The Last Frontier of Human Rights Protection: Interrogating Resistance to Regional Cooperation in the Asia-Pacific

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Abstract

Asia and the Pacific are the only regions in the world which are yet to establish cooperative regional mechanisms for the promotion and protection of human rights. This article briefly outlines the existing scope of human rights protections in the region. It then interrogates common explanations for the Asia-Pacific's reluctance to institutionalise regional protection of human rights, including that the region is too diverse for uniform standards; contrarily, that 'Asian values' differ from western 'international human rights standards'; that principles of sovereignty and non-intervention preclude external scrutiny; and that Asians have a cultural preference for conciliation over adjudication, ruling out quasi-judicial methods for protecting human rights. This article draws upon the experiences of establishing regional mechanisms in the Americas, Europe and Africa to demonstrate that claims about the uniqueness of the Asian experience are often exaggerated or inaccurate. Asian exceptionalism on human rights questions is often more fruitfully explained as an expression of strategic policy choices by Asian governments to avoid strengthening human rights protections, rather than by any inherent truths about the unsuitability of rights and institutions to Asian traditions, values, diversity or cultural preferences. This article draws lessons from other regions concerning the prospects for regional and institutional cooperation on human rights in the Asia-Pacific, including as regards the establishment of regional charters, commissions and courts.

Introduction

While regional mechanisms for human rights protection were established in Europe in 1950,[1] the Americas from 1959,[2] Africa from 1981,[3] and among Arab States from 2004,[4]

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[1] The *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 13 May 2004, CETS No 194 (entered into force 1 June 2010) ('*ECHR*'), was adopted by the Council of Europe in 1950 and established the European Court of Human Rights and the European Commission on Human Rights. The Commission was abolished and the Court restructured in 1998.

[2] The *American Declaration of the Rights and Duties of Man* was adopted by the Organization of American States ('OAS') on 2 May 1948 ('*American Declaration of the Rights of Man*'); the Inter-American Commission on Human Rights was established by the OAS in 1959; the *American Convention on Human Rights*, opened for signature 22 November 1968, 1144 UNTS 123 (entered into force 18 July 1978); and the Inter-American Court of Human Rights was established in 1979 (following entry into force of the *American Convention on Human Rights*). See generally David Harris and Stephen Livingstone (eds), *The Inter-American System of Human Rights* (Clarendon Press, 1988).

[3] The *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986) ('*African Charter*'), was followed by the establishment of the African Commission on Human Rights in 1987 and the African Court of Human Rights in 2004.

the Asia-Pacific has long been the last frontier of regional cooperation.[5] Despite calls by Asian leaders in 1993 to 'explore the possibilities of establishing regional arrangements for the promotion and protection of human rights in Asia',[6] the Association of Southeast Asian Nations ('ASEAN') only committed to creating a human rights body in its Charter of November 2007 and established the ASEAN Intergovernmental Commission on Human Rights ('AICHR') in October 2009.[7] Despite that significant step, the AICHR is entrusted with far fewer powers than the regional human rights bodies in the Americas, Europe and Africa. Beyond the limited club of South-East Asian States, there is no subregional mechanism for the Pacific, North and East Asia, or South Asia. Other intergovernmental networks in the region have devoted little attention to human rights, whether through the South Asian Association for Regional Cooperation ('SAARC'), Asia-Pacific Economic Cooperation ('APEC'), Pacific Islands Forum ('PIF'), or Shanghai Cooperation Organisation ('SCO').

The purpose of this article is to interrogate common explanations for the Asia-Pacific's reluctance to institutionalise regional protection of human rights. Such explanations typically include that the region is too diverse to subscribe to uniform standards; contrarily, that 'Asian values' differ from western 'international human rights standards'; that principles of sovereignty and non-intervention preclude external scrutiny; and that Asians have a cultural preference for conciliation over adjudication, ruling out quasi-judicial methods for protecting human rights. This article examines these common explanations by drawing upon the experiences of establishing regional mechanisms in the Americas, Europe and Africa. The comparison with other geographical regions contextualises the debate in the Asia-Pacific and shows that claims about the uniqueness of the Asian experience are often exaggerated or inaccurate. Asian exceptionalism on human rights questions is often more fruitfully explained as an expression of strategic policy choices by Asian governments to avoid strengthening human rights protections, rather than by any inherent truths about the unsuitability of rights and institutions to Asian traditions, values, diversity or cultural preferences.

The article first briefly outlines the existing scope of human rights protections in the region before critically analysing common objections to the institutionalisation of human rights in the

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4 The *Arab Charter on Human Rights*, opened for signature on 22 May 2004, (2005) 12 *International Human Rights Reports* 893 (entered into force 15 March 2008) ('*Arab Charter*'), was adopted by the Council of the League of Arab States in 2004 and entered into force in 2008, and provides for the establishment of an independent Arab Human Rights Committee, which will consider States' reports but cannot consider individual complaints. See Mervat Rishmawi, 'The Arab Charter on Human Rights and the League of Arab States: An Update' (2010) 10 *Human Rights Law Review* 169. It is notable that the Council of the League of Arab States created an Arab Commission on Human Rights in 1968 to promote human rights, but the Commission was not empowered to review Arab States' human rights performance.

5 For a recent survey of developments in the Asia-Pacific region, see Andrea Durbach, Catherine Renshaw and Andrew Byrnes, '"A tongue but no teeth?": The Emergence of a Regional Human Rights Mechanism in the Asia Pacific Region' (2009) 31 *Sydney Law Review* 211.

6 ASEAN, *Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights*, Bangkok (29 March–2 April 1993) [26] ('*Bangkok Declaration*').

7 *Charter of the Association of Southeast Asian Nations*, opened for signature 20 November 2007 (entered into force 15 December 2008) art 14 ('*ASEAN Charter*'). See also the *Cha-Am Hua Hin Declaration on the Intergovernmental Commission on Human Rights*, adopted by the ASEAN Heads of State and Government at the 15th ASEAN Summit in Thailand, 23 October 2009. ASEAN also created a Commission on the Promotion and Protection of the Rights of Women and Children: for a detailed discussion of this development, see Suzannah Linton, 'ASEAN States, Their Reservations to Human Rights Treaties and the Proposed ASEAN Commission on Women and Children' (2008) 30 *Human Rights Quarterly* 436.

Asia-Pacific. By considering the creation and characteristics of regional mechanisms in the Americas, Europe and Africa, the article draws lessons from those regions concerning the prospects for regional and institutional cooperation on human rights in the Asia-Pacific region.

Human rights protections in the Asia-Pacific region

In the absence of a regional human rights mechanism in Asia, the dual focus of human rights initiatives in countries in the region has been at the national and international levels. First, many countries in the region formally embed human rights (sometimes also including socio-economic rights) in their constitutions or in national legislation, and sometimes provide judicial remedies for their breach.[8] The New Zealand Law Reform Commission has highlighted the strategic advantage of focusing on existing strong constitutional protection of human rights at the domestic level. As most Pacific nations already have a bill of rights within their constitutions, these may provide a positive avenue for building local confidence and capacity to protect human rights.[9] Such an approach is equally applicable to countries in the broader Asian region. The problem, however, is not with formal legal protections, but access to them, in a region where lack of awareness about legal rights, obtaining legal representation and legal aid, access to courts, and enforcement of judgments are all frequent obstacles.

Second, an increasing number of States have established national institutions, such as human rights commissions, entrusted with a variety of functions in different contexts, from education and monitoring to complaints handling mechanisms. National commissions are capable of being sensitive to local circumstances, as in the Pacific. The New Zealand Human Rights Commission and the Pacific Islands Forum Secretariat have emphasised the importance of fostering the incremental growth of national human rights institutions in Pacific nations — as resources and capacity allow — as a first step in strengthening human rights protection in the region.[10] In practice, national institutions have been well supported since 1996 by the Asia Pacific Forum of National Human Rights Institutions ('APF').[11] National institutions remain, however, of varying quality and some in the region (particularly the Pacific) do not meet the standards of the *Paris Principles*.[12]

Third, various countries in the region participate in the international human rights machinery of the United Nations ('UN') system, including the Human Rights Council and treaty monitoring bodies. In general terms, these bodies play two main roles. The first is a 'policy' or 'political' role, by which these bodies develop awareness of human rights and, through political dialogue and the negotiation of international instruments, enhance their international protection. A second role is the more quasi-judicial function of the various treaty bodies in monitoring and 'enforcing' human rights standards. However, the ability of

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8 See Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Human Rights in the Asia-Pacific: Challenges and Opportunities* (2010) 81–4 ('*Human Rights in the Asia-Pacific Report*').

9 New Zealand Law Reform Commission, *Converging Currents – Custom and Human Rights in the Pacific*, Study Paper No 17 (2006) 68 ('*Converging Currents Report*').

10 See Joy Liddicoat, *National Human Rights Institutions: Pathways for Pacific States* (Pacific Human Rights Issues Series 1, New Zealand Human Rights Commission and Pacific Islands Forum Secretariat, 2007).

11 Its members have been established in accordance with the *Principles Relating to the Status of National Institutions for the Promotion and Protection of Human Rights* ('*Paris Principles*'), GA Res 48/134, UN GAOR, 48th sess, 85th mtg, UN Doc A/RES/48/134 (20 December 1993). Currently there are 15 full members including Australia and New Zealand.

12 *Human Rights in the Asia-Pacific Report*, above n 8, 70–1.

such bodies to perform this supervisory function in the Asia-Pacific region may be limited by the low level of ratification of treaties — particularly in relation to acceptance of individual complaints mechanisms.[13]

In spite of this engagement with human rights at the national and international levels, governments in the Asia-Pacific region have long been reluctant to pursue regional cooperation on human rights issues, although the picture is more nuanced than is often thought. Regional institutions in the Asia-Pacific have tended to be smaller in membership, less ambitious in their mandates, and more tentative in their cooperation than those in other regions. Thus, ASEAN was founded with the limited aim to pursue economic cooperation and regional stability; APEC was designed to advance trade and economic matters; and SAARC was formed principally out of concern for economic and developmental matters, as well as less controversial social and political questions. Human rights were not seen as within the ambit of regional action, for reasons explained and critiqued in the next section.

Even so, it often happens that the limited mandates conferred upon organisations at their creation expand into new fields of activity over time. In some cases, as with the European Union (EU), mandate creep has been transformative, as in the rapid movement from narrow economic cooperation to deep pan-European integration on a wide range of common political and social concerns. While developments in the Asia-Pacific region have not been as radical, institutional evolution is also part of regional history, with ASEAN, APEC and SAARC all widening the subject matter of cooperation over time.[14]

SAARC, for instance, has adopted conventions on specific human rights issues such as the trafficking of women and children, and on children's rights.[15] Many countries in the region also cooperate informally with the UN High Commissioner for Refugees, despite not being parties to the 1951 *Refugee Convention*.[16] Since the end of the Cold War, ASEAN has been unable to ignore the mounting pressure to protect human rights[17] and, to this end, has previously made a range of commitments in specific areas such as the rights of women, children, trafficked persons and migrant workers.[18] Under the *ASEAN Charter*, ASEAN now embraces not only economic, development and security cooperation, but also a commitment to democracy, good governance, the rule of law and human rights. It is also drafting a specific instrument on the right of migrant workers. Even APEC has moved beyond pure economic imperatives into certain political and security issues,[19] a move that

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13 Ibid 39–42.

14 For example, on the widening ambit of ASEAN, see Jürgen Haacke, *ASEAN's Diplomatic and Security Culture: Origins, Development and Prospects* (Routledge, 2005).

15 *SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution*, adopted 5 January 2002; *SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia*, adopted 5 January 2002.

