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## A Human Rights Mechanism for ASEAN?

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Regional intergovernmental human rights mechanisms have been established by regional international organizations in most of the world. The Council of Europe, by treaty, created the European Court of Human Rights. The Organization of American States established, by treaty, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The African Union has also established an African Commission on Human and Peoples' Rights as well as the African Court of Human and Peoples' Rights. Asia has no overarching regional international organization. However, ASEAN recently adopted a Charter that is now being ratified by the ten founding member states. The Charter contemplates the creation of an eventual regional human rights mechanism for human rights. This prospect is the culmination of the efforts of ASEAN's working group on human rights, composed of government representatives, non-governmental human rights organizations and academicians.

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**I**t may seem quixotic but I believe that South East Asia needs an international human rights mechanism, particularly in light of its past and especially if it hopes to prosper in the future.

Of course, this is hardly a new idea. As long ago as 1993 the foreign ministers of the Association of South East Asian Nations (ASEAN) issued a declaration that "ASEAN should also consider the establishment of an appropriate regional mechanism on human rights".<sup>1</sup> And since that time a joint governmental/civil society working group has kept the idea alive, even preparing a draft treaty for that purpose. With the promulgation of the ASEAN Charter at the organizations' XIII Summit in Singapore on November 20, 2007 it appears the establishment of some sort of intergovernmental human rights body is in the offing.

In this paper, I will examine the experiences of the United Nations and a number of regional international organizations and their efforts to promote and protect human rights by advancing relevant international law and the

practice of their respective human rights bodies. Next I will revisit ASEAN and look more carefully at the countries' political, economic and historical experiences and see what, if any, lessons might be derived from the UN and the regional inter-governmental human rights mechanisms from around the world. Finally, I will formulate some concrete proposals with accompanying justifications for setting in motion a process aimed at pushing along a movement whose time has come, will not disappear, and will only increase in importance in the future where news is practically instantaneous and old notions of state sovereignty are on the wane.

### UNITED NATIONS

With the adoption of the Universal Declaration of Human Rights,<sup>2</sup> the UN has been the arena, during and since the cold war, of a fitful development of treaties and organs for the purpose of educating people regarding their rights and corraling state power to reduce the incidence of human rights violations. In practice and law, the UN human rights umbrella covers two parallel systems, one based on the UN Charter<sup>3</sup> and the other on a series of human rights treaties.

The so called Charter based mechanism included the UN Human Rights Commission, now restructured and renamed the UN Human Rights Council, served by the High Commissioner for Human Rights.<sup>4</sup> At present, that post is held by Louise Arbour, though she has just announced her forthcoming retirement upon completion of her four year term. She and her staff are located in Geneva, Switzerland. Under this same system, historically quite politicized, the UN, nevertheless, has addressed a number of particularly egregious situations of massive, gross and systematic violations. Furthermore, the Council, *nee* Commission, with its 53 members, is elected by the General Assembly. Over the years it has established a number of sub-mechanisms which enjoy widespread respect and credibility.<sup>5</sup> They include the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, a body of independent experts, whose studies and findings, members and aides have contributed significantly to the advancement of the international law of human rights.

Again on the Charter based side of the ledger, the UN has instituted the practice of designating thematic and country rapporteurs and experts whose mandates include numerous areas of human rights and whose influence in many situations has been considerable.

The UNHR Council has the ECOSOC authorization to receive and process communications and although the procedures are confidential until the very end and only concern instances of reliably attested allegations of massive, gross and systematic violations, it still has served to focus UN attention on numerous large scale and flagrant human rights violations.<sup>6</sup>

The other pillar of UN human rights work is a collection of general and specific human rights treaties. The former, include the International

Convention on Civil and Political Rights (ICCPR)<sup>7</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>8</sup> which together with the Universal Declaration are referred to as the International Bill of Rights. It is notable that 148 UN member states have ratified the ICCPR and 145 of the ICESCR out of a total number of 191 member countries.

What's more, under the ICCPR, 99 states parties have ratified that treaty's first protocol, thereby expressly accepting the competence of a special treaty body, the UN Human Rights Committee, for purposes of receiving and examining individual complaints alleging human rights violations committed by state agents.<sup>9</sup> While not a court, the Committee's "views"—in reality, findings—constitute a respected and growing body of jurisprudence often cited by governments as well as international and domestic human rights commissions and courts around the world.

In addition, under United Nations' aegis, a number of specialized treaties have been drafted and are in force in many countries. These include the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention on the Elimination of Racial Discrimination (CERD),<sup>10</sup> the Convention on the Elimination of Discrimination Against Women (CEDAW),<sup>11</sup> the Convention on the Rights of the Child (CRC),<sup>12</sup> the Convention Against Torture and of the Cruel, Inhuman or Degrading Treatment (CAT),<sup>13</sup> not to mention numerous treaties of the International Labour Organization (ILO)<sup>14</sup> aimed at defining and protecting workers' rights as well as indigenous peoples. On this score the UN Council has given access to representatives of indigenous groups who have participated for years in a special forum in Geneva, the Council's seat. This process culminated last year with the adoption of the United Nations Declaration of the Rights of Indigenous Peoples by the UN General Assembly.

The UN's thematic treaties call for the establishment of committees of experts who play a supervisory role in overseeing state compliance. In addition, these committees receive and assess state reports submitted periodically as part of the treaties' enforcement mechanisms.

Besides these bodies, one can view the UN family of agencies such as the Food and Agricultural Organization (FAO)<sup>15</sup> in Rome, the UN Education, Science and Cultural Organization (UNESCO),<sup>16</sup> headquartered in Paris, the World Health Organization (WHO)<sup>17</sup> at Geneva, and the UN Development Programme (UNDP)<sup>18</sup> in New York, as focusing on the cluster of ECOSOC rights. Even intellectual property, another protected right, is fostered by the World Intellectual Property Organization (WIPO).<sup>19</sup>

In sum, the United Nations in the last half century has established a plethora of bodies mandated to promote and protect human rights throughout the world. Following the creation of four ad hoc international criminal tribunals for former Yugoslavia,<sup>20</sup> Rwanda,<sup>21</sup> Sierra Leone,<sup>22</sup> and Cambodia,<sup>23</sup> the United Nations adopted the Statute of Rome<sup>24</sup> establishing the International Criminal Court which has recently issued its first indictments and is in the process of trying its first case. All of these courts have been contrived to judge

individuals, governmental and non-governmental persons accused of the most serious international offenses. These include genocide, war crimes and crimes against humanity.

