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

208 Stephen Castles and Mark J. Miller, *Migration Information Source: Migration in the Asia-Pacific Region*, (Migration Policy Institute (MPI)), Jul. 2009.

209 *Id.*

210 Amnesty International, *Report 2010: Asia and the Pacific* <http://thereport.amnesty.org/regions/asia-pacific>.

211 Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, Annex, at 262 U.N. GAOR Supp. (No. 49A), UN Doc. A/45/49 (1990).

Since the First APF Annual Meeting in 1996, the APF and member NHRIs have recognized the necessity for the effective protection of migrants' rights.²¹² 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.²¹³ 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 Asia (the Seoul Guidelines).²¹⁴ 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."²¹⁵ 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

212 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.*

213 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).

214 *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) available at <http://www1.umn.edu/humanrts/instree/Seoul-Guidelines.html>.

215 *Id.*

the regional level, both bi-laterally 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 Seoul 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 a starting point for building legally binding regional arrangements on the rights of migrants in Asia in the future.

b. The Environment

Beginning with the 1972 U.N. Conference on the Human Environment (the Stockholm Conference), followed by the 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,²¹⁶ international environmental law has significantly developed over the last few decades.²¹⁷ 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.²¹⁸ At the regional level, there are a number of arrangements dealing with human

216 See The Advisory Council of Jurists, *Background Paper: Human Rights and the Environment*, THE ASIA-PACIFIC FORUM (Sep. 2007).

217 William Beardslee, *International Law and the Environment: The Need for an Aggregate Organization*, 5 J. Int'l L & Prac. 379, 380 (1996).

218 See The APF, *Issues: Environment*, <http://www.asiapacificforum.net/issues/environment>

rights in Europe, Africa,²¹⁹ and the Americas.²²⁰ There are, however, no regional instruments applicable in the Asia-Pacific region that contain a human right to environment provision.

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].*²²¹

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.

i. Summary

So far I have reviewed eight human rights issues of common concern in this region and examined how the APF and NHRIs have worked together in those selected areas which have a potential to be developed into a legally binding

219 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 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).

220 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.

221 See The APF, *Annual Meetings: 12th Annual Meeting, Sydney, Australia, 2007* <http://www.asiapacificforum.net/about/annual-meetings/12th-australia-2007>

regional arrangement. In some 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.

2. 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.²²² Once there are sub-regional arrangements, they can build a human rights institution from the sub-regional to the regional level.

²²² 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.H.R & 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)

Indeed, Asia may be too large to have a regional human rights institution.²²³ 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.”²²⁴ Or, as Clarence Dias argues, it might be true that “there is no such thing as Asia but there are different sub-regions,”²²⁵ and each sub-region has a common context in terms of history, religion, culture, or level of economic development.²²⁶ Therefore, as a starting point, the establishment of sub-regional human rights mechanisms is important for the protection of human rights in this region.²²⁷

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)²²⁸ in South Asia, the Association of Southeast Asian Nations (ASEAN)²²⁹ in South-East Asia, and the Pacific Islands Forum (PIF)²³⁰ 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.²³¹

223 Hidetoshi Hashimoto, *THE PROSPECTS FOR A REGIONAL HUMAN RIGHTS MECHANISM IN EAST ASIA*, 134-5 (2004).

224 Virginia Leary, *The Asian Region and the International Human Rights Movement in ASIAN PERSPECTIVES ON HUMAN RIGHTS*, 16 (Virginia A. Leary and Claude E. Welch eds., 1990).

225 Hidetoshi Hashimoto, *supra* note 112, at 134-5.

226 *Id.*

227 *Id.* See also Dinah L. Shelton, *REGIONAL PROTECTION OF HUMAN RIGHTS*, 1055-6 (2008).

228 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>

229 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>

230 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>

231 Hidetoshi Hashimoto, *supra* note 112, at 134-5.

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.

a. 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 on human rights”.²³² 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, 1998.²³³

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.²³⁴ 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.²³⁵ 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.²³⁶ The ASEAN, however, has long faced

232 Joint Communiqué of the Twenty-Sixth ASEAN Ministerial Meeting, Para.18, Singapore (Jul. 23-4, 1993).

233 Joint Communiqué of the Thirty-First ASEAN Ministerial Meeting, Para.28, Manila, Philippines (Jul. 24-5, 1998).

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

235 *Id.*

236 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>

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).²³⁷

In 2007, member states finally adopted the ASEAN Charter at the thirteenth ASEAN Summit,²³⁸ which contains a commitment to establish a regional human rights body as an organ of ASEAN under Article 14 of its Charter:

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.²³⁹ (emphasis added).