16 *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) ('*Refugee Convention*').

17 For a historical account of these developments, see Li-ann Thio, 'Implementing Human Rights in ASEAN Countries: "Promises to Keep and Miles to Go Before I Sleep"', in Dinah L Shelton (ed), *Regional Protection of Human Rights* (Oxford University Press, 2010) 1064; Amitav Acharya, 'Human Rights and Regional Order: ASEAN and Human Rights Management in Post-Cold War Southeast Asia' in James Tang (ed), *Human Rights and International Relations in the Asia-Pacific Region* (Pinter, 1995) 167.

18 Tan Hsien-Li, 'The ASEAN Human Rights Body: Incorporating Forgotten Promises for Policy Coherence and Efficacy' (2008) 12 *Singapore Yearbook of International Law* 239, 248–51.

19 John McKay, 'APEC's Role in Political and Security Issues' in Richard Feinberg (ed), *APEC as an Institution: Multilateral Governance in the Asia-Pacific* (Institute of Southeast Asian Studies, 2003) 229. On the potential use of

could conceivably lead to greater engagement with human rights if the experience of the Organization for Security and Co-operation in Europe ('OSCE') is a guide.[20]

Despite such evolution, regional cooperation on human rights within the Asia-Pacific remains rudimentary and ad hoc. Effective national institutions and a robust dialogue with the international mechanisms are essential pre-conditions for the protection of rights in Asia-Pacific countries, but they are not sufficient conditions and a strong regional mechanism could complement existing processes. Such a mechanism could assist in building awareness of, and respect for, human rights. It could aid in tailoring international standards to specific problems faced at a regional or subregional level. It could provide non-threatening, cooperative, region-sensitive assistance to countries with weak human rights protection or institutions, to constructively help them to meet their human rights obligations. It could strengthen the capacity and independence of national institutions by drawing on region-specific expertise. Ultimately, it could enhance the perceived legitimacy of rights across the region, including by subjecting national authorities to external scrutiny from within the region, counterbalancing the common objection that UN bodies in Geneva are too remote from realities on the ground.

ASEAN's establishment of the AICHR in late 2009 indicates a belated, if partial, recognition of the need for stronger regional cooperation on human rights, following various earlier attempts by civil society to generate momentum.[21] The AICHR is far less robust than regional mechanisms elsewhere.[22] It is composed of governmental representatives and lacks independence. Its mandate is limited to promoting and protecting rights, but there is no power to openly criticise States or to consider individual complaints. It is designed to follow the 'ASEAN way':[23] consultative, non-confrontational and respectful of sovereignty and non-interference. These considerable limitations are far from the minimum standards for regional mechanisms set out by the UN High Commissioner

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regional economic arrangements as a 'back door' for addressing human rights issues, see Lawrence Woods, 'Economic Cooperation and Human Rights in the Asia-Pacific Region: The Role of Regional Institutions' in James Tang (ed), *Human Rights and International Relations in the Asia-Pacific Region* (Pinter, 1995) 152.

[20] While the essential mandate of the OSCE is to prevent conflict and promote security in Europe, it has become evident that engagement with issues of human rights and democracy is essential to the effective performance of this mandate. The OSCE has been particularly influential in the sphere of minority rights: its High Commissioner for National Minorities has adopted a number of Recommendations on the treatment of national minorities, which, although not formally binding, are influential on national governments as statements of best practice. The OSCE also does important work related to the promotion of democracy and associated rights.

[21] For example, the Asian Human Rights Commission, a Hong-Kong-based non-governmental organisation ('NGO') drafted an *Asian Human Rights Charter* with involvement from thousands of individuals from various Asian countries and over 200 regional NGOs. Similarly, in 1989, the Law Association of Asia and the Pacific (LAWASIA) prepared a Draft Pacific Charter of Human Rights, largely modelled on the *African Charter of Human and Peoples' Rights*, and proposed a Pacific Human Rights Commission to implement that Charter and receive complaints about human rights violations. In 1993, LAWASIA also proposed an Asian Charter, Commission and Court. There were also earlier proposals for regional mechanisms in 1964 (at the UN Kabul Seminar on Human Rights in Developing Countries), 1965 (by the South-East Asia and Pacific Conference of Jurists in Bangkok), 1967 (a Philippines proposal to the UN Commission on Human Rights), 1968 (an International Commission of Jurists proposal for a Council of Asia and the Pacific) and 1976 (by Amnesty International): see James Tang, 'Towards an Alternative Approach to International Human Rights Protection in the Asia-Pacific Region' in James Tang (ed), *Human Rights and International Relations in the Asia-Pacific Region* (Pinter, 1995) 185, 191, 194.

[22] For a critical overview of the ASEAN mechanism and its development, see Hsien-Li, above n 18. See also *Human Rights in the Asia-Pacific Report*, above n 8, 63–8.

[23] See, eg, Gillian Goh, 'The "ASEAN Way": Non-Intervention and ASEAN's Role in Conflict Management' (2003) 3 *Stanford Journal of East Asian Affairs* 113.

for Human Rights, which emphasise the need for independence and individual complaints procedures.[24]

Despite the shortcomings of the AICHR, the very fact of its establishment is a cause for optimism given the strong historical resistance to regional action on human rights by many governments in the region. Understanding and dissecting the reasons for official resistance to regional human rights cooperation is important not only in explaining the past, but also in identifying prospects for future strengthening of regional cooperation.

Explaining resistance to regional rights protections in Asia

There are a variety of conventional explanations for the reluctance of Asian and/or Pacific countries to embrace regional mechanisms. This section both summarises and interrogates those views, with the aim of demythologising commonly held ideas about the perceived uniqueness of the Asia-Pacific region when it comes to prospects and possibilities for stronger human rights protection.

Assertion One: The Asia-Pacific is too diverse to share common standards

Asian countries have often been seen as too diverse and plural to subscribe to a uniform set of regional standards governing the behaviour of their citizens and residents. It is, of course, true that there is great social, ethnic, linguistic, cultural and political diversity among Asian countries,[25] particularly given that the region is by far the world's most populous. Some have even suggested that there is 'far greater diversity of language, culture, legal systems, religious traditions, and history in the Asia-Pacific region than in other regions of the world'.[26]

Yet, it is difficult to accept that Asia is objectively more diverse than all of the other regions of the world that have felt able to accept regional human rights standards and mechanisms. There are presently 57 countries in Africa, 53 in the Americas, and 52 in Europe, but only 50 in Asia (or only 32 if Middle Eastern countries are excluded from that group) and a further 24 in Oceania.[27] Most pertinently, it is hard to accept that, for instance, Africa is any less diverse than Asia at the regional, national and sub-national levels, given the acutely complex tribal structures, religious diversity and different political ideologies in Africa. Asia may, indeed, be more homogenous than Africa is in certain respects, since national boundaries in most of Africa are colonial constructs superimposed upon an underlying autochthonous diversity, whereas certain regions of Asia — China, Japan, Thailand, Vietnam and some others — were less defined by external forces than by local political entities exercising pre-modern administrative control and which *unified* large areas. Various subregions in Asia also have long, pre-colonial histories of interaction[28] that suggest at least some degree of shared experiences among Asian peoples.

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24 UN Office of the High Commissioner for Human Rights, *Principles for Regional Human Rights Mechanisms (Non-Paper)*, Office of the High Commissioner for Human Rights Regional Office for South-East Asia <http://bangkok.ohchr.org/programme/asean/principles-regional-human-rights-mechanisms.aspx>.

25 Tang, above n 21, 191.

26 Dinah L Shelton, *Regional Protection of Human Rights* (Oxford University Press, 2010) 1055.

27 UN Statistics Division, *Composition of Macro Geographical (Continental) Regions, Geographical Sub-Regions, and Selected Economic and Other Groupings* (1 April 2010) <http://unstats.un.org/unsd/methods/m49/m49regin.htm>.

28 Tang, above n 21, 193.

At the same time, it is true that some regions, such as Europe and the Americas, are more homogeneous than Asia in certain characteristics, such as the widespread acceptance of democratic political systems, which tend to correlate with human rights values. But that was not always so; and is, indeed, a relatively recent phenomenon. Totalitarianism, fascism and communism are as much a part of recent European history as liberal democracy; military dictatorships ruled in Spain, Portugal and Greece as recently as the 1970s; genocidal wars gripped the Balkans in the 1990s; and both Russia and Turkey remain plagued by periodic internal armed conflicts. In fact, as the Council of Europe enlarged from its initial 10 Member States to its current 47, the scholarly literature has emphasised the diversity amongst the States participating in the European human rights system. Thus, the current membership of the Council of Europe covers 'a land mass stretching from Iceland to Vladivostok'[29] and 'displays an unprecedented and formidable diversity'.[30]

The dominant narrative of the creation of the European human rights system suggests that the system was a more or less spontaneous and consensus-based response to the horrors of the Second World War and the threat of communism in Eastern Europe, by 'a club of largely like-minded Western European countries which share much of their legal and political culture and traditions'.[31] Yet this narrative is incorrect, or at least incomplete. In fact, there was considerable disagreement and diversity of views among States negotiating the *European Convention on Human Rights* ('*ECHR*') system, concerning both its nature and the rights to be protected by it.

To give some examples, a number of European States argued that human rights should be expressed merely in terms of 'general principles'; others, including the United Kingdom, argued against rights of individual petition and the establishment of a judicial body.[32] The narrow range of rights initially protected by the *ECHR* reflects the difficulties in securing consensus among different States on the scope and content of rights: the *ECHR*, thus, focused only 'on the most fundamental violations of human rights, recognising that they should command instant and unconditional outrage from all people, regardless of their cultural and political traditions'.[33] As the European system strengthened over time,[34] different techniques for managing diversity have come into play. Most prominently, the European Court of Human Rights has developed the 'margin of appreciation' doctrine, by which a degree of deference is accorded to 'better placed' national authorities in decisions about restricting rights to secure other public interests.[35] The central point is that the European human rights system did not spring fully-formed from homogeneity and consensus, but rather represents a slow evolution of consensus on human rights from the starting point of a diversity of views.

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[29] Steven Greer, 'What's Wrong with the European Convention on Human Rights?' (2008) 30 *Human Rights Quarterly* 680, 680–1.

[30] Wojciech Sadurski, 'Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and Eastern European States to the Council of Europe, and the Idea of Pilot Judgments' (2009) 9 *Human Rights Law Review* 397, 400.

[31] Ibid.

[32] See generally Elizabeth Wicks, 'The United Kingdom Government's Perceptions of the European Convention on Human Rights at the Time of Entry' [2000] *Public Law* 438, 439–40.

[33] Sadurski, above n 30, 406–7.

[34] See further below.

[35] See further below.

At the same time, not only is diversity not fatal to shared values, but the experience of diversity may actually demonstrate the need for them. Human rights consciousness in Europe largely grew out of the excesses and failures of authoritarian political systems. Despite the distinctly European intellectual legacy of Enlightenment thought, in practice, political and cultural diversity has been as much a part of European history as Asian history. Paradoxically, it is the collision of extreme manifestations of diversity — ethnic violence, racial supremacy, ideological competition — that propelled the ultimate recognition of shared human values in Europe and a commitment to their regional protection, even if there was disagreement about how to do it. Given the extraordinary level of violence in the Asia-Pacific during the Second World War, it is in some ways puzzling that human rights did not catch on there too (with the notable exceptions of India, US-occupied Japan, and the Philippines).

