

# **Establishing a Regional Human Rights Mechanism for the Asia-Pacific Region**

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**Establishing a Regional Human Rights Mechanism for the Asia-Pacific Region**

*Introduction*

The Asia-Pacific region currently exists as the only continent without a regional human rights mechanism to adjudicate over the protection of human rights by member states. All efforts taken to establish such a mechanism, most notably perhaps through the annual workshops arranged by the UN Office of the High Commissioner for Human Rights, have been hampered by traditionalist concepts of state sovereignty emphasizing the schism between “western” and “non-western” values.<sup>1</sup> Ordinarily, these regional co-operation workshops follow the pattern adopted by the 1998 Tehran ‘Framework for Regional Technical Cooperation in the Asian and Pacific Region’ by discussing national capacity building, human rights education, the role of national institutions, and economic, social and cultural rights. Whilst these are commendable issues, the framework, intentionally or otherwise, has driven a trench between the above issues and addressing the question of establishing a permanent regional mechanism for human rights. Beyond the guise of a “step-by-step”, “building blocks” approach<sup>2</sup>, these developments have heightened the suspicion that the UN annual workshops are a means for states to *avoid* establishing any such permanent arrangement under the pretext of appearing committed to the ideal.

The fact that 20 years of round-table discussions have produced no tangible results in this regard signifies that any expectations of a regional mechanism comparable to that of the European or Inter-American Courts on Human Rights are unrealistic. Attempts at drafting non-official Asian Charters for Human Rights have invariably failed, being inconsistent with the obligations of international customary or conventional law, or hijacked by self-appointed enforcing authorities such as the Association of Asian Parliaments for Peace.<sup>3</sup> Accepting a “building blocks” approach as the agreed means towards progress, and

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<sup>1</sup> Bangkok Declaration (see) wherein it is recognized that “while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds”, U.N. Doc. A/CONF.157/PC/59.

<sup>2</sup> Regional Arrangements for the Promotion And Protection Of Human Rights in the Asian and Pacific Region: Report of the Secretary-General submitted in accordance with Commission resolution 2001/ 77, U.N. Doc. E/CN.4/2002/WP3, 8 March 2002, para. 4.

<sup>3</sup> SAHRDC, The Proposed Asian Human Rights Charter: No Rights At The End of This Tunnel, HRF/27/00, 11 November 2000.

“mindful of the vastness of, and diversities within, the Asia-Pacific region”<sup>4</sup>, APHRN suggests that the focus for establishing a regional human rights arrangement needs to be shifted towards those institutions already functioning in the Asia Pacific region and capable of moving incrementally towards such an undertaking. One possibility is through enhancing the work of the Asia Pacific Forum of National Human Rights Institutions (APF), and particularly, its Advisory Council of Jurists (ACJ).

### *Strengthening the Role of the Asia-Pacific Forum*

The APF constitutes the most cohesive regional human rights body in the Asia-Pacific region. Under the limited but useful guidance of the Paris Principles, the APF intends to co-ordinate the functioning of national human rights institutions in accordance with international best practice. Unlike in Europe or the Americas, which have adopted regional human rights Conventions and Courts that arguably surpass the protections afforded by the UN international bill of rights, national human rights institutions still represent the best means to monitor, investigate, and seek redress for human rights abuses in Asia. As the organisation charged with the difficult task of ensuring that these national human rights institutions meet international standards of independence and competency, the APF is the best-positioned intermediary in the region between individual state policy and/or behavior and their respective monitoring bodies.

In order for the APF to operate in the manner of a regional human rights mechanism, a strengthening of its mandate and operating powers are required. The mandates of national institutions in the Asia Pacific region have largely been determined by the political context in which they are created, and thus an imperative must firstly be placed on establishing a centralised and uniform policy binding on all national institutions, plus a system of assessment for effective implementation of the Paris Principles. Whilst these principles only exist as a ‘lowest common-denominator’, their provisions are yet rarely adhered to by respective national institutions. This problem is compounded by the fact that the APF permits such concessions in its rules of membership.<sup>5</sup> This allows for less than perfect institutions to gain membership. This also damages the legitimacy of the APF as a forum concerned with independence, transparency and accountability, all fundamental prerequisites of a regional human rights body, and needs to be quickly rectified.

Most importantly the APF must take initiatives beyond the Paris Principles to stress the role of the quasi judicial capacity of national institutions. As mere commentators on human rights, national institutions capabilities are severely weakened, but as investigative bodies they serve as a vital connection to any regional sphere. To date, Asia-Pacific

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<sup>4</sup> Conclusions of the Eleventh Workshop on Regional Cooperation for the Promotion and Protection of Human Rights in the Asia-Pacific Region, Islamabad, Pakistan, 25-27 February 2003, para. 7.

<sup>5</sup> See Constitution of the Asia-Pacific Forum for National Human Rights Institutions, Section 11 (3): “Associate Members are those institutions which do not comply with the Paris Principles and are unlikely to do so within a reasonable period. Forum Councillors may determine that it would be in the interests of the Forum to admit a specific institution as an associate member of the Forum”. Available at <http://www.asiapacificforum.net/about/membership.html>.

national institutions have been deficient in recognising their role in the international arena. A broader mandate adopted by the APF, which would not only specify national institutions' spheres of competence and jurisdiction but also encourage them to intervene in relevant court cases, would empower the APF to address human rights violations as an independent regional adjudicator.

