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Do We Need Regional Human Rights Institutions in the Asia-Pacific Region?

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The normative work is largely done. The international human rights standards are in place. The task for us all … will be to implement them.¹)

Human rights are African rights. They are also Asian rights, they are European rights. They are American rights. They belong to no government, they are limited to no continent, for they are fundamental to humankind itself²)


²)
I. Introduction

The Asia-Pacific region is the largest and most populous region in the world. It is also the place where most of the major religions in the world originated. Because of this uniqueness of the region, Choong-Hyun Paik recognizes that establishing regional human rights institutions (RHRIs) in this region, "[a]n attempt to identify and, even, to create a homogeneous community in Asia bound by the common goals of human dignity protection, thus, may be looked as equal to building a cultural-legal bridge that extends across the boundaries of Islamic creeds, Christian beliefs, Hinduist custom, Buddhist philosophy and Confucian regimes." In this sense, it is a challenge to build an integrated regional system in which most Asia-Pacific countries can agree on the protection and promotion of human rights because it is hard to

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3) Before proceed further, let me explain how this paper understands the Asia-Pacific region. It is impossible to define this region by its single or common elements of identities like ethnicity, culture, history, language or religion. Even geographical boundaries that distinguish this region from others are not clear. Further, in various international institutions there are no general guidelines to categorize their member states into regional groupings in the name of the Asia or Asia-Pacific region. Even in the U.N. structure, there are no official standards. The different institutions of the U.N. use different regional grouping guidelines based on their operational needs, and as a result, the number of member countries grouped into the Asia or Asia-Pacific region are all different. This paper recognizes the Asia-Pacific region as the geo-political notion consisting of several sub-regions which share common elements rather than as a clearly defined geographical concept, which is, in other words, a flexible and fluid notion rather than one with a strict boundary. For human rights discussion purposes, the general scope of this region is followed but not limited to the UNOCHR regional categories. Therefore, this paper refers the Asia-Pacific region or Asia as one that embraces countries in four sub-regions: the South Asia, the South-East Asia, the Pacific, and the East Asia. See The Asia Pacific Forum (APF), "The Region" http://www.asiapacificforum.net/about/the-region

4) See Bradley K. Hawkins, Asian Religions: An Illustrated Introduction (2003); See also National Geographic, "Religion and Belief Systems in Asia" http://www.nationalgeographic.com/xpeditions/lessons/10/g68/index.html

generalize on the perception of human rights in a region as large, diverse, and complex as Asia.\(^6\) Indeed, since the adoption of the Bangkok Declaration in 1993,\(^7\) there have been numerous initiatives to establish regional human rights institutions and charters in the Asia-Pacific region, but all efforts have been impeded by deep cultural, political, and historical issues.\(^8\)

Over the last two decades, there have also been a large number of studies exploring the possibilities for establishing RHRIs in the Asia-Pacific region by human rights scholars in law, anthropology, sociology, and political science. They, however, have mainly focused on examining the reasons why such regional human rights systems have not emerged in the Asia-Pacific region and on suggesting ways in which RHRIs in this region can be created, without answering or only slightly discussing the basic question that should be reviewed first: *the issue of whether RHRIs are desirable for the Asia-Pacific region*.

Indeed, the question of whether we need RHRIs in this region has not been answered for a long time in most academic literature. But it is necessary first and foremost to answer this question in order to explore further the ways for establishing RHRIs in the Asia-Pacific region and analyze the obstacles they face, and this is the main purpose of my paper.

Therefore, this paper will provide four general reasons behind the necessity to establish RHRIs for the protection and promotion of human rights: 1) to serve as an additional highly effective tool for the implementation of international human rights norms though the state itself should still be the main obligor for the protection of human rights; 2) to further enhance the legitimacy of humanitarian interventions as

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8) Especially the first Asia-Pacific Workshop on human rights which was held in Manila, the Philippines in 1990 under the umbrella of the U.N., particularly the Office of the U.N. High Commissioner for Human Rights (OHCHR) is considered the first step to explore the possibility of regional human rights arrangements in the Asia-Pacific region. See U.N. General Assembly Resolution on Regional arrangements for the promotion and protection of human rights in the Asian and Pacific region, G.A. Res. 45/168, UN Doc. A/RES/45/168. (Dec. 18, 1990)
demonstrated by interventions that have not always been attainable, or indeed desirable, as the past experiences in Kosovo, Iraq, Sudan or North Korea reveal: 3) to offer a better opportunity for individual states to cooperation in the protection of human rights through the neighborhood effect; 4) to provide a better chance for protecting the victims and human rights defenders when the U.N. or other international human rights institutions can hardly access the countries in which human rights violations occur, and also when they cannot work properly.

Then, this paper will show why it is desirable to have RHRIs specifically in the Asia-Pacific region by reviewing the development of international human rights law and the counter-responses by Asian countries against international human rights norms. Here, I will maintain that the validity of the universality of human rights should come at the very least as the product of a process in which most countries are committed to international human rights law by ratifying major international human rights conventions and treaties. Thus, some kind of intermediate human rights institutions are necessary for the implementation of international human rights law at regional and national levels to meet their social and cultural context because the universality of human rights does not mean uniformed implementation of human rights norms. If individual states cannot and do not want to comply with international human rights norms, the role of RHRIs is important as a medium institution for the internalization and localization of international human rights norms because RHRIs can be a mediator between regional specificity and international standards by extensive contacts with individual states, civil society, and international institutions.

Lastly, I will briefly review RHRIs in other regions: Europe, the Americas, and Africa, to show why RHRIs can get positive results in the promotion of human rights. Many human rights activists and scholars in Europe and the Americas have published numerous papers and reports criticizing regional human rights court decisions or commissions' resolutions. It is also true that there is ample room for further improvement in RHRIs in other regions. The experience of RHRIs in Europe and the Americas, however, demonstrates positive effects on the development of human rights in the sense that at least regionally adopted human rights treaties reflect the specific
sentiments in the region, and that regional institutions can handle human rights violation cases effectively with a better understanding of the context of a problem.

II. Necessity of Establishing Regional Human Rights Institutions

1. Regional Human Rights Institutions

RHRIs have created after WWII with the global consensus of adding human rights agendas from the national to the regional and international level, based on human rights provisions of the U.N. Charter and the Universal Declaration of Human Rights. RHRIs can be said, in general, to consist of three elements. First, there should be a list or lists of internationally guaranteed and regionally agreed human rights and corresponding state obligations such as regional human rights charters or conventions based on international human rights norms. Second, there should be permanent institutions such as regional human rights courts, and/or regional human rights commissions. And third, legally binding enforcement procedures and compliance mechanisms should exist to guarantee the protection and promotion of individual human rights. In this sense, regional human rights systems do not exist in Asia but do in Europe, the Americas, and Africa.

Here, I will provide one main reason and three additional ones to explain the necessity of establishing regional human rights systems under the framework of international human rights law.

2. Effective Tool for Implementation of International Human Rights Norms: Better Account of Regional Conditions and Peculiarities

With the ongoing debate on the universality of human rights in the last decades,

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10) Id., p.15.
both international relations and international law scholars have increasingly produced interdisciplinary studies in the area of human rights. The questions of who the main actor in the internalization process of international human rights norms is and what the role of all related actors in the international human rights system is have been the main interest in both areas of scholarship.