Claims about the irreconcilable diversity of the Asia-Pacific region may also mask strategies of national political control. If diversity is thought to preclude a commitment to shared rights-based values at the regional level, then it is hard to see why that argument would not equally preclude action at the national level. India, for instance, has many hundreds of minority groups (including tribal groups or 'Adivasis'), yet one does not hear the Indian Government objecting that India is too diverse to be subject to a single system of Indian law, including its constitutional rights protections. Just as different social groups within a country are capable of sharing minimum rights-based standards, so too it is equally possible for diverse national societies to be shaped by shared regional standards — particularly those based on the international human rights agreements that many countries in the Asia-Pacific have formally endorsed.

Further, if safeguarding diversity and pluralism is a genuine concern in the Asia-Pacific, then a regional human rights system could strengthen, rather than weaken pluralism. Protecting cultural and minority practices, safeguarding languages, and preserving the self-determination of peoples are all group-oriented human rights which a regional system could readily endorse and institutionalise in the Asia-Pacific. The European and American experiences also suggest it would be possible to establish regional systems that initially protected only these rights, but that could subsequently evolve to protect other categories of rights as well.

Assertion Two: 'Asian values' are incompatible with 'western' international standards

Paradoxically, a second explanation for the reluctance of Asian countries to pursue regional human rights cooperation is not that Asia is too diverse, but that it shares common 'Asian values' that are at odds with supposedly 'western' human rights conceptions (and are, thus, perceived as a modern extension of imperialism).[36] In particular, it is suggested that 'Asians' place the collective before the individual and prefer to prioritise economic development and political stability over civil and political rights.[37] Such an approach is exemplified in the *Bangkok Declaration* of 1993, which recognises:

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[36] Michael Freeman, 'Human Rights: Asia and the West' in James Tang (ed), *Human Rights and International Relations in the Asia-Pacific Region* (Pinter, 1995) 13, 14.

[37] Yash Ghai, 'Asian Perspectives on Human Rights' in James Tang (ed), *Human Rights and International Relations in the Asia-Pacific Region* (Pinter, 1995) 54; Joseph Chan, 'The Asian Challenge to Universal Human Rights:

> 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.[38]

A version of that statement is repeated in the AICHR's Terms of Reference.[39] The 'Asian values' (and universalism/relativism) debate, is well trodden[40] and is only discussed here in the context of its implications for regional institution building.

The most powerful and immediate criticism of the 'Asian values' argument is that it essentialises 'Asian identity', failing to take account of diversity within and among the peoples of the region. However, even if there were something anthropologically sound about essentialising 'Asian values' (and constructing them in opposition to supposedly uniform 'western' values and traditions),[41] an acceptance of the notion does not so much rule out a regional human rights mechanism, but rather affects its institutional design. Asian States have committed themselves to the universality of human rights, but argued for specificity in their application, such that 'Asian values' claims — much weakened since the Asian economic crisis of 1997–98[42] — are not fatal to a regional mechanism, but rather bear upon the content of rights protected, whether 'duties' are also emphasised, and the method (for instance, consensual rather than adversarial) by which a regional mechanism would operate.

The formation of the African human rights system is instructive. In the preamble of the *African Charter*, African countries take into consideration 'the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights'. Article 61 of the Charter allows the Commission to consider, 'as subsidiary measures to determine the principles of law', among other things, 'African practices consistent with international norms on human and people's rights, customs generally accepted as law, [and] general principles of law recognized by African states'.

A Philosophical Appraisal' in James Tang (ed), *Human Rights and International Relations in the Asia-Pacific Region* (Pinter, 1995) 25, 35; Mely Caballero-Anthony, 'Human Rights, Economic Change and Political Development: A Southeast Asian Perspective' in James Tang (ed), *Human Rights and International Relations in the Asia-Pacific Region* (Pinter, 1995) 39. This is particularly the case when linked with other transformative western objectives in the region such as democratisation, good governance or other geo-strategic goals: Stig Toft Madsen, *State, Society and Human Rights in South Asia* (Manohar, 1996) 190.

38 *Bangkok Declaration*, above n 6, [8].

39 ASEAN, *Terms of Reference of ASEAN Intergovernmental Commission on Human Rights* (October 2009), [1.4] <http://www.aseansec.org>.

40 See, eg, Randall Peerenboom, 'Beyond Universalism and Relativism: The Evolving Debates about "Values in Asia"' in Dinah L Shelton (ed), *Regional Protection of Human Rights* (Oxford University Press, 2010) 1056; Chan, above n 37; Freeman, above n 36; Caballero-Anthony, above n 37; Ghai, above n 37; David Kelly and Anthony Reid (eds), *Asian Freedoms: The Idea of Freedom in East and Southeast Asia* (Cambridge University Press, 1999); Arvind Sharma, *Are Human Rights Western? A Contribution to the Dialogue of Civilisations* (Oxford University Press, 2006); Amartya Sen, 'Human Rights and Asian Values: What Lee Kuan Yew and Li Peng Don't Understand about Asia' (1997) 217 *The New Republic* 33; Joanne R Bauer and Daniel A Bell (eds), *The East Asian Challenge for Human Rights* (Cambridge University Press, 1999); Kishan Rana, *Asian Diplomacy: The Foreign Ministries of China, India, Japan, Singapore and Thailand* (The John Hopkins University Press, 2008) 161–80.

41 Ghai, above n 37, 61, observes that tensions between liberty and community equally feature in western societies and thought.

42 Ian Neary, *Human Rights in Japan, South Korea and Taiwan* (Routledge, 2002) 5.

Yet, the drafters of the Charter were careful to ensure that 'African specificities in dealing with rights' did not 'deviate from the international norms' in the global human rights treaties ratified by African States.[43] The preamble, thus, highlights 'the importance traditionally attached to these rights and freedoms in Africa', and others have written on the traditional importance of various freedoms, such as free expression and opinion,[44] in certain societies in Africa, including in highly variable pre-colonial cultures, societies, philosophies, and religions.[45] In Asia, too, there has been considerable scholarly attention to the antecedents of human rights in pre-modern Asian societies, including notions of political freedom.[46]

The idea of 'African values' in the *African Charter* is not presented as incompatible with human rights,[47] but rather as a particular expression of human rights in a regional context. Such expression finds form in the Charter through the inclusion of group or people's rights (to self-determination, development, peace and security, and the environment);[48] the articulation of concomitant duties (including a duty on the individual 'to preserve and strengthen positive African cultural values in his relations with other members of the society');[49] and (at its inception) the creation of a regional commission, rather than a quasi-judicial body. Of greater concern, however, is its selective preambular reference to eliminating Zionism (a sentiment shared by the *Arab Charter*).

In practice, the application of the *African Charter* has generally complemented, rather than competed with or undermined, the scope of internationally protected human rights, notwithstanding the unusual inclusion of extensive moral 'duties'.[50] In the Americas too,

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43 B Obinna Okere, 'The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems' (1984) 6 *Human Rights Quarterly* 141, 152, citing the drafting record.

44 Ibid 146.

45 Nana Kusi Appea Busia, 'The Status of Human Rights in Pre-Colonial Africa: Implications for Contemporary Practices' in Eileen McCarthy-Arnolds, David R Penna and Debra Joy Cruz Sobrepeña (eds), *Africa, Human Rights, and the Global System: The Political Economy of Human Rights in a Changing World* (Greenwood Press, 1994) 225.

46 Freeman, above n 36, 15; Kelly and Reid, above n 40; Mushakoji Kinhide quoted in Neary, above n 42, 10–11; Inoue Tatsuo, 'Liberal Democracy and Asian Orientalism' in Joanne R Bauer and Daniel A Bell (eds), *The East Asian Challenge for Human Rights* (Cambridge University Press, 1999) 27; Madsen, above n 37, 34–64. Madsen finds that '[s]cholarly literature … presents a dualistic image of Indic civilisation: hierarchical, normatively relativistic and unjust, yet leaving ample scope for indigenous forms of communal and cultural self-determination or self-regency within larger statal orders exhibiting measures of tolerance and humanism' (at 45).

47 For a radical sociological critique of human rights in Africa as an ideology of domination, see Issa Shivji, *The Concept of Human Rights in Africa* (Codesria Books, 1989).

48 See generally Rachel Murray and Steven Wheatley, 'Groups and the African Charter on Human and Peoples' Rights' (2003) 25 *Human Rights Quarterly* 213; Rose M D'Sa, 'Human and Peoples' Rights: Distinctive Features of the African Charter' (1985) 29 *Journal of African Law* 72; S Kwaw Nyameke Blay, 'Changing African Perspectives on the Right of Self-Determination in the Wake of the Banjul Charter on Human and Peoples' Rights' (1985) 29 *Journal of African Law* 147.

49 Art 29(7). See generally Makau wa Mutua, 'Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties' (1995) 35 *Virginia Journal of International Law* 339.

50 Christof Heyns, 'The African Regional Human Rights System: The African Charter' (2004) 108 *Penn State Law Review* 679, 692, for instance, observes that the notion of duties in the *African Charter* has not been used in a sinister, rights-denying manner, but instead interpreted by the African Commission as a form of general limitations clause common in other regional and international jurisprudence. By contrast, others warn of the risk of abuse of the concept of duties by African States: see U O Umozurike, 'The African Charter on Human and Peoples' Rights' (1983) 77 *American Journal of International Law* 902, 911; Shivji, above n 47, 99. For a critique of the global 'human duties' discourse including its Asian dimensions, see Ben Saul, 'In the Shadow of Human Rights: Human Duties, Obligations and Responsibilities' (2001) 32 *Columbia Human Rights Law Review* 565.

the inclusion of extensive duties[51] has generally not prejudiced rights protection and the Inter-American system has generally avoided any attempt to claim or develop distinctive 'American values' that might reduce or limit international human rights standards. In the *Arab Charter*, however, some regional particularities potentially diminish international standards, such as concessions to Shari'a law in the area of women's rights.[52]

The African experience suggests that ideas about the particularity of African values perform more of an expressive political function — generating communal solidarity and pan-African identity — than deliberately watering down or contesting international standards.[53] Given the sheer diversity of African peoples, the continent-wide expression of common 'African values' is just as anthropologically suspect as assertions of 'Asian values'. Yet, whether social reality corresponds with official or political claims about it is not the only thing that matters, for regions — just as nations — are, up to a point, imagined or socially constructed.[54] The various permutations of pan-African solidarity over time have been partly reactionary against colonialism, western hegemony, and the liberal economic order, a form of negative self-definition as much as the construction of a positive collective identity.

A similar process of construction of identity *through* the development of a regional human rights system can be seen in Europe. Granted, the idea of human rights is generally traced to European Enlightenment thought, so the human rights tradition was already seen as indigenous to Europe. Yet, in the first half of the 20th century, various countries in Europe had fallen under authoritarian or totalitarian regimes, most notably Nazi Germany, which supported and constructed national identities through systems based on the systematic denial of human rights, at least to certain sectors of the population, and forms of chauvinistic cultural nationalism.

Post-war moves to create a united Europe, characterised by 'the rule of law and the enjoyment by all persons … of human rights and fundamental freedoms'[55] can, thus, be read as an effort to reclaim an earlier vision of European identity, rooted in Enlightenment values and championing a cosmopolitan identity over narrower nationalist ones. It can also be seen as a response to the threat of communism, which was sweeping Eastern Europe: one of the aims of the *ECHR* was 'to protect states from Communist subversion'.[56] Human rights, and the notion of 'European identity' as based on these rights, were, therefore, deployed for a political purpose. Over time, participation in the European human rights instruments has extended from a small number of western European States to now cover the entire land mass of Europe, with the exception of Belarus, and this development has been associated with political and other social changes in the region. Even in Europe, then, the alignment of 'European values' with human rights is not natural or self-evident, but has involved the construction of 'regional identity' for political purposes.

