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Demystifying Human Rights Protection in Asia

BACKGROUND PAPER

Cover photo : Hong Kong, China: the "Occupy Hong Kong" movement crystallized the youth's (in particular, students') aspirations for democracy.

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Introduction: Asia and human rights

From the start, any critical analysis of human rights protection in Asia has to contend with semantics. Circumscribing the Asian continent is not simple because of the variations in boundaries across time,¹ and the fact that people in positions of authority as well as social groups have not been inclined to regard the continent as a coherent geographical whole; moreover, the addition of human rights to the equation further exposes the analysis of human rights protection in Asia to a series of opposing forces – among which the tension between universalism and relativism plays a central role.

Any one conducting this type of analysis runs three major risks. The first – which in a more general context could be referred to as orientalism,² culturalism or essentialism – is arguing that there are cultural barriers to the protection of human rights in Asia. In arguing a reified culture – one that is seen as uniform in substance and development and sacrosanct (an “essence”) – the defenders of the type of relativism that aims to weaken the guarantees provided by the international human rights system are joined by extrinsic observers who may have doubts as to the complexity of Asian societies and thus lay down their weapons before the battle has even started. As we will demonstrate, these types of arguments continue to be used by some actors, either as a comprehensive discursive strategy or in specific instances, to deny the applicability of particular human rights. They are also used to deny external actors the right to speak about a society of which they are not a member: the “voice problem” that anthropologists are familiar with.

The second risk, which partially overlaps the first, is that of ethnocentrism. The external observer is tempted to assess behaviours, values or cultural traits on the basis of criteria established by his or her own culture. One must bear in mind that all human beings are susceptible to this because simplification and evaluative judgment are part of the categorisation process that is inherent to cognitive functions. It is equally important, however, to not relinquish judgment entirely by reasserting the universal nature of human dignity and of the rights that protect it. This is the ultimate aim of the philosophy of human rights. Frequently, what is perceived as a cultural trait is nothing more than disguised domination. Human rights are a means of combating the idea that inequalities are the natural state of things.

The third type of risk is applying an evolutionistic approach and assuming that a particular society, identified arbitrarily, can serve as a reference for other societies that are purported to be at other stages of advancement and destined either to follow the same pattern as the “reference” society or disappear. While this may sound like an archaic colonial cliché, it still serves a purpose, be it for the media or for common sense: to discredit societies or practices (e.g., female genital mutilation, corporal punishment or the criminalisation of homosexuality) by qualifying them as backwards. These types of comments are not constructive to the discussion. As anachronistic as they may seem, the very serious breaches of human rights that are mentioned above and that are covered by the media are indeed being committed in the 21st century and are the manifestation of forms of domination, by individuals or social groups, that are facilitated by the exercise of power without any legal or moral obligations.

A fourth type of risk can be added to the three described previously; one that is sometimes made evident by the focus the media give to the relation between Asia and human rights and consists of a form of fatalism or pessimism that disregards advancements and concentrates exclusively on the forces of inertia. While some of the most egregious human rights situations are found in Asia (North Korea, Iran, Laos, Vietnam, Afghanistan, Burma, etc.), the continent has also seen the rise of democratic regimes (India and Japan,³ for example), institutions and practices, as well as experiments in greater openness with respect to democratisation (e.g., South Korea, Indonesia, the Philippines). Asia has a long humanist tradition whose evolution is concomitant with the crystallisation, throughout the world, of norms of behaviour that are based on the respect for human dignity. We need only point out philosophical treatises such as the Mahabharata, or rules and customs that guarantee rights to the most vulnerable groups, such as civilians and the wounded in wartime (the Hammurabi Code, the Laws of Manu, the practices of Empress Jingu, the

1. See François Godement and Guibourg Delamotte (eds.), *Géopolitique de l'Asie* (Paris: Armand Colin-SEDES, 2007).

2. In his famous treatise, *Orientalism* (New York: Vintage, 1979), Edward Said describes how the West – through its literary, artistic and academic works – created and spread a uniform and inexistent “Orient” that negates its history and complexity.

3. See Dae-Jung Kim, “Is Culture Destiny? The Myth of Asia’s Anti-Democratic Values”, *73 Foreign Affairs* 6 (1994), pp. 189-194.

writings of Sima Qian and Confucius),⁴ or to religious minorities (think about the legacy of Cyrus the Great with regard to the protection of the Jews).

Rules providing a minimum amount of protection during armed conflict have been codified throughout the world to provide for human treatment. In the absence of such rules, total warfare could annihilate all possibilities of any future peace. The conceptualization of freedom emerged throughout the world to combat the arbitrariness⁵ that characterizes authoritarian modes of exercising power. To circumscribe, through selective perception, the philosophical origins of human rights to Europe during the Enlightenment would be tantamount to insulting Asia and the other continents. Liberty and dignity have been conceptualised the world over and have inspired human behaviour just as the obstacles to the exercise of rights and freedoms are similar everywhere, irrespective of political systems, socioeconomic conditions or culture. Weak institutions and the absence of systems of checks and balances, and therefore the inability to control the way power is exercised, have farther-reaching consequences, beyond the practices and discourses of those who govern. Constitutional law is fundamental to the creation of obligations for states and to guarantee the rights of individuals, whereas criminal law and administrative law, when applied by independent courts, guarantee the effective fulfilment of rights. In Asia, as elsewhere, what is lacking is often precisely that.

These epistemological precautions, however, should not impede the process of critical analysis. Also, the object is not to disregard the extreme civilisational, political, cultural, religious and socioeconomic diversity of Asia; drawing up a list of generalities that apply to a continent that is home to half of the world's population is a difficult task. Even *within* certain countries, social, political and legal fragmentation would make any exercise in generalisation perilous. Notwithstanding, common traits do exist and, if need be, can be identified and used as smallest common denominators. We shall have to strike a balance between idiographic epistemology (which describes unique, isolated and unrelated situations) and nomothetic epistemology (which aims to reach general conclusions). To examine human rights protection in Asia, a trans-disciplinary approach is required; we have to go beyond purely legal analyses. This approach can use political anthropology to identify relevant social structures in each society, sociology to analyse tensions and social movements, and political science to deconstruct power relations and discourses.

The aim of the current paper is to examine national, regional and international discourses and practices and to identify where they coincide and where they differ, rather than to establish an exhaustive inventory of the human rights situation in every country in Asia. To these ends, we will have to deconstruct what has been reified, to historicise discourses and practices, and to contextualise human rights violations in 25 countries (plus one)⁶ located in three large sub-regions: Southeast Asia, South Asia, and East Asia. Sub-dividing the continent in this conventional manner can be misleading, from a theoretical standpoint, but is useful for the purposes of research. The Middle East and Central Asia have not been included in the analysis because of their specificities and political, historical and sociolinguistic ties to other regions.

In the first part we examine the debate on the universality of human rights through a discussion on what is commonly referred to as "Asian values". In the second part, we look into domestic human rights protection mechanisms in Asia; a cross-country approach is used to compare and contrast rights and protection mechanisms. Although Asia does not have a regional instrument for the protection of human rights, Southeast Asia, through ASEAN, has recently made advancements; possible regional human rights protection mechanisms are explored in the third part. The fourth and last part is a discussion on the role of the international human rights protection system in Asia.

* * *

Note: This paper is based on a lecture ("Human Rights Protection in Asia", in French "La protection des droits de l'Homme en Asie") given by Nicolas Agostini (FIDH) at the International Institute of Human Rights (IIDH) in 2014 and 2015. For more information, see: <http://www.iidh.org/page-27-37-annual-study-session.html>

4. See Robert Kolb, *Ius in bello: Le droit international des conflits armés* (Basel: Helbing & Lichtenhahn, 2003) and Joseph Yacoub, *Les droits de l'homme sont-ils exportables? Géopolitique d'un universalisme* (Paris: Ellipses, 2005).

5. Amartya Sen, "Human Rights and Asian Values" in Richard Falk, Hilal Elver and Lisa Hajjar (eds.), *Human Rights: Critical Concepts in Political Science* (New York: Routledge, 2008), p. 397.

6. The 25 countries are Afghanistan, Bangladesh, Bhutan, Burma, Brunei, Cambodia, China, North Korea, South Korea, India, Indonesia, Iran, Japan, Laos, Malaysia, Maldives, Mongolia, Nepal, Pakistan, the Philippines, Singapore, Sri Lanka, Thailand, Timor-Leste and Vietnam; the 26th being Taiwan (although not a member of the UN, it is recognised by a handful of states and is a *sui generis* geopolitical entity).

FIDH and its member organisations in Asia (www.fidh.org/en/asia/) document in detail and on a daily basis the human rights situation in the following countries:

Afghanistan: Armanshahr/Open Asia <http://openasia.org/en/>

Bangladesh: Odhikar <http://odhikar.org/>

Burma: Altsean-Burma <http://www.altsean.org/>

Cambodia: Cambodian Human Rights and Development Association (ADHOC) <http://www.adhoc-cambodia.org>

Cambodian League for the Promotion and Defense of Human Rights (LICADHO) <http://www.licadho-cambodia.org/>

China - Tibet: China Labour Bulletin (CLB) <http://www.clb.org.hk/en/> International Campaign for Tibet (ICT) <http://www.savetibet.org/> Human Rights in China (HRIC) <http://www.hrichina.org/en>

India: Commonwealth Human Rights Initiative (CHRI) <http://www.humanrightsinitiative.org/>

Indonesia: KontraS <http://www.kontras.org/>

Iran: Defenders of Human Rights Center (DHRC) <http://www.humanrights-ir.org/english/> Ligue de défense des droits de l'Homme en Iran (LDDHI) <https://www.facebook.com/lddhi.fidh>

Japan: Center for Prisoners' Rights (CPR) <http://www.cpr.jca.apc.org/>

Laos: Lao Movement for Human Rights (LMHR) <http://www.mldh-lao.org/>

Malaysia: SUARAM <http://www.suaram.net/>

Pakistan: Human Rights Commission of Pakistan (HRCP) <http://hrcp-web.org/hrcpweb/>

Philippines: Philippine Alliance of Human Rights Advocates (PAHRA) <http://www.philippinehumanrights.org/>

Taiwan: Taiwan Association for Human Rights (TAHR) <http://www.tahr.org.tw/>

Thailand: Union for Civil Liberty (UCL)

Vietnam: Vietnam Committee on Human Rights (VCHR) <http://queme.net/index.php>

Part One: “Asian Values” and their metamorphoses: the debate on the universality of human rights

The starting point for any discussion of human rights in Asia is frequently the “Asian values” discourse which had its heyday in the 1990s, in the run-up to the 1993 World Conference on Human Rights (the Vienna Conference). The concept was used strategically to defend the role of state sovereignty as a firewall against the international system of human rights and to challenge the universality of human rights. Although the “Asian values” discourse has lost some of its credibility it is still occasionally used to rekindle a cultural relativist approach to human rights or at least to certain civil and political rights; the hard-line variant seems destined to remain sidelined.

1. The “Asian values” discourse

The term “Asian values” used by its champions is specious; firstly, because the debate is just as much about how society is organised and how power is exercised as it is about values; and secondly, even at the height of their popularity, “Asian values” were the object of theorisation in only a handful of countries in Southeast Asia and China, albeit in different ways. It would be illusory to assume that the term reflected a common position in Asia. The “Asian values” discourse simply posits that there are cultural traits that are incompatible with certain internationally recognised rights and freedoms. Our objective is to debunk this argument by analysing its structure and main tenets and by demonstrating that it has never been used unequivocally.