While international relations scholars mainly focus on state actors, a different liberal school of international relations theories – including the ideational approach, neoliberalism, and constructivism – has emerged. These scholars emphasize that the individual state is just one of many different actors and stress international cooperation as explained by Kant in his article Perpetual Peace. Scholars like Kathryn Sikkink and Martha Finnemore underline the importance of the different values of each state and region in the cooperation of implementing international human rights norms. These scholars emphasize the role of transnational advocacy networks. As Thomas Risse and Kathryn Sikkink propose, transnational advocacy networks are a methodology to understand the normative dynamics of international law. They argue that a state is an entity that is “composed of different institutions

17) See Thomas Risse et. al., supra note 13, pp.17–35.
and individuals." The development of human rights is not solely a domestic matter, but a process of interaction among international organizations, civil society, media, corporations, academics and other private entities at the international, regional and national level. Domestic social movements have played an especially critical role in the process of legalizing international human rights standards. Along the same lines, as Jack Donnelly points out, using the regime approach to the field of human rights, the importance of the role of international organizations has increased. He describes the international regime as consisting of "norms and decision-making procedures accepted by international actors to regulate an issue area" and I understand this not only as the consensus of each individual state for the protection of human rights but also the interaction of all related stakeholders as the foundation of international human rights regimes. International law scholars like Harold Koh emphasize a transnational legal process approach to explain the roles of transnational actors in the domestication of human rights norms while also introducing the definitional change of the principle of sovereignty. That is, the relationship between human rights and state sovereignty should and can be complementary. In other words, the protection and promotion of human rights can be enhanced with a respect for state sovereignty. Each individual state has a responsibility to protect and promote the human rights of its own nationals based upon the principle of sovereignty. State sovereignty and independence should serve not as a hurdle to, but as a guarantee for, the realization of the fundamental human rights of the state's nationals. Therefore, each individual state should cooperate with other states and human rights related actors in order to carry out their obligations under state sovereignty and international human rights law.

18) *Id.*, p.4.
19) *Id.* pp.20–35.
22) *Id.*, p.602.
The discourse on international human rights law by various international relations and international law scholars reveals at least two things. First, there are many actors in the process of the development of human rights. Their interaction especially with the civil society is important in the protection and promotion of human rights in individual states. However, it might be a mistake to place too much emphasis on the interactions with civil society only, including human rights NGOs, and other private entities. There are still national borders that divide countries and human rights issues are often highly politically contentious. Indeed, individual states have constantly used human rights as political tools in international diplomatic fora. While the internal dynamic of the civil society and the cooperation among local, national, and international human rights NGOs is an important factor in the protection and promotion of human rights in individual countries, the state is, still, inevitably the main actor in international human rights law. For example, in countries like Myanmar and North Korea, there are few domestic human rights NGOs. Only a couple of government-sponsored NGOs might exist to mislead the population into justifying human rights violations by the government. In this case, external pressures from the regional and international level may be more important. This is why cooperation and collaboration at the state level are important factors in the process of the development of human rights while it is still necessary to find ways to communicate and cooperate with local NGOs and the local population.

Second, therefore there is a necessity to establish so-called channeling actors like RHRIs which link various actors at the local, national, regional, and international level. Furthermore, the fact that almost all related discourse on international human rights deals with cultural diversity, different levels of economic development, political systems, and various levels of constitution and domestic legislation in individual states, shows the necessity to have regional human rights institutions as a medium.

Human rights problems are so complex that they are hard to understand from a single perspective.\textsuperscript{26} Considering the interdependence, complexity, and dynamics of the norms, institutions, and procedures of international human rights law,\textsuperscript{27} it is important to establish medium institutions like RHRI s, especially when the state, the main obligor for the protection of human rights, does not work properly and is reluctant to accept any intervention from international human rights institutions.

RHRI s are indeed important in the Asia-Pacific region because no such regional human rights regime has been formed there yet. If a regional human rights institution is established, the individual state in the Asia-Pacific region will surely benefit from its geographical proximity and historical and cultural bonds. Furthermore, a regional institution can ensure higher standards or effective enforcement of human rights because it is the result of the need to provide an additional or better protection of human rights.

Regional human rights systems emerged as a result of the frustration with the ineffectiveness of the mechanisms at the international level\textsuperscript{28} and, at the same time, the desire for a better implementation of international human rights norms as a complement to international human rights mechanisms. The global human rights systems have less ability to reflect the diversity and particularities of each region than a regional body does. The U.N. Charter and the international human rights treaties cannot fully incorporate regional contexts. That is the reason why the U.N. Office of the High Commissioner for Human Rights (UNOHCHR) has been trying to enhance its presence in the field by establishing regional offices.\textsuperscript{29}

Overall, regional human rights mechanisms are considered a more effective and efficient tool for the protection and promotion of human rights than the international


\textsuperscript{28} Id., pp.353–354.

human rights system under the U.N. structure.\textsuperscript{30}) Along with the emphasis on “the need to explore the possibilities of establishing regional arrangements for the promotion and protection of human rights in Asia” in the 1993 Bangkok Declaration,\textsuperscript{31}) the Vienna Declaration of the 1993 World Conference on Human Rights clearly shows the necessity for regional human rights mechanisms:

\textit{37. Regional arrangements play a fundamental role in promoting and protecting human rights.} They should reinforce universal human rights standards, as contained in international human rights instruments, and their protection. The World Conference on Human Rights endorses efforts under way to strengthen these arrangements and to increase their effectiveness, while at the same time stressing the importance of cooperation with the United Nations human rights activities. The World Conference on Human Rights \textit{reiterates the need to consider the possibility of establishing regional and sub-regional arrangements for the promotion and protection of human rights where they do not already exist}\textsuperscript{32)} (emphasis added).

Surely, RHRIs cannot be a perfect solution and a total remedy to all human rights violations in the region. They, however, can work effectively not as a replacement but as a complement to both the international and the national human rights system, because regional human rights mechanisms can reflect regional specificity and its particular needs, and at the same time monitor individual states’ practices in their region to meet international standards on human rights.\textsuperscript{33)}


\textsuperscript{31}) \textit{Bangkok Declaration, supra} note 8, Art. 26.


\textsuperscript{33}) Hidetoshi Hashimoto, \textit{supra} note 31, pp.1-2.
3. The Legitimacy of Interventions

Regional arrangements can enhance the legitimacy of interventions.\(^{34}\) The U.N. has greater authority than a regional body, but its intervention is not always attainable and sometimes not desirable.\(^{35}\) Article 2(4) of the U.N. Charter and the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations\(^{36}\) clearly state the principle of non-intervention in international law. The International Court of Justice (ICJ) has also recognized the principle of non-intervention.\(^ {37}\) Numerous General Assembly Resolutions have repeatedly emphasized the importance of the principle of state sovereignty and non-intervention.\(^{38}\)

However, evolving international human rights law now requires a re-examination of this principle. That is, when states agree to bilateral, multilateral or customary human rights norms through human rights treaties or conventions, their sovereignty will be limited by such norms.\(^{39}\) I believe that to a certain extent, as Sir Hartley Shawcross confidently declared at the Nuremberg Trials, “[t]he right of … intervention on behalf of the rights of man, trampled upon by a state in a manner shocking the sense of mankind, has long been considered to form part of the recognized law of nations.”\(^{40}\)

It is undeniable that humanitarian intervention had been abused in the past by strong states to pursue other political, economic or military objectives.\(^{41}\) There is little

\(^{34}\) See Sigrun I. Skogly, supra note 25, pp.171-185.
\(^{35}\) See in general Mahmood Mamdani, Saviors and Survivors: Darfur, Politics, and the War on Terror (2009).
\(^{40}\) The Avalon Project at Yale Law School, Nuremberg Trial Proceedings Volume 3, Tuesday, 4 December 1945, http://www.yale.edu/lawweb/avalon/int/proc/12-04-45.htm
express support from states for the doctrine of humanitarian intervention by individual states or by the international community as a whole.\textsuperscript{42} The Non-Aligned Movement (NAM) also rejects humanitarian intervention as having no legal basis in the U.N. Charter.\textsuperscript{43} The time may not yet be ripe for recognizing humanitarian intervention as an established exception to the principle of non-intervention. The reasons are as follows: first, the U.N. Charter and the current international treaties do not seem to incorporate such a doctrine specifically. Second, in the last two centuries, and especially since the end of WWII, only a very few cases can be considered a genuine humanitarian intervention, if any at all. Last, the potential for abuse of humanitarian intervention overshadows its usefulness. However, it is certain that there is increasing international interest in the development of a detailed framework for humanitarian intervention for the protection of human rights.\textsuperscript{44} At this point, the most important element is to focus on how to reduce the reluctance of the country in question to accept humanitarian intervention by lessening any politicized motives from other countries and how to enhance the legitimacy of intervention by sharing a bond of sympathy with other countries with a common background.