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51 *American Declaration of the Rights of Man* arts 29–38 (including duties towards society, children and parents; to receive instruction, vote, obey the law, serve the community and nation; concerning social security and welfare; to pay taxes, work, and for non-citizens to refrain from certain political activities).

52 Art 3(3); see Rishmawi, above n 4, 171.

53 As Chan, above n 37, 26, observes, the crux of the debate is this: '[w]hile Asian governments acknowledge the universality of human rights and while the West concedes that particularities do matter, the two sides have very different views of how the two ideas should be related'.

54 Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso, 1991).

55 *Statute of the Council of Europe*, opened for signature 5 May 1949, 8 UNTS 103 (entered into force 3 August 1949) art 3.

56 Clare Ovey and Robin White, *Jacobs & White's The European Convention on Human Rights* (Oxford University Press, 4th ed, 2006) 2.

The critical question in the process of constructing a regional identity is: who enjoys the power to imagine and, thus, to constitute it? Some Asian political leaders have arrogated to themselves the authority to 'speak' exclusively and authoritatively on behalf of their populations — when in many countries, Asian leaders are not representative of democratic sentiment, with some not being elected. As Yash Ghai wrote during Asian values debate in the 1990s:

> Perceptions of human rights are also reflective of social and class positions in society. What conveys an apparent picture of uniform Asian perspective on human rights is that it is the perspective of a particular group, that of the ruling elites, which gets international attention. What unites these elites is their notion of governance and the expediency of their rule. For the most part the political systems they represent are not open or democratic, and their publicly expressed views on human rights are an emanation of these systems, of the need to justify authoritarianism and repression.[57]

In contrast, other, competing Asian voices — minorities, indigenous peoples, the rising middle class, NGOs, human rights advocates — are often marginalised.[58] Many of those voices are clamouring *for*, not against, stronger rights protections, although they too may be elites of a different sort.[59] As others have observed:

> '[s]ervitude and oppression are resented everywhere; Asian peoples do not inhabit a separate planet. When they themselves appeal to freedom as a universal standard of political and other values, this can hardly be dismissed as a bourgeois, Western, hegemonic invention'.[60]

The Asian State is not, indeed, the community, which is often suppressed by it.[61] The articulation of a common 'ASEAN Identity' in chapter XI of the *ASEAN Charter* speaks of creating a 'sense of belonging among its peoples in order to achieve its shared destiny, goals and values' (art 35), but in the same breath rules out diversity and pluralism by imposing the motto 'One Vision, One Identity, One Community' (art 36). Given the undoubted diversity of voices and societies in the Asia-Pacific region, the distillation of a common set of pan-Asian values or identity would seem unlikely,[62] even if there may be some commonalities of experience.[63] Institutionalisation in the Asia-Pacific region, such as

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57 Ghai, above n 37, 55; see also Freeman, above n 36, 15.

58 Ibid.

59 Madsen, above n 37, 186, noting that 'human rights are also part of a global culture mediated by intellectual elites around the globe' and representing 'different political and ideological positions'.

60 Kelly and Reid, above n 40, 9.

61 Ghai, above n 37, 61–2.

62 Ibid 54. As Ghai writes, '[i]t would be surprising if there were indeed one Asian perspective, since neither Asian culture nor Asian realities are homogenous throughout the continent'.

63 David Kelly, 'Freedom – A Eurasian Music,' in David Kelly and Anthony Reid (eds), *Asian Freedoms: The Idea of Freedom in East and Southeast Asia* (Cambridge University Press, 1999) 7. As Kelly notes: 'Critics of Orientalism correctly point out that there is no underlying unity, no Asian essence, shared at a deep level by all cultures from Turkey to Japan. But to assert … a total absence of cross-cutting relationships is contrary to common experience'. Likewise it is suggested that there exists in Asia 'a history of religious-cultural inter-flows, leavened with value systems rooted in local heterogeneity … . Notwithstanding commonalities, each national culture is unique. Within each country sub-cultures exist, the minorities, linguistic groups and ethnicities, differentiated from the dominant culture': Rana, above n 40, 166.

through ASEAN, has historically been 'interests' driven, rather than grounded in a shared political or cultural identity.[64]

For African countries, the commitment to constructing a pan-African identity found expression, in part, in the articulation of human rights values. The same can be said of Europe and the Latin American countries. In Asia, however, the expression of Asian values has taken the form of resistance to rights. The core point is that the construction of regional values — African, European, American or Asian — is a deeply political project of imagining identity and bringing into being through deliberate political choices, as much as it may relate to any innate or underlying 'truth' about the character of a particular people or region. Further, cultural identity is dynamic, not static, and capable of change over time. There is no reason why, for instance, Asian countries cannot embrace regional human rights mechanisms to combat harmful traditional practices, just as Indian national law bans *sati* (widow burning) or many countries prohibit child marriages.

Assertion Three: The Asia-Pacific emphasises non-interference in national sovereignty

A third explanation for Asian resistance to regional human rights cooperation involves a reaction against the historical experience of European colonialism in Asia. As asserted in the *Bangkok Declaration*, Asian countries 'emphasise the principle of respect for national sovereignty and territorial integrity as well as non-interference in the internal affairs of States, and the non-use of human rights as an instrument of political pressure'.[65] As such, human rights have long been regarded as 'internal affairs' to be dealt with by national governments and not through external scrutiny. Regional institutions, such as ASEAN, have, thus, frequently ignored serious human rights violations in Member States. Such ideas still hold powerful sway in many governments in the region[66] and are a pragmatic constraint on prospects for greater regional cooperation on human rights.

Whether such ideas were ever coherent, or remain so, is another question. In Africa, for instance, the experience of colonialism (and slavery) was a key reason *in favour* of Africa's support for regional human rights protection.[67] The human right of self-determination and the processes of decolonisation were central to the UN's post-war international order and, thus, attractive to both liberation movements and newly independent African States — although not, it must be said, when claims of 'internal' self-determination were made against newly independent States inheriting arbitrarily drawn colonial borders.[68] Liberation movements also tended to subordinate other human rights in the quest to secure the overarching goal of self-determination, leading to violent excesses and suppression of domestic opposition.[69]

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64 Amitav Acharya, *Regionalism and Multilateralism: Essays on Cooperative Security in the Asia-Pacific* (Eastern Universities Press, 2nd ed, 2003) 242–75.

65 *Bangkok Declaration*, above n 6, [5].

66 For an examination of notions of sovereignty and non-intervention in ASEAN practice, see Acharya, above n 64, 224–41.

67 Heyns, above n 50, 670.

68 Rose M D'Sa, 'The African Charter on Human and Peoples' Rights: Problems and Prospects for Regional Action' (1981) 10 *Australian Yearbook of International Law* 101, 118.

69 On the troubled relationship between liberation movements and human rights in Africa, see George Houser, 'Human Rights and the Liberation Struggle: The Importance of Creative Tension' in Eileen McCarthy-Arnolds,

The discourse of human rights was also instrumentally useful to African States as a 'weapon for attacking political opponents', particularly to criticise Israel's occupation of Palestinian territories,[70] to condemn apartheid in white South Africa (and Namibia),[71] or to protest Portuguese colonialism in Mozambique and Angola. Thus, while African States were protective of their sovereignty,[72] and sometimes exaggerated the importance of non-interference to shield violent regimes (as in Uganda, Central African Republic, and Equatorial Guinea),[73] that impulse was tempered by an appreciation of rights. Even sympathy for the plight of the Indo-Chinese 'boat people' in the 1970s influenced African attitudes, along with United States (US) President Carter's activist stance on human rights.[74]

Ironically, many Asian countries benefitted from the rights-based decolonisation agenda of the UN after the Second World War, yet newly independent Asian governments promptly turned away from extending human rights protections to their own peoples. Some Asian countries emerged relatively unscathed from colonialism (such as Thailand and Nepal), while others were colonial powers themselves (such as Japan in China and South-East Asia, or China in Tibet, or India in various Himalayan territories). In the deeper past, there were numerous relations of domination and subordination between many different political entities in pre-modern Asia. Far from being distinctively 'Asian', rigid notions of sovereignty and non-interference are largely products of post-war modernisation and the appropriation of European-derived notions of territorial statehood.

Contemporary attitudes among Asian governments are also more nuanced than is sometimes thought. Some robust democracies have made firm commitments to human rights, if imperfectly protected (such as Japan, the Philippines, South Korea, India, Indonesia, Timor, various Pacific Islands); other democracies are either less stable or less protective of human rights (such as Thailand, Nepal, Cambodia, Bangladesh, Sri Lanka, Singapore and Malaysia); while others are communist or authoritarian (including China, Laos, Vietnam, Bhutan, Myanmar, and Pakistan). In a new democracy such as Indonesia, the notion of sovereignty in a once authoritarian, centralised State has undergone radical transformation through the extensive decentralisation of law-making and diffusion of political authority.[75]

Further, there is a spectrum of views, rather than unity, in the region on issues such as humanitarian intervention, the responsibility to protect, and human security[76] — from outright hostility, to agnosticism, to moderate enthusiasm — suggesting that ideas about sovereignty and non-intervention are both diverse and changing. It was a notable development to find some Asian countries becoming involved in the management of

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David R Penna and Debra Joy Cruz Sobrepeña (eds), *Africa, Human Rights, and the Global System: The Political Economy of Human Rights in a Changing World* (Greenwood Press, 1994) 11.

70 D'Sa, above n 68, 104.

71 Heyns, above n 50, 685.

72 Ibid 686.

73 Umozurike, above n 50, 902; U O Umozurike, 'The African Charter on Human and Peoples' Rights: Suggestions for More Effectiveness' (2007) 13 *Annual Survey of International and Comparative Law* 179, 182.

74 Umozurike, above n 50, 904.

75 See, eg, Simon Butt, 'Regional Autonomy and Legal Disorder: The Proliferation of Local Laws in Indonesia' (2010) 32 *Sydney Law Review* 177 (noting, however, that decentralisation has been rather chaotic and may undermine both the rule of law and human rights domestically).

76 See, eg, Ben Saul, 'The Dangers of the United Nations' "New Security Agenda": Collective and Regional Security in the Asia-Pacific Region' (2006) 1 *Asian Journal of Comparative Law* 147.

conflicts (such through the Cambodian peace process and the UN Transitional Authority in Cambodia, or in the International Force for East Timor intervention in Portuguese (East) Timor in 1999).[77] Divisions within ASEAN over its approach to Myanmar is another example, with increasing evidence of a hardening of attitude towards the military dictators.[78]

Old, static notions about sovereignty that underpin resistance to regional human rights cooperation are likely to be further challenged by the increasing distance from the colonial era, the growth of an educated middle class and increasingly empowered civil societies, greater economic and social integration across Asia, and the end of the threat of interference during the Cold War.[79] As one writer notes, the quiet engagement by ASEAN with civil society on human rights issues since the mid-1990s suggests that 'the norm on non-interference is a nuanced norm in practice'.[80]

Further, even within regions with a long tradition of human rights protection, such as Europe, it is questionable whether there has been really much less concern about sovereignty and non-interference in the field of human rights. Outside the Council of Europe framework, the treaties creating the European Communities were 'virtually silent on the protection of human rights' and, instead, focused on economic and technical cooperation.[81] The EU was, thus, designed with a limited competence to intrude in the domestic affairs of Member States in relation to human rights.[82] This only changed over time as the European Court of Justice began to recognise and protect fundamental rights in order to ensure community law would be compatible with the constitutional protections in the national law of Member States.[83]

Even within the Council of Europe's human rights system, the jurisdiction of the European Court of Human Rights and the right of individual petition were originally optional for States parties to the *ECHR*, precisely due to concerns about preserving sovereignty. Further, referral of matters to the European Court was subject to scrutiny by the Committee of Ministers (that is, a committee of government representatives),[84] suggesting reticence on the part of Member States to relinquish control in favour of a regional body. Enforcement of decisions of the European Court still remains a matter for the Committee of Ministers.