A. The articulation and crystallisation of “Asian values”

What is invariably common to the different versions of the “Asian values” discourse is the negation of the universality of human rights and the affirmation of its corollary: cultural relativism. The latter being the most common means of challenging the former. Because of religious diversity, lower colonial penetration and the economic success of certain countries in the region, Asia has been the seat of some of the harshest criticisms made of the international human rights system.⁷

Several events that preceded the crystallisation of “Asian values” in the 1990s are worth mentioning. The 1955 Bandung Conference of non-aligned states played an undeniable role in strengthening an assertive third-world identity and criticism of the behaviour of Western countries, but it was the economic success of the Asian “dragons” or “tigers” (Singapore, South Korea, Hong Kong and Taiwan), during the last third of the 20th century that allowed the advocates of “Asian values” to formally call into question certain civil and political rights. In parallel, the defence of cultural identities and societal models that were clearly different from those of the West paved the way for: (a) a culturalist theory explaining the success of Asian economies; (b) the rejection of “pretentious universalism” (Bilahari Kausikan) and of Western cultural imperialism; and (c) the assertion of discontent with “the Western interpretation of human rights”.⁸ This corpus of ideology enabled the proponents of the “Asian values” discourse to launch an assault against the international human rights system by speciously asserting, for example, that many rights as such “were still contested”.⁹

As Yash Ghai¹⁰ pointed out, it is paradoxical that states that have much in common with the West (in economic, commercial and technological terms), such as Singapore and Malaysia, became the main critics of the international human rights system. The Singapore school, which was comprised of university scholars and political leaders such as Lee Kuan Yew (Prime Minister from 1959 to 1990), Kishore Mahbubani (Singapore’s Permanent Representative to the United Nations), Bilahari Kausikan and Tommy Koh, developed the concept of “Asian values” during the last quarter of the 20th century. In other countries, leaders such as Mahathir ibn Mohamad (Malaysia), Suharto (Indonesia) and Ferdinand Marcos (the Philippines) publicly expressed relativist points of view that used the main ideas underpinning “Asian values”.¹¹

7. See Yash Ghai, “Understanding Human Rights in Asia” in Catarina Krause and Martin Scheinin (eds.) *International Protection of Human Rights: A Textbook* (Turku: Åbo Akademi University, Institute for Human Rights, 2012).

8. See Bilahari Kausikan’s famous article, “Asia’s Different Standard”, 92 *Foreign Policy*, Fall 1993, pp. 24-41.

9. *Ibid.*, p. 39.

10. Yash Ghai, “Human Rights in the Asian Context: Rights, Duties and Responsibilities”, *Human Rights Solidarity*, AHRC Newsletter 7 (September 1997) 4: 9-17.

11. See Maria Linda Tinio, *Les droits de l’homme en Asie du Sud-Est* (Paris: L’Harmattan, 2004), pp. 21-68.

The 1993 Vienna Conference (14 to 25 June), which resulted in the Vienna Declaration and Programme of Action and in the creation of the Office of the United Nations High Commissioner for Human Rights (OHCHR) had been preceded by several regional meetings. It was at the Asian regional meeting that took place in Bangkok from 29 March to 2 April 1993 that “Asian values” were deployed to criticise the international human rights system. Some of the political leaders present at the meeting attempted to defend the existence of a unified Asian perspective on human rights by claiming cultural specificity and regional particularities.¹² They also denounced the West’s attempt to “impose” its value system, purportedly based on human rights.¹³ Paragraph 8 of the Final Declaration adopted in Bangkok clearly reflects this position:

“Recognize 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; [...]”¹⁴

In addition to the regional particularities, the Declaration also emphasises national sovereignty and the principle of non-interference in domestic affairs and rejects attempts to link development aid to human rights (see paragraph 5 of the Declaration) as well as the use of selectivity (“double standards”) and the political manipulation of human rights.¹⁵ Emphasis is also given to the primacy of national legal frameworks vis-à-vis international mechanisms (see paragraph 9 of the Declaration).

B. The “Asian values” discourse as a strategic essentialism – its main arguments

The proponents of the “Asian values” discourse use several clearly identifiable arguments; the coherence they have sought to create does not, however, correspond to reality because national versions of the discourse reveal instances of divergence. What these national versions have in common is a form of strategic essentialism: i.e., the use of cultural relativism to negate, for political reasons, the universality of human rights. To have a basis to refute their universal value, the supporters of the “Asian values” discourse claim that the West, which is seen as imperialist, created human rights. Maria Linda Tinio pointed out that the “Them” versus “Us” dichotomy, on which the “Asian values” discourse is based, is a form of reverse orientalism that postulates the uniformity of values and practices in Western societies.¹⁶ Remarks made by former Malaysian Prime Minister Mahathir illustrate this phenomenon:

“The western interpretation of human rights is that every human being can do as he wishes; free of any government restrictions...The result is not exactly what liberal democrats were expecting. Individuals have decided to transgress every law that governs society, starting with ordinary things such as dress codes and going as far as disregarding institutions such as marriage. Extramarital sex has become the norm. The family has been redefined to mean cohabitation between a man and a woman, with frequent changes in partners, or between a man and a man, or a woman and a woman [...] Western society wants absolute freedom for everyone, but no freedom when society is opposed to it... They see no contradiction in their contradictory attitudes.”¹⁷

In addition to denouncing the decadent morals and mores of the West, the “Asian values” discourse also attacks individualism and individual rights and freedoms, which are described as generating selfishness and questioning authority, which in turn lead to instability.¹⁸ The rights to freedom of expression (particularly freedom of the press), freedom of association, freedom of peaceful assembly and political participation are particularly targeted. The proponents of the “Asian values” discourse intend to promote traditions and culture which are based on the following principles:

12. Tinio clearly demonstrates that the only function of these “particularities” was to give states an excuse not to respect certain human rights.

13. See Kausikan, *supra* note 8.

14. General Principle no.7 of the 2012 ASEAN Human Rights Declaration reiterates this wording and can be seen as an attempt to reassert regional particularities.

15. Paragraph 7: “Stress the universality, objectivity and non-selectivity of all human rights and the need to avoid the application of double standards in the implementation of human rights and its politicization [...]”.

16. See Tinio, *supra* note 11, p. 29; see also Leena Avonius and Damien Kingsbury, “Introduction” in Leena Avonius and Damien Kingsbury (eds.), *Human Rights in Asia: A Reassessment of the Asian Values Debate* (New York: Palgrave Macmillan, 2008), p. 7.

17. See Tinio, *supra* note 11, p. 29; our translation is above.

18. See Ghai, *supra* note 10.

Respect for authorities and for elders. The aim is to promote filial piety as defined in Confucian philosophy and by extension the respect owed by those who are governed to those who govern. The latter are assumed to be infallible simply because they exercise political authority; their decisions are not to be questioned by the governed. Moreover, the state is described as the guarantor of stability against the centrifugal forces of religion, ethnicity or race (and all the more so in multiethnic states such as Singapore and Malaysia).

Family and community values. Community and family are described as intrinsically superior to the individual. If a conflict were to arise the interests of the community or of the family would supersede the rights of the individual. The individual has no real existence except as a member of a group.

Emphasis is given to an individual's duties to society, to work and to discipline. Individuals see themselves in terms of their role within a social group and must conform to a system of duties and obligations where work is given the highest priority because it guarantees economic independence and stability for society.¹⁹

The quest for consensus and harmony. Importance is given to non-confrontation in all spheres of life, especially the political, social and family spheres. According to the proponents of "Asian values" the individual must do and say what is expected of them when it is expected of them rather than publically airing his or her doubts and criticisms.²⁰ Kausikan clearly states that, unlike what he refers to as Western intellectual tradition, human rights are not exercised "against the state" (in other words, by using the rights of individuals as guarantees against abuses of power) but rather *with* the state and that the West's insistence on civil and political rights is tantamount, in Asian societies, to inciting instability.²¹

The primacy of economic development over individual freedoms. Civil and political rights are described as individualistic and generating instability and disorder and are consequently obstacles to orderly development. The position of the Singaporean school, in this area, has been to denounce the West's "obsession with rights" which is presumed to produce conflicts incessantly between citizens and the state.²²

Paradoxically, the discourse on "Asian values" is partly based on philosophical theories and intellectual traditions that can be qualified as Western. Postmodernism, for example, and the idea that everything is relative because everything is socially constructed; or cultural anthropology, which has grounded its analyses in the idea that cultures and languages are discrete and separate entities;²³ or the myth of "European exceptionalism," which is based on the affirmation that democracy was invented in Athens and that human rights are a product of the European Enlightenment.²⁴ The proponents of the "Asian values" discourse can easily use these affirmations to excoriate Western cultural imperialism, selectivity and hypocrisy and to describe human rights as an instrument of domination.²⁵ They also borrow and expand a particularly Western concept: Westphalian sovereignty.²⁶

What becomes clear when one analyses the way "Asian values" have been used in different national contexts is that their components have not all been given the same importance. While some of their national versions focus on the culturalist aspects others emphasise the materialist aspects. What these two currents have in common is that they were part of a discourse on a reified, uniform and sacrosanct culture, which was used to attack political opponents, civil society and the international human rights system, as all were construed as threats to the hegemony of the regimes in power.

19. Theoretically, those in power also have obligations vis-à-vis the people they govern.

20. These concepts can be compared to the Buddhist perspective whereby the place of each individual in society is determined by the everything a person has done in his previous live(s).

21. See Kausikan, *supra* note 8, p. 41.

22. For further discussion on these points see Avonius and Kingsbury, "Introduction", *supra* note 16; see also Laurence Wai-Teng Leong, "From 'Asian Values' to Singapore Exceptionalism", in Avonius and Kingsbury, *supra* note 16, pp.121 -140; Tinio, *supra* note 11 ; Kausikan, *supra* note 8 ; Ghai, *supra* note 10; for the thinking of Lee Kuan Yew, See Fareed Zakaria, "Culture Is Destiny: A Conversation with Lee Kuan Yew", 73 *Foreign Affairs* 2 (1994), pp. 109-126.

23. Damien Kingsbury, "Universalism and Exceptionalism in 'Asia'", in Avonius and Kingsbury, *supra* note 16; Paul Close and David Askew, *Asia Pacific and Human Rights: A Global Political Economy Perspective* (Aldershot, Ashgate, 2004), pp. 57-58.

24. See Sen, *supra* note 5.

25. See Tinio, *supra* note 11, pp. 27-30.

26. The signing of the Peace of Westphalia (1648) established the concept of the sovereignty of states whereby the state has the exclusive right to administer its domestic affairs and to forbid the exercise of any other authority on its territory. This notion of sovereignty long served as the basis for the international community to consider that how a state treats its nationals (and any other person under its jurisdiction) as being a strictly domestic matter.

C. Various national situations

In Singapore and Malaysia the intellectual elite have adopted culturalist positions. They have striven to describe and render concrete a version of Asian culture that is radically different from that of the West. In China, the denouncing of Confucianism during the Maoist cultural revolution and the need for economic growth have led to a more materialist perspective to “Asian values”: the promotion of a strong state, the only guarantor of economic development and national sovereignty.²⁷ In sum, “culture” dominates the “Asian values” discourse in Singapore and Malaysia and “economic efficiency” dominates that of China.²⁸

Furthermore, in Singapore, the political grammar is dominated by “meritocracy”, which is the foundation of a form of elitist authoritarianism that produces intellectual elites that serve the city-state’s most important objectives: national security, social stability and economic success.²⁹ It is in this context that one needs to see Mahbubani’s theory of “good government” (stability and growth guaranteed by an efficient bureaucracy). In Malaysia, members of the political elite have repeatedly used moralist rhetoric to praise discipline and good morals in contrast to what is described as the permissive and depraved West.³⁰ Indonesia has taken an intermediary position under Suharto’s “New Order” regime, where the discourse encompassed values and customs (although in practice many of the country’s indigenous cultures were disregarded) and the need for a strong government to guarantee economic growth. Suharto decried the “socially irresponsible” exercise, and futility, of civil and political rights in the absence of economic development.³¹ In other countries, despite occasional attempts, “Asian values” never really took hold. This is the case in Japan,³² where human rights have been part of the public agenda for several decades, in the Philippines, despite Marcos regime’s exultation when claiming “bread before freedom,”³³ and in Thailand, although to a lesser extent.³⁴

* * *

As we can see from this overview of national situations, the proponents of “Asian values” have sought to create a procustean bed of culture for different, complex societies which in fact cannot be reduced to a handful of arbitrarily defined traditions and values. The smallest common denominator in the “Asian values” discourse is the intent to weaken the universality of human rights by negating certain fundamental rights – freedom of expression the first among them. At the turn of the 21st century, because of its structural weakness and cyclical factors, the “Asian values” discourse went into crisis.