The sprawling, expensive, complex and varied character of the UN's mechanisms, to be properly understood, must be seen in the context of international power politics, economics and ideology. They reflect the art of the possible at given moments in conflictive environments through consensus where possible. With all their flaws, and at times, overlapping competencies, all in greater or lesser measure have played useful roles in discouraging or in ameliorating human rights violations.

## EUROPE

In human rights circles, the European Court of Human Rights<sup>25</sup> in Strasbourg, France, is viewed with respect and envy. A creature of the Council of Europe<sup>26</sup> composed today of 46 member states and the European Convention for the Protection of Human Rights and Fundamental Freedoms, a basic treaty, modified and strengthened by thirteen protocols, the Court with 46 judges and professional staff of 600 lawyers, annually issues thousands of judgments, frequently finding state responsibility for the violation of rights set forth in the Convention. Since its adoption in 1950, originally with a European Commission on Human Rights which, *inter alia*, served to screen cases going to the Court, the Council of Europe, through its political organ, the Committee of Ministers,<sup>27</sup> oversees compliance by member states with judgments handed down by the Court. An important novelty of the European Court is that victims may present petitions to it directly, once they have exhausted domestic remedies.

In addition, the Brussels based European Union (EU),<sup>28</sup> promulgated the Charter of Fundamental Rights in the year 2000.<sup>29</sup> In effect, it constitutes a proto European bill of rights and could form part of an eventual constitution for all of Europe. Apart from the European Court system, the Council of Europe has established two additional human rights mechanisms. The first, a committee of experts under the European Convention for the Prevention of Torture and Inhuman or Degrading Punishment by which states parties agree to allow virtually unlimited access to all places of detention and private access to all prisoners.<sup>30</sup> The second institution, established in 1997, provides for the election of a European Commissioner for human rights. His mandate is non-judicial and essentially educational and promotional. The current commissioner is Thomas Hammarberg.<sup>31</sup>

When examining the European human rights mechanisms treaty based on the ratification or adherence of all member states, it is easy to overlook the slow evolution that marked the development of the European human rights system. For example, the European Court of Human Rights during its first decade was not called on to decide a single case. Moreover, only by incrementally enlarging notions of what constitute human rights through a

process of additional protocols, has Europe been able to forge and define, and amplify and alter new rights.

Again there is a tendency to look at the high standard of living achieved in Europe and the pace of economic integration, especially from the vantage point of the developing world and forget the centuries of religious wars, witch burnings, inquisitions, and pogroms culminating in the Nazi holocaust, that made the establishment of institutions of justice on the national and international levels an imperative for all European states.

Even today, Europe is not out of the woods. With the collapse of socialism, the eruption of old ethnic hatreds, particularly in the Balkans, and simmering impatience of its immigrant populations coupled with the challenges of international and domestic terror, Europe, like every other region of the world, faces ongoing challenges. Phenomena like xenophobia, skin head violence and the like promise to continue to test the strength of Europe's institutions.

At the same time Europe has stood firm in insisting that eastern European countries seeking admission to the Council of Europe and the EU meet the treaty obligations established in the European Convention and Charter. These requirements, including the harmonization of domestic legislation, are prerequisites for European countries seeking admission to the rich united states of Europe.

So while Europe today unquestionably has evolved the most sophisticated and comprehensive regional human rights mechanisms, like all ongoing social endeavors, it has its work cut out, not the least of which, by the way, is a backlog of thousands of cases before the European Court.

## AFRICA

Fifty-three out of fifty-four African countries belong to the African Union (AU),<sup>32</sup> which was previously known as the Organization of African Unity (OAU). In 1979 under the chairmanship of the Senegalese jurist, Professor K. M'Baye, African human rights experts drafted the Continent's basic human rights treaty—the African Charter on Human and People's Rights.<sup>33</sup> The instrument refers to the Universal Declaration in its preamble and proceeds to enumerate the standard canon of civil and political rights, albeit with some disturbing clawback clauses. The multilateral treaty also contains a number of economic, social, and cultural rights. Much emphasis is placed on the rights of self-determination and development. But perhaps the Charters' most significant contribution (or departure from orthodoxy, depending on one's point of view) to the international law of human rights is in the elaboration of so called peoples' rights, including those of nations, tribes, clans, and families. These are of collective rights intended to be enjoyed by communities. The African Charter, uniquely, sets forth a number of duties incumbent on citizens such as responsibility for children, parents and the like. The Charter also has a protocol on the rights of women adopted in 2001.

In addition, the African human rights system has produced the African Charter on the Rights and Welfare of the Child which came into force in 1999.<sup>34</sup> In order to monitor state compliance with its treaty obligations the Charter provides for a Commission, an individual case procedure, and a reporting procedure whereby states agree to submit periodic accounts of their actions in the field of human rights.<sup>35</sup>

The AU, with its headquarters in Addis Ababa, Ethiopia is particularly underfunded. This has been an important limitation on the operations of the African Commission on Human and People's Rights. The Commission is composed of 11 persons, nationals of AU countries who are nominated by governments for five-year terms. They are elected by secret ballot during the AU's annual Assembly of Heads of State and Government. Once elected, commissioners serve in their individual capacity, that is, not as representatives of their governments but in the best interests of all Africans. Their job is to monitor and report upon state conduct with respect to the provisions of the Charter.<sup>36</sup>

The Charter entered into force in 1986 and the first African Commission commenced its work the following year at its seat in Banjul, the Gambia. With the assistance of a number of European countries, non-governmental organizations like the International Commission of Jurists, the Raoul Wallenberg Institute, and the African Institute on Human Rights and Development, not to mention many volunteers, members of the bar and student interns, the African Commission has begun to issue some interesting case decisions. It has also conducted a fair number of on-site human rights visits to various countries and has published several country reports, particularly on penal conditions in different countries.