Further, the relationship between the *ECHR* scheme and national legal systems is one of 'solidarity and subsidiarity'.[85] In other words, the rights enshrined in the Convention are primarily to be protected through *national* legal systems, rather than through the *ECHR* and Court. 'Solidarity' refers to the fact that, under article 1 of the *ECHR*, Member States are

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77 On ASEAN's supportive role in East Timor from 1999, see Haacke, above n 14, 197–204.

78 Larry Jagan, 'Burma's FM Gets an "Earful" from ASEAN and Partners', *The Irrawaddy* (online), 24 July 2010 <http://www.irrawaddy.org/article.php?art_id=19052>.

79 Acharya, above n 64, 239.

80 Caballero-Anthony, above n 37, 249.

81 Jean-Marie Henckaerts, 'The Protection of Human Rights in the European Union: Overview', in Dinah L Shelton (ed), *Regional Protection of Human Rights* (Oxford University Press, 2010) 43.

82 Although, of course, it had significant competence to interfere in the domestic affairs of Member States with respect to matters falling within the treaties constituting the European Communities (and later the EU).

83 Henckaerts, above n 81.

84 This changed in 1998 when *Protocol 11* entered into force, establishing the Court as a permanent, full-time judicial body, and making individual petition and acceptance of the Court's jurisdiction compulsory.

85 See, eg, Ovey and White, above n 56, 18.

obliged to ensure that *ECHR* rights are protected by their national legal orders: the Member States, thus, act in 'solidarity' at the national level to guarantee rights. 'Subsidiarity' refers to the corollary, that the Court is only a 'subsidiary' means of protecting rights, to be called upon where national legal systems fail to do so. This principle is embodied, for example, in article 35 of the *ECHR*, which provides that the Court can only deal with a matter 'after all domestic remedies have been exhausted'.[86]

Further, the European Court has developed principles of interpretation that pay considerable deference to the decisions of national authorities. Perhaps the best known is the doctrine of the 'margin of appreciation', by which the Court gives States a measure of discretion in their application of the *ECHR* and defers, within limits, to the decisions of national authorities as to what (if any) action is appropriate to protect rights.[87] The scope of the margin of appreciation depends on the nature of the right in question and is wider where there is no consensus among Member States as to how a particular right should be protected in a particular fact situation, and where important State interests are at stake.[88] In this way, the 'margin of appreciation' offers a way of mediating between the need to protect human rights and the need to respect State concerns about loss of sovereignty (particularly in relation to critical issues such as national security). However, it has also been criticised for giving undue deference to States and, thus, detracting from the effectiveness of supra-State human rights protection.[89] In its various efforts to balance national sovereign concerns against regional supervision of human rights, the European experience provides nuanced lessons for the Asia-Pacific region, as greater attention is paid there to working out the interaction between sovereignty and external human rights mechanisms.

Assertion Four: The Asia-Pacific prefers informal dispute settlement over adjudication

A fourth explanation for resistance to human rights cooperation in Asia is that Asian people (and countries) prefer to resolve disputes by less formal and relatively unstructured means (such as by negotiation, diplomacy or mediation), rather than submitting to formal, binding adjudication. A corollary of this argument is a view that human rights are better dealt with as matters of national policy and are not suited to 'legalisation' through judicial mechanisms.[90]

Such views require careful scrutiny. While many Asian countries were historically sceptical of binding international dispute resolution mechanisms — seeing them as a tool of western hegemony — such attitudes have changed markedly over time. As a former

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[86] For more detailed discussion, see, eg, Laurence R Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19 *European Journal of International Law* 125, 128–9.

[87] For a recent discussion of this doctrine, see Stefan Sottiaux and Gerhard van der Schyff, 'Methods of International Human Rights Adjudication: Towards a More Structured Decision-Making Process for the European Court of Human Rights' (2008) 31 *Hastings International and Comparative Law Review* 115, 134–6.

[88] For example, in relation to the determination of whether there exists a threat to national security warranting derogation from Convention rights.

[89] See Dinah Shelton, 'The Boundaries of Human Rights Jurisdiction in Europe' (2005) 13 *Duke Journal of Comparative and International Law* 95, 134.

[90] A finer variation of this view is that for 'Asians', 'principles, rules and issues are seen in relative terms, not as absolutes engraved in stone and that cannot be compromised': Rana, above n 40, 174.

Chinese President of the International Court of Justice ('ICJ') shrewdly observed,[91] Asian States have increasingly embraced judicial settlement in contentious cases before the ICJ, as well as participating in advisory opinions.[92] Some of those cases have involved acutely sensitive matters of sovereign title to territory, as have complex maritime disputes submitted to the International Tribunal for the Law of the Sea (such as between Myanmar, Bangladesh and India in 2010). Moreover, there has also been a shift to Asia in the centre of gravity of binding international arbitrations, with more now taking place each year in Asia than in western countries.[93] Asian countries are also active participants in the World Trade Organization's dispute settlement procedure. Over time, ASEAN itself has developed increasingly strong dispute resolution mechanisms providing for binding determinations.[94]

The brief survey above illustrates that Asian countries are willing to resort to binding settlement processes when it suits them — principally in the economic arena, but also on sensitive sovereignty questions such as territory — yet many reject the adjudication of human rights disputes. This suggests that binding settlement is hardly foreign to Asia, its values or traditional practices, and that indeed it has been warmly embraced where natural resources or economic transactions are involved. The selection of a particular dispute settlement method in a given subject area can only be understood as a political choice by Asian governments — not something dictated by immutable Asian values or inherited ancestral characteristics.

Deconstructing reductive, essentialist, and Orientalist or Occidentialist views about legal systems, cultures and regions is vital in properly understanding resistance to greater regional cooperation in Asia. During the drafting of the *African Charter*, it was agreed by many African countries that 'the formal adversarial procedures common to Western legal systems were inappropriate. African customs and traditions emphasise conciliation rather than judicial settlement'.[95] Yet, in the very short time span of 17 years, the African Commission established in 1987 was supplemented by an African Court of Human Rights in 2004,[96] suggesting that custom is hardly determinative if the conditions for regional cooperation are right. In Africa, the change of opinion was partly due to increasing democratisation in various countries, the end of apartheid in South Africa in 1994, and the passing of the Cold War.[97]

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91 Shi Jiuyong, 'Asia and International Court of Justice' (Speech by President of the International Court of Justice, delivered at the UN University Asia, UN House, Tokyo, 14 April 2004).

92 Contentious cases have involved India, Pakistan, Cambodia, Thailand, Malaysia, Indonesia, Singapore and Japan; advisory opinions have involved at least ten Asian countries, such as Korea, the Philippines and Vietnam, among others already mentioned.

93 Shahla F Ali, 'Approaching the Global Arbitration Table: Comparing the Advantages of Arbitration as Seen by Practitioners in East Asia and the West' (2009) 28 *Review of Litigation* 791.

94 See, eg, *Protocol to the ASEAN Charter on Dispute Settlement Mechanism*, signed and adopted 8 April 2010. On economic disputes, see *ASEAN Protocol on Enhanced Dispute Settlement Mechanism*, signed 29 November 2004 (entered into force 29 November 2004) (replacing the *Protocol on Dispute Settlement Mechanism*, signed 20 November 1996 (entered into force 26 May 1998)).

95 Umozurike, above n 50, 909; see also Heyns, above n 50, 686; Umozurike, above n 73, 190 (also stressing the traditional importance of good future relations, thought to be impaired by judicial settlement).

96 On the creation of the Court, see Ibrahima Kane and Ahmed Motala, 'The Creation of a New African Court of Justice and Human Rights' in Malcolm Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2006* (Cambridge University Press, 2nd ed, 2008) 406.

97 Heyns, above n 50, 686.

Moreover, given the proliferation of alternative dispute resolution mechanisms in western societies over many decades, it cannot be said that binding adjudication is a peculiarly western preference. Even within the *ECHR* system, which is generally seen to be the ultimate binding, judicial approach to human rights protection, there remains an emphasis on 'friendly' settlement of disputes. Although the European Court has the power to issue binding judgments, it must encourage the parties to resolve their dispute through negotiation, by 'plac[ing] itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter'.[98] Article 39 of the *ECHR* establishes specific procedures for such settlements. Similarly, article 48(f) of the *American Convention on Human Rights* reserves a mediatory role for the Inter-American Commission 'with a view to reaching a friendly settlement of the matter', while article 49 of the Convention highlights the relevant mediation procedure.[99]

Some pre-conditions of regional cooperation

The experience of other regional human rights systems suggests that there is no single pattern or template in establishing regional cooperation. In the Americas, there was a relatively high degree of regional solidarity among a fairly small number of countries and extending over a long period, boosted by the regional hegemonic influence of the US, which created enough momentum and confidence among States to submit to regional scrutiny.[100] The modern Organisation of American States ('OAS') was established in 1948 and had deep roots in the International Union of American Republics of 1890, the Pan-American Union of 1910, and even the Congress of Panama of 1826.[101] Common regional practices, such as diplomatic asylum and geopolitical realities driving independence movements, drove perceptions of shared regional interests. Hence, regional human rights protection became a natural outgrowth of relatively 'thick' regional social bonds. From its outset, the OAS was not limited to narrow technical cooperation, but pursued a broad agenda including the promotion of democracy and human rights; the strengthening of peace and security; and economic, social and cultural cooperation.[102]

In Europe, by contrast, protracted historical animosity between the great powers and their satellites, punctuated by periodic continental and world wars, was replaced relatively quickly by post-war economic cooperation followed by deep political and social integration. The experience of mass global violence was a trigger for regional human rights cooperation, as Europe deliberately turned against the violent past and sought to

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[98] *ECHR* art 39(1). Previously, this role was performed by the Commission, which would seek to secure a 'friendly settlement' before issuing a report to the Committee of Ministers: former art 28 of the *ECHR*.

[99] That procedure is not, however, as commonly used as in the European system, given the essential unsuitability of mediation in resolving the kind of gross violations of human rights that have featured in the Inter-American system. See David Harris, 'Regional Protection of Human Rights: The Inter-American Achievement' in David Harris and Stephen Livingstone (eds), *The Inter-American System of Human Rights* (Clarendon Press, 1998) 1, 3.

[100] Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, 2003) 142.

[101] *Charter of the Organization of American States*, opened for signature 30 April 1948, 119 UNTS 3 (entered into force in 13 December 1951) as amended by *Protocol of Buenos Aires*, opened for signature 27 February 1967, 721 UNTS 324 (entered into force 27 February 1970); *Protocol of Cartagena de Indias*, opened for signature 5 December 1985, 25 ILM 527 (entered into force 16 November 1988); *Protocol of Washington*, opened for signature 14 December 1992, 33 ILM 1005 (entered into force 25 September 1997); *Protocol of Managua*, opened for signature 10 June 1993, 33 ILM 1009 (entered into force 29 January 1996).

[102] Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights 1994* (17 February 1995) 347.

reconstruct a European social order founded on new values. Regional European cooperation was also stimulated by the slow pace of UN efforts in codifying the *Universal Declaration of Human Rights* of 1948[103] into the binding twin covenants of 1966.[104] Africa moved more slowly than Europe, but the experience of colonialism catalysed regional cooperation on human rights, albeit flavoured by perceptions of 'African values' that, in turn, appropriated human rights as a part of a new African identity.