2. The waxing and waning of “Asian values”

A series of factors – mainly geopolitical, economic and social – contributed to the progressive fading of the “Asian values” discourse. The 1997 financial crisis played a major role because it was a hard blow to states that up until then had flourishing economies, but other factors also came into play. The crisis did not stop the occasional reactivation of the discourse, although these episodes are usually circumscribed to specific national contexts.

A. The crisis of “Asian values” at the turn of the 21st century

On 4 December 1997, in the midst of the monetary and financial crisis that was affecting Southeast Asia (capital flight, currency depreciation, the end of fixed exchange rates), the *Financial Times* published an article entitled “Asian Model, R.I.P.” The consequences of the financial crisis, including economic and social instability,³⁵ led to fierce challenges to the development models that had been applied and weakened the “Asian values” paradigm. The 1997 crisis rattled the development-first discourse because “enlightened” leaders had not planned for the slow-down in economic growth

27. In this context, human rights are described as a domestic political issue not to be debated with the rest of the world.

28. See Ghai, *supra* note 10; and Sen, *supra* note 5.

29. See Garry Rodan, “Political Accountability and Human Rights in Singapore”, in Thomas W.D. Davis and Brian Galligan (eds.), *Human Rights in Asia* (Cheltenham, E. Elgar, 2011), p. 72.

30. Anthony Milner, “Contesting Human Rights in Malaysia”, in David and Galligan, *supra* note 29, p. 91; Tinio, *supra* note 11, p. 32.

31. Michele Ford, “International Networks and Human Rights in Indonesia”, in Davis and Galligan, *supra* note 29, p. 40.

32. Mikako Iwatake, “The Nation-State and its Violence: Debates in Post-Cold War Japan”, in Avonius and Kingsbury, *supra* note 16.

33. Raul C. Pangalangan, “Human Rights Discourse in Post-Marcos Philippines”, in Davis and Galligan, *supra* note 29; and Duy Phan Hao, *A Selective Approach to Establishing a Human Rights Mechanism in Southeast Asia: The Case for a Southeast Asian Court of Human Rights* (Leiden: Martinus Nijhoff, 2012), pp. 54-56.

34. See Naruemon Thabchumpon, “Human Rights in Thailand: Rhetoric or Substance on ‘Asian Values’”, in Avonius and Kingsbury, *supra* note 16.

35. Which ultimately led to Suharto’s departure in Indonesia.

or for the means to return to growth in the short term. The legitimacy the economy had given members of the elite was called into question.³⁶ As Laurence Wai-Teng Leong pointed out, it is ironical that in this context the virtues usually given importance by the proponents of “Asian values” became vices: “family values” became nepotism, the “search for consensus” became corruption, and “respect for authority” became authoritarianism.³⁷

At the same time, civil society (NGOs and scholars) conducted public education and advocacy campaigns to counter the influence of “Asian values.” As early as 1993, during the Bangkok meeting in the context of preparations for the World Conference on Human Rights, at which state representatives attempted to establish a common Asian position on human rights, over 100 NGOs held their own conference and produced their own declaration which was appreciably different from that of states. In their declaration, NGOs defended the universality of human rights in the face of oppression and rejected arguments that justified human rights violations on the basis of culture:

“As human rights are of universal concern and are universal in value, the advocacy of human rights cannot be considered to be an encroachment upon national sovereignty. [...] We affirm our commitment to the principle of indivisibility and interdependence of human rights, be they economic, social and cultural, or civil and political. [...] The pretext for constraining these channels of freedom of expression is often internal [...] this is a façade for authoritarianism and for the suppression of democratic aspirations and institutions.”³⁸

Civil society also wanted to reaffirm the plurality of local traditions and cultures in response to the claims made by state representatives that restrictions to freedom of expression were unanimously supported in Asia. In fact many indigenous communities have developed mechanisms for dialogue and dispute settlement whereby everyone concerned can express their opinion. These mechanisms are contrary to the “Asian values” position which is narrow in vision and opposed to open, free speech.³⁹ Some of the criticism also consisted of minimising differences between Asia and the West and demonstrating that international law already provides for limitation or derogation to certain rights on the basis of collective interests and social life. Absolute freedom of expression, for example, does not exist anywhere; it is limited on the basis of public order and safety. All societies forbid the raising alarms or “crying wolf” without legitimate reasons because of the risk of wreaking panic. International law and regional instruments (ranging from the American Convention on Human Rights to the African Charter on Human and Peoples’ Rights) recognise a balance between individual rights and collective interests. Furthermore, the 1948 Universal Declaration of Human Rights and the 1966 Covenants are universal instruments and certain of the rights enshrined therein, such as the right to self-determination, were the direct consequences of requests made by “non-Western” countries. It would be misleading to describe the international human rights system as grounded in Western values.⁴⁰

Additionally, in recent decades, some Asian scholars have sought to break the causal link between authoritarianism and economic growth that had been created by the Chinese Communist Party and political leaders such as Lee Kuan Yew. There is no statistical evidence to back up this link. On the contrary, the work of the Indian economist and philosopher Amartya Sen, who won the Nobel Prize in Economics in 1998, demonstrates that the most democratic countries are generally the most economically developed and that the proponents of authoritarian models are guilty of biasing and manipulating the facts. Furthermore, even in those countries that are used as examples by the proponents of authoritarian models, concomitance of growth and authoritarianism does not mean causality.⁴¹ In fact, democratic freedoms contribute to economic development: a free press can exert public pressure on the government and therefore influence economic choices and avoid scourges such as famine.⁴² Moreover, examples that run counter to the authoritarian model abound. How does one explain the poor economic performance of authoritarian regimes in countries such as Pakistan, Bangladesh or Burma? It is no accident that the champions of “Asian values” cite Singapore and Taiwan as examples.

36. See Tinio, *supra* note 11, pp. 46-49.

37. See Wai-Teng Leong, *supra* note 22, pp. 121-122.

38. “Bangkok NGO Declaration of Human Rights” in *Report by the Secretariat, Regional Meetings*, UN General Assembly A/Conf.157/PC/83 19 April 1993.

39. For examples in Indonesia see Avonius, “From Marsinah to Munir: Grounding Human Rights in Indonesia”, in Avonius and Kingsbury, *supra* note 16, pp. 102-103.

40. See Aryeh Neier, “Asia’s Unacceptable Standard”, 92 *Foreign Policy* (1993), pp. 42-51.

41. See Sen, *supra* note 5; see also Sen’s fundamental work on the links between development and freedom, *Development as Freedom* (New York: Alfred A. Knopf, 1999).

42. See Sen, *supra* note 5.

New areas of research have given new impetus to Asian humanist traditions and have weakened the “Asian values” discourse. It has been shown⁴³ that political leaders such as Lee Kuan Yew had a selective interpretation of Confucianism. Confucius never gave carte blanche to governments. His philosophy criticises those who do not act with integrity. He placed as much importance on the exemplarity of those who govern as he did on the duties of those who are governed; these ideas are also found in certain Hindu texts.⁴⁴ Last, by the turn of the 21st century, the strongest attacks on the universality of human rights were no longer being launched from Asia but rather from conservative states in the Middle East and Africa, the pretext being religion – thus disarming the proponents of Asian exceptionalism.

With the 1997 crisis and the dismantling efforts conducted by civil society, it became clear that the emperor was wearing nothing at all. The discursive strategies used by the supporters of “Asian values” were systematically scrutinized to reveal their true objectives, namely: (a) preserving hierarchies and the political, social and economic *status quo*; (b) smothering the diversity and aspirations of society as well as its underpinning struggles for power; (c) legitimizing authoritarianism; and (d) weakening the voices of dissent (political opponents, civil society, indigenous peoples and the international community). Aryeh Neier rightly denounced the “consensus-imposing” ways of the defenders of “Asian values” as being very far from the “consensus-seeking” they ostentatiously claimed.⁴⁵ In sharp contrast to the picture painted by Lee Kuan Yew or by Mahathir, social relations in the West are actually more consensual than in Asia because of their lesser coercion.⁴⁶ *In fine*, the question that ultimately arises is the same reached by all of the critics of essentialist discourses: “Who is speaking?” When members of the elite claim that what Asian masses want is stability and growth rather than freedom, in whose name and to what ends do they do so? In reality, they do not have the monopoly on the definition of culture or the right to speak on behalf of complex, diverse and dynamic societies.

The “Asian values” discourse has been weakened, but not entirely silenced. It is not longer being used in a coordinated manner on the world stage. Nationally, it is occasionally revived, but on a truly *ad hoc* basis and for specific objectives, be they winning votes in elections from a particular social group (as has been the case with the rise in Islamist extremism in Malaysia and Indonesia), destroying the credibility of political opponents, or disqualifying civil society (as was the case with the Coalition of Malaysian NGOs (COMANGO) at the Universal Periodic Review of the country in 2013). Regardless of the language used, these discourses no longer claim to have international scope.⁴⁷

B. Singaporean, Chinese or post-Asian values?

After the 1997 crisis, Singapore distanced itself from its neighbours, which were trapped by “crony capitalism”. From a theoretical perspective, political leaders in Singapore went from “Asian exceptionalism” (back) to the “Singaporean exceptionalism”⁴⁸ that had been part of its political grammar since its independence. Singapore no longer claims to speak on behalf of Taiwan, Hong Kong or Indonesia; it speaks only on its own behalf and on that of its interests.⁴⁹ Confucianism plays a central role in this context.⁵⁰

China has promoted “post-Asian values” and while economic and social rights are still opposed to civil and political rights, the official Chinese discourse has evolved from one that defended the absolute sovereignty of the state over national affairs at the beginning of the 1990s to one that shows some degree of openness. Today, China tries to explain its position on the world stage more than it did in the past. The 2009 National Action Plan reflects the regime’s current position: human rights are described as relative, conditioned and prioritised and, consequently,

43. See Avonius, “Introduction” in Avonius and Kingsbury, *supra* note 16; See also Thabchumpon, *supra* note 34.

44. See Ghai, *supra* note 7 and note 10.

45. See Neier, *supra* note 40, pp. 42-43.

46. See, Ghai, *supra* note 10.

47. The scope has become sub-regional, at best. General Principle no.7 of the 2012 ASEAN Human Rights Declaration can be seen as an attempt to rekindle discourse that argues relativism or particularities: “All human rights universal, indivisible, interdependent and interrelated. All human rights and fundamental freedoms in this Declaration must be treated in a fair and equal manner, on the same footing and with the same emphasis. At the same time, the realisation of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds.”

48. See Wai-Teng Leong, *supra* note 22, pp. 126-129.

49. *Ibid.* p. 133; and Rodan *supra* note 29, p. 70.

50. Prime Minister Lee Hsien Loong declared in his 2007 New Year’s address that age-old family ties, which gave members of Asian societies care and mutual support throughout the wars, famines and crises, were still useful and meaningful nowadays (quoted by Wai-Teng Leong, *supra* note 22, p. 122).

neither interdependent or indivisible. In the plan, unbalanced economic growth is used to justify the strengthening of social safety nets, but these changes are not followed by concessions regarding civil and political rights.⁵¹ Here, China is also only speaking on its own behalf, to defend its model, and definitely not on behalf of Asia as a whole. But this relativist discourse is being used to implement a materialist (economic) plan and not for any culturalist ends. In any case, the Taiwanese experience and the protest movement “Occupy Hong Kong” (in the Fall of 2014) have weakened the culturalist argument as a whole by demonstrating that democratisation and Chinese culture are not incompatible.