With respect to State reporting procedures, the African compliance record has been dismal and there is an ongoing debate on whether this chronic problem is mostly a function of bureaucratic inertia, lack of skilled human resources, bad faith, or elements of all three.<sup>37</sup> Whatever the reasons, it seems that a genuine effort is called for to change or simplify or perhaps eliminate a procedure that is, by and large, only honored in the breach, thereby bringing the Charter, the Commission, and the AU as a whole into disrepute.

Paradoxically, notwithstanding extraordinary dramas like those that have taken place in Rwanda, Burundi and Sierra Leone and are now occurring in Darfur, Sudan, Kenya, Chad, eastern Democratic Republic of the Congo and Zimbabwe, the AU has adopted an ambitious plan for the future. In economics the New Plan for African Development (NEPAD)<sup>38</sup> calls for multi-party, representative democracy, good governance, and steps towards economic integration. All of these goals are subject to a peer review procedure. At the same time, the new AU constitutive statute contemplates an African parliament, monetary fund, development bank, and African court of justice modeled on the EU's Court of Justice in Brussels.

While it remains to be seen whether and how these aims are achieved, African leaders have also set their sights on the establishment of a court of

human rights similar to the Council of Europe's Court of Human Rights in Strasbourg. The Protocol to the African Charter on Human and Peoples' Rights for the Establishment of the African Court of Human and Peoples' Rights<sup>39</sup> has now been ratified by 22 African states, seven more than the number required for the treaty to enter into force. And early in 2007 the first 11 judges were elected to the Court. The Court's seat has been fixed in Arusha, Tanzania, currently the site of the ICTR. In the near future, the AU intends to create a Court of Justice to adjudicate economic and AU community and labor cases. For reasons of economy, the Court of Justice and the Human Rights Court are to be merged into a single entity.

So while Africa continues to be beset by horrific situations like those in Sudan and Chad, and seemingly intractable ones as in Ethiopia and Ivory Coast, or the even tighter institutionalized oppression of Eritrea and Zimbabwe, another strong current is at work. Countries like South Africa, Botswana, Tanzania, Kenya, Benin, Ghana, Rwanda, Senegal, the Gambia, Liberia, Togo, Mauritania, and Mali are pushing for a more developed and robust international human rights mechanism. Curiously, one who most helped to finance the transition from OAU to AU was the Libyan leader, Mohamar Khaddafi. Whether his largesse continues to underwrite the establishment of the African Court of Human and Peoples' Rights remains to be seen.

#### THE AMERICAS

The so called Inter-American System, today composed of several international organizations, principally the Organization of American States (OAS), traces its roots to 1889 when the United States Secretary of State James G. Blaine, invited his fellow foreign ministers—17 at the time—to Washington, D. C. to discuss trade and commercial relations in the hemisphere. The first meeting took place in Washington, D.C. the following year and led to a series of periodic International Conferences of American Republics held every few years in different American capitals to consider matters of mutual concern. Another result of that first encounter was the creation of a small, permanent international staff called the Commercial Bureau of American Republics located in Washington, D.C. which eventually evolved into the General Secretariat of the OAS.<sup>40</sup> The overall organization was known as the International Union of American Republics. Like ASEAN until recently, it had no formal constitution.

Some of the early work of the International Union dealt with recognizably human rights matters such as women's suffrage and child labor. The institution was later renamed the Pan American Union. Its conclaves of foreign ministers focused generally on more traditional issues of international law and relations with an emphasis on forging treaties and model national laws on subjects like asylum and the elaboration of the Bustamante Code, an effort to codify private international law by treaty.<sup>41</sup>

Following World War II and in light of Article 52 of the UN Charter which expressly contemplated the establishment of regional intergovernmental organizations, the American foreign ministers met at Bogota, Colombia in 1948 to draft a charter under the renamed Organization of American States.<sup>42</sup> The OAS Charter, similar in many respects to the UN Charter but lacking a security council, established *inter alia*, a mutual defense alliance meant to assure that the advance of international communism would not spread to the new world. The Charter thus complemented the Inter-American Treaty of Reciprocal Assistance, the Rio Treaty, adopted a year earlier, emphasizing peace keeping and mutual defense.<sup>43</sup> At the same time, the American foreign ministers reflected their concern for development given the extreme poverty of most of the hemisphere's nations. So, as in the UN, the OAS would promote and guarantee peace, security and development through various mechanisms including a General Assembly, held annually, a meeting of consultation of foreign ministers in cases of emergency, and a permanent council of ambassadors of all member states posted to Washington and accredited to the OAS. The Organization also included two technical councils—one dealing with economic and social matters and the other with education, science, and culture. These have recently been merged into a single council for integral development.<sup>44</sup> Moreover, a permanent cadre of international civil servants headed by a secretary general (known before the war as the director general) was recruited and stationed in the US with branch offices throughout the Americas.

At the same time, the foreign ministers adopted the American Declaration of the Rights and Duties of Man, a good six months before the publication of the Universal Declaration of Human Rights by the UN that same year.<sup>45</sup> The American Declaration was a first attempt to codify basic human rights on the continent. Composed of rights and duties, it is a *mélange* of traditional civil and political rights (e.g., life, physical integrity, due process, free speech, and so on) and the then novel idea of social and economic rights (family, work, leisure, etc.). Further, until the adoption of the African Charter of Human and Peoples Rights many years later, it was the only multilateral human rights instrument that also set out duties for citizens including those of voters, tax payers, parents, and children. Today many of the norms in the Declaration constitute customary international law.

But if the work of the founding fathers (there were no mothers) was interesting and innovative in terms of articulating human rights, it was silent on the question of a human rights treaty and the creation of a human rights mechanism aimed at monitoring state compliance with the principles contained in the Declaration.