In the Asia-Pacific region, neither the mass violence of the Second World War nor the experience of colonialism was sufficient to surmount various kinds of resistance to regional cooperation on human rights. The explanations for Asian resistance to human rights, analysed above, help to explain why Asian governments have typically taken certain positions, but they do not satisfactorily account for the considerable divergence on rights between Asia and Africa when many of the underlying experiences are comparable: diversity; perceptions of unique values; colonialism; and a preference for conciliation over adjudication. These explanations can be further questioned once it is realised that many of these experiences can also be found, albeit to a more moderate degree, in the American and European contexts.

Some tentative further explanations are these. There is a lesser sense of geographical contiguity in the Asia-Pacific than in other regions. Europe is a dense continent of neighbours; Africa is larger, but still identifiable as a discrete continent; and the Americas are two well-defined continents aligned north to south. By contrast, the Asia-Pacific is geographically unruly and chaotic, and no-one really agrees on where it starts and ends: the mid-Pacific Ocean through to the Middle East, with quite discrete subregions in between — Central Asia, South Asia, North and East Asia, and South-East Asia.

While this point might be dismissed as merely geographical trivia, geography can nonetheless affect social perceptions of unity, solidarity and community, and, therefore, ideas about what kind of cooperation is possible in a given area. A practical consequence of the geographic point is that there is no single regional organisation or institution in Asia that can claim pre-eminence in representing the wider, amorphous group: ASEAN, SAARC, APEC, and PIF are all small clubs of limited subregional memberships, in contrast to the larger continental constellations of the Council of Europe and EU, the African Union, and the OAS.[105]

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[103] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

[104] Dinah Shelton, 'The Promise of Regional Human Rights Systems' in Dinah L Shelton (ed), *Regional Protection of Human Rights* (Oxford University Press, 2010) 16, 16.

[105] Although Europe is also, to some degree, characterised by a proliferation of regional bodies with different memberships and different mandates, all of which play some role in relation to the protection of human rights. The Council of Europe has 47 members, while the EU consists of only 27 of these. There are also subregional organisations, such as the Regional Cooperation Council for countries in South-East Europe (which replaced the Stability Pact for South-Eastern Europe). At the other end of the spectrum, the Organization for Security and Cooperation in Europe (OSCE) consists of 56 Member States from Europe, Central Asia and North America. The relationship between these organisations can cause problems. The most obvious of these is the ongoing issue about the relationship between the EU (and the *Charter of Fundamental Rights of the European Union*, signed 7 December 2000, OJ C 364/01 (entered into force 1 December 2009)) and the *ECHR* system. The EU and Council of Europe are currently seeking to resolve this issue by negotiating for the EU to accede to the *ECHR*. The EU, meanwhile, is continuing to develop new human rights mechanisms, such as early warning systems in relation to breaches of human rights in Member States under article 7 of the *Treaty on European Union*, opened for signature 7 February

Further fracturing the Asia-Pacific community is the comparatively limited scope of cooperation pursued within these bodies to date — mainly economic, plus some security issues, but nothing like the wider and deeper integration elsewhere, including in the most comparable context, Africa.[106] Diplomacy is often conducted through formal regional meetings of leaders, with relatively limited bilateral contacts.[107]

The relatively narrow scope of cooperation limits the degree of mutual confidence among governments in the region which would be necessary to cooperate on human rights. Cross-border historical animosities, ethnic and religious tensions, and competition over resources (such as shared watercourses) are just some of the sources of intergovernmental distrust in the region. External powers in the region, such as the US, also tended to subordinate human rights concerns to wider geo-strategic priorities, particularly during the Cold War;[108] while rising powers, such as China, do not place human rights at the centre of foreign policy.

External scrutiny of one another's human rights performance requires a fairly high level of intergovernmental confidence, so that criticism does not result in the rapid deterioration of diplomatic relations — particularly in a region where criticism may be received as personal insults to leaders.[109] At the same time, thick social relations are necessary in the event that sanctions are required to compel compliance. As Heyns observes of the African system, 'trade, diplomatic communication, travel, and other links between state parties' are necessary before a regional human rights system can be effectively enforced, including through sanctions.[110] Time, the widening of cooperation generally, the thickening of transboundary social relations (including civil society),[111] democratisation,[112] and the loosening of authoritarian governance and legal systems are all factors in moving towards stronger regional protection of human rights in the Asia-Pacific.

Inter-regional lessons for the Asia-Pacific

Given the difficulties identified above, subregional[113] rather than whole-of-region cooperation on human rights may be both more feasible and more fruitful in the short term, given that this could tap into existing institutions that share common concerns, values and histories of cooperation. Such a suggestion was made in the African context concerning 'like-minded' States in the early 1980s,[114] although it was superseded by pan-African developments. The recent ASEAN mechanism, AICHR, is a rudimentary

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1992, [2009] OJ C 115/13 (entered into force 1 November 1993): see Wojciech Sadurski, 'Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider' (2010) 16 *The Columbia Journal of European Law* 385.

106 Michael Niemann, 'Regional Integration and the Right to Development in Africa' in Eileen McCarthy-Arnolds, David R Penna and Debra Joy Cruz Sobrepeña, *Africa, Human Rights, and the Global System: The Political Economy of Human Rights in a Changing World* (Greenwood Press, 1994) 107, 111–12 (noting that regional cooperation sprang up in Africa as part of decolonisation and development).

107 Rana, above n 40, 174.

108 Tang, above n 21, 186–7.

109 Haacke, above n 14, 222.

110 Heyns, above n 50, 701.

111 There has been a rapid proliferation of civil society organisations in South-East Asia: see Mely Caballero-Anthony, *Regional Security in Southeast Asia: Beyond the ASEAN Way* (Institute of Southeast Asian Studies, 2005) 235–9.

112 Haacke, above n 14, 218.

113 See *Human Rights in the Asia-Pacific Report*, above n 8, 107-10; Shelton, above n 26, 1055–56.

114 Emmanuel G Bello, 'Human Rights: The Rule of Law in Africa' (1981) 30 *International and Comparative Law Quarterly* 628 (proposing the group of Kenya, Ivory Coast, Nigeria, Senegal, Tanzania and Zambia).

beginning in South-East Asia, but, as noted earlier, falls short of both international guidelines for regional human rights mechanisms, as well as best practice in other regions. The other two promising subregions in the Asia-Pacific are South Asia (through SAARC) and the Pacific (through the PIF), while East Asia would seem to be the most unlikely to embrace a mechanism given its current geo-politics.

South Asia is promising because SAARC countries are geographically proximate in the area of the Indian subcontinent; are a relatively small group of States (seven); have strong historical ties (including a shared legacy of British colonialism in many countries); are all democracies with strong formal human rights protections in domestic law; have increasingly thickened regional cooperation over time, including by adoption of at least two subject-specific human rights instruments;[115] and share a range of common problems, from terrorism to environmental protection to transboundary resource governance.

The Pacific region too may be a viable subregion,[116] given that it exhibits significant commonalities of culture, custom and values. According to the New Zealand Law Reform Commission, there are notable similarities across Pacific countries, largely based on shared economic issues, similar democratic systems of government, Christian heritage, a shared history of colonisation and the need to respond to the impacts of globalisation.[117] These similarities provide a firm basis for the development of a regionally appropriate mechanism that is capable of harmonising international human rights norms with regional customs and culture.

There is also growing recognition by Pacific leaders that human rights are a regional issue. For example, in recent years, the PIF, a network of 16 independent Pacific States, has expressed a strong commitment to regional cooperation on human rights and good governance. In the '*Pacific Plan*', developed in October 2005 and updated in October 2007, the leaders of the PIF agreed to 'promote and protect cultural identity, regional inclusiveness, subregional representation, human rights, gender, youth and civil society'.[118] Moreover, the PIF leaders have repeatedly affirmed the need to protect human rights, and the 2004 *Auckland Declaration* articulated a vision for the future of the Pacific region as one where 'cultures, traditions and religious beliefs [of the Pacific] are valued, honoured and developed' and the region is respected 'for its defence and promotion of human rights'.[119]

When considering regional and subregional models, it is useful to consider the mechanisms through which human rights are protected in other regions and internationally. The existing international and regional human rights systems tend to share a number of broad structural and functional features, although they all evolved over time rather than being born fully formed.[120]

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115 *SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution*; *SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia*.

116 See Petra Butler, 'A Human Rights Charter for the Pacific' (2005) 3 *Human Rights Research Journal* 7.

117 *Converging Currents Report*, above n 9, 32–3.

118 Pacific Islands Forum Secretariart, *The Pacific Plan for Strengthening Regional Cooperation and Integration* (October 2007) [2(iv)] ('*Pacific Plan*').

119 Pacific Islands Forum Secretariart, *Auckland Declaration* (6 April 2004).

120 For an overview of the development of the African system over time, see generally Malcolm Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights* (Cambridge University Press, 2nd ed, 2008); see especially Gino Naldi, 'The African Union and the Regional Human Rights System' in Malcolm Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights* (Cambridge University Press, 2nd ed, 2008) 20; see also Heyns, above n 50; Umozurike, above n 73; Rachel Murray, 'The African Charter on Human and Peoples' Rights

First, they each have a legislative instrument, such as a charter, which defines the substantive content and scope of the applicable human rights norms. The primary instrument is sometimes supplemented by additional specific agreements, as in Africa with further agreements on children, refugees, and culture;[121] in Europe on torture, migrant workers, socio-economic rights and minority rights;[122] and in the Americas concerning torture, enforced disappearances, violence against women and disability discrimination.[123]

Second, human rights systems may work through an executive-type body, such as a commission, with responsibilities to promote and protect human rights through public education, monitoring State performance, and investigating individual complaints. In the Americas and Africa, commissions were initially established as the sole institution in each region, but were later supplemented by the establishment of courts. In Europe, a commission and court were established simultaneously, but the Commission was disbanded in 1998 and replaced by a sole, reformed judicial mechanism.

Judicial bodies, then, are the third feature of regional systems, with powers to investigate rights violations and provide binding remedies. The following section considers each of these features in turn to evaluate their feasibility in the Asia-Pacific and to provide lessons for the institutional design of regional or subregional mechanisms there.

A subregional charter

The first step in establishing subregional mechanisms is to define the content and scope of the applicable rights. As noted earlier, a subregional charter could strengthen human rights protection by contextualising internationally recognised rights, encouraging a culture of respect for rights, and enhancing the legitimacy of rights in the region, thus increasing acceptance of rights by States. However, some argue that an attempt to formulate any such instrument in the Asia-Pacific region would be premature, counterproductive and may lower international standards, given the diversity of the region, the lack of consensus over

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1987–2000: An Overview of its Progress and Problems' (2001) 1 *African Human Rights Law Journal* 1; Michelo Hansungule, 'African Charter on Human and Peoples' Rights: A Critical Review' (2000) 8 *African Yearbook of International Law* 265. For an overview of the development of the European system, see, eg, Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press, 2006). In relation to the Inter-American system, see Harris, above n 99; Felipe Gonzalez, 'Report from Regional Human Rights Mechanisms: The Experience of the Inter-American Human Rights System' (2009) 40 *Victoria University of Wellington Law Review* 103.

[121] *Convention Governing the Specific Aspects of Refugee Problems in Africa*, opened for signature 10 September 1969, 1001 UNTS 45 (entered into force 20 June 1974) ('*OAU Convention*'); *African Charter on the Rights and Welfare of the Child*, opened for signature 11 July 1990, OAU Doc CAB/LEG/24.9/49 (1990) (entered into force 29 November 1999); *Cultural Charter for Africa*, opened for signature 5 July 1976, AU Doc 0014 (entered into force 19 September 1990).