Hong Kong, China: the “Occupy Hong Kong” movement crystallized the youth’s (in particular, students’) aspirations for democracy.

Essentialist discourses have occasionally been used elsewhere, but only for national purposes. In Cambodia, for example, the elite have attempted to discredit freedom of expression which is deemed too broad (in particular criticism made of political leaders) by referring to it as “non-Khmer” or as being imported from the West. At the same time, they have tried to invent national traditions which are in fact recent practices.⁵²

The waning of “Asian values” can also be observed in the fact that the economic take-off of the “new tigers” (Thailand, Indonesia, the Philippines and Vietnam) in the 1990s and 2000s, did not give rise to a uniform discourse on “Asian values;” in other words, the situations are fragmented and seen as such. “Asian values” seem to be a thing of the past. Consequently, in Asia, the most serious threat to the universality of human rights may emanate from what has been referred to as the “Beijing Consensus” (Barry Desker): a set of concepts comprised of national sovereignty, social order, free trade and social, rather than individual, rights.⁵³ The current strongholds of relativism are Singapore, Malaysia, Brunei and China.

C. Is there growing recognition of the universality of human rights in Asia despite the sporadic re-emergence of opposing trends?

In recent years, the theoretical and practical recognition of the universality of human rights has progressed in Asia. Even the most regressive regimes now use some human rights language and tacitly accept the idea that the way a state treats its nationals does not fall exclusively under national sovereignty. China recently changed its position: it went from an unyielding defence of

51. On these points see Ann Kent, “China’s Human Rights in the ‘Asian Century’”, in Davis and Galligan, *supra* note 29, pp. 189-191.

52. Nicolas Agostini, “The Use and Abuse of Culture”, *The Phnom Penh Post*, 21 May 2013. The “invention of tradition” concept refers to the eponymous 1983 book edited by E. J. Hobsbawm and T. O. Ranger and the historiographic current it started, which seeks to deconstruct the so-called historical nature of certain traditions.

53. Milner, *supra* note 30, pp. 97-98.

its sovereignty with respect to attempts by the international community to delve into its domestic situation to the rhetorical promotion, on the world stage, of the Chinese approach to human rights. For example, in response to criticism of the *refoulement* policy it applies to North Korean refugees, China uses an argument that is based neither on the defence of its sovereignty nor on its right to apply *refoulement* as it deems fit, but rather on international human rights law (albeit erroneously because it claims that the political persecution criterion does not apply to North Koreans). This change in stance is a publicity tactic;⁵⁴ but is realistic, i.e. based on the realisation that its previous line of argument was untenable.

There have been other noteworthy changes. Burma has authorised the UN Special Rapporteur to regularly visit the country and Vietnam authorised UN Human Rights Council special procedure mandate holders to conduct official visits. Authorities in Singapore, who are usually not receptive to discordant voices, have agreed to a mechanism to consult civil society on ASEAN initiatives in the 2000s (see *infra*, Part Three). In any case, and regardless of the ratification of a given instrument by a given state, customary international law – whose psychological element (*opinio juris*) stems, *inter alia*, from the Universal Declaration of Human Rights and resolutions adopted by the UN General Assembly and other bodies – covers the main rights and freedoms enshrined in treaties. Therefore, all Asian states are bound to the international human rights regime. The Universal Periodic Review (UPR) process conducted by the Human Rights Council (see *infra*, Part Four) decisively vested human rights with practical universality: through the UPR process UN member states are subject to peer review but they also have to conduct a national self-assessment beforehand and undertake follow-up afterwards.

The validity of peremptory norms of international law, or *jus cogens* (article 53 of the 1969 Vienna Convention on the Law of Treaties), has never been called into question. Even the staunchest defenders of “Asian values” have never denied the supreme value of the prohibition of genocide or slavery nor of the ensuing obligations for states.⁵⁵ The debate has always been focused on the rights to freedom of expression, association and peaceful assembly and those related to political participation. In practice, what we are seeing today, instead of head-on attacks on the relevant international legal provisions, is the challenging of their scope and interpretation. Consequently the debate is honed in on restricting freedoms on the basis of notions such as “national security,” “public order” or “public morals.” But the debate is taking place within the human rights sphere, which in and of itself is a form of progress.

* * *

The “Asian values” discourse is not uniform. It was used in a coordinated manner at the end of the 20th century, but that is no longer the case, not even for the states that upheld it in the past. This is the result of the 1997 economic and financial crisis and the work done to deconstruct the discourse. The strongest argument used today, on the world stage, to limit the scope of human rights is that of national sovereignty but its use is certainly not limited to Asian countries.

Domestic situations differ. In Part Two of the current paper we look into the advancements, barriers and perspectives for human rights in Asia by relying on an analysis of the types of rights and of the remedy mechanisms that exist in actual fact.

54. See Close and Askew, *supra* note 23.

55. See what Kausikan has to say on the issue, *supra* note 8, p. 39.

Part Two: Domestic human rights protection in Asian states

The starting point for victims seeking reparation for human rights violations is, almost always, the national legal order. In the great majority of cases, only the national system comes into play, because regional and international mechanisms can only be used after long proceedings and (for most of them) once all domestic remedies have been exhausted. The remedies provided for by the national legal order are crucial. If they are insufficient, it is often tantamount to an insurmountable obstacle.

Our objective is not to draft an exhaustive catalogue of the guarantees provided for by domestic law in all Asian countries but rather to identify what these have in common and how they differ, where they have been successful and where they have failed, the barriers and the perspectives. Our analysis looks at the types of rights (civil and political; economic and social) and the means for their realisation.

1. Civil and political rights; economic and social rights: perspectives

On the one hand, civil and political rights are the *bête noire* of the critics of universalism, while economic and social rights, on the other hand,⁵⁶ are crucial to their discourse and given primacy. In doing so they are in contradiction with the Vienna Declaration and Programme of Action, which stipulates that: "All human rights are universal, indivisible and interdependent and interrelated" (paragraph 5). In practice, the relations between these two sets of rights are complex. The discourses and practices observed in many Asian countries vest the (specious) dichotomy – civil and political rights vs. economic and social rights, or individual rights vs. collective rights – with heuristic properties despite its many perverse effects.

A. The assertion and questioning of civil and political rights

Asia is not a homogeneous whole. Some of the advancements made by certain countries in recent years are described below, in the second paragraph of this section. To make claims about "Asia" as a whole is not an easy task. To be able to describe the situation in greater detail we would need to conduct a comprehensive analysis of common indicators over the same period of time and in all of the countries under study; it is not in the objective of the current paper. What is examined is the dialectic between the assertion of rights and the denial of rights in the discourses identifiable in Asian countries. In sum, the aim is to examine how human rights are dealt with in the public sphere and in public discussions. Within a country many situations are possible: civil and political rights may not be part of the public sphere (China, Laos, Burma, Iran, etc.), or they may form an integral part of it (Japan, South Korea, India, the Philippines), or there may be discordant opinions and forces in the country (Thailand, Cambodia). Political and opinion leaders may support, or criticise, civil and political rights to varying extents, depending on the subject. And, of course, none of these situations are hewn in stone. The fall of a repressive regime, the advent of democratic openness or, on the other end of that continuum, a political or an institutional crisis can change the debate, the rhetoric and the political grammar and, consequently, the status given human rights in the public sphere.

In China, with the exception of certain (economic and social) rights that are cherry-picked by the Communist Party, human rights are not the subject of public debate or discussions; and civil and political rights are disqualified because in the Marxist school of thought they are seen as bourgeois rights.⁵⁷ The recent, less hard-line changes in official discourse have maintained this connotation. China is a signatory to the International Covenant on Civil and Political Rights (ICCPR), but it has never ratified it and ratification does not seem to be topical.

Similarly, in Singapore, although China's ideological opposite, the institutionalised system used to repress freedom of expression limits considerably the importance of human rights in public debate.

56. Cultural rights, notably those related to indigenous peoples' right to development and to the preservation of their cultures, tend to be neglected by governments who champion economic development.

57. See Kent, *supra* note 51, p. 188.

There are taboos (ethnicity or relations among communities)⁵⁸ and there is nothing to indicate that the government is going to change their position with respect to international instruments any time in the near future. Singapore is not a party to the 1966 Covenants or to a certain number of other conventions (see below, Part Four). Brunei also severely restricts the exercise of freedoms of the press, of assembly, of association and of religion as well as of political rights, and in particular the right to freely join a political party. These rights are very rarely discussed in public and the country is signatory to very few international conventions.

The situation is similar in Vietnam where there are restrictions on the fulfilment of many rights, among them expressive rights, the rights to political participation, to an independent judicial system and to freedom of movement. Participation in public discussions, including over the Internet, on issues connected to civil and political rights, cases of violations, or reforms exposes citizens, journalists and bloggers to fierce repression.⁵⁹ In Laos, issues connected to human rights are simply not addressed in public debate or discussions.

In other national contexts such as Bangladesh, Pakistan, Iran and Afghanistan, anyone publicly calling for political reform or for greater observance of women's or religious minorities' rights, or for those of human rights defenders is exposing him or herself to reprisals from state and non-state actors. Discussions of sensitive issues related to human rights are largely circumscribed to the Internet. The barriers and restrictions created by political dynamics make it counterproductive and even dangerous for public figures to advocate for these rights.

The situation in Sri Lanka is equally menacing; openly debating certain issues (in particular, violations committed during the armed conflict between the government and the Tamil Tigers (LTTE) and the harassment of human rights defenders) is dangerous. Persons expressing independent opinions are subjected to repression. The political discourse does not include human rights as a subject for debate; attention is focused on national security and economic development. (The recent presidential election and the unexpected defeat of former president, Mahinda Rajapaksa, may have positive effects and allow greater inclusion of human rights in public discussions.) And finally there is the extreme case of the Democratic People's Republic of Korea (North Korea) where civil and political rights are almost inexistent. There is no public debate on human rights matters and anyone who ventures onto that terrain runs the risk of immediate internment in a work camp and perhaps death.⁶⁰ The situation in North Korea is the result of its unique historical process which makes it difficult to include it in any generalisations made with regard to the region.

As we shall see in the following paragraphs, several countries are in a much more favourable position. There, in the domestic sphere, for a range of reasons, the defence of civil and political rights was legitimised by public figures and integrated into the political culture. In Indonesia, during the time that spanned from the murder of activist and workers' representative Marsinah in 1993 and to that of Munir, the founder of the NGO KontraS, in 2004, the fall of Suharto (1998) and democratic opening (*keterbukaan*) led to the emergence of a political ethos based on human rights and freedom of expression. A series of key actors and institutions (the media, the National Human Rights Commission (Komnas-HAM), NGOs and judges) made these fundamental changes possible.⁶¹ Today Indonesia is very different from what it was under Suharto, even though impunity and serious breaches of human rights persist.

Timor-Leste was occupied by Indonesian forces for a long period of time. Many of the actions undertaken since independence (ratification of treaties, the creation of human rights institutions and policies, and of a truth and reconciliation commission) have made civil and political rights a public matter, although a high number of violations continue to take place.

In the Philippines, the end of President Marcos' regime and greater political openness also led to a more assertive discourse on human rights which was notably promoted by the first National Human Rights Commission in Southeast Asia, civil society and the media.⁶² The Philippines

58. Wai-Teng Leong, *supra* note 22 p. 123.

59. See the report by FIDH and the Vietnam Committee on Human Rights (VCHR): <https://www.fidh.org/International-Federation-for-Human-Rights/asia/vietnam/Bloggers-and-Netizens-Behind-Bars-12866>. More information is available on FIDH's website <https://www.fidh.org/International-Federation-for-Human-Rights/asia/vietnam/> and that of the VCHR / Quê Me (<http://www.queme.net>). For the situation in Laos, information is available at the Lao Movement for Human Rights' (LMHR) website: <http://www.mldh-lao.org>.