It was not until 1959 that the foreign ministers, by way of a resolution, established the Inter-American Commission on Human Rights.<sup>46</sup> The first Commission commenced its work in 1960 with precious few powers. Notably, it lacked the authority to receive individual petitions alleging human rights violations by state agents with the concomitant duty of OAS member states



to address such complaints. This weakness was remedied, however, in 1965 when the General Assembly modified the Commission's statute authorizing it to process individual communications.<sup>47</sup>

In the meantime, the Commission had established its usefulness in the region with its work with Cuban refugees fleeing the Island's revolution and in the wake of the US invasion of the Dominican Republic in 1965.<sup>48</sup>

Despite the right wing military dictatorships that ruled throughout most of Latin America and the tensions of the cold war, there was a continuing concern about creating a hemispheric human rights mechanism with enhanced powers on a more solid legal footing. So in 1969 a meeting of experts was convoked in San Jose, Costa Rica to prepare the American Convention on Human Rights that was opened to ratification the next year.<sup>49</sup> The American Convention, also known as the Pact of San Jose, which required 11 ratifications to enter into force, might well still be collecting dust but for the impetus given to the instrument by the US administration of President Jimmy Carter.<sup>50</sup>

Today 24 of the OAS's 35 member states have ratified or adhered to the American Convention on Human Rights. Notably and ironically, the United States is not one of them. Nor are Canada and a number of Caribbean island states. All South and Central American countries as well as Haiti, Barbados, Jamaica, Trinidad and Tobago, and Dominica are parties to the Convention.<sup>51</sup>

The American Convention deals almost exclusively with political and civil rights. They are classical ones. One of the innovative provisions, article 27, seeks to limit abuses of states of exception, historically a chronic pretext for military intervention in governance. The Convention sets up a seven-person Commission and an Inter-American Court of Human Rights composed of seven judges. The latter's seat is in San Jose while the Commission usually meets at OAS headquarters in Washington, D.C.<sup>52</sup> Commissioners and judges are nominated by member states and elected by secret ballot by the General Assembly of foreign ministers. They serve in their individual capacity. Commissioners serve for four years and judges for six. Each may be reelected once.<sup>53</sup>

Over the course of more than forty years the Commission has processed more than 15,000 cases, many involving multiple victims. It has conducted scores of on-site human rights investigations, always at the invitation or by consent of the state. These have taken place in virtually every country including the US and Canada and today are done routinely. The Commission and its staff attorneys have visited prisons, refugee camps, asylums, hospitals, prisoner of war camps, churches, union halls, media centers, and non-governmental human rights organizations, and conducted countless interviews. Its members routinely meet with heads of government and state, ministers, parliamentarians, judges, military leaders, ombudsmen, and police. It has penetrated remote areas in the Amazon and the Andes mountains, and held press conferences, seminars, and training programs throughout the region.<sup>54</sup>

Based on these efforts the Commission has published many country and thematic reports besides its annual report to the General Assembly. These, not surprisingly, have garnered much press attention and are highly regarded in human rights circles for their objectivity and even-handedness.<sup>55</sup>

In doing its work the Commission has proven its usefulness to the inter-American community, oftentimes offering good offices for humanitarian solutions to knotty problems and sometimes fostering dialogue in the midst of tense circumstances. Perhaps most importantly the Commission often can do and say things in a multilateral manner that states for political reasons are hesitant to do bilaterally.

With creation of the Court in 1980, the Commission took on a new function—that of vetting cases to be taken before the Court. However, this process got off to an excruciatingly slow start. It was not until the 1990s that a regular flow of cases to the Court became the norm. During the previous decade the Court only handed down judicial decisions in three cases.<sup>56</sup> For its first ten years the Court's work was limited primarily to the issuance of a number of advisory opinions in which it was asked to interpret various provisions of the Convention.<sup>57</sup>

Under the American Convention, a state party must by separate declaration accept the jurisdiction of the Court in order to subject itself to the Court's jurisdiction. In theory any OAS member state, however, may accept the Court's jurisdiction for a particular case, but in practice this has not happened.

The Convention also permits inter-state complaints if the states have expressly accepted the Courts' competence for this purpose. To date, however, unlike in Europe, there have been no inter-state complaints.<sup>58</sup>

When the Commission has determined that a human right contained in the American Declaration of the Rights and Duties of Man or the American Convention has been violated by a state agent of an OAS country and once domestic remedies have been exhausted or deemed ineffective, it may adopt a report that relates the allegations, examine proofs, hear witnesses and arrive at reasoned findings on both admissibility as well as the merits of individual cases.<sup>59</sup>

For non-states parties to the Convention, the Commission issues its individual case report and does follow up with the state to try to achieve compliance with its recommendations on reparations. It may not present the matter to the Court though, without the consent of the state concerned.<sup>60</sup>

For states parties, however, the Commission increasingly has presented its reports, in effect indictments, to the Court seeking a judgment and order of appropriate remedies. In the past 15 years the Court has decided well over one hundred cases, some of a collective or class action character and the level of compliance by states deemed to have violated the treaty has been impressive. The Commission and Court's track record in cases decided has been so effective in recent years that many states have preferred to negotiate friendly settlements with the victims at an earlier stage of the proceedings. It

is important to note that unlike in Europe, only the Commission may take cases to the Court.

The Court may also issue provisional measures in serious and urgent cases and where there is imminent danger of irreparable harm. Like injunctions, provisional measures have proved a useful tool for the Court.<sup>61</sup>

The American Convention on Human Rights has two additional protocols, one on economic, social and cultural rights and another on the elimination of capital punishment in signatory states.<sup>62</sup> Further, the Inter-American human rights system promulgated four additional human rights treaties. The first prohibits torture; the second makes forced disappearance universally punishable and subject to extradition for those responsible. A third treaty deals with the eradication of violence against women, and the final instrument seeks to eliminate discrimination against persons with disabilities.<sup>63</sup> It should be noted that the Commission under its standard setting mandate played an active role in the drafting and crafting of all of these agreements.

The Inter-American Commission, with all its limitations of staff, budget and, not infrequently, resistance from some member states, has proven a creative and constructive agent for the promotion and protection of human rights.<sup>64</sup> For example, as in the UN, the Commission has appointed both thematic and country rapporteurs to monitor human rights and interact with national, international and thematic NGOs. It has also managed to tiptoe through numerous political minefields by providing a forum for civil society, particularly non-governmental organizations and activists, church people, indigenous peoples, minority groups, and the like. By maintaining an open door policy and transparency, the Commission has garnered a reputation for integrity and impartiality and, by acting collegially, it has counter balanced any tendency to favor or prejudice particular interests.