[122] To name but a few. See *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, opened for signature 26 November 1987, ETS No 126 (entered into force 1 February 1989); *European Convention on the Legal Status of Migrant Workers*, opened for signature 24 November 1977, CETS No 93 (entered into force 1 May 1983); *European Social Charter*, opened for signature 18 October 1961, CETS No 35 (entered into force 26 February 1965); *Framework Convention on the Protection of National Minorities*, opened for signature 1 February 1995, CETS No 157 (entered into force 1 February 1998).

[123] To name but a few. See *Inter-American Convention to Prevent and Punish Torture*, opened for signature 9 December 1985, OAS Treaty Series No 67 (entered into force 28 February 1987); *Inter-American Convention on the Forced Disappearance of Persons*, opened for signature 9 June 1994, 33 ILM 1429 (entered into force 28 March 1996); *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women*, opened for signature 9 June 1994, 1438 UNTS 63 (entered into force 5 March 1995) ('*Convention of Belem do Para*'); *Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities*, opened for signature 7 June 1999, OAS Treaties Register A65 (entered into force 14 September 2001).

applicable human rights standards, and the low rates of ratification of international instruments. For example, a former Australian Human Rights Commissioner warned that:

> unless we have strong adherence to the existing universal treaties by states in this region, my fear is that any regional treaty would be a lowest common denominator treaty that would in fact have the effect of undermining international global standards rather than providing a regional means for their implementation.[124]

On this view, rather than putting effort into creating a regional human rights charter that is inferior to, and would undermine, the international framework, emphasis should be placed on encouraging regional States to ratify existing instruments. This concern is echoed by others. For example, the Director of Human Rights International stated that creating an Asia-Pacific charter 'would not be a good idea':

> The countries of the Asia-Pacific region are slowly expanding their adherence to UN human rights instruments and this process should be left to continue. To try to develop an Asia-Pacific Charter would introduce an extremely controversial element into regional human rights diplomacy… [a]nd it is doubtful that the standard in any Asia-Pacific Charter would equal those of existing international instruments.[125]

Having canvassed opinions such as these, in 1998 an Australian Joint Standing Committee on Foreign Affairs endorsed the view that 'before consideration is given to the development of a regional charter of human rights, Australia should encourage to the fullest extent possible those countries in the region that have not yet entered into the major UN treaties to ratify those documents'.[126]

More than a decade later, it is not clear that the driving down of standards to a lowest common denominator would be the inevitable result, particularly at the subregional, rather than regional, level. The ASEAN subregion is certainly problematic, given that it is the historical epicentre of the 'Asian values' debate, although the creation of the AICHR and the increasing participation of civil society in ASEAN's work are positive signs of gradual change over time. The AICHR is tasked to develop an ASEAN Human Rights Declaration[127] and it will be important for that key instrument to pay due regard to the internationally recognised human rights treaties, as envisaged already in the AICHR's Terms of Reference.[128] The *Arab Charter*, for instance, contains a savings clause that provides: '[n]othing in this Charter may be construed or interpreted as impairing the rights and freedoms … set forth in the international and regional instruments which the States parties have adopted or ratified'.[129]

The democracies of South Asia and the Pacific Island States, however, are more likely to adhere to international standards, not least because, in many cases, their constitutions contain higher formal protections than the international treaties. In the Pacific, for

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124 Chris Sidoti, quoted in Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Improving But…: Australia's Regional Dialogue on Human Rights* (1998) 136 ('*Australia's Regional Dialogue on Human Rights*').

125 Bill Barker, quoted in *Australia's Regional Dialogue on Human Rights*, above n 124, 101.

126 *Australia's Regional Dialogue on Human Rights*, ibid 102.

127 ASEAN, above n 39, [4.2].

128 Ibid [1.6].

129 *Arab Charter on Human Rights* art 43.

instance, given the current climate of cooperation, there is a greater chance of a charter succeeding than in the past:

> In the last 15 years things have changed in the Pacific region. The establishment of the Fiji Human Rights Commission in 1997, the unrest in the Solomon Islands and the subsequent peace and reconciliation movement, and also the ever-increasing judgments referring to human rights by the courts of the Pacific are only some examples to show that political buy-in for a Pacific Human Rights Charter might be easier to achieve than 15 years ago. Furthermore, a regional human rights instrument can foster cultural identity rather than jeopardise it.[130]

While the interaction between Pacific customs and international standards is sometimes sensitive,[131] the New Zealand Commission for Human Rights has dispelled the perception that human rights and local customs and identity are incompatible, concluding that 'while the values underlying human rights may be worded differently than Pacific values, both express similar aspirations'.[132] As in other regions such as Africa, the Arab States, and ASEAN, the challenge is to embed local customs and values within a subregional charter without diluting international standards.

Work on subregional charters could build on earlier initiatives such as the Asian Human Rights Commission's *Asian Human Rights Charter* and LAWASIA's Draft Pacific Charter of Human Rights. Reaching consensus on the content of such charters is likely to be a lengthy and difficult process, particularly as regards economic, social and cultural rights; 'collective' rights, such as rights to development or to a clean environment; and human 'duties'. Nonetheless, the widespread participation in, and approval of, the drafting of the earlier *Asian Human Rights Charter*[133] illustrates that there is emerging support for a regional human rights instrument and that consensus on a regional human rights charter may be possible. Further, the mere process of initiating regional discussions on the drafting of subregional charters is likely to have a positive impact, in terms of encouraging dialogue on human rights.

Regional human rights protection is also an evolving process: charters can be amended and improved over time. In the Arab world, for example, a 1994 version of an Arab charter was so heavily criticised for failing to meet international standards that no State ratified it, and extensive revisions were made in adopting the 2004 Charter.[134] Further, as noted earlier, foundational charters can be supplemented by sector-specific instruments over time. In Europe particularly, the initial *ECHR* protected only a narrow range of rights, but the scope of protection was enhanced over time through the conclusion of Protocols and the adoption of parallel instruments protecting other rights (such as economic, social and cultural rights under the *European Social Charter*, or minority rights under the *Framework Convention for the Protection of National Minorities*).[135] The African system also demonstrates[136]

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[130] Butler, above n 116.

[131] *Human Rights in the Asia-Pacific Report*, above n 8, 100–3.

[132] *Converging Currents Report*, above n 9, 12.

[133] See, eg, Vitit Muntarbhorn, 'Asia, Human Rights and the New Millennium: Time for a Regional Human Rights Charter?' in Dinah L Shelton (ed), *Regional Protection of Human Rights* (Oxford University Press, 2010) 1060.

[134] See Rishmawi, above n 4, 170.

[135] Ovey and White, above n 56, 2.

[136] Umozurike, above n 73, 182.

that the purposive, dynamic interpretation of rights by strong, independent commissions or courts can fill gaps and improve on the limitations in formal treaty texts as adopted.

The scope of any regional or subregional charter in the Asia-Pacific could, therefore, be expected to evolve over time. On the other hand, if such a charter were prepared today, the drafters should try, as far as possible, to 'get it right'. In this respect, lessons can be learnt from the experiences of other regional charters, particularly the oldest and best-tested, the *ECHR*. The literature suggests that three main lessons can be learnt from the *ECHR* experience. The first is that, while the content of regional charters can change over time, and while the content may initially need to be narrow to secure consensus from different Member States, focusing on one category of rights from the outset can shape the focus of the charter as a whole for decades to come.

Thus, many have criticised the *ECHR* for largely excluding economic, social and cultural rights,[137] and noted that this has led to a bias towards the protection of civil and political rights, which affects the European system to this day.[138] This bias is evident both in the interpretation of *ECHR* rights that have implications for socio-economic rights,[139] and in the fact that these rights are subject to less effective enforcement mechanisms under the *European Social Charter*. In light of this criticism, any charters in the Asia-Pacific region should seek, from the outset, to include as wide a range of rights as possible.

Second, any regional charter should provide for mechanisms that allow it to be changed over time, in response to changing circumstances. Thus, one of the major criticisms of the *ECHR* is that it is very difficult to amend: the only option is for all of the parties to agree on an additional Protocol. Now that the Convention has 47 parties, this can present considerable practical difficulties. This was particularly evident in relation to the adoption of *Protocol 14*,[140] which was urgently needed to amend procedures of the European Court to reduce the massive backlog of cases before it.[141] *Protocol 14* was opened for ratification in 2004, but Russia refused to ratify until February 2010.[142] As a result, *Protocol 14* did not enter into effect until June 2010.[143]

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137 The notable exception being the right to education in art 2 of *Protocol No 1*: *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 20 March 1952, ETS No 9 (entered into force 18 May 1954) as amended by *Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 11 May 1994, ETS No 155 (entered into force 1 November 1998).

138 For a recent example, see Vanessa Bettinson and Alwyn Jones, 'The Integration or Exclusion of Welfare Rights in the European Convention on Human Rights: The Removal of Foreign Nationals with HIV after *N v UK* (Application No. 26565/05; Decision of the Grand Chamber of the European Court of Human Rights, 27 May 2008)' (2009) 31 *Journal of Social Welfare and Family Law* 83.

139 See further, ibid.

140 *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention*, opened for signature 13 May 2004, CETS No 194 (entered into force 1 June 2010) ('*Protocol 14*').

141 As at June 2010, the number of cases pending before the Court was 129,650: European Court of Human Rights, *Pending Applications Allocated to a Judicial Formation* (30 June 2010) <http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Statistics/Statistical+information+by+year/>. In October 2009, the number of cases pending before the Court was 114,550: Philip Leach, 'On Reform of the European Court of Human Rights' (2009) 6 *European Human Rights Law Review* 725, 726.

142 For a discussion of *Protocol 14* and the Russian non-ratification, see Jennifer W Reiss, 'Protocol No 14 ECHR and Russian Non-Ratification: The Current State of Affairs' (2009) 22 *Harvard Human Rights Journal* 293.

143 In the interim, the pressing need to reduce the backlog led to the conclusion of *Protocol 14bis*, allowing certain procedural measures to enter into effect with respect to parties who agreed to them, prior to the entry into force of *Protocol 14*.

Difficulties associated with amending the *ECHR* have also led it, in the views of some commentators, to become 'anachronistic', because the 'incremental way of updating it, through Protocols, has not resulted in a comprehensive and modern document'.[144] This suggests that the drafters of any Asia-Pacific charter should consider mechanisms allowing it to be updated easily, particularly in relation to the procedures of any regional bodies established under it. One way of doing this would be to exclude such procedures from the scope of the charter, leaving it up to the body itself to decide on its own procedures as and when it sees fit.

Third, it may be worth including in any regional charter some description of the principles to be applied when interpreting it. Determining the precise scope or practical application of particular human rights is always a difficult task, one which becomes even more complicated when it is necessary to balance the protection of human rights against other interests such as national security or the protection of other rights. The *ECHR* provides relatively little guidance on how its provisions are to be interpreted, while the general law of treaty interpretation[145] is vague and may not suffice in the specific context of human rights adjudication.

As a result, the European Court has evolved its own set of interpretive principles, including the 'margin of appreciation' (discussed above); the 'principle of effectiveness' (that rights should be interpreted as far as possible so that they are 'practical and effective', rather than merely 'theoretical or illusory');[146] and the idea that the *ECHR* is a 'living instrument' (such that the interpretation of the content of rights may change over time, as community perceptions change).[147] While some commentators have praised the Court for developing these principles, which they see as allowing for flexibility and as balancing the interests of individuals and States, others have criticised the Court's development and application of these principles as unstructured and haphazard.[148] Such criticisms could perhaps be avoided if any Asia-Pacific charter included in its text a set of principles that should be applied when interpreting it.