Therefore, the role of RHRLs is important because a regional system can be positioned “in the middle between undesirable unilateral actions and desirable but less accessible roles of the U.N.”\textsuperscript{45} For example, in the case of gross human rights violations in Myanmar, the international community and the U.N. have constantly criticized the Myanmarese government’s misdemeanors but there have been no significant changes. Myanmar argues that the international community condemns it without understanding its historical, social, and cultural background. But, what if there were human rights resolutions against the Myanmar government’s human rights violations by the ASEAN countries? Criticisms from neighboring countries which share common social and cultural background will be a more powerful means of

\textsuperscript{41} Peter Malanczuk, Akehurst’s Modern Introduction to International Law, (7th ed., 1998), p.221.
\textsuperscript{43} Declaration of the Group of 77 South Summit, para.54, (Havana, Apr. 10-14, 2000).
\textsuperscript{44} Christine Gray, supra note 43, p.596.
\textsuperscript{45} See Joseph S. Nye, International Regionalism, (1968), p.79.
changing the government’s human rights policy compared to those from the international community, especially developed Western countries. Article 4 of the Constitutive Act of the African Union (2000) may show how the regional framework on the protection of human rights can be developed. It states that the African Union has “the right … to intervene in a Member State … in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.”

Regionally adopted human rights treaties can reflect the specific sentiments in the region, and a regional institution can consider the context of a problem in a better way while avoiding high-level politicization because regional human rights bodies will be staffed by people from that region who are very closer to local realities and are less likely to be subject to political manipulation by governments or local elites. RHRIIs can have “a distinct vantage point that derives from their position as neither national nor international … [thus] are positioned [to be not only] broadly compatible with the spirit of international treaties but also to respond to the ways that local cultures coexist with national politics and national economic capacity.” Overall, it is necessary to establish RHRIIs because they can enhance the legitimacy of humanitarian interventions and reduce the danger of politicization by other countries.

4. The Neighborhood Effect

A regional institution can offer a better opportunity for individual states to participate in human rights cooperation with its neighborhood effect. Originally, the neighborhood effect was institutionalized in Europe. To be considered for the European Union membership, states must become member state to the European Convention on Human Rights and accept the jurisdiction of the European Court on

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47) Helen M. Stacy, supra note 13, pp.150~151.
48) Id.
50) David P. Forsythe & Patrice C. McMahon, id., p.312
human rights.\textsuperscript{51} It means that applicant states for the EU should show their serious commitment to human rights.

In a regional system, states with similar economic and security concerns can invite neighboring states to join the forum, and can force each other to comply with international human rights obligations with less political tension. Indeed, a regional human rights body will encourage more non-member states to participate in the institution and bring them to join the human rights dialogue with greater openness. At first, there might be a small number of states that agree to establish a regional human rights body. But once established, this regional body will solicit more non-member Asian states to join the existing regional human rights framework. In that sense, it is necessary to establish RHRI because the regional institution can implement human rights norms with increased persuasiveness in dealing with human rights situation operating in a more candid and friendly manner than the much politicized international institutions.\textsuperscript{52}

5. Effective Tool for the Protection of Victims and Human Rights Defenders

A regional human rights institution can offer a better opportunity to the victims of human rights violations and human rights defenders who often put their lives at risk in their work for the protection of the rights of others. It is easy for them to utilize RHRI which offer a more convenient opportunity for remedies by mobilizing neighbor states, especially when the U.N. or other international human rights institutions cannot work properly.\textsuperscript{53}

The victims of human rights violations face many difficulties trying to reach international human rights agencies and pursuing their remedies and protection from the violating state in question. For instance, because of geographical limitations, they have to hide in remote areas and it is hard for them to cross borders. Sometimes

\textsuperscript{52} Tae-Ung Baik, Emerging Regional Human Rights System in Asia – With a Focus on East Asian States, S.J.D. Dissertation, Notre Dame Law School, 2009, p.255.
\textsuperscript{53} David P. Forsythe and Patrice C. McMahon, supra note 50.
because of the language problem, it is also hard to access English-language resources. Even worse, human rights defenders, who play an important role in assisting victims and serve as a crucial link between victims and the state, have consistently been victims of extrajudicial killings, enforced disappearances, arbitrary arrests, detention, and torture, particularly where states use national security laws in the context of countering terrorism.

Therefore, an effective and accountable regional human rights body at the regional level is necessary to promote an overall culture of respect for human rights. There is also the need to establish through RHRIs a regional index on human rights victims and human rights defenders in order to effectively track their situation and facilitate experience sharing. In the case of the Americas region, the Inter-American Commission on Human Rights, for instance, has been devoted to the protection of human rights defenders and has been able to refer cases to the Inter-American Court of Human Rights.\footnote{See “Human Rights Defenders Mechanisms in Inter-American Commission on Human Rights: Functional Unit for Human Rights Defenders”, http://www.humanrights-defenders.org/iachr-mandate/}

At present, Asia has not established a regional human rights system that has the mandate to investigate individual complaints of human rights violations, monitor and report on the human rights situations in its member states, conduct visits and investigations, raise awareness of human rights issues, and issue recommendations pertaining to human rights issues to member states. If both national and international human rights institutions cannot work properly, the establishment of RHRIs is vital as they can identify gaps in the protection of human rights by monitoring member states’ national human rights situations and providing effective remedies for human rights victims and human rights defenders.
III. Ideas in Transit: International Human Rights Law in the Asian Human Rights Context

In the previous section, I demonstrated why it is necessary to have regional human rights institutions by providing one major reason and three additional ones. Most of them have already been discussed by a number of human rights scholars and activists within the discourse of the development of international human rights law. Their discussion has been mainly focused on the debate of the universality of human rights, along with the role of various human rights institutions at the national, regional, and international level of international human rights norms. For a long time, many Asian states have been reluctant to accept the concept of universal human rights and have been maintaining that human rights is a domestic issue and it should be handled at the national level. Asia still remains the only region which does not have RHRIs. Thus, the next question that can be asked is why it is necessary to establish RHRIs specifically in the Asia-Pacific region. And to answer that question, it is necessary to examine the Asian human rights context within the framework of international human rights law and its development since the adoption of the Universal Declaration of Human Rights.

On December 10, 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR). Eleanor Roosevelt, first chairwoman of the Commission on Human Rights (CHR) which drafted the Declaration, stated that it “may well become the international Magna Carta of all men everywhere.” The UDHR has been approved by virtually all governments representing all societies, and human rights are enshrined in the constitutions of virtually every one of today’s 170 states. Indeed, the Declaration is generally considered a starting point of international human rights law though as a declaration it is not legally binding.