The Court, likewise, has earned a solid reputation for the quality of its jurisprudence and for the creative evolution of appropriate reparations, sometimes of a communal or symbolic character.

With the end of the cold war and the resurgence of representative democracy in the Americas, and the admission of Canada and the West Indian states with their parliamentary tradition of rule of law, the OAS human rights organs have indeed made a significant contribution in boosting human rights mechanisms in the region. And while a glance at any newspaper will reveal that the region is hardly free from its legacy of political instability and economic injustice, things in the main are better now than they have been throughout most of its history.

## WEST INDIES

CARICOM, the Caribbean Economic Community composed of 15 member states, was created in 1973 to foster economic integration in the English speaking subregion. Recently the Community established a Caribbean

Court of Justice with a view to leaving the British Commonwealth system's resort to the UK's Privy Council as a court of last instance. Presently, CARICOM leaders are debating the adoption of a draft treaty on human rights and the possibility of enlarging the Caribbean Court of Justice's mandate to include litigation of human rights cases under the new treaty. No definitive steps have been taken yet to launch this potentially new human rights mechanism but it is indicative of a trend toward greater concern for human rights on the regional level and bears watching.<sup>65</sup>

### REFLECTIONS

Having reviewed the United Nations varied undertakings in the field of human rights and, similarly, the principal characteristics of the three existing regional human rights mechanisms, what lessons might be derived?

The first commonality, it seems to me, is that all of these projects are works in progress. Indeed, the United Nations, now over sixty years old, recently changed the name and mode of selecting its principal Charter-based organ; the "Commission" is now a "Council" and membership on the Council is to be based in the future, at least in part, on the respect for human rights of Council members' states.

Another common denominator one gleans from studying these various mechanisms is that they have all been established to assist member states and not primarily as adversaries or critics. Likewise, each of the systems was built on a consensus of member states attainable at a given historical moment.

Moreover, each universe of states collectively embraces enormous diversity. None of the groups of member states are particularly homogenous. Each is blessed with peoples of differing races and faiths, languages, and cultures. Each includes persons of wide and varying levels of economic well-being. Further, all of the groupings include indigenous peoples. Perhaps, most importantly, all of the groupings have experienced first hand the wages of war, the boot of repression and exploitation, and the consequences of a lack of rule of law on their societies and economies.

From Europe, ASEAN can learn the lessons of creativity and the benefits of holding member states accountable to high standards of respect for human rights. The European experience also teaches the value of incrementalism, the gradual and patient but inexorable expansion of notions of human rights and the concomitant strengthening and streamlining of the region's human rights mechanisms, principally the European Court. Finally, Europe demonstrates like no other part of the globe the inextricable relationship between free peoples and socially and economically prosperous peoples.

The Inter-American human rights mechanism teaches the value of creative work under the bland rubric of "promotion and protection." The Inter-American Commission and Court continue to dialogue with member states of the OAS. A glance at the various reforms of their respective rules of procedure reflect this willingness to codify and clarify their rules of conduct.<sup>66</sup>

The Commission—called a “pequeno demonio,” a “little devil” by one of its former distinguished presidents, Cesar Sepulveda of Mexico—pioneered the practice of on-site investigations and in recent years has shown great initiative through the work of its thematic rapporteurs.

The Inter-American human rights mechanism, precisely because it is incomplete, bifurcated, and unconsolidated, demonstrates the need to take the long view in matters of public international law in general and human rights law in particular. Multilateral action requires consensus or at least acquiescence on the part of doubters. Consensus comes with confidence building and small but sure steps. Perhaps this explains why the United Kingdom was hesitant for a long time before accepting the jurisdiction of the Court in Strasbourg, and perhaps, it is the reason why the UK is still debating acceptance of the euro in lieu of the pound sterling. In the OAS, the reluctance of the US to ratify the American Convention on Human Rights and accept the jurisdiction of the Inter-American Court may reflect a similar sense of caution, not to mention hubris. Lessons to be derived? Rome wasn't built in a day. We are talking about laying foundations for a new world order, a post cold war world.

Finally, it is important to keep in mind that the OAS launched its efforts on behalf of human rights during the height of the cold war and in a period in which most members were governed by right wing military dictatorships. The fact that several ASEAN states are presently governed by authoritarian regimes should not give way to cynicism or discouragement.

Africa with its enormity, a huge number of nation states, or perhaps, we should say multiple nations within states, plus its hundreds of languages, grinding poverty, chaotic governance, corruption and history of colonialism, slavery, and exploitation also offers lessons. There a majority of governments are forging ahead with the establishment of a court of human rights while the African Commission on Human and Peoples Rights continues to refine and enlarge its work. Meanwhile, AU peacekeepers carry out the thankless task of trying to save lives and restore order in places like the Sudan, Ivory Coast, and eastern Congo.

Indeed, if Africa can achieve consensus on the creation of regional mechanisms, how can other regions and subregions of the world argue that similar undertakings are not feasible in their parts of the planet?

and ASEAN?

When I prepared the original draft of this study, ASEAN was characterized by its loose affiliation and lack of a constitutive treaty. That has changed, or at least is in the process of changing. The member states of ASEAN adopted a Charter in November of last year that has thus far been ratified by Singapore and Malaysia. The others will presumably follow suit soon.

The document creates a legal entity endowed with juridical personality, a permanent secretariat and a headquarters in Jakarta, Indonesia. It also calls

for twice annual meetings of high level representatives of member governments.

While fairly bristling with assertions regarding national sovereignty, non-intervention in internal affairs of neighboring states and the principle of non-interference in the domestic affairs of foreign states, the Charter states: "ASEAN shall establish a human rights body" to operate, eventually, in accordance with the "terms of reference" to be set by ASEAN foreign ministers.

Press accounts on the Charter's adoption note that the creation of a human rights mechanism was the most contentious issue in the process of negotiation and that Burma, *aka* Myanmar, in particular, was resistant to the establishment of a human rights mechanism.