### *Proposed Role for the Advisory Council of Jurists*

The ACJ was established following its endorsement at the Third Annual Meeting of the APF held in Jakarta, Indonesia, in September 1998. It acts as “a specialist advisory body to provide, on request, jurisprudential guidance to the Forum and its member institutions.”<sup>6</sup> Its jurisdiction is to “provide comment, opinion and advice on the interpretation and application of relevant international human rights standards, upon request, having regard to settled principles of international law and the treaty obligations of the concerned states.”<sup>7</sup> Requests may be taken from national institutions that are members of the Forum, provided the subject relates only to their national jurisdiction, yet it has no jurisdiction to receive requests from individuals, organisations, domestic judiciaries or governments.<sup>8</sup>

APHRN proposes that the Terms of Reference of the Council be extended to strengthen its judicial capacity, for the purpose of establishing the ACJ as an Asian-Pacific referral body with quasi-judicial powers akin to a UN human rights treaty monitoring body, with concomitant powers of regional interpretation or consultation. The Asia-Pacific region at present lacks any higher means of appeal of legal decision-making beyond the highest national courts, thus protecting national sovereignty from the scrutiny of international law.

A recent case in hand is that of the *People's Union for Civil Liberties v. Union of India*<sup>9</sup>, which challenged the legislative competence of India's Prevention of Terrorism Act. The Supreme Court upheld the constitutionality of POTA in every instance, thus closing the door on the subject in India. However, NGOs remain united in their condemnation of the Act as an insidious and retrogressive attempt to rid India of all fundamental legal safeguards pertaining to due process and fair trial.<sup>10</sup> The decision by the Supreme Court

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<sup>6</sup> Terms of Reference of the Advisory Council of Jurists of the Asia-Pacific Forum of National Human Rights Institutions, Article 1, at [http://www.asiapacificforum.net/jurists/terms\\_ref/terms\\_ref.pdf](http://www.asiapacificforum.net/jurists/terms_ref/terms_ref.pdf).

<sup>7</sup> *Ibid.*, Article 2.

<sup>8</sup> *Ibid.*, Article 3(3).

<sup>9</sup> *People's Union of Civil Liberties and Anr. v. Union of India*, 2003 SOL Case No. 840, 16 December 2003.

<sup>10</sup> See SAHRDC, PREVENTION OF TERRORISM ORDINANCE: GOVERNMENT DECIDES TO PLAY JUDGE AND JURY (2001); AMNESTY INTERNATIONAL INDIA, SPECIAL SECURITY LEGISLATION AND HUMAN RIGHTS: A REPORT OF THE FOUR REGIONAL WORKSHOPS AND A CONFERENCE ON SECURITY LEGISLATION AND HUMAN RIGHTS (2002).

has likewise been dismissed as a “concession” to a “panic-stricken state unable to handle terrorism through the normal legal process.”<sup>11</sup>

In this instance, no recourse may be taken to any higher appellate court in Asia to challenge the Supreme Courts decision from the standpoint of India’s obligations under international customary and treaty law. It is in cases such as these that national institutions should be expected to immediately refer cases to the Advisory Council. Whilst it is unrealistic in the current political climate to expect Asian states to cede sovereignty to a Council whose judgments would be legally binding, a referral body which may issue authoritative observations and recommendations would offer a firmer regional means of human rights protection than any that currently exist. Also, an appeal of a Supreme Court judgment on the basis of international obligations offers an alternate means of redress, as opposed to questioning such a judgment on the basis of former national jurisprudence.

*Encouraging Regional Arrangements on Human Rights Issues of Common Concern*

Requests to the ACJ may also be made at the unanimous decision of the APF on any issues of common concern, and it is this capacity that the Council have been most productive thus far. APHRN is of the view that collective responses present the most viable solutions to regional and global problems, and that the recommendations of the ACJ should be respected and acted upon by all States concerned. The matter of cross-border adjudication is intrinsic to the success of a regional arrangement for the Asia-Pacific region.

To date, the ACJ has published detailed reports on trafficking, child pornography, use of the death penalty in Asia, and the rule of law and terrorism. To take one example, the report on trafficking explains the significance of the UN Trafficking Protocol 2000<sup>12</sup>, and urges states to ratify in order to “prevent and combat trafficking, to assist the victims of trafficking and to promote cooperation among the party States to achieve these objectives.”<sup>13</sup> It also outlines the sources and methods of international law and other recommended principles. The January 2004 update of the report on the rule of law and terrorism presents a critical cross-examination of the inconsistency of Asian anti-terrorist legislation and its impact on human rights, challenged from the perspective of international obligations and safeguards. Unsurprisingly, few Asian countries can be congratulated on their present performances.<sup>14</sup>

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<sup>11</sup> Delhi High Court Chief Justice Rajinder Sachar, quoted in *Pota Violates Basic Rights, Say Lawyers* ECONOMIC TIMES, 24 January 2004, at <http://economictimes.indiatimes.com/articleshow/442079.cms>.

<sup>12</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention Against Transnational Organized Crime, Report of the Ad Hoc Committee on the Elaboration of a Convention against transnational organized crime on the work of its first to eleventh sessions, UN Doc. A/55/383 (2000), Annex II.

<sup>13</sup> Advisory Council Of Jurists, Consideration Of The Issue Of Trafficking: Final Report, 11 – 12 November 2002, India, December 2002, p. 5.

<sup>14</sup> Advisory Council of Jurists, Reference on the Rule of Law in Countering Terrorism Addendum: Update to the Background Paper, January 2004.

These are notable contributions aimed at establishing a uniform regional approach to human rights concerns, and are commended by APHRN as such. However, a strengthening of the judicial capacity of the ACJ, as recommended above, would add considerable persuasion to their recommendations. Otherwise, as with all the examples given in this report, the Asia-Pacific region will continue to exist as the poor cousin of international community in the protection of universal human rights.