However, because many of the rights in the UDHR have become widely observed as a binding law, they have become a recognized part of customary international law.\textsuperscript{57} Since its adoption, a large number of human rights treaties have been adopted and entered into force on the international and regional levels. One thing to be noted is that the idea of human rights, mainly civil and political rights developed between the 16\textsuperscript{th} and the 19\textsuperscript{th} centuries by many eminent Western jurists, theorists, and philosophers plays a rather prominent role in the UDHR. For example, Francisco de Vitoria, the 16\textsuperscript{th}-century Spanish jurist, expresses the idea of natural rights in his \textit{De Indis Noviter Inventis}, regarded as the first international law text.\textsuperscript{58} Vitoria searches for the “lawful titles whereby the aborigines of America could have come into the power of Spain.”\textsuperscript{59} He assumes that “[t]hese aborigines were true owners alike in public and in private law before the advent of the Spaniards among them.”\textsuperscript{60} In other words, Vitoria recognizes that every human being, including indigenous people, has certain natural rights. Overall, as Louis Henkin mentions, the concepts of human rights are heavily indebted to natural law (jus gentium) and Western philosophical traditions.\textsuperscript{61}

The development of international human rights law in Asia is, however, not just the acknowledgment of the philosophical values but a real process of adopting treaties and conventions which have a binding power on individual states and related actors. Here, to show why Asia needs to have RHRIs, I will review how human rights have developed as legal norms both in the international and the Asian human rights context and will examine how Asian countries have dealt with the progress of legalization of international human rights.\textsuperscript{62}

\textsuperscript{60} Id., p.115.
\textsuperscript{61} Louis Henkin, \textit{supra} note 57, pp.7–8.
\textsuperscript{62} \textit{Legalization of human rights} can be defined in many different ways: the attempt to secure human rights ideals by international and domestic law (Michael Freeman, Jack Donnelly and
1. Challenges against International Human Rights Law

In the last decades, there have been a lot of debates about the nature of international human rights law in Asian countries, and more specifically, the universality of international human rights in light of cultural relativity. The main questions are whether it is possible to maintain the fundamental universality of human rights while still taking into account the historical and cultural particularity of human rights and further, whether human rights themselves are universal.

This paper, however, does not intend to intervene into the traditional philosophical debates over universalism and relativism. Rather, it focuses on the ways in which universality of international human rights law has been challenged ever since the adoption of the UDHR to articulate why and how countries in the Asia-Pacific region have responded and interacted with the development of international human rights law, which will be discussed at length in section 3.2.

The first criticism against the universality of human rights came from the American Anthropological Association (AAA)’s statement on human rights in 1947, published just one year before the adoption of the UDHR. It argues that if the Declaration were “a statement of rights conceived only in terms of the values prevalent in the countries of Western Europe and America,” it could not be applicable to all human beings because “[t]he Personality of the individual can develop only in terms of the culture of his society.” Karen Engle regards this statement as having been written in the context of colonialism to oppose a dominant belief that the West and Western culture are superior and to suggest that all men are formed by the communities in which

Richard Ashby Wilson); the establishment of a practice of adjudicating and monitoring domestic conflicts by international institutions (Edward Weisband); international institutionalization of legal protections for human rights in post-conflict reconstruction (David Chandler); an attempt to limit the interpretation of the notion of human rights by appeal to certain forms of authority supposedly underlying international legal norm production (Upendra Baxi). In general, it is about the discussion of the role of law in defining and pursuing human rights goals. See Saladin Meckled-Garcia and Basak Cali ed., The Legalization of Human Rights: Multidisciplinary perspectives on human rights and human rights law (2006).


64) Id.
they live.\(^{65}\) Interestingly, the AAA changed its position on the universality of human rights in its 1999 declaration\(^{66}\) for the following reasons:

*Cultural relativism is a major factor which has severely retarded anthropological involvement in human rights since the Executive Board's 1947 statement on the UN Universal Declaration of Human Rights. Furthermore, in recent years some countries accused of gross violations of human rights have attempted to take refuge in relativism and simplistically and falsely asserted that human rights are reducible to Western moral imperialism*\(^{67}\)

I agree with Engle's assertion that in reality AAA's position on human rights and its understanding of culture have not significantly changed.\(^{68}\) Even though at first glance, it may seem that the AAA's 1947 statement is skeptical of international human rights law, "the statement does not argue against the idea of a declaration on human rights. Rather, it suggests that any declaration must attend to differences among cultures\(^{69}\) ... [and] imagined there could be a document with worldwide applicability."\(^{70}\)

As the AAA's 1947 statement explained, many non-Western countries were still under colonial rule and had no chance to participate in the drafting of the UDHR in 1948.\(^{71}\) In addition, the so-called Third World at the United Nations at that time

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69) Id., p.540.
70) Id., p.559.
71) 51 countries participated in the establishment of the UN in 1945 and member states were increased to 58 in 1948. Even the member states from Asian region were only five: China (Taiwan), India, Philippine, Thailand and Burma. See UN, "Growth in United Nations membership, 1945-present". http://www.un.org/en/members/growth.shtml
was mainly composed of non-Asian or African countries, but rather of Latin American countries whose dominant world view was European. Mary Ann Glendon emphasizes the important role played by Charles Malik of Lebanon and Peng-chun Chang of China in the drafting of the Universal Declaration, but Makau Mutua argues that although they were non-Westerners, both Malik and Chang were educated in the United States and were firmly rooted in the European intellectual traditions of the day.

The contributions of these two prominent non-Westerners were not steeped in the philosophies or the intellectual and cultural traditions from which they hailed. In fact most of the Third World human rights formulators were trained in the West. Even African conceptions of peoples' rights and duties and the more celebrated right of development remain marginal to the mainstream practice of human rights.

Balakrishnan Rojagopol describes this issue as the birth defect of the international human rights movement in terms of its representativity, simply noting the absence of particular cultures and communities. He also argues that this defect has never fully been cured because of the way in which it responded to colonialism, the most dominant political question of the 20th century. In the same vein, Mutua sees that liberalism, democracy and human rights are used as a Holy Trinity for Western countries to keep their hegemony over non-Western countries:

In the historical continuum, therefore, liberalism gave birth to democracy which in turn now seeks to present itself internationally as the ideology of human rights. The main focus of human rights law has been on those rights

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72) See Mary Ann Glendon, supra note 56.
74) Id.
76) Id.
and programs that seek to strengthen, legitimize, and export political or liberal democracy. Furthermore, the currency of civil and political rights has been so strong that they have become synonymous with the human rights movement.\textsuperscript{77}

In other words, the universality of modern international human rights law has been challenged ever since the adoption of the UDHR. Upendra Baxi also argues that the paradigm of the UDHR is being replaced by a \textit{trade-friendly} and \textit{market-friendly} human rights paradigm to promote and protect the collective rights of global capital and international corporate well-being.\textsuperscript{78} Furthermore, international financial institutions and donor agencies also constitute an increasingly important component of the political approach to human rights: see, for example, the World Bank’s Good Governance Project as a dual policy that opposed human rights violations while strengthening democracy.\textsuperscript{79} Anthony Anghie claims that “the colonial history of international law is concealed even when it is reproduced”\textsuperscript{80} and “the rhetoric of governance, as articulated by the West and the IFIs [International Financial Institutions], is driven significantly by economic considerations... [and] the powerful discourse of human rights has been used for this purpose.”\textsuperscript{81} Many human rights scholars also expose the fact that the most prominent international human rights NGOs, based in Western countries, have sought to enforce the application of human rights norms internationally, particularly towards repressive states in non-Western countries. Mutua criticizes the mandates of leading INGOs like Amnesty International and Human Rights Watch, stressing the narrow range of civil and political rights, and the overlooking of other important human rights violators like international corporations.\textsuperscript{82}

\textsuperscript{79} Anthony Anghie, \textit{supra} note 59, pp.245–272.
\textsuperscript{80} \textit{Id.}, p.268.
\textsuperscript{81} \textit{Id.}, p.269.
So, has international human rights law been developed in such a biased way based solely on developed Western countries' perspectives and mainly focused on civil and political rights? Were there any contributions by Third-World developing countries to the development of international human rights norms?