Human Rights Watch congratulated ASEAN for embracing the rule of law and respect for human rights in its new Charter, but warned against delay and politicization of the adoption of terms of reference for the regional mechanism. In addition, it expressed concern about treaty compliance and enforcement measures for states that fail to remedy human rights violations.

In light of these advances, and bearing in mind the hurdles yet to be cleared, I believe, ASEAN offers fertile ground for the establishment of a regional human rights mechanism. As I write, Asia in general is experiencing tremendous economic growth. ASEAN exists mainly to catalyze and foment such growth. However, sustained growth requires a stable environment and free thought and expression to allow for the creative possibilities of its thinkers and workers to maintain and accelerate that growth.

ASEAN countries already enjoy a certain consensus regarding some areas of human rights. All of its members have ratified the UN Convention on the Rights of the Child and most are parties to the UN Convention on the Elimination of Racial Discrimination. All have accepted the terms of the Universal Declaration of Human Rights and a number have accepted the UN Convention on the Elimination of Discrimination Against Women. Others have also adhered to the UN Covenants on Civil and Political Rights as well as Economic, Social and Cultural Rights.<sup>67</sup> All subscribe to the Geneva Conventions.<sup>68</sup>

ASEAN leaders also know that to continue to grow and generate jobs and wealth, their economies need foreign investment. And foreign investors want to make safe investments, preferably without corruption that exposes ASEAN leaders to international criticism and, possibly, criminal prosecution.

ASEAN has shown a tentative, perhaps timid interest in the creation of a subregional human rights mechanism, and the multi-sectoral Working Group set up for this purpose has done good ground work. But one gets the impression that concerns of the moment—e.g., pro-democracy demonstrations on behalf of Aung San Suu Kyi, the resignation of a prime minister in Thailand, or the fear of a coup in the Philippines, the exigencies of reconstruction of war-torn Timor and attempt on the life of its President, or the threat of terrorism and civil strife in Indonesia—have diverted the attention of statespersons of

the region who instead of taking the long view have concentrated their focus on day to day challenges.

But there are counter-trends. On the national level several ASEAN states have established offices of ombudsmen and national or parliamentary human rights commissions.<sup>69</sup> Most importantly, all of ASEAN's states have active, concerned civil societies who understand the indivisible relationship between economic development and respect for civil and political rights, including those of due process and private property.

In 1999, the Working Group for an ASEAN Human Rights Mechanism published a book entitled *Towards an ASEAN Human Rights Mechanism: Proposals, Declarations and Related Documents*.<sup>70</sup> The main article contained in that work, a brilliant summary, review, and analysis, written by Thai Professor Vitit Muntarbhorn, cites the United Nations principles for national institutions for the promotion and protection of human rights. These are equally applicable to intergovernmental human rights mechanisms. They include legal and operational independence, impartiality, pluralistic composition, accessibility to all, accountability, sustainability, and efficacy.<sup>71</sup>

Professor Muntarbhorn then goes on to list a number of stipulations regarding an eventual human rights mechanism. These include the right of individuals and groups to petition the yet to be created commission, the independence of commissioners and the like. Two of these stipulations, are however, in my view, problematic. The first is that the new South East Asian Commission should apply the Universal Declaration of Human Rights as well as all the other UN human rights conventions, and that participating states would be required to ratify all of these before they could participate in the mechanism.

As much as this approach might be devoutly wished for, I fear that it would in practice result in the stillbirth of the regional mechanism. As of this writing only three ASEAN states—the Philippines, Vietnam, and East Timor—have acceded to all six treaties and the likelihood of the other eight countries adhering to all of them is remote for the time being. Moreover, it is precisely in the states that have ratified the fewest human rights instruments where the need for a subregional mechanism is greatest.

Finally, Professor Muntarbhorn lists seven options for the ASEAN's member states ranging from a maximalist possibility—an ASEAN court and committee of ministers charged with enforcement of judgments a la Europe, to a minimalist approach whereby ASEAN states would engage in promotional activities, for example, training police forces, with a view towards confidence building and strengthening national mechanisms while not discarding the eventual creation of a regional mechanism.

For what its worth, I would like to gratuitously, share my preferences and explain why I believe that such an approach is more likely to receive the backing of hopefully a majority of ASEAN states.

I think that it would be best to press for the creation of an ASEAN human rights commission initially on the basis of the principles set forth above. A

court with or without a commission, is likely to be seen as ambitious, expensive, complicated and most importantly, politically unpalatable by most ASEAN governments at this juncture.

A commission on the other hand, charged with promotional as well as protective duties, mandated to receive communications and issue public reports with findings and recommendations, might find greater acceptance.

In terms of applicable law, because there is consensus on the terms of the Universal Declaration, the CRC, and almost universal acceptance of the CERD, I would start with these.

At the outset, bearing in mind the birth of the Inter-American Commission, an ASEAN resolution establishing the mechanism and that would provide at least minimal means for operations (including the possibility of seeking external funding) should be sufficient to launch the body.

Such a resolution ideally would contain language referring to the future development of the mechanism with a view to giving it a permanent character by way of a multilateral agreement that could be supplemented over time through additional protocols following the European, Inter-American, and African models.

Finally, the resolution creating the Commission should emphasize the commission's advisory role in providing technical services to member states, their organs, and civil societies. The matters of greater detail such as composition and functioning of the mechanism and headquarters could be set forth in a statute for the commission's governance, again by ASEAN resolution, ideally with the active participation of NGO's, church groups, the media, academics, professional associations and the like. The statute, for example, could call for the presentation of an annual report to the ministers of ASEAN for "appropriate action." It could provide for on site visits with prior government consent. It could adopt also basic rules on admissibility of communications.

My counsel would be to take a modest, almost minimalist approach, at the outset. The Spanish sometimes say that "the perfect is the enemy of the good." The human rights movement is here to stay. A foot in the door would constitute, if not a quantum improvement, at least the opening of a portal to the systematic development of the international law of human rights on a continent where no such mechanism currently exists. It would be in the best interests of states and people and would provide a supplemental tool for the achievement of greater respect for human rights in their various generations. And if developed intelligently and with patience and maybe a little luck, it could contribute greatly to the fuller development of the region.