Commission and/or court?

Presently, a commission that performs an investigative and conciliatory role, similar to that which may be performed by the Inter-American and African Commissions, may be better suited to the Asia-Pacific subregions than a judicial mechanism. This reflects the views of the ASEAN Working Group[149] and the approach taken by LAWASIA in its Draft Pacific Charter of Human Rights. It also corresponds with the historical development of the Inter-American and African systems, which both commenced with commissions that were supplemented by courts as those systems evolved and strengthened over time. It is a reality that many countries in the Asia-Pacific region are sceptical of submitting to binding dispute

[144] Sadurski, above n 30, 404.

[145] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), arts 31–32.

[146] *Airey v Ireland* (1979) 32 Eur Court HR (ser A) [24].

[147] See, eg, the evolution in the Court's interpretation of the right to privacy as it affects the rights of transgender individuals: *Rees v United Kingdom* (1986) 106 Eur Court HR (ser A); cf *Goodwin v United Kingdom* (2002) 35 EHRR 447.

[148] See, eg, Greer, above n 29, 696–8; Sottiaux and van der Schyff, above n 87.

[149] As now embodied in the *Terms of Reference of ASEAN Intergovernmental Commission on Human Rights*: ASEAN, above n 39.

resolution mechanisms, remain protective of their sovereignty, and insist upon non-interference. Any proposals for a court would not receive governmental support.

Even among the more cohesive subregions, such as the Pacific, the development of a court with enforcement jurisdiction is unlikely to find support. This prediction is confirmed by past experiences: the Draft Pacific Charter's proposal for an enforcement mechanism proved to be a 'substantial barrier' to its acceptance.[150] Similarly, the vision articulated in the *Pacific Plan* and *Auckland Declaration* is largely based on facilitating cooperation between States, to encourage the development of national human rights machinery. There is no conception of a supranational mechanism that would impose reporting obligations on the State, have investigative powers, or receive complaints about rights violations. Concerns to preserve sovereignty appear to be strong, and dispute resolution based on mediation, rather than adjudication, is more in line with Pacific customary approaches to conflict.[151]

If a commission is the best available first step, a key issue is the functions that such a commission should perform, which could range from facilitating intergovernmental dialogue and providing support for national initiatives, to preparing reports on the human rights situation in the region or in individual States, to investigating and adjudicating individual complaints of human rights violations by States and making recommendations. In view of the challenges to the establishment of regional mechanisms in the Asia-Pacific discussed earlier, three conclusions can be drawn.

First, the functions of a commission should initially be limited to facilitating political dialogue, promotion of and education about rights, and supporting existing human rights initiatives and protection in the region, as has been the approach of the Arab Commission on Human Rights since 1968. As others note, '[s]tamina is needed to cultivate the "heartware" that sustains a human rights regime's "hardware" in the form of institutions and processes'.[152] Over time, as the Commission develops expertise and, more importantly, gains the confidence of States, it may then be possible to expand its role to include reporting, monitoring and ultimately enforcement functions. The new Arab Committee on Human Rights, for instance, is empowered to examine mandatory States' reports, but is not yet able to consider individual complaints. The quasi-judicial function of hearing individual complaints is the final stage in development of a commission. The ASEAN Working Group itself proposes an 'evolutionary process' by which 'the Commission's capacity as an institution' could evolve over time, from promotion of rights within the region to the investigation of individual complaints.[153]

This evolutionary process can be seen in the history of the Inter-American human rights system. Today, the Inter-American Commission has two central tasks: the adjudication of individual cases and country reporting.[154] Initially, however, country reporting was the predominant feature of the Commission's work. The Commission began

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[150] Butler, above n 116, 6.

[151] See, eg, Graham Hassall, 'Alternative Dispute Resolution in Pacific Island Countries' (2005) 9 *Journal of South Pacific Law* 14.

[152] Thio, above n 17, 1073.

[153] ASEAN, above n 39, [2.5].

[154] *American Convention on Human Rights* arts 41(c), (f). The Commission is also empowered to undertake initiatives for the promotion of human rights, participate in the preparation of OAS human rights treaties and declarations, and issue advisory opinions: arts 41 (a), (e) respectively.

to open cases in the mid-1960s, but country reporting (in particular, as a method of dealing with systematic violations of human rights) remained its focus.[155] A further development of the right of individual petition came with the entry into force of the *American Convention on Human Rights* in 1978, which made it possible for individual cases to be referred to the Inter-American Court. The process has evolved further over the last 15 years, as the decline in systematic violations of the right to life and the return to democratic government in previously dictatorial Latin American countries has resulted in an increasing number of individual petitions being heard by the Commission.[156]

When considering prospects for evolution towards the investigation of individual complaints in the Asia-Pacific, some salient lessons can, again, be learnt from the European experience. A hallmark of the *ECHR* system is the right of individual petition to the European Court for adjudication that is binding on the State. This feature has been widely praised, and has led to the *ECHR* being declared 'the most effective international system of human rights protection ever developed'.[157]

At the same time, however, the focus on individual petition has led to the European Court being literally inundated with petitions, such that there is now a backlog of some 120,000 cases. This backlog is the most serious problem facing the Court today: in spite of amendments introduced by *Protocol 14*, the workload of the Court 'continues to rise inexorably' and, as a result, the Court 'is in danger of losing its credibility'.[158] This experience suggests the importance of appropriate filtering and streamlining procedures, to ensure that any regional commission or court can deal with complaints in an efficient and timely manner.

However, as many commentators have noted, it also reveals a more fundamental flaw in the European system, which other regional systems may seek to avoid: namely, a focus on 'individual', rather than 'constitutional' justice.[159] In other words, the European system focuses on resolving individual complaints, rather than achieving broader, 'constitutional' change within national legal orders to ensure widespread protection of human rights within States. Thus, while judgment may be issued in a particular case, the legislation or administrative action found to violate rights in the case often remains in place, resulting in multiple 'repetitive applications'[160] to the Court by different parties concerning the same essential issue. This not only increases the Court's workload, but also decreases its effectiveness in securing human rights for all in the region, not just those who complain to the Court. Any regional system in the Asia-Pacific can learn from this experience by focusing from the outset on 'constitutional' change, through political dialogue and other strategies, and ensuring that this focus is not lost if, and when, an enforcement mechanism is introduced.

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155 Gonzalez, above n 120, 105–6.

156 Ibid 114. For the increasing numbers of individual petitions, see Inter-American Commission on Human Rights, *Annual Reports* <http://www.cidh.org/annual.eng.htm>.

157 Luzius Wildhaber, 'The European Court of Human Rights – Reflections of a Past President' (2007) 16 *Tulane Journal of International and Comparative Law* 5, 11.

158 Ibid 11–12. See also the discussions and *Interlaken Declaration* resulting from the Interlaken High Level Conference on the Future of the European Court of Human Rights, held in February 2010, primarily to address the issue of the Court's workload and backlog.

159 See, eg, Greer, above n 29, 684–6.

160 *Interlaken Declaration* (High Level Conference on the Future of the European Court of Human Rights, Interlaken, Switzerland, 19 February 2010) [7].

The second general conclusion that can be drawn regarding the establishment of a human rights commission for the Asia-Pacific is that it may be easier and more productive to develop human rights mechanisms attached to existing regional bodies, rather than to create a new human rights commission from scratch. In particular, given the valuable work of the APF, one possibility would be to expand the functions of, and regional participation in, the APF so that it may become a quasi-human rights commission for the Asia-Pacific region and, thus, avoid duplication of institutions in a region lacking in resources.[161] Further, the European experience suggests that focusing on cooperation with *national* systems can be an important strategy both in decreasing the workload of any regional body and in ensuring better human rights protection within States. A number of commentators, and the Committee of Ministers of the Council of Europe itself, have stressed that this is the way forward for the *ECHR* system.[162]

A third conclusion that can be drawn regarding a human rights commission in the Asia-Pacific is that a subregional commission with (initially) limited functions is likely to have a greater chance of success. The successful functioning of such commissions can build confidence among States that human rights mechanisms need not be seen as threatening, thus prompting the further development of both the commission's powers and, ultimately, judicial mechanisms over time. Much depends, however, on both the structure and resources of a commission. The African experience is again instructive. The African Commission was inadequately resourced for many years.[163] Further, there have been real concerns about the independence of commissioners given that some have had close professional ties to governments and, thus, been protective of them.[164] The African Commission has also faced problems of disorganisation, over-reliance on NGOs to fulfil its functions, a limited monitoring role, lack of follow-up on its findings, and a lack of coordination with its parent entity, the Organization of African Unity ('OAU') — now the African Union ('AU').[165] Similarly, the European experience suggests the importance of adequate resourcing[166] and appropriate procedures to prevent any regional body becoming overloaded. Important practical lessons can also be learnt from Europe about the independence of officials and the use of appropriate procedures to deal with linguistic diversity and other logistical issues.[167]

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[161] As a past President of the Australian Human Rights and Equal Opportunity Commission remarked:

> Rather than engage the APF [Asia Pacific Forum], aid donors, and the two NHRIs [national human rights institutions] in the region – the New Zealand Human Rights Commission and the Australian Human Rights and Equal Opportunity Commission – in supporting the establishment of another body to carry out the same or very similar functions to APF, would it not be better to put the effort directly into assisting each PIF Member State to overcome its domestic obstacles that stand in the road of establishing a NHRI?

John von Doussa, 'The Potential Role of National Human Rights Institutions in the Pacific' (Speech delivered at the Australasian Law Reform Agencies Conference, Port Vila, Vanuatu, September 2008) <www.paclii.org/other/conferences/2008/ALRAC/Papers/Session%207/Session%207%20(von%20Doussa).doc>.

[162] *Interlaken Declaration*, above n 160, [4]–[5]. See also Helfer, above n 86; Greer, above n 29, 687–96; Sadurski, above n 30.

[163] Umozurike, above n 73, 181.

[164] Ibid 188.

[165] Murray, above n 120.

[166] See Sadurski, above n 30, 406.

[167] Ibid 404–6.

Conclusion

The Asia-Pacific region faces numerous human rights problems that well-designed regional or subregional human rights mechanisms can assist in addressing. Despite common belief, there is nothing inherent about the Asia-Pacific region that precludes the development and evolution of strong human rights institutions. The Asia-Pacific region is neither too diverse, nor too distinctively 'Asian' to rule out regional cooperation, and other regions of the world have faced, and overcome, similar concerns. Further, seemingly rigid concepts of sovereignty and non-interference are more nuanced in practice when examined closely, and governmental attitudes towards them are changing in the region over time as cooperation widens and deepens on a range of issues. Finally, 'Asians' are well familiar with binding forms of adjudication in a variety of contexts and are not wedded to a perceived inheritance of conciliation.

All too often in the Asia-Pacific region, strategic political choices by governments to avoid strengthening human rights protection have been presented as inherent truths about the human condition in the region. Once such camouflage is stripped away, there are, of course, a range of pragmatic difficulties in the way of developing new mechanisms in the region and a 'sober realism'[168] about the pace of possible change is needed. Yet, many of these difficulties may be overcome by an evolutionary approach that builds regional confidence and strengthens institutions over time, just as occurred in the European, American, African and Arab regions. Subregional mechanisms in the Pacific, South Asia and ASEAN regions are potentially viable options. At the same time, to maximise the effectiveness of regional arrangements, it is imperative to support the ongoing development of both national human rights institutions and the ratification of international human rights instruments.

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[168] Thio, above n 17, 1075.