Contrary to the views of Mutua and Rajagopal, there are human rights scholars who maintain that international human rights have been by and large about Third-World states, as Roland Burke argues:

*The principal triumph of the African, Asian, and Arab diplomats who entered the UN in the 1950s and 1960s was their successful struggle to make human rights truly universal... [and] in virtually every significant debate, Arab, Asian, and African delegations played a leading role, with their contribution central to the creation of major pillars of the modern human rights system: the covenants, ICERD, and the right to individual petition... [they] had secured the status of universal rights and greater scrutiny of state power.*

It was the Third-World states that have put the biggest human rights issues on the U.N. agenda including colonialism, self-determination, racial discrimination, apartheid, the right to development and economic, social and cultural rights for last 60 years after the adoption of the UDHR. Third-World states, especially early anti-colonial nationalists who were ardent supporters of universality have played a major role in developing international human rights norms,

\[8^{4}\] though at the same time, many post-colonial authoritarian governments also use the same anti-colonial doctrine to impose their power and authority and maintain their regimes in the name of cultural relativism.

Therefore, I suggest that the argument of whether the role of Third World

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82) Makau Mutua, *supra* note 78, pp. 610–626
84) *Id.*, p.5.
countries in the development of international law during the process of decolonization after WWII, has been positive or not, is both partially right and partially wrong. Roland Burke is right in the sense that “[t]he politics of anti-colonialism both advanced and obstructed the progress of international human rights.”\(^{85}\) Though it is true that much of Asia and most of Africa had not been involved in the drafting process of the UDHR in 1948, it is also true that the adoption of the UDHR itself is not the end of the story for the universality of international human rights norms but its beginning in a decades-long process by those who had no chance to participate in the creation of the UDHR.\(^ {86}\)

What is more, with the gradually increasing number of countries which ratified major human rights conventions and treaties, people inside individual states’ civil societies have increasingly used international human rights norms to enhance the legitimacy of their claims for the protection of certain fundamental human rights. Therefore, the questions that should be asked are what kind of human rights can be embraced in non-Western cultures and how such a process can be conducted in non-Western societies.\(^ {87}\) Similarly to Jack Donnelly, I believe that in the world we live in today, human rights are not optional but necessary\(^ {88}\) because human rights protection itself is about human dignity and justice. Therefore “some kind of intermediate position is required” because unrestricted relativism is as inappropriate as radical universalism.\(^ {89}\) I suggest that it may be RHRIs that are uniquely situated “to formulate morally credible and practically attainable standards of human rights - a negotiation between reality and hope.”\(^ {90}\)

2. Human Rights in the Asian Context

As Amartya Sen articulates, human dignity and fundamental rights ideas have

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\(^ {85}\) Id., p.6.
\(^ {86}\) Id., p.146.
\(^ {90}\) Helen M. Stacy, supra note 13, p.169.
existed not only in Western cultures, but in Asian cultures, as well. A number of historical and classical text discuss the values of human dignity, as well as the pursuit of economic, social, and cultural well-being in the Asian cultural context.\(^\text{91}\) Thus, the so-called Asian values and the Asian way of human dignity should be recognized as a philosophical and cultural component of the Asian human rights context. These are, however, different from the modern concept of human rights, especially in terms of its legal nature. This is precisely the reason why human rights are still regarded as somewhat alien by many Asians. As Onuma Yasuaki mentions, the formulation of modern human rights emerged in a legalistic culture, with the protection of individual rights to be realized by the rule of law.\(^\text{92}\) This is also why the notion of human rights was born in Western countries where a legalistic culture is predominant, whereas Asian countries have relied on the concepts of virtue, conciliation, family, community ties, or prudence\(^\text{93}\) and have not been very comfortable with this legalistic culture.

In the last decades, however, Asian countries have achieved a remarkable development in the legalization of human rights.\(^\text{94}\) The progress seems slow, but it is undeniable that an increasing number of actors have been involved in the process of developing human rights norms in Asia. Their interacting initiatives, including intergovernmental, NGOs', and other public and private entities' cooperation, have gradually and positively changed the environment of human rights in individual states. This section will examine the normative development of a human rights framework in the Asia-Pacific region.

Many Asian states incorporated basic human rights norms in their domestic laws as early as the 19\(^\text{th}\) century. The modern Western concepts of rights and constitutionalism were initiated and promoted in Asia mostly by Asian people themselves rather than imposed by the external world, as those elites of the


\(^{92}\) Id., pp.75-76.

\(^{93}\) Id.

\(^{94}\) See Tae-Ung Baik, supra note 53, pp.130-206. See also the definition of legalization at footnote 62.
movements against imperialism during the 19th and 20th centuries dreamt of independent states with democracy and human rights protections.

Ever since the early 1990s, there has emerged a negative response to the human rights discourse from a group of newly industrializing countries in Asia. Its most active advocate may be Singapore. It is hard to define the argument clearly, because it conflates, on the one hand, the development argument, which gives priority to economic development over other social goals, and, on the other, the post-colonialism argument, which describes human rights movements in cultural imperialism terms. As Bilahari Kausikan points out, most East and South-East Asian governments see "order and stability as preconditions for economic growth, and growth as the necessary foundation of any political order that claims to advance human dignity." Through the Asian value debate on economic development and a non-Western approach to human rights, many Asian governments have rejected the universal validity of international human rights norms. It seems that most Asian leaders, especially those in authoritarian governments, have the intention of weakening the normative basis of Western interference.

Although the concept of Asian values is considered relatively recent, peaking at it did in the mid-90s, it should not be seen as a novel phenomenon. Asian values have many localized precedents in colonial and post-colonial history as Michael

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http://www.unu.edu/unupress/asian-values.html


97) Bilahari Kausikan, "Asia's Different Standard", 92 Foreign Policy, Fall, 1993, p.35.

98) Inoue Tatsuo, supra note 97, pp.37-42.

99) Id.

Jacobsen and Ole Bruun explain: "the late nineteenth-century Chinese debate on 'self-strengthening'; the post-war Indonesian *Pancasila* ideology; the *Panchayat* system in Nepal; the 'Basic Democracy' policy in Pakistan and the more recent Malaysian '2020-vision' under Premier Mahathir are all examples of struggles to activate a native values resource in the service of nation-building and frequently in the face of foreign domination."\(^{101}\) Besides those, there are also countless examples of emergency orders, which may rest on similar principles.

I believe that such a view shows a clear misunderstanding of the nature of human rights.\(^{102}\) As Keven Tan argues, there is a fine line between the West and the East regarding economic development and the anti-colonialism argument.\(^{103}\) For instance, countries like Taiwan and Korea have experienced the oppression of an Eastern colonial power, namely, Japan. And the people in these states who suffered are still claiming the remedies from the Japanese for past wrongs under the internationally recognized principles of fundamental human rights. In addition, as Amartya Sen points out, there is no direct evidence that authoritarian governance influenced economic growth in Asia and furthermore, it is very doubtful that there are pre-existing rights standards or values that all Asian states can accept other than those contained in modern international human rights law.\(^{104}\)

In March 1993, Asian state representatives adopted the Bangkok Declaration, a statement that would represent the Asian region's stance on human rights at the World Conference on Human Rights held in June of the same year in Vienna.\(^{105}\) Although delegates of the Asian regional group recognized that some human rights were universal, they asserted that there were other human rights which were founded on the Western ideal of individual autonomy and which did not necessarily reflect Asian values.\(^{106}\) They further stated that, in the absence of economic development

\(^{101}\) *Id.*


\(^{104}\) Amartya Sen, *supra* note 103.

\(^{105}\) *Bangkok Declaration*, *supra* note 8.