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#### ENDNOTES

<sup>1</sup> ASEAN was established by the Bangkok Declaration in 1967. Association members are: Brunei, Cambodia, East Timor, Indonesia, Laos, Malaysia,



- Myanmar, Philippines, Singapore, Thailand, and Vietnam. See: *Towards an ASEAN Human Rights Mechanism*, Working Group for an ASEAN Human Rights Mechanism, School of Law, Ateneo de Manila University, 1999.
- <sup>2</sup>G.A. Res. 217 A, 3 GAOR, Resolutions (A/810) at 71.
- <sup>3</sup>See: *International Organizations in Their Legal Setting*, Frederic L. Kirges, West, 1993, p. 11.
- <sup>4</sup>See: UN Secretary General Kofi Annan's statement: Pretoria News, March 22, 2006.
- <sup>5</sup>U.N. Doc. E/C No. 4/1070 at 50, August 14, 1971.
- <sup>6</sup>ECOSOC Res. 1235, 42 Economic and Social Council Official Records, Supp. 1 (E/4393 at 17, June 6, 1967. ECOSOC Res. 1503, 48 Economic and Social Council Official Records, Supp. 1A (E/4832/Add. 1) at 8, May 27, 1970.
- <sup>7</sup>999 U.N.T.S. 171, December 19, 1966.
- <sup>8</sup>993 U.N.T.S. 3, December 16, 1966.
- <sup>9</sup>999 U.N.T.S. 302, December 19, 1966.
- <sup>10</sup>78 U.N.T.S. 277, December 9, 1948.  
660 U.N.T.S. 195, December 21, 1965
- <sup>11</sup>1249 U.N.T.S. 13, December 18, 1979.
- <sup>12</sup>1577 U.N.T.S. 3, November 20, 1989.
- <sup>13</sup>1465 U.N.T.S. 85, December 10, 1984.
- <sup>14</sup>See: *Human Rights*, Louis Henkin et al., Foundation Press, N.Y. 1999. p. 277.
- <sup>15</sup>12 U.S.T. 980, T.I.A.S. 4803, October 16, 1945
- <sup>16</sup>61 Stat. 2495, T.I.A.S. 1580, 4 U.N.T.S. 275 November 16, 1945.
- <sup>17</sup>World Health Organization Treaty, ATS 7, April 7, 1948.
- <sup>18</sup>The U.N. General Assembly merged a number of programs in 1965 to create the UNDP which today has offices in 133 countries and development activities in 174 countries
- <sup>19</sup>PO is a special UN agency since 1974 although its roots go back to 1883. Convention Establishing the World Intellectual Property Organizations, July 14, 1967.
- <sup>20</sup>N.S.C. Res. 827, May 25, 1993.
- <sup>21</sup>N.S.C. Res. 955, November 8, 1994.
- <sup>22</sup>U.N.S.C. Res. 1315, August 14, 2000.
- <sup>23</sup>See: National, South Africa, March 18, 2006.
- <sup>24</sup>U.N. Doc. A/CONF. 183/9. The Rome Statute entered into force July 1, 2002.
- <sup>25</sup>European Convention for the Protection of Human Rights and Fundamental Freedoms 312 U.N.T.S. 221, November 4, 1950. See Art. 19 et seq.
- <sup>26</sup>Robertson, Council of Europe, *Encyclopedia of Public International Law*, Installment No. 6 at 86 (R. Bernhardt ed.,) 1983.
- <sup>27</sup>See: Note 25 European Convention, Article 46.
- <sup>28</sup>Consolidated Version of the Treaty on European Union, Official Journal C325, December 24, 2002.
- <sup>29</sup>Official Journal C364/01, December 12, 2000
- <sup>30</sup>E.T.S. No. 126, C PT/NFC (2002) 1(EN) Strasbourg, November 26, 1987.
- <sup>31</sup>Council of Europe Resolution (99) 50, 104<sup>th</sup> Session, May 7, 1999.

- Myanmar, Philippines, Singapore, Thailand, and Vietnam. See: *Towards an ASEAN Human Rights Mechanism*, Working Group for an ASEAN Human Rights Mechanism, School of Law, Ateneo de Manila University, 1999.
- <sup>2</sup> G.A. Res. 217 A, 3 GAOR, Resolutions (A/810) at 71.
- <sup>3</sup> See: *International Organizations in Their Legal Setting*, Frederic L. Kirges, West, 1993, p. 11.
- <sup>4</sup> See: UN Secretary General Kofi Annan's statement: Pretoria News, March 22, 2006.
- <sup>5</sup> U.N. Doc. E/C No. 4/1070 at 50, August 14, 1971.
- <sup>6</sup> ECOSOC Res. 1235, 42 Economic and Social Council Official Records, Supp. 1 (E/4393 at 17, June 6, 1967. ECOSOC Res. 1503, 48 Economic and Social Council Official Records, Supp. 1A (E/4832/Add. 1) at 8, May 27, 1970.
- <sup>7</sup> 999 U.N.T.S. 171, December 19, 1966.
- <sup>8</sup> 993 U.N.T.S. 3, December 16, 1966.
- <sup>9</sup> 999 U.N.T.S. 302, December 19, 1966.
- <sup>10</sup> 78 U.N.T.S. 277, December 9, 1948.  
660 U.N.T.S. 195, December 21, 1965
- <sup>11</sup> 1249 U.N.T.S. 13, December 18, 1979.
- <sup>12</sup> 1577 U.N.T.S. 3, November 20, 1989.
- <sup>13</sup> 1465 U.N.T.S. 85, December 10, 1984.
- <sup>14</sup> See: Human Rights, Louis Henkin et al., Foundation Press, N.Y. 1999. p. 277.
- <sup>15</sup> 12 U.S.T. 980, T.I.A.S. 4803, October 16, 1945
- <sup>16</sup> 61 Stat. 2495, T.I.A.S. 1580, 4 U.N.T.S. 275 November 16, 1945.
- <sup>17</sup> World Health Organization Treaty, ATS 7, April 7, 1948.
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- <sup>19</sup> IPO is a special UN agency since 1974 although its roots go back to 1883. *Convention Establishing the World Intellectual Property Organizations*, July 14, 1967.
- <sup>20</sup> N.S.C. Res. 827, May 25, 1993.
- <sup>21</sup> N.S.C. Res. 955, November 8, 1994.
- <sup>22</sup> U.N.S.C. Res. 1315, August 14, 2000.
- <sup>23</sup> See: National, South Africa, March 18, 2006.
- <sup>24</sup> U.N. Doc. A/CONF. 183/9. The Rome Statute entered into force July 1, 2002.
- <sup>25</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms 312 U.N.T.S. 221, November 4, 1950. See Art. 19 et seq.
- <sup>26</sup> Robertson, Council of Europe, *Encyclopedia of Public International Law*, Installment No. 6 at 86 (R. Bernhardt ed.,) 1983.
- <sup>27</sup> See: Note 25 European Convention, Article 46.
- <sup>28</sup> Consolidated Version of the Treaty on European Union, Official Journal C325, December 24, 2002.
- <sup>29</sup> Official Journal C364/01, December 12, 2000
- <sup>30</sup> E.T.S. No. 126, CPT/NFC (2002) 1(EN) Strasbourg, November 26, 1987.
- <sup>31</sup> Council of Europe Resolution (99) 50, 104<sup>th</sup> Session, May 7, 1999.