In 2008, the Charter came into force with 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).²⁴⁰ The HLP proposed that the AHRB 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 1993,²⁴¹ when there were four ASEAN countries with NHRIs.²⁴² In 2007, they made an official commitment, the Declaration of Cooperation, to work together

237 Termsak Chalermpananupap, *10 Facts about ASEAN Human Rights Cooperation*, <http://www.aseansec.org/HLP-OtherDoc-1.pdf>.

238 *ASEAN Finalises Historic Charter*, BBC News (Nov. 19, 2007).

239 See Association of Southeast Asian Nations, *THE ASEAN CHARTER*, (ASEAN Secretariat, 2008) available at <http://www.aseansec.org/ASEAN-Charter.pdf>

240 *ASEAN Secretariat: ASEAN Charter Fully Ratified*, The China View, (Oct. 21, 2008) available at http://news.xinhuanet.com/english/2008-10/21/content_10229587.htm

241 See Summary of Proceedings, First Workshop for an ASEAN Regional Mechanism on Human Rights, Para.4, 12.l)vi), 13.iii), Jakarta, (Jul. 5-6, 2001). See also *ASEAN National Working Groups*, <http://www.aseanhrmech.org/nwgs/index.html>

242 The Philippines, Indonesia, Malaysia, and Thailand have NHRIs. They were established respectively in 1987, 1993, 1998 and 1999.

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.²⁴³ The Declaration envisages an advisory role for the NHRIs; i.e. that they will advise their governments on the steps that can be taken to establish an ASEAN human rights mechanism.²⁴⁴ 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*.²⁴⁵ The Working Group also emphasized the role of NHRIs in establishing an ASEAN human rights arrangement at its annual meetings²⁴⁶ by stating that the “Working Group believes that cooperation among NHRIs is a precursor to an intergovernmental human rights mechanism.”²⁴⁷ 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.²⁴⁸

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

243 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 Rights Institutions of Indonesia, Malaysia, the Philippines, and Thailand on Human Rights Aspects of the ASEAN Charter*, (Jun. 26, 2007) available at http://www.aseannhriforum.org/attachments/012_positionpaper_bali.pdf.

244 *Id.*

245 See ASEAN, *The ASEAN National Human Rights Institutions (NHRI) Forum*, <http://www.aseannhriforum.org/en/about-us.html>; See also Vitit Muntarbhorn, *supra* note 144.

246 See Summary of Proceedings, Sixth Workshop on the ASEAN Regional Mechanism on Human Rights, Para.7, Manila, Philippines (Jul. 16-7, 2007).

247 Working Group for an ASEAN Human Rights Mechanism, *The Promise of an ASEAN Human Rights Mechanism*, <http://www.aseanhrmech.org/aboutus.html>.

248 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>.

have been concerns from the civil society and human rights NGOs during the process of establishing this sub-regional human 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.*²⁴⁹

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.”²⁵⁰ 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 Myanmar, which is one of its members.²⁵¹

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 promotion and protection of human rights, conducting studies on thematic issues as well as preparing reports to the ASEAN Foreign Ministers Meeting.²⁵²

249 Termsak Chalermpananupap, *supra* note 237, at 4.

250 Alexander C. Chandra and Rafendi Djamin, *ASEAN ‘People’s Charter’ to Advance Civil Society*, The Jakarta Post (Nov. 19, 2007).

251 *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).

252 See *Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights, Mandate and Functions* <http://www.aseansec.org/publications/TOR-of-AICHR.pdf>

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.”²⁵³ Similarly, stressing that “the ASEAN is after all intergovernmental...not inter-people,”²⁵⁴ 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.²⁵⁵

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 transformation “into a rules-based, legal entity through the adoption of an ASEAN Charter,”²⁵⁶ because human rights issues in the region are now totally legitimate.²⁵⁷ 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.²⁵⁸ I believe that even

253 Pravit Rojanaphruk, *Human Rights in ASEAN Seen as a Paper Tiger*, The Nation (Oct. 15, 2010).

254 *Id.*

255 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.*

256 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>

257 Pravit Rojanaphruk, *supra* note 253.

258 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).

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.

b. 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 SAARC 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 Child Welfare in South Asia.²⁵⁹ 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 9.²⁶⁰ The latter provides for regional arrangements among member states in the arena of child rights and development in its Article 5.²⁶¹ 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.²⁶² 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

259 See South Asian Association on Regional Cooperation, SAARC Conventions <http://www.saarc-sec.org/SAARC-Conventions/63/>.

260 SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution <http://www.saarc-sec.org/userfiles/conv-trafficking.pdf>.