\(^{106}\) *Id.*, Art.8.
and social stability, emphasis on civil and political rights, as in the developed countries, would be inappropriate. A large number of Asian human rights NGOs, intellectuals, and ethnic minorities also gathered in Bangkok at the same time and issued the NGO Bangkok Declaration, a significant departure from the governments’ statement. It argued that cultural and religious traditions did not constitute an obstacle to the realization of international human rights norms. What is more, as Yash Ghai notes, the NGOs also addressed the market system and the international economic order, and saw “a closer connection with domestic oppression and international exploitation... [by] multinational corporations and aid agencies.” Civil society in Asia geared up its efforts to build regional human rights mechanisms with the adoption of the Asia Pacific NGO Human Rights Congress Resolutions in 1996 and the Asian Human Rights Charter of 1998, signed by more than 200 human rights NGO groups. In addition, there have been some sub-regional normative developments in Asia, including the ASEAN Declaration of 1967, the ASEAN Charter of 2007 in South-East Asia, the Charter of SAARC of 1985 and the Social Charter of 2004 in South Asia. All the discussions and normative consensus on human rights are limited and not always the focus of their cooperation, but at least some positive changes have been made at the regional and sub-regional level. More importantly, these changes have been effected not by Asian states themselves, but by the regional cooperation of a complex network of civil society,

107) Id., Art. 10, 17 and 19.
111) Asia Pacific NGO Human Rights Congress Resolutions, Dec. 6, 1996.
113) ASEAN Declaration, Bangkong, Aug. 8, 1967.
including both internal forces like grassroots human rights activists and local NGOs and external forces like regional and international human rights NGOs.

Overall, I theorize the development of human rights in Asia not as the result of transplanting foreign concepts but as the product of its internal dynamics of normative development. As Amartya Sen articulates, the concept of freedom, liberty, rights, and human dignity might have existed not only in Western cultures, but in Asian cultures as well. However, as Jack Donnelly argues, human dignity is a concept distinct from human rights which is a legal idea. And in that sense, Asian traditions may be not identical to the modern forms of human rights. As Louis Henkin maintains, "the contemporary idea of human rights was formulated and given content during the Second World War and its aftermath." As briefly reviewed above, many Asian countries chose to adopt a democratic political system and embraced the ideas of human rights and constitutional rights after their long fight against colonialism or authoritarian regimes. Another point to emphasize is that people in Asia have also witnessed instances of misuse of the human rights language. In other words, states that provide for extensive human rights protection through national legislation and constitution have continuously violated the human rights of their people in reality. As Tae-Ung Baik asserts, "the right provisions in many newly independent [Asian] states were often mere window-dressing until democracy movements changed the political landscapes of these Asian societies." Undeniably, however, once adopted or ratified, human rights norms create a moral power that mobilizes internal social movements to monitor the enforcement of the norms, provide rallying points for activists, and offer hope for social change to people.

122) Tae-Ung Baik, supra note 53, p.81.
123) Id.
Therefore, there is no reason that Asia should not have a regional human rights system comparable to other regions. Actually, it is even more necessary to establish RHRIs in the Asian human rights context because in the process of legalization of human rights, Asian countries need to reconcile the new foreign cultural norms and ideas with domestic moral traditions. And if each individual country cannot afford to do it or is not willing to do it, regional human rights institution can fill the gap between the adoption of international human rights norms and their implementation, or, in other words, the gap between the current U.N. human rights system and many national legal systems, because RHRIs can effectively work as a complement to already existing human rights system in the Asia-Pacific region.

IV. The Experience of RHRIs in Other Regions: Europe, the Americas, and Africa

So far, I have examined whether it is necessary to have RHRIs in the Asia-Pacific region both in the international human rights context and in the Asian human rights context and concluded that it is desirable to do so. Lastly, this section will briefly review regional human rights systems in other regions in relation to their positive contribution and particular advantages for the promotion and protection of human rights, which can be reflected in the Asia-Pacific region to show why it is desirable to establish RHRIs in this region, as well.

Regional human rights systems emerged after the end of WWII but different historical and political reasons inspired each region for the creation of RHRIs. The Americas has the oldest regional human rights protection system. The Inter-American Declaration on the Rights and Duties of Man was adopted in 1948 with a growing “regional solidarity developed during the movements for independence” and

126) Dinah Shelton, supra note 10, pp.16~17.
a coalition against communist threats.\footnote{128} Following that, the Inter-American Commission of Human Rights was created in 1959 and the American Convention on Human Rights (ACHR) was adopted in 1969. The Convention itself deals mainly with civil and political rights but it has two Protocols \textit{on economic, social and cultural rights} and \textit{on the abolition of the death penalty}; though compared to the Convention, they have a relatively weak protection mechanism by reserving the individual petition system only for the violations of the right to education and trade union rights. \footnote{129} Finally, the Inter-American Court of Human Rights was established in 1979. Most of its cases concern Central and South America and Mexico, mainly focusing on human rights violations related to military coups.\footnote{130} Europe adopted the European Convention on Human Rights (ECHR) and established the European Court of Human Rights in 1950 as part of a European reconstruction for democracy, the rule of law and peace to guarantee individual rights after the experience of the WWII atrocities. As A.H. Robertson describes, European states needed human rights to be respected so as to secure democracy and avoid dictatorship. The conflict between Eastern and Western Europe also enabled states in the West to make an exclusive human rights system.\footnote{131} In 1954, the European Commission of Human Rights was established, but it was abolished in 1998 with a project to reformat the European Court of Human Rights. Today, the ECHR exercises jurisdiction over the twenty seven members of the EU and the additional twenty member states of the Council of Europe. \footnote{132} The Court received more than 50,000 complaints in 2006 alone and the number is increasing, especially from the newly democratized countries in Central and Eastern Europe.\footnote{133}

\footnote{127} Id.
\footnote{128} See OAS, \textit{Caracas Declaration of Solidarity (The Declaration of Solidarity for the Preservation of the Political Integrity of the American States Against the International Communism)}, Tenth Inter-American Conference, (Mar. 28, 1954).
\footnote{130} Helen M. Stacy, \textit{supra} note 13, pp.148-149.
\footnote{132} Helen M. Stacy, \textit{supra} note 13, pp.147-8.
\footnote{133} Id.
Africa adopted the African Charter on Human and People’s Rights (ACHPR) in 1981. Self-determination from colonization was a recognized part of the African human rights agenda, as were the regional actions ignited by the apartheid policy and human rights abuses in South Africa.134) The Charter distinctively recognizes collective rights and especially the right to development in its Article 22.135) It also recognizes legal obligations to the community (ubuntu), family, and society. The African Commission on Human and People’s Rights was created in 1987 and the following year saw the adoption of the Protocol establishing the African Court of Human and People’s Rights. Finally in 2006, the African Court on Human and Peoples’ Rights was established. The Court has a unique provision which differs from other regional human rights courts, according to which any human rights treaties that have been ratified by African member states are claimed as part of the Court’s jurisdiction.136)

RHRIs in other regions show how regional human rights institutions can get positive results in the promotion of human rights. As Helen M. Stacy maintains, “if [RHRIs] developed in the right way, [they] could play a role in making cultural human rights adjudication both morally credible and practically attainable.”137) Dinah Shelton describes the effective contribution of RHRIs in Europe, the Americas, and Africa to human rights as follows:

_The functioning European and Inter-American courts are one of the great contributions to human rights by regional systems. The … protocol to the African Charter, creating a court in the African system… add[s] to the regional protection… Thus, regional systems have elements of uniformity and diversity in their origins. All of them began as the global human rights_

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134) See Dinah Shelton, supra note 28.
135) Article 22 of the African Charter on Human and People’s Rights:
1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.
136) Helen M. Stacy, supra note 13, pp.149~150.
137) Id., pp.141~145.
system was developing and they were inspired by the agreed universal norms. At the same time, each region had its own issues and concerns. As the systems have evolved, the universal framework within which they began and their own interactions have exercised a strong influence.\textsuperscript{138)}

The regional human right systems in Europe, the Americas and Africa offer some meaningful lessons for the establishment of an Asian human rights system, namely, regional human rights conventions, a reporting system, individual petition, and regional human rights courts.