60. See FIDH's report on the application of the death penalty in North Korea: <https://www.fidh.org/en/region/asia/north-korea/the-death-penalty-in-north-korea-in-the-machinery-of-a-totalitarian>

61. See Avonius, "From Marsinah to Munir", in Avonius and Kingsbury, *supra* note 39, pp. 99-120.

62. See Hao, *supra* note 33, pp. 54-56.

continues to take the most progressive stance among ASEAN countries and has, to a great extent, integrated human rights in its public sphere, if not (yet) in its foreign policy.

In Japan, the World War II surrender led to a complete reform of the country's political grammar and gave rights and fundamental freedoms considerable importance; after 1945 there was consensus on the importance of human rights. The Japanese Constitution guarantees rights and contains philosophical considerations on liberty and peace as well as some rather innovative concepts such as academic freedom.⁶³ To date, however, Japan does not have a national human rights institution.

For many reasons India is a textbook example. As of its independence in 1947, human rights were in the public arena because of the drafting of the Constitution and through the agency of political actors. Mahatma Gandhi, of course, played a key role but so did other well-known public figures such as Dr. Ambedkar, the first Untouchable to obtain a doctoral degree and one of the authors of the Constitution. The Constitution was completed in 1950 and provides for a collection of rights (civil, political, economic, social, cultural and non-discrimination); this was rather unique at the time. The Indian Constitution is an instrument for political, economic and social transformation, made tangible through judicial interventionism and legislative and regulatory measures.⁶⁴

A third subset of countries has contrasting contexts. In Thailand, a broad and large range of organisations, notably grassroots organisations, contributed to putting human rights on the public agenda despite the fact that historically most of them focused on issues less "political" in nature such as the environment and the fight against poverty. During the Cold War political entities such as the Thai Communist Party advanced considerations on civil and political rights but in recent years issues linked to the rights of individuals (in relation to nation-wide issues such as security) have been more frequently included in major discussions. There continue to be strong opposing forces that affect public debate; this was clearly observed during the "war on drugs" that was started in 2003 by Prime Minister Thaksin Shinawatra when the government publicly breached the fundamental rights (among them the presumption of innocence) of persons suspected of drug trafficking, and continued to do so even after reports of serious violations such as summary executions.⁶⁵ Sovereignty and national independence rhetoric are still used by political actors across the entire political spectrum; this has led to xenophobia and violations of the rights of foreign residents.⁶⁶ The 2013-2014 political crisis rekindled anti-democratic rhetoric, in particular from the yellow shirts with respect to the red shirts (the supporters of Shinawatra). In a highly polarised political context, the country's highest national judicial authorities tend to orchestrate institutional *coups d'État* such as the ousting of Prime Minister Yingluck Shinawatra in May 2014. A discourse on fundamental rights continues, although in this context it is mobilised strategically and through the current political battle.

Cambodia and Thailand share the same discursive ambivalence. On the one hand, Cambodia is a party to many international human rights instruments, its Constitution provides for an array of civil and political rights and there are numerous human rights NGOs⁶⁷ actively working in the country. On the other hand, the positions taken by political actors on civil and political rights oscillate between support and detraction. In January 2014, the right to peaceful assembly was abruptly suspended in Phnom Penh in reaction to demonstrations conducted by political opponents and garment industry workers. The fact that the authorities did not attempt to use a legal basis (which does not exist) to justify the suspension is indicative of the fact that human rights have limited importance in the political discourse and in politics.⁶⁸

In Malaysia, there are also contradictory forces at play in the public sphere. Institutions such as the National Human Rights Commission (SUHAKAM) have acted independently and regularly and supported civil and political rights, but in recent years the political rhetoric has become more hard-

63. Iwatake, *supra* note 32.

64. See Christophe Jaffrelot, "L'Inde, Ambedkar et les libertés politiques", in Thierry Marrès and Paul Servais (eds.), *Droits humains et valeurs asiatiques: Un dialogue possible?* (Louvain-la-Neuve, Bruylant, 2002); see also Ranabir Samaddar, "The Politics of Human Rights in India", in Davis and Galligan *supra* note 29; see also Ghai, *supra* note 7.

65. See Thabchumpon, *supra* note 34.

66. This problem is shared by several countries in the region: Cambodia Vietnam, Thailand and Malaysia.

67. The two largest organisations, ADHOC (<http://www.adhoc-cambodia.org>) and LICADHO (<http://www.licadho-cambodia.org>) are members of FIDH.

68. See FIDH press releases: <https://www.fidh.org/International-Federation-for-Human-Rights/asia/cambodia/14443-denunciation-of-government-deadly-crackdown-on-phnom-penh-demonstration> and <http://www.fidh.org/en/asia/cambodia/14511-cambodia-harassment-arrest-and-detention-of-human-rights-defenders>

line and the government has taken up the relativist banner once again – one that targets freedoms of expression, association and peaceful assembly.⁶⁹

Burma warrants particular attention. The military regime in power since 1962 has spent half a century silencing dissident voices and thwarting attempts to bring issues related to human rights into the public sphere. The openness policy instituted in the 2010s, however, has led to more freedom, mainly that of the press. But the situation remains alarming. Many issues – the situation of the Rohingyas, that of other ethnic minorities, and the impunity that the elite and the military enjoy – remain taboo.⁷⁰

* * *

Self-censorship is the primary practical consequence of the repression of freedom of expression. It can be the direct result of laws that limit freedom of expression (on the basis of national security or criminalising defamation or the incitement of civil unrest) or the indirect result of fear of reprisals, mainly through the use of the criminal justice system (political opponents in Singapore have routinely been accused of tax fraud, while Malaysian authorities have a penchant for indicting opponents for vice crimes⁷¹). Greater democratic openness in Indonesia, the Philippines and Thailand has led to a decline in the use of these practices.⁷² But certain issues are still off limits, or are not seen as falling within the scope of human rights because they are dealt with from another perspective or “framed” differently (e.g., from a “national security” or “crime” perspective). This is the case with capital punishment; which is still used as a form of social control and political repression.⁷³

Many Asian countries have laws that curtail freedoms of expression, association and peaceful assembly on the basis of concepts such as national security, public order or the interests of the state. In most instances these laws breach international human rights law.⁷⁴ Countries such as Vietnam, China and Burma systematically use such laws to imprison political dissidents, harass human rights defenders and discourage criticism, whereas other countries use them on a more *ad hoc* basis to stop people from demonstrating in the streets, for example. In Singapore, the Societies Act, the Public Entertainment and Meetings Act (PEMA) and the Public Order Act are used to deny requests for authorisation for public meetings on the ground that they may be a threat to public order.⁷⁵ In Japanese law, the concept of “public welfare” is vague and broad (as was pointed out by the UN Human Rights Committee) and paves the way for abuses.⁷⁶ India has adopted laws that curtail freedoms, the Special Powers Act and the Terrorist and Disruptive Activities (Prevention) Act (TADA), which are additional to state of emergency and exceptional circumstances provisions and that give rise to serious breaches of rights, especially in areas affected by armed conflict.⁷⁷

A certain number of subjects are off-limits when it comes to public debate and while the lists are longer in repressive regimes, less closed countries also have taboo subjects: the monarchy in Thailand,⁷⁸ Irian Jaya (Papua) in Indonesia and the privileges of ethnic Malays in Malaysia.

If we were to compare the status of civil and political rights with that of economic and social rights in Asian countries would we see a major difference? Yes, in terms of the rhetoric. Many governments count on economic development to bolster and maintain their legitimacy. But, when it comes down to the actual realisation of these two sets of rights, no distinction can be made.

69. See Hao, *supra* note 33, pp. 51-52, see also urgent plea made by the FIDH and the OMCT with regard to the situation of the Malaysian organisation (COMANGO) and in favour of the UPR: <http://www.fidh.org/en/asia/malaysia/14633-malaysia-new-developments-regarding-obstacles-faced-by-comango-in-its>

70. See bulletins regularly published by Altsean-Burma: <http://www.altsean.org/>

71. Anwar Ibrahim, a government opponent, is serving a prison sentence for sodomy.

72. Ford, *supra* note 31; Pangalangan, *supra* note 33; Thabchumpon, *supra* note 34; Textbook examples of self censorship is provided by Wai-Teng Leong, *supra* note 22 and by James Gomez, *Self-Censorship : Singapore's Shame* (Singapore, Think Centre, 2000).

73. See below, Part Two, second section.

74. Article 19.3 of the ICCPR provides for restrictions to freedom of expression on the conditions that they specifically be provided by law, necessary for the respect of the rights or reputations of others, or for the protection of national security or of public order (*ordre public*), or of public health or morals.

75. See Rodan, *supra* note 29, pp. 81-85.

76. Kohki Abe, “Implementation of Universal Human Rights Standards in Japan: An Interface of National and International Law”, in Rainer Arnold (eds.), *The Universalism of Human Rights* (Dordrecht, Springer, 2012), p. 130.

77. Samaddar, *supra* note 64, pp. 170-172.

78. For further reading on the use of the *lèse-majesté* law in Thailand, See Michael K. Connors, “Ambivalent about Human Rights : Thai Democracy”, in Davis and Galligan, *supra* note 29; see also <http://www.fidh.org/en/asia/thailand/Thailand-Thai-human-rights-12787>.

B. Are economic and social rights given primacy of importance?

There is no Asian state where criticism of economic and social rights is as harsh as any of the criticisms of civil and political rights described above. This phenomenon is quite easy to understand; the governments that are most critical of civil and political rights are the very same that seek to establish their legitimacy by promoting economic, social and cultural rights (ESCRs) through their political rhetoric. Singapore, Malaysia and China are textbook examples of this strategy, but it is also applied in other countries.

The basis for this strategy is the idea that poverty is the main obstacle to the effective enjoyment of human rights: without security and material comfort, individuals cannot exercise their other rights. Article 19 of the Bangkok Declaration summarises this notion: "Affirm that poverty is one of the major obstacles hindering the full enjoyment of human rights".⁷⁹

President Marcos was famous for his "bread before freedom" motto which eloquently summarises the primacy of importance given to economic development vis-à-vis civil and political rights. Many Asian states, in their rhetoric, give priority to economic development and to meeting basic needs. This, in fact, is China's official position (e.g., in its 2009 national human rights action plan) with respect to work, life conditions, health and education, which were previously referred to as "subsistence rights." With the increase in social discontent, the regime has had to react to the adverse effects of economic development and to the need for regulating its consequences.⁸⁰ With the advent of independence, the Singaporean elite made primacy of subsistence over liberty their credo. In fact, a certain number of Asian states, and Singapore, Brunei and Malaysia are clearly among them, underwent rapid growth that enabled their inhabitants, through crafty systems of redistribution, to improve their human development (even though the poor are largely excluded). To a certain extent, urban populations in Thailand, China, Vietnam and Taiwan also benefitted from growth.

The concept of "legitimacy based on results" or "on performance" was the brainchild of the Singaporean school. Rapid economic growth in the city-state gave its political leaders the wherewithal to build political legitimacy solely on economic development and not on political responsibility.⁸¹ In other countries in the region, the national stability rhetoric was used to stifle the press and civil society and to justify the importance placed on economic development which was seen as a way of preserving unity, even in cases where it was cruelly lacking such as Laos, Burma and Sri Lanka.