261 SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia <http://www.saarc-sec.org/userfiles/conv-children.pdf>.

262 Vitit Muntarbhorn, *Discussion Paper on Exploring the Window of Opportunities*, *supra* note 255, at 3.

*of society; promote gender equity; promote the welfare and interest of children and youth; promote social integration and strengthen civil society.*²⁶³

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.”²⁶⁴

The first non-governmental sub-regional Workshop on a South Asian Human Rights Mechanism was held in 2010 with 70 NGO participants.²⁶⁵ 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.²⁶⁶ 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.*²⁶⁷

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.

263 SAARC Social Charter, <http://www.eias.org/luncheons/saarc220104/socialcharter.pdf>.

264 See SAARC, *Area of Cooperation: SAARC Social Charter* http://www.saarc-sec.org/areaofcooperation/detail.php?activity_id=7

265 Forum-Asia, *SAARC Must set up a Human Rights Mechanism in South Asia* (Mar. 25, 2010).

266 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.*

267 *Id.*

c. 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. 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 region²⁶⁸ in 1985 at a meeting in Fiji. A draft Pacific Charter of Human Rights was adopted at a subsequent meeting in Samoa in 1989.²⁶⁹ 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 1971,²⁷⁰ 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 participate by means of free and democratic political process in framing the society in which he or she lives.*²⁷¹

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.*²⁷²

268 The Law Association for Asia and the Pacific, <http://lawasia.asn.au/>

269 See Fernand de Varennes ed., *Pacific Charter of Human Rights*, ASIA-PACIFIC HUMAN RIGHTS DOCUMENTS AND RESOURCES VOL. 1, (1998).

270 The Pacific Islands Forum Secretariat, <http://www.forumsec.org.fj/>.

271 The Biketawa Declaration, Kiribati (Oct. 2000).

272 The Auckland Declaration, Pacific Islands Forum Special Leaders' Retreat, Auckland (Apr. 6, 2004).

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.²⁷³ 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.²⁷⁴

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.²⁷⁵ 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 human rights negatively.²⁷⁶ 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.²⁷⁷

All those recent developments show that there have been two main obstacles in 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

273 The Eminent Persons' Group Review of the Pacific Islands Forum (Apr. 2004).

274 The Pacific Plan for Strengthening Regional Cooperation and Integration, 18-9 (Nov. 2007).

275 The APF, *Pacific Islands Human Rights Consultation* <http://www.asiapacificforum.net/services/training/regional-workshops/pacific-islands>.

276 Pacific Islands Human Rights Consultation, *Concluding Statement and Recommendations*, Suva, Fiji Islands, (Jun. 2004).

277 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).

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 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.²⁷⁸

3. Strengthening the Role of the APF

My third suggestion of how NHRIs can be a driving force for the establishment of RHRI 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.”²⁷⁹

Indeed, 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 RHRI, 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

278 Petra Butler, *A Human Rights Charter for the Pacific*, 3 HUM. RTS. RESEARCH J. (Victoria University of Wellington, 2005).

279 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 UN Doc. E/CN.4/2006/NI/1 (Mar. 24, 2006).

report, discuss and share information of human rights violations in the region, based on international human rights standards. Further, they can be a forum for all stakeholders to intervene and reflect their concern 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 could 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 for 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,²⁸⁰ 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 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

280 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.

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.²⁸¹ 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 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.

281 The APF, *APF Members to Consider Five-year Strategic Plan*, <http://www.asiapacificforum.net/news/apf-members-to-consider-five-year-strategic-plan.html>.

4. 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. It is unlikely that a single integrated human rights arrangement for all Asian countries will emerge 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.

VI. CONCLUSION

This paper first examined the very nature, role and functions of NHRIs at the national, regional and international level, and based upon the analysis on them, provided three reasons why NHRIs can be a driving force for establishing RHRIs in the Asia-Pacific region.

Noha Shawki categorizes the basic functions of NHRIs as regulative and constitutive:

[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.*²⁸²

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 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

282 Noha Shawki, *supra* note 148, at 43.

supported and promoted the creation of NHRIs and their networks for a long time. 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.²⁸³

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. Thus, 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.

This paper, then, 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.

283 See The Secretary General, *Regional Arrangements for the Promotion and Protection of Human Rights in the Asian and Pacific Region: Report of the Secretary-General* - para.4-7. UN Doc. E/CN.4/1999/94 (Mar. 15, 1999); See also The Secretary General, *Regional Arrangements for the Promotion and Protection of Human Rights in the Asian and Pacific Region: Report of the Secretary-General* para.28-30 UN Doc. E/CN.4/1999/93 (Feb. 19, 1999).

The second one is establishing RHRIIs 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 strengthened domestic environment for effective implementation of international human rights standards. It will ultimately move governments to establish RHRIIs 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 RHRIIs and the recognition that it is necessary to have a regional human rights protection system.

The last suggestion is to begin establishing RHRIIs 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 establishment, NHRIs have worked as key players 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 RHRIIs in the Asia-Pacific region.