First, the provisions of human rights charters or conventions in those other regions include their own regional characteristics, along with the goal of meeting international human rights standards. Article 4.1 of the American Convention on Human Rights, the right to life, for instance, contains an anti-abortion provision which is believed to reflect the Roman-Catholic religious background of most Inter-American countries: “Every person has the right to have his life respected. This right shall be protected by law and, in general, \textit{from the moment of conception}” (emphasis added). Unlike Article 8 of the ECHR and Article 5 of the ACHR, the African Charter on Human and People’s Rights does not specify the right to privacy and, I believe, this comes from the unique African view on personhood which is different from the Western concept of individualism. Therefore, the ACHPR emphasizes the harmonious development of the family, national solidarity and independence, and African values and unity in Article 29.\textsuperscript{139) These examples might be a valuable lesson to Asian states

\textsuperscript{138) Dinah Shelton, \textit{supra} note 10, p.17.}

\textsuperscript{139) Article 29 of the African Charter on Human and People’s Rights:

\textit{The individual shall also have the duty:}

1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family, to respect his parents at all times, to maintain them in case of need,
2. To serve his national community by placing his physical and intellectual abilities at its service;
3. Not to compromise the security of the State whose national or resident he is;
4. To preserve and strengthen social and national solidarity, particularly when the latter is strengthened;
5. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to his defence in accordance with the law;
that seek to preserve indigenous distinctiveness.

Second, all three regional human rights institutions have their own reporting system on human rights violation by member states or monitoring systems for member states' compliance. In Europe, the Organization of Security and Cooperation in Europe (OSCE) has operated to monitor member state's commitment in human rights and fundamental freedoms.¹⁴⁰ Active inspections and investigations include unfettered visits, empirical study, ad hoc visits etc., and Europe is considered to have a very advanced system of preventive mechanisms for human rights violations. The Inter-American Commission does not have a coercive power to intervene in individual member states' internal affairs, but its activity in investigating and issuing a country report based on Article 41 of the ACHR has contributed tremendously to raising public awareness in the region and also to mobilizing the international community.

Many Asian countries have regarded the reporting and monitoring system by international human rights institutions as an infringement of sovereignty. But, if RHRIs are established in the Asia-Pacific region, they might accept reports from RHRIs with less reluctance because an investigation by neighboring countries can be seen as a relatively informal procedure and be conducted in amicable environments. RHRIs, however, should be mindful of the danger that countries with dismal human rights record can submit a report as a means of defending themselves, bypassing an otherwise long and extensive investigation.

Third, individual petitions are considered a critical component of the European human rights system but inter-state complaints have been politically sensitive issues in other regions. In fact, individual complaints have not been a core activity of the Inter-American Commission of Human Rights. But the Americas has a much more

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6. To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society;

7. To preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society;

8. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

advanced system than other regions in allowing exceptions to the exhaustion of local remedies based on Article 46 of the ACHR.\footnote{Article 46.2 of the American Convention on Human Rights. The provisions of paragraphs 1.a and 1.b of this article shall not be applicable when: 
a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; 
b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or 
c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.} The unstable political conditions in Latin America, similar to those in many Asian states, might be the main reason for such a provision. As a democratic system has not been institutionalized in many Asian countries, such specific provisions might need to be taken into consideration for the establishment of RHRIs in the Asia-Pacific region. In addition, unlike Europe, the lack of public awareness on human rights violations and the lack of means to bring the case to the regional level will lead to relatively small number of individual complaints at the beginning of RHRIs in this region.

Lastly, in the case of Europe, the European Court of Human Rights greatly strengthens the protection of human rights on the continent. The Court initially started as a marginal institution under the Council of Europe, but it has become one of the most important institutions of the organization.\footnote{Mark W. Janis, International Court for the Twenty-First Century, (1992), pp.105–106; See also Giovanni Bonello, “The European Court of Human Rights” in the Essentials of Human Rights, (Rhona K.M. Smith and Christien van den Anker eds., 2005), pp.115–118.} As a permanent judicial body with full-time judges, it has been successfully supplementing other human rights institutions in Europe.\footnote{See Kevin Boyle, “Council of Europe. OSCE, and European Union” in Guide to International Human Rights Practice (Hurst Hannum ed., 2004), p.143.} Such a harmonization with all different human rights institutions under different organizations has not weakened the protection of human rights but strengthened it. It can be a good example for Asian states in their multidimensional efforts to institutionalize a human rights system. The Inter-American Court of Human Rights has extensive competence in providing advisory opinions to any member state of the Organization of American States (OAS) regardless of its ratification of the Convention,\footnote{See Kevin Boyle, “Council of Europe. OSCE, and European Union” in Guide to International Human Rights Practice (Hurst Hannum ed., 2004), p.143.} and in this sense, the OAS has also
become an integral part of the human rights protection system in the region.\textsuperscript{145} While the fact that not all OAS member states have signed the American Convention on Human Rights, indeed one of the weaknesses of the American human rights system, the Inter-American Commission's full authority to monitor and deal with human rights violations sustains the system as a useful mechanism.\textsuperscript{146} It shows that the establishment of RHRI\textunderscore{s} in the Asia-Pacific region can be started with a small number of countries at first once there is a guarantee on the authority, effectiveness and independence of RHRI\textunderscore{s}. Then, with the increasing number of member states, RHRI\textunderscore{s} can gradually strengthen their power for the protection and promotion of human rights. In Africa, it took a long time for states to obtain sufficient ratifications to establish the African Court on Human and Peoples' Rights.\textsuperscript{147} The eventual establishment of the Court, however, demonstrates that well-coordinated efforts and interactions between the stakeholders - states, NGOs and regional bodies - can push a region toward the establishment of a regional human rights institution.\textsuperscript{148} The function of the Court is to "complement the protective mandate of the commission" and individuals and NGOs cannot bring a suit against a state through the Court.\textsuperscript{149} Thus, the responsibility of human rights protection is heavily imposed on the Commission itself. But because of the African states' risk-averse political culture, the African Commission has no power to enforce its decisions, which is considered a major drawback of the African human rights system.\textsuperscript{150} Thus, it is important for the Asian human rights system to design a way in which RHRI\textunderscore{s} can ensure member

\textsuperscript{144} Article 64 of the American Convention of Human Rights.


\textsuperscript{146} Id.

\textsuperscript{147} See Muna Ndulo, "The Commission and the Court under the African Human Rights System" in International Human Rights Monitoring Mechanisms, (Gudmundur Alfredsson et al. eds., 2009), pp.635-640.

\textsuperscript{148} See Coalition for an Effective African Court on Human and Peoples' Rights (CEAC), "About the African Court", http://www.africancourtcoalition.org


states' compliance with declared or recommended decisions by exerting political clout and providing clear remedies to victims of human rights violations.

Overall, these three regional human rights systems have significant benefits for human rights. They parallel the way regionalism has effectively benefited inter-state trade through regional trade agreements like the Central European Free Trade Agreement (CEFTA), the North American Free Trade Agreement (NAFTA), the Southern African Development Community (SADC), and the South Asia Free Trade Agreement (SAFTA).

V. Conclusion

Since the Universal Declaration of Human Rights was adopted over sixty years ago, human rights have been vigorously internationalized with the emergence of numerous subsequent human rights treaties and conventions to extend their areas of legalization. At the same time, under the evolving international human rights system, human rights norms and principles have been gradually internalized into individual states' domestic legal systems through the active participation of civil societies to effectively implement them. In this progress, the traditional concept of sovereignty has been strongly challenged, and now we recognize that individual states have main responsibilities to protect and promote the human rights of their people. Concurrently, with the advent of the transnational human rights movement and network for the best practice of human rights at the regional and national level, the emerging role of civil society and human rights NGOs cannot be ignored anymore and their voice from below has been taken seriously in the international human rights mechanism. Moreover, all the ongoing human rights discourses, not only the stale debate on cultural relativism in the human rights literature, but also the Third World perspective of human rights in the public international law literature, the norm diffusion theory in the international relations literature and the vernacularization theory in the law and anthropology literature,
emphasize the complicated but important issue of the implementation of international human rights law in the sense that the universality of human rights does not mean uniformity of human rights.