The reputation of certain regimes is closely linked to their capacity to project their countries as being "social heavens" or at least as being able to guarantee a minimum level of subsistence for their inhabitants. This partly explains why, for a long time, Belarus was shielded from the scrutiny of the international community and why a country like Vietnam continues to escape the scrutiny of the UN Human Rights Council despite the country's serious human rights situation. This argument is regularly used at the Human Rights Council but states that have experienced unquestionable economic success (Singapore and Malaysia) give their backing to states that use the "results-based legitimacy" argument even in the absence of said results. Alliances are certainly at play there, within the group of non-aligned countries or within *ad hoc* groups such as the "Like Minded Group" at the Council. But countries in these groups are more willing to discuss issues connected to economic and social rights than to civil and political rights. Komnas-HAM, the national commission on human rights in Indonesia, was in part established, before the advent of democratic opening, to respond to criticism on working conditions in the factories.⁸² During its Universal Periodic Review, at the closing of 2013, China displayed much greater willingness to discuss economic and social rights than more sensitive issues such as freedom of expression and human rights defenders.⁸³

The situation is not that simple, however. Differentiating between these two sets of rights, however valid this may be for heuristic purposes, becomes irrelevant when one looks at what countries are doing in concrete terms: the economic and social rights rhetoric is nothing more than histrionics.

79. *Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights* ("Bangkok Declaration"), Bangkok, 29 March-2 April 1993. See UNGA, *Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights* ("The Bangkok Declaration"), http://faculty.washington.edu/sw/whiting/pols469/Bangkok_Declaration.doc (accessed 17 March 2015).

80. Kent, *supra* note 51, pp. 189-191.

81. See Rodan, *supra* note 29, pp. 72-74.

82. See Ford, *supra* note 31.

83. See China's replies to recommendations addressed to it at: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/CNSession17.aspx>

C. Specious distinctions and perverse effects

The two international covenants – on civil and political rights and on economic, social and cultural rights – were both adopted on the same day (16 December 1966). The Vienna Declaration and Programme of Action stipulates that all human rights are interrelated and interdependent. States must grant them equal importance. Therefore, the primacy granted to economic and social rights by certain Asian countries, including in certain international forums, has no legal basis. With that duly noted, Western countries are partly responsible for this situation (i.e., the dichotomy between the two types of rights) because some states have on occasion denied the applicability or the binding nature of ESCRs by describing them as merely “programmatic”. This position is fallacious and it is to the credit of NGOs such as FIDH and Amnesty International to have given considerable attention to the protection of economic, social and cultural rights.

Trade union rights are an excellent starting point to understanding the interdependence of human rights. These rights are recognised in Article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and as part of the right to freedom of association in Article 22 of the ICCPR. The right to create a trade union has been historically described as a civil and political right although its objective is to protect working conditions that come under the scope of ESCRs.

Besides, civil and political rights – from freedom of the press to freedom to demonstrate – play a role in economic development; Amartya Sen skilfully demonstrated this in *Development as Freedom*. Having the actions undertaken by public authorities scrutinised by the media and debated publicly, making governments accountable to citizens, and making it possible for citizens to alert the public at large on public policies contribute to a good environment where alternatives can be examined and public policy corrected when it fails to produce results. The rule of law and independent institutions, including the judiciary, are fundamental to economic growth because they are instrumental to the stability sought by economic agents and investors.

The overwhelming truth is that states that violate civil and political rights generally also violate economic and social rights. This is the case for trade union rights, which are as frequently breached as civil and political rights in purported socialist countries such as Vietnam or China. China recently reformed its trade union representation system, but it remains under the control of the Communist Party. (Concessions have occasionally been made to striking workers, in plants located in Guangdong, for example, but these have only been safety valves occasionally opened to release mounting pressure. There are no plans to authorise the creation of trade unions or to allow for more dialogue between labour and management.) In Indonesia, under Suharto, workers’ representative Marsinah was murdered barely a month after the 1993 Bangkok regional meeting for Asia, during which Indonesia joined its voice to those of the proponents of “Asian values” and emphasised the primacy of economic and social rights.⁸⁴ And the collapse of the Rana Plaza building in Dhaka, Bangladesh on 24 April 2013 reminded the world of the horrible working conditions in garment factories in South Asia.

Second on the list of examples is the right to an adequate standard of living (Article 11 of the ICESCR) which also encompasses housing conditions. In Cambodia, Laos and Burma forced land evictions take place daily and with complete disregard for procedural safeguards and for the right to compensation. One last example, Singaporeans’ rights to health and education are generally respected, but this is not the case for domestic workers and specifically for migrant domestic workers who have few means to obtain justice.⁸⁵

84. See Avonius, *supra* note 39, p. 99.

85. Cultural rights, and particularly those of ethnic and religious minorities, are violated on a large scale by certain states that boast of the emphasis they have given to ESCRs, notably Vietnam and Laos; this was also the case in Indonesia under Suharto, who attempted to establish a certain degree of Javanese cultural uniformity.



Phnom Penh, Cambodia: the forced eviction of residents of the Borei Keila settlement (2012) was carried out outside legal rules and procedural safeguards regarding the right to adequate housing provided for by national and international law (@ photo ADHOC).

Interestingly, those who claim to be the champions of economic and social rights generally create weak legal guarantees for them. They do not systematically enshrine rights in their Constitutions or Basic Laws. Moreover, the rights covered by the law rarely correspond to the state's obligations – so much so that the state cannot be held accountable because the rights are not enforceable in a court of law. In addition, on the one hand, there are many developing countries, including in Asia, that officially give priority to ESCRs but on the other hand, they also use budget problems to justify insufficient fulfilment of these rights before international bodies such as the UN Committee on Economic, Social and Cultural Rights. In response to these frequent attempts by states to elude their obligations, the Committee reminds them that Article 2 of the ICESCR⁸⁶ provides for the immediate effect of some rights (e.g., the right to non-discrimination), which must be implemented irrespective of financial constraints and obliges states to act to the “maximum of [their] available resources”.⁸⁷ The lack of financial resources is not an acceptable ground for justifying delays in the implementation of core, cross-cutting obligations such as non-discrimination.

In fine, prioritising one type of rights over another is just another attempt at squaring the circle: if freedom of expression is limited, how can victims come together and organise themselves? If the justice system is not independent, how does one obtain reparation or avoid the repetition of violations? Violations of economic and social rights are inherently linked to violations of civil and political rights; or rather, the former necessarily imply the latter. And this is the problem that many states cannot resolve as long as they promote a specious dichotomy of these two sets of rights.

* * *

Another dichotomy that is characteristic of the rhetoric and practice of many Asian countries, but is much harder to detect because it is implicit, is the one between the “promotion” and the “protection” of human rights. Emphasis is placed on the former to the detriment of the latter, consequently weakening rights. It should be noted that in many countries the situation has improved over the last decades; the following section deals with this second, more subtle dichotomy.

86. Such was the case during the review of Indonesia by the Committee (April-May 2014).

87. Article 2 also states: “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, [...]”.

2. Promotion and protection? Implementing and guaranteeing rights

The practice of dividing rights into generations⁸⁸ and its insidious consequences are widely known. The “promotion-protection” dialectic, however, is of a different nature. The consequences of this dichotomy on the rights of victims are real, and negative. In Asia, this dialectic has its own specificity because there is no regional mechanism for human rights and national legal frameworks are weak; but positive changes at the national level have created greater contrasts between countries.

A. An implicit dichotomy

In international human rights language the “protection” of rights is adjoined to their “promotion”. Most resolutions adopted by the UN General Assembly, Human Rights Council and other bodies use this wording. In their domestic legal order, states are equipped with an array of means of fulfilling their obligations: they can create new laws, amend existing legal frameworks (constitutional, criminal, civil, or administrative), adopt public policies, create institutions, train state agents, etc.

But problems arise when the “promotion” of rights takes precedence over their protection, in other words over the effective guarantees and safeguards for rights, notably those relating to access to justice. In this regard, the mandates of National Human Rights Institutions (NHRIs) in Asia are often weak. Also, states are hesitant vis-à-vis individual complaint mechanisms. In Asian countries, rates of ratification of the main human rights treaties are much higher than that of the optional protocols that provide for complaint mechanisms.⁸⁹ With the exception of the Philippines, Cambodia, Timor-Leste and a handful of countries that have ratified most international instruments (Maldives, Mongolia, Nepal), few Asian states have accepted such mechanisms. The majority of Asian states are also hesitant to accept visits by holders of UN special procedures “protection” mandates, such as the Special Rapporteur on torture, the Special Rapporteur on extrajudicial killings, the Special Rapporteur on contemporary forms of slavery, or the Working Group on enforced or involuntary disappearances and the Working Group on arbitrary detention. Special procedure visits that are accepted by Asian states are usually those related to ESCRs, or to reflection subjects such as the right to development. Countries such as Singapore, Laos and Brunei systematically refuse to accept visits by special procedures. Notwithstanding, in recent years the number of visits to Asia has increased, involving in particular the Special Rapporteurs on human rights defenders, freedom of expression, freedom of religion and the independence of judges and lawyers, as well as Special Rapporteurs with country mandates (Cambodia and Burma/Myanmar).⁹⁰

But we need to look more closely at the differences among countries. There are states that have created effective domestic legal protection mechanisms for individual rights. India passed a series of laws, measures and amendments that have made it possible to realise the rights enshrined in the Constitution; these changes have already been used by the courts on many occasions.⁹¹ The Japanese and South Korean judicial systems also have adequate conditions for the exercise of constitutional rights. However, in many countries, protection is weak; in the worst of cases the authorities can nullify rights overnight, without forewarning, because they regard them as mere matters of policy – rights can be given and taken away depending on the circumstances.⁹² Generally, in practice, the justiciability and direct applicability of constitutional and treaty rights is problematic.

* * *

In many instances, the lack of protection is not as straightforward. For example, a state may fail to fulfil its obligation to protect by refusing to examine a problem from a human rights perspective, or to “frame” an issue as a *human rights* issue, thereby effectively denying the human rights aspects of issues which would require authorities to act – because individual or collective rights are at stake. This is the strategy used by countries that retain capital punishment: the denial of the human rights issues that arise when the death penalty is applied.⁹³ And the same holds true for a series

88. The “third generation” comprises rights such as the right to peace, to development, environmental rights and the right to democratic governance.

89. See Part Four of the current paper.

90. For a list of completed, requested and planned visits, go to the website of the Office of the UN High Commissioner for Human Rights: <http://www.ohchr.org/EN/HRBodies/SP/Pages/countryvisitsae.aspx>

91. See Samaddar, *supra* note 64.

92. For an example of the situation in Singapore, see Rodan, *supra* note 29; for the Chinese case, see Kent, *supra* note 51.

93. See Part Four, second paragraph of the current paper.

of problems that vary across countries. In Singapore, it has been highlighted that the government strives to have cases where employers stand accused of abuse against their domestic workers treated individually, as unrelated events, not as part of a broader pattern of abuses.⁹⁴ The cases are dealt with from a purely criminal law perspective and the fact that they are treated as individual cases (atomized) allows the government to avoid any public discussion on the root causes of the problem and to eschew their obligations to find comprehensive policy solutions.

Similarly, in Muslim states where corporal punishment is still applied by the judicial system these types of cases are dealt with from a criminal law and religious perspective. In Iran, Afghanistan and Pakistan the inhuman and degrading nature of corporal punishment, which calls for a human rights approach to criminal sentencing in public discussions, is simply not addressed. Elsewhere, the fight against terrorism is seen exclusively as a security issue; the rights of suspects are never addressed during public debates – if there are any. Another way in which rights are disregarded is illustrated by what happened during the 2013 legislative elections in Cambodia when the government and the National Election Committee (NEC), through their rhetoric, reduced democracy to nothing more than the ability to vote. They never once referred to a holistic approach to the election process (the importance of independent media, civil society organisations and freedom of expression). Equally astonishing is how authorities in Singapore and Malaysia reduce relations between ethnic communities to a social stability issue, without referring to its human rights aspect.