- <sup>32</sup>Constitutive Act of the African Union, OAU Doc. CAB/LEG/215, May 26, 2001.
- <sup>33</sup>African (Banjul) Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG.67/3 rev 5, 20 ILM 58, June 27, 1981.
- <sup>34</sup>African Charter on the Rights and Welfare of the Child, OAU, Doc. CAB/LEG/249/49, entered into force November 29, 1999.
- <sup>35</sup>See Note 33. African Charter. Under Article 62 parties must submit biennial reports "on the legislative or other measures taken with a view to giving effect to the rights and freedoms guaranteed" by the Charter.
- <sup>36</sup>Ibid. Articles 45-49.
- <sup>37</sup>As of 1998 there were more than 200 overdue reports. *International Guide to Human Rights*, Hurst Hannum, editor, Transnational Publishers & the Procedural Aspects of International Law Institute, 1999.
- <sup>38</sup>New Partnership for Africa's Development, Abuja, Nigeria, 2001, see University of Minnesota treaty series.
- <sup>39</sup>Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (111), June 9, 1998.
- <sup>40</sup>Columbia Encyclopedia, Sixth Edition, 2001-2005, Pan American Union.
- <sup>41</sup>C.L. Chandler, "The Beginnings of Pan-Americanism," *Bulletin of the Pan-American Union*, September, 1911.
- <sup>42</sup>U.S.T. 2394, T.I.A.S. 2361, 119 U.N.T.S. 3 April 30, 1948.
- <sup>43</sup>Inter-American Treaty of Reciprocal Assistance (Rio Treaty), September 2, 1947.
- <sup>44</sup>See Note 42. OAS Charter, Articles 93-98.
- <sup>45</sup>The Universal Declaration was issued December 10, 1948, now celebrated annually as international human rights day. The American Declaration was issued May 2, 1948.
- <sup>46</sup>Declaration of the Fifth Meeting of Consultation of Ministers of Foreign Affairs, Santiago, Chile, August 12-18, 1959, Final Act. Document OEA/Sec. C/11. 5, pp. 4-6.
- <sup>47</sup>Final Text of the Second Special Inter-American Conference, OAS Official Records, OEA/Sec. C/1. 13, 1965, pp. 32-34.
- <sup>48</sup>Padilla, David, "The Inter-American Commission on Human Rights of the Organization of American States: A Case Study," *American University Journal of International Law and Policy*, Volume 9, No. 1, Fall, 1993.
- <sup>49</sup>American Convention on Human Rights, OAS Treaty Series No. 36, 1144, U.N.T.S. 123, July 18, 1978.
- <sup>50</sup>Patricia Derian, special envoy of the US State Department during the Carter Administration, was particularly influential in urging OAS member states to ratify the American Convention on Human Rights.
- <sup>51</sup>OEA, Ser. L/V/1.4 rev 10, May 31, 2004, original: Spanish, p. 56.
- <sup>52</sup>The Inter-American Commission meets at OAS headquarters, Washington, D.C. where its secretariat is located. Article 58 of the American Convention provides that the General Assembly shall designate the seat of the Court.

Since its establishment, the Court has been located in San Jose, Costa Rica & signed a headquarters agreement to that effect with the government. See Note 51 supra.

<sup>53</sup>Ibid. American Convention, Articles 37 and 54, pp. 41 and 48.

<sup>54</sup>Ibid. pp 268-271.

<sup>55</sup>See the Commission and Court's websites at [www.iachr.org](http://www.iachr.org)

<sup>56</sup>Velasquez Rodriguez v. Honduras, 4 Inter-American Court of Human Rights.

<sup>57</sup>See Note 49. American Convention, Article 64.

<sup>58</sup>Ibid. American Convention, Article 45.

<sup>59</sup>Rules of Procedure of the Inter-American Commission on Human Rights, Basic Documents Pertaining to Human Rights in the Inter-American System, Articles 30-43, pp 153-158.

<sup>60</sup>See Note 49. American Convention, Articles 50 and 62.

<sup>61</sup>Ibid. Article 63.2.

<sup>62</sup>See Note 49 supra. Pp 73-89.

<sup>63</sup>Ibid. p. 111.

<sup>64</sup>Padilla, et al., "A Schematic Comparison of Regional Human Rights Systems," *African Human Rights Journal*, University of Pretoria, Vol. 3, No. 1, 2003.

<sup>65</sup>Stabrock News, "CARICOM Human Rights Treaty Being Drafted," March 27, 2006

<sup>66</sup>See Note 49, pp. 11, 141 et seq., 181 et seq.

<sup>67</sup>See Note 1, p. 14.

<sup>68</sup>See ICRC, IHL Database, [icrc.org](http://icrc.org)

<sup>69</sup>See Note 1, pp 14-15.

<sup>70</sup>Ibid. The information provided in this 1999 study has been updated and can be found on the Working Group's website: [www.hrwgmechanism.com](http://www.hrwgmechanism.com)

<sup>71</sup>Ibid. p.6.

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