At this point, I believe regional human rights institutions (RHRIs) are important as medium institutions for the implementation of human rights, especially when the state, the main obligor for the protection of human rights, does not work properly and is reluctant to accept any intervention from international human rights institutions. The reason is that they can serve not as a replacement but also as an effective supplementary human rights protection tool to confirm international human rights norms and at the same time, reflect regional specificities through an extensive interaction with governments, civil societies, and international institutions as a channeling institution.

Regional human rights mechanisms are considered a more effective and efficient tool for the protection and promotion of human rights than the international human rights system under the U.N. structure, and it is indeed desirable to establish RHRIs in the Asia-Pacific region. If a regional human rights institution is established, Asian states will surely benefit from their geographical proximities, and historical and cultural bonds.

Surely, RHRIs cannot provide a total solution to human rights violations. A regional human rights system, however, emerges as the result of the frustration with the ineffectiveness of international mechanisms and, at the same time, the hope for a better implementation of international human rights norms as a supplement to human rights mechanisms. RHRIs have unique institutional advantages for the promotion and protection of human rights. Considering the continuing debate on Asian values and the Asian way of human rights in the last two decades, the U.N. Charter and the international human rights treaties cannot fully incorporate Asian regional contexts, which is another reason why regional human rights institutions should be established in the region.

151) Hidetoshi Hashimoto, supra note 31, pp.1–2.
Since the adoption of the Bangkok Declaration in 1993, there have been numerous initiatives to establish regional human rights institutions and charters in the Asia-Pacific region, but all efforts have been impeded by deep cultural, political, and historical issues. Over the last two decades, human rights scholars have also published a large number of studies exploring the possibilities for creating RHRIs in the Asia-Pacific region. They, however, have mainly focused on examining the reasons why such regional human rights systems have not emerged in the Asia-Pacific region and on suggesting ways in which RHRIs in this region can be created, without answering or only slightly discussing the basic question that should be reviewed first: the issue of whether RHRIs are desirable for the Asia-Pacific region. Answering this question is the main purpose of this paper.

First, it provides four general reasons behind the necessity to establish RHRIs for the protection and promotion of human rights, including the one that RHRIs can serve as an additional highly effective tool for the implementation of international human rights norms though the state itself should still be the main obligor for the protection of human rights.

Then, this paper shows why it is desirable to have RHRIs specifically in the Asia-Pacific region by reviewing the development of international human rights law and the counter-responses by Asian countries to international human rights norms. This paper, however, does not intent to intervene into the traditional philosophical debates over universalism and relativism. Rather, it focuses on the ways in which the universality of international human rights law has been challenged ever since the adoption of the UDHR with to the goal of articulating why and how countries in the Asia-Pacific region have responded and interacted within the development of international human rights law.

Here, the broad argument of this paper is that the validity of the universality of human rights should come at the very least as the product
of a process in which most countries are committed to international human rights law by ratifying major international human rights conventions and treaties. Thus, some kind of intermediate human rights institutions are necessary for the implementation of international human rights law at regional and national levels to meet their social and cultural context because the universality of human rights does not mean uniformed implementation of human rights norms. If individual states cannot and do not want to comply with international human rights norms, the role of RHRIs is important as a medium institution for the internalization and localization of international human rights norms because RHRIs can be a mediator between regional specificity and international standards through their extensive contacts with individual states, civil society, and international institutions.

Lastly, this paper briefly reviews existing RHRIs in other regions: Europe, the Americas, and Africa, to show why establishing RHRIs can positively influence the promotion of human rights, in the sense that at least regionally adopted human rights treaties reflect the specific sentiments in the region, and that regional institutions can handle human rights violation cases effectively with a better understanding of the context of a problem.

Surely, RHRIs cannot provide a total solution to human rights violations. They, however, have emerged as the result of the frustration with the ineffectiveness of international mechanisms and, at the same time, the hope for a better implementation of international human rights norms. They can work effectively not as a replacement but as a complement to both the international and the national human rights system, because regional human rights mechanisms can reflect regional specificity and its particular needs, and at the same time, monitor individual states' practices in meeting international standards on human rights.

Overall, it is indeed desirable to establish RHRIs in the Asia-Pacific region.
아태지역 인권기구 설립 필요성의 고찰

백 범 석

1993년 방콕 인권선언이 채택된 이래로 아태지역에서는 지역인권기구 설립을 위한 다양한 논의가 유엔, 개별 아시아정부간 그리고 NGO들을 통해 다각도로 이루어져 왔으나 현재까지도 정치, 사회, 문화, 종교적 차이점 그리고 역사적 경험이 등에 기한 요인들로 인해 큰 성과를 거두지 못하였다. 한편 지난 20여 년간 이를 위한 학문적 논의도 학자들 간에 활발하게 전개되어 왔다. 그러나 대부분의 논의들이 지역인권기구 설립 전망과 장애요인 그리고 앞으로의 실천 과제에 주된 초점을 맞추어 온대 반해, 왜 지역인권기구가 아태지역에 필요할 수 있는 근본적 질문에 대해서는 상대적으로 소홀히 다루어 왔던 것이 사실이다. 이에 당해 논문은 아태지역 인권기구 설립 필요성에 대한 보다 구체적인 이론적 고찰을 통해 그 답을 찾는데 목적이 있다.

우선 본고는 지역인권기구 설립의 일반론적 필요성을 1) 국제인권규범의 보다 효과적인 이행을 위한 보충적 장치, 2) 인권침해 국가에 대한 지역적 차원에서의 인도적 개입을 통한 적법성 및 정당성 강화, 3) 근린효과 (neighborhood effect)를 통한 지역 내 주변국간의 인권보호를 위한 협력 확대, 4) 인권 활동가 및 피해자들에 대한 지역차원에서의 효과적인 보호 장치 제공 등 네 가지 측면에서 제시하고자 한다. 다음으로는 보다 구체적으로 아태지역에서의 지역인권기구 설립 필요성을 국제인권법의 발달과 그 과정 속에서의 아태지역 국가들의 관점 및 입장 변화를 살펴봄으로써 제시하고자 한다.
그리고 그 이론적 필요성은, 전통적인 인권의 보편성과 상대성에 관한 논의를 통해서야 한다. 오늘날 주요 인권조약들에 대한 대다수 국가들의 비준 및 가입을 통해 국제인권규범이 수용 확대되었다는 측면에서 찾고자 한다. 즉 국제인권규범의 보편적 (universality) 수용이 화일적 (uniformity) 이행을 의미하는 것은 아니기에, 보다 효과적인 인권규범의 이행을 위해서는 지역적 특성, 문화 그리고 가치를 반영할 수 있는 매개체 (medium, intermediate) 역할을 할 수 있는 지역인권기구의 설립이 아태지역에서는 더욱 필요한 것이다. 마지막으로는 기존의 유럽, 미주 그리고 아프리카 지역인권기구의 설립 및 운영의 선례를 살펴보면서 아태지역에서의 인권기구 설립의 실질적 필요성을 제시하고자 한다.

물론 지역인권기구가 인권보호와 증진을 위한 완전한 해결책은 아니다. 그러나 개별국가들의 다양한 인권보호장치들을 보충하고 보다 효과적인 국제인권규범의 이행을 보장할 수 있다는 측면에서 아태지역에서의 인권기구 설립은 반드시 필요하다 할 것이다.

주 제 어

국제인권법, 인권규범의 이행, 지역인권기구, 아태지역.