Finally, in Burma the very serious violations committed against the Rohingya community are hardly mentioned in public discussions. The authorities work hard at denying the problem and at creating a diversion by insisting on the foreignness of the Rohingya (who are *de facto* stateless) and the problems they purportedly pose to national stability. Here again, and as ironical as it may seem, a situation that qualifies as crimes against humanity is examined with no regard to human rights.

In all of these situations, states fail to fulfil their obligation to protect human rights. The conclusion that was reached in an earlier section with respect to the dichotomy of types of rights also applies to the “promotion-protection” dichotomy. States that give primacy of importance to economic, social and cultural rights over civil and political rights violate both; and states that give priority to promotion over protection also fail to accomplish either. In practice, none of these states allocate means to conduct effective human rights “promotion” which would include systematically training civil servants on human rights and organising significant awareness-raising campaigns.

But is the situation that alarming? In recent decades many states in the region have created greater democratic space, and this has brought about real progress. These advancements are addressed in the section that follows.

B. Have internal changes led to an improvement in the protection of rights?

Various approaches can be used to overcome the problems that arise when comparing national situations. Each country has its own specificities, but states where the human rights situation has improved are those that in one way or another have undergone some degree of democratisation. Was greater openness rooted in national or international dynamics? How much pressure was brought to bear by social movements, internal political dynamics and international concerns?

Greater respect for human rights and the establishment of the rule of law and of democratic structures are important social changes and as such primarily have internal causes; although there may be external factors that may trigger or support them. Indonesia is an interesting example in this regard. After the end of the Cold War and the 1997 economic crisis, socio-political tensions and a profound desire to dismantle authoritarian structures (*reformasi*) converged with aspirations for greater democratisation (*keterbukaan*). A constitutional court was created and many new laws were enacted which helped to foment greater freedoms for the press, for trade unions and for civil society organisations. Local NGOs and the national commission, Komnas-HAM, played a key role in bringing into the public sphere subjects previously seen as taboo.⁹⁵ In its report on the murder of Marsinah, Komnas-HAM introduced the idea that the army has to be held accountable for its acts. The media also proved their bravery by linking society’s concerns with emblematic court cases and by bringing down the wall of silence. After the murder of Munir in 2004, newspapers used greater freedom that had been introduced in laws regarding the activities of the press to talk

94. Wai-Teng Leong, *supra* note 22, pp. 123-125.

95. See Ford, *supra* note 31; Avonius, *supra* note 39.

openly about the case and to publish all relevant hypotheses about the case.⁹⁶ Civil society and the media continue to speak out against the restrictions placed on freedom of expression for the sake of “national security”. Today, public demonstrations are a frequent occurrence and have become part of the country’s social and political culture.

In the Philippines, the adoption of the 1987 Constitution and of the Bill of Rights is emblematic of the openness that followed the toppling of President Marcos in 1986. Since then a national human rights commission and independent agencies have been created and numerous laws have been enacted. Civil society and the press have exercised their new freedoms, including by tackling the issue of impunity. Finally, while the Supreme Court has been guarded on occasion, it was proactive when it introduced instruments such as the Writ of Amparo, which gives courts the power to order the government to search for disappeared persons.⁹⁷

In Thailand, civil society organisations and the establishment of human rights institutions (the National Human Rights Commission, the Parliamentary Committee, and the Reconciliation Commission) have also been instrumental to the progress observed in recent decades, despite the persistence of ambivalent rhetoric (see *supra*, Part Two, first section). Many organisations have appropriated human rights and conducted awareness-raising activities. Major progress was made in the 1990s (adoption of the Constitution including a Bill of Rights in 1997, ratification of international treaties, creation of the Office of the Ombudsman and of a NHRI) and continued into the first decade of the 21st century. The 2007 Constitution guarantees a series of rights, among them civil and political rights and strengthened the powers of the national human rights commission.⁹⁸ During the first years of its existence the commission demonstrated its determination by deciding on its own to investigate individual cases and by denouncing instances of abuse of power in its reports and statements. However, in the 2010s the nomination of several new commissioners has raised concerns with regard to its independence and competency. Moreover, the 2013-2014 political crisis proved that regression still happens. The military regime and its systematic repression of dissent do not portend good things. Thailand is currently backsliding on human rights.

Timor-Leste is a textbook case with a unique history. Since its independence in 2002, the country has adopted a new Constitution and Bill of Rights, created a transitional justice mechanism (the Truth and Reconciliation Commission), a national action plan for human rights, and a dedicated administration (the Office of the *Provedor*) with a broad mandate to promote and protect rights. The country has also enacted special laws that provide for freedom of expression and freedom of assembly, and regulate the legal profession.⁹⁹ Violations are still widespread, but there is now an institutional framework that can be used as a foothold for concrete progress.

The final example to be mentioned here is that of Japan, which has its own particular course, marked by defeat in 1945 and by the awareness of the importance of the rule of law and of the guarantees it provides for fundamental rights. One of the threads in the country’s human rights discourse is the antimilitarism that has characterised a large part of society since World War II.¹⁰⁰ In practice, the Japanese judicial system has played a major role in the fulfilment of the rights guaranteed by the Constitution and legislative pieces.

* * *

The rise of an NHRI is often key to improvements in a country’s human rights record. While such bodies do not always help to drive radical change in position held by authorities on human rights, they frequently play a major role simply by existing and affording recognition to the importance of human rights in the public sphere. The Philippines and Indonesia are the most eloquent examples of this phenomenon. NHRIs there are not perfect but do comply with the Paris Principles¹⁰¹ and have promoted the inclusion of human rights in the public sphere. NHRIs have given a human rights perspective to public policies or at least allowed for the inclusion of human rights in policies. In India, at the time of independence, the courts and an array of public figures contributed having

96. Avonius, *supra* note 39, p. 110.

97. See Pangalangan, *supra* note 33, pp. 64-65.

98. Thabchumpon, *supra* note 34, pp. 152-153.

99. See Hao, *supra* note 33, pp. 61-62.

100. Iwatake, *supra* note 32.

101. These principles are endorsed by the United Nations and guarantee the legitimacy of NHRIs. They are related to the mandate, composition, independence of NHRIs as well as their pluralist nature, and work methods.

the concepts of human dignity and progress serve as the basis for government action. Similarly, NHRIs in the Philippines and Indonesia have promoted the inclusion of human rights language in the day-to-day administration of government affairs. NHRIs in other countries, such as India, Malaysia and Mongolia, have also moved to consider the protection of human rights defenders as part of their mandates; some were able to do this by giving their mandate a progressive interpretation in the absence of a formal provision to that effect. NHRIs in countries such as Bangladesh, Malaysia, Nepal and Timor-Leste have regular exchanges with civil society. This is not the case with the NRHI in Sri-Lanka (Human Rights Council of Sri Lanka, HRCSL). The Komnas-HAM in Indonesia is exemplary in its composition, which includes representatives of civil society.

Unfortunately, in practice, many Asian NHRIs have proven to be weak and lacking in independence. In Thailand, after a promising start, the national commission was purposefully weakened by authorities who accused the body of obstructing their actions. The new members of the commission are former members of the military or civil servants who are unable to provide evidence of their competence or independence. In Sri Lanka, the President has the power to dismiss members of the HRCSL. In Burma, the Myanmar Human Rights Commission (MHRC) reports to the president, has a weak mandate and most commissioners are former diplomats; additionally, the commission refuses to conduct inquiries in ethnic zones. In other countries the biases of NHRIs are less obvious, although the selection process for commissioners is frequently influenced by the executive branch. The role of NHRIs is weakened by political interference, by the lack of independence, capacity and human resources, by restrictive national legislation and by a culture of impunity for the powerful. Moreover, national authorities have a tendency to pay no heed to the work of NHRIs. And certain countries have no NHRI at all (inter alia, Japan, Pakistan Laos, Vietnam).

In Asia, a series of cross-cutting problems continue to hinder the fulfilment of rights, access to courts and legal remedies for victims.

C. Persistent impediments to the fulfilment of human rights

Impediments to actual fulfilment of human rights fall into three separate sets: the first set is linked to impunity; the second to cultural traits; and the third to social constructs. The set that is characterised by impunity is the most pressing. In numerous Asian countries impunity constitutes the greatest obstacle to the effective guarantee of rights. Members of political and financial elites and of certain institutions – the armed forces are at the top of the list – are off limits to the justice system. Top politicians and high-ranking members of the military are seen as legally untouchable; courts are afraid of opposing them, even in the countries that have made the most significant improvements in human rights (the Philippines and Indonesia). Despite democratisation, there are institutions in Indonesia, the intelligence agency *Badan Intelijen Negara* for example, that remain untouchable. In certain countries, the culture of impunity for the elite is so widespread that it has a name ("*phu ya*" in Thailand). Before 2014, none of the abuses connected to the "war on drugs" conducted by Thaksin Shinawatra government gave rise to a court conviction.¹⁰² In Cambodia, frequent shoot-outs or road accidents involving members of the political or military elites rarely result in arrests. In cases involving gunfire, the police inquiries conclude "accidentally fired rounds" or "ricocheting bullets"; no one is brought in for questioning for acts of violence or manslaughter.

Usually, in Asia, the victims of abuses arising from business activities, for instance those committed by extractive industries, rarely obtain justice. This is a large-scale phenomenon in China, India, the Philippines and Indonesia, and throughout the Southeast Asian peninsula. In the most closed countries (Laos, Burma and Vietnam), victims who dare to complain are harassed and their actions are criminalised by security or anti-defamation laws. Cambodia has similar repressive practices.¹⁰³ Protecting individuals from abuses committed by non-state actors is a ubiquitous problem.¹⁰⁴ Such abuses are the result of the state's failure to act (failure to protect persons from violence during demonstrations, for example) or of its inability to arrest and try alleged perpetrators or to guarantee access to justice for victims.

102. See Connors, *supra* note 78, pp. 108-113.

103. See the report published by ADHOC in 2013, *A Turning Point?*: <http://www.adhoc-cambodia.org/wp-content/uploads/2013/02/ADHOC-A-Turning-Point-Land-Housing-and-Natural-Resources-Rights-in-2012.pdf>

104. In English, violations committed by the state or its agents are referred to as "human rights violations" and those that result from the State's failure to protect private individuals from each other are referred to as "human rights abuses". Such a distinction cannot be made as easily in French.



Burma: Nur, 7, works nearby a camp for internally displaced persons, for less than a dollar a day. An entire generation of Rohingya children does not have access to education (photo @ Greg Constantine).

The impediments that comprise the second set are the result of the political culture inherent in many Asian countries whereby individuals are given priority over institutions – the concept of “strongman” as the guarantor of stability. This phenomenon is clearly not limited to Asia. However, it has underpinned most authoritarian regimes in Asia, with the exception of socialist regimes (Vietnam, post-Mao Zedong China, and Laos) that gave pride of place to the all-powerful party and not to its leader – North Korea being the exception. The consequences are that institutions have little legitimacy and risk not surviving longer than the span of a human life, namely that of the head of the regime. Above all, institutions are unable to curb the abuse of power. Also, some institutions are created by the head of a regime only for his benefit and to protect his interests. For example, in Cambodia, Prime Minister Hun Sen’s personal brigade has committed many abuses. Another factor in this set of impediments is the way power is exercised: decisions are made at the top and imposed on everyone in the lower echelons, without consulting with the groups or persons at whom they are aimed (top-down vs. bottom-up approach). Notwithstanding, effective control over the country is yet another problem. In certain countries the central state does not have effective control over the entire territory or is incapable of having its policies implemented everywhere in the same manner. Also, there are regions in certain countries that fall under special laws (state of emergency, martial law) or are under military jurisdiction (Southern Thailand and Indonesian Irian Jaya/Papua). The army in these situations becomes the only state institution present and this poses very serious threats to the rights of individuals.

The third set of impediments to the exercise of human rights is the result of social constructs, or structures of thought, that are particularly prevalent in the South and Southeast of Asia: the importance of social hierarchy and of etiquette and the obligation to save face¹⁰⁵ result in reification of inequalities so that violating the rights of a particular group or individual is seen as commonsensical or part of the natural order of things – what sociologist Pierre Bourdieu referred to as “symbolic violence”. This naturalisation of inequalities needs to be deconstructed in order to make way for the idea that another order of things is possible.

An additional set of impediments could be described as the “perverse effects” of greater democratic openness in certain states. In Indonesia and Malaysia, greater freedom of speech has given Islamist groups the opportunity to publicly voice their anti-universalist positions and call for a

¹⁰⁵. Which leads to reputation being seen as an individual’s most precious asset and consequently places limits on overt public criticism, because it is seen as a form of humiliation.

crackdown on certain rights, namely those of women and religious minorities.¹⁰⁶ And paradoxically, democratic openness in certain states has led international aid agencies and organisations to lose interest in them.

* * *

The protection of human rights afforded by domestic mechanisms varies across countries in Asia. In many countries there are still a significant amount of obstacles. Social structures, the fragmentation of public discourse and the ways in which authority is exercised are impediments to the fulfilment of rights. When political changeover does take place, it is sometimes marked by revenge and violence ("winner-takes-all").¹⁰⁷ Respect for rights is dependent on social and political forces and on the importance rights are given in the public sphere. Progress is slow, but real: the 1990s and 2000s witnessed improvements brought about by the advent of democratisation.

Given the national differences, what is Asia's position with respect to the international human rights protection system and to regional dynamics? What are the regional prospects for human rights protection? And lastly, what can be expected of recent advancements in intergovernmental cooperation?

106. See Ford, *supra* note 31, p. 48; see also Avonius and Kingsbury, "Introduction", *supra* note 16, p. 9.

107. Certain warrior traditions in Southeast Asia (such as the Khmer, in the territory of today's Cambodia) have encouraged disproportionate revenge and justified committing atrocities against the vanquished. For further reading on the Cambodian example see Sorpong Peou, "The Challenge for Human Rights in Cambodia", in Davis and Galligan, *supra* note 29, pp. 135-136.

Part Three: Regional perspectives for the protection of human rights

Regional protection of human rights in Asia has been insufficiently studied for one simple reason: there is no regional mechanism to that end on the continent. In this regard, recent developments in Southeast Asia have lessened the usual distance between the rest of the world and Asia, the only continent devoid of a regional human rights protection system. Before examining these developments, an analysis of the Asian diplomatic context is needed.

1. Asia and the international system

Asia's lack of a specific human rights instrument or mechanism puts the continent in a unique position. Europe, Africa, the Americas and the Middle East all have regional systems, albeit very different. Geographic borders are arbitrary and dividing continents in a different manner would just be moving lines. However one goes about looking at it, Asian states, with the exception of the member states of ASEAN, have never seriously considered the creation of a regional human rights mechanism. This is in part due to some characteristics of regional intergovernmental relations.

A. The characteristics of the array of Asian diplomatic policies

Identifying the characteristics of Asian diplomacies is a difficult exercise. There is no single diplomatic policy; there is a multiplicity of diplomatic policies in Asia. The subjects and language registers described herein coexist with other subjects and other registers that appear sporadically, especially during a crisis. The verbal sparring between Japan and China, between India and Pakistan, or between North and South Korea are examples that run counter to non-confrontation. Furthermore, how could Iranian diplomacy be compared to that of Timor-Leste or that of Nepal or Taiwan? The respective objectives, limitations and partners of Asian countries differ and call for circumspection. The objective here is not to draw broad conclusions that are valid all of the time and in all Asian states, but rather to describe the fundamental characteristics of the diplomatic policies of the countries in the region; those that are probably the smallest common denominators and which can be used to make sense, from a sociological perspective, of the weaknesses in intra-Asian human rights cooperation.

Non-confrontation is frequently described as the Asian approach to international relations *par excellence*. It is based on the principle of non-interference in domestic affairs, which in turn is based on the Westphalian notion of sovereignty (see *supra*, Part One). The non-interference doctrine is a sacred cow¹⁰⁸ that is very rarely questioned, even in cases of serious human rights violations involving foreign nationals. The logical consequence of a rigid view of sovereignty is weak supranational institutions. In Asia, transfers of sovereignty are extremely rare. ASEAN was in part inspired by the European Union and uses some of the terms proper to the EU ("community" for example), but refuses the transfer of any concrete aspect of state sovereignty to it. ASEAN is a forum for political dialogue, devoid of institutional integration and of a legally binding instrument.¹⁰⁹

A corollary of this approach is the weakness in the legality of regional texts. Generally, legal issues linked to creation of new entities or mechanisms (legal personality, functions, procedures, dispute settlement mechanisms, etc.) are not addressed or whatever legal provisions there may be are ambiguous, inexorably paving the way for *ad hoc* negotiations when problems arise.¹¹⁰ As a general rule, decisions are taken unanimously; rarely is decision-making by a majority rule accepted. This process can be made a bit more flexible; as in international bodies where consensus replaces unanimity for decision-making, but generally after long discussions in Asian contexts. What is also characteristic of Asian diplomacy is a progressive, step by step, approach. Lastly, there are diplomatic taboos, subjects that states do not address publicly other than through a security lens: regional separatism, refugees, asylum seekers, etc.

108. Tinio, *supra* note 11, p. 74.

109. *Ibid.*, pp. 76-77.

110. See Hao, *supra* note 33, p. 102.

B. The absence of a regional mechanism and weak human rights cooperation

On the whole, regional cooperation in Asia is weaker than elsewhere in the world. It is limited to a few organisations that have ambiguous legal statuses or no official structure, or are functionally weak: ASEAN, APEC (Asia-Pacific Economic Cooperation), ADB (Asian Development Bank), SAARC (South Asian Association for Regional Cooperation), and SCO (Shanghai Cooperation Organization) – with the exception of the ASEAN these organisations focus on either economic or military matters.

In general, when it comes to human rights there is a strong correlation between the quality of national systems and the likelihood of a regional mechanism. The stronger the national system the less menacing a regional instrument appears to be.¹¹¹ The diversity of national situations is perhaps one of the additional factors that explain the lack of a regional mechanism. To date, cooperation among Asian countries in the field of human rights has been limited to bilateral agreements, public aid development programmes¹¹² and to dialogue circumscribed to subjects deemed less “political” (women’s rights or children’s rights)¹¹³ – keep in mind the promotion-protection dichotomy with respect to human rights.

Any form of progress is constrained by these structural conditions and by the internal political situation in many of the states, which raise barriers to the creation of a regional or sub-regional human rights system.

C. Did you say progress?

The situation should not be seen as being static, however. Certain countries have on occasion, and increasingly, abandoned the non-confrontation approach and backed international texts (such as UN resolutions) condemning Asian states. The Philippines voted in favour of the UN Security Council resolution that was adopted in 2005 against Burma, as well as the 2014 resolution on North Korea adopted by the UN Human Rights Council. The Maldives, Japan and South Korea frequently vote in favour of HRC resolutions concerning Asian countries. Indonesia has abandoned its principled approach against country-specific resolutions at the HRC, and now votes on a case by case basis and frequently abstains (instead of voting no). New approaches have been implemented to deal with complex situations: “constructive intervention”, “flexible engagement” (used in cases of threats to regional security that arise from domestic crises) and “strengthened interaction” to address cross-border issues.¹¹⁴ In ASEAN, a preventive diplomatic mechanism (a ministerial troika) and a “ministerial retreat” were established to address sensitive matters. Coercion or sanctions have never been envisioned, however. All issues are dealt with through dialogue, “advice” is offered through informal channels by persons acting unofficially, think tanks and scholars (“Track-Two Diplomacy”). But the fact that subjects previously seen as taboo are discussed is progress. One example of progress also occurred during the UPR of Laos, in January 2015, when Singapore publicly raised an individual case for the first time, that of Sombath Somphone (see below, Part Four) to express its concerns. While Singapore may well have reacted because Somphone’s wife is Singaporean, it nonetheless put an end to a taboo within ASEAN: that of publicly raising cases of human rights violations committed in a neighbouring country.

ASEAN underwent further innovation with the creation of the ASEAN Inter-Parliamentary Organisation or AIPO (renamed the ASEAN Inter-Parliamentary Assembly, AIPA), which comprises members of Parliaments from ASEAN countries. It has for instance declared that it is in favour of the creation of a regional human rights mechanism. Subsequent to initiatives in the 1990s (the Bangkok NGO Declaration), civil society plays an important role, notably through its networks, which include the ASEAN Civil Society Conference-ASEAN Peoples’ Forum (ACSC-APF). The ACSC-APF assemble every year in parallel to the official ASEAN summit meeting. During the forum representatives of civil society in ASEAN countries meet to exchange points of view, alert the general public on pressing issues and issue public statements (charters or declarations, press releases, etc.) that are often substantively different from official ASEAN statements. National and regional NGO networks have been created to facilitate and coordinate human rights advocacy work,

111. *Ibid.*, p. 42.

112. Almost exclusively on ESCRs (health and education). The Korean International Cooperation Agency (KOICA) and its Japanese counterpart, Japan International Cooperation Agency (JICA), are the biggest Asian donors of public development aid, with the Asian Development Bank.

113. Hao, *supra* note 33, pp. 86-89; see also Part Four of the current paper.

114. See Tinio, *supra* note 11, pp. 110-112.

for instance in Cambodia (COMFREL, CHRAC, CCC, NGO-Forum, etc.), Indonesia (NGO Coalition for International Human Rights Advocacy), the Philippines and even in Singapore (SG Human Rights or MARUAH¹¹⁵). This is what Tinio refers to as “grassroots” regionalism (“*régionalisme par le bas*”) or “Track-Three Diplomacy.” Regionally, the Asian Forum for Human Rights and Development (Forum-Asia) comprises NGOs from South and Southeast Asia.¹¹⁶ Civil society networks are precursors throughout the region. The civil society working group on a human rights mechanism for the South Asian Association for Regional Cooperation (SAARC), the Regional Initiative for a South Asian Human Rights Mechanism, was created in 2010 and continues to meet regularly. Throughout the continent there are NGO networks working on specific themes and issues, such as national human rights institutions, among them the Asian NGO Network on National Human Rights Institutions. There are also Chinese, Laotian, Vietnamese and Iranian NGOs in exile who work to put their countries on the agendas of international bodies (notably UN mechanisms) and attract attention to relevant issues, in addition to conducting advocacy campaigns and documenting human rights situations. Their work has created space for human rights work on these countries, while this space does not exist at the domestic level.

* * *

Southeast Asia is the region that is most likely to undergo major change. The changes within ASEAN in recent years are fundamental, even though they are relatively limited in terms of their actual concrete scope.

2. ASEAN, has there been any real progress?

Southeast Asia has done more than any other Asian sub-region. No other sub-region has created formal dialogue mechanisms for human rights. Recently, things have started to take on speed because of the relative institutionalisation of ASEAN. Whatever progress-related factors and corollaries there may be (economic integration, close cultural ties, influence from the international system), ASEAN dynamics have brought about changes in Southeast Asia that do not seem possible elsewhere in Asia in the short term.

A. The long maturation of a mechanism dedicated to human rights

The creation in 2009 of the ASEAN Inter-Governmental Commission on Human Rights (AICHR) may seem like a miracle to those who witnessed ASEAN’s early years. The position adopted initially by ASEAN was that human rights were off-limits because they fell under state sovereignty.

With the years and UN calls for the creation of regional human rights systems, the ASEAN position evolved. Change was initially marginal: the 1993 Singapore Communiqué mentioned the possibility of a regional arrangement in Asia. Later on, with the Manila Summit and the creation of a working group (1995-1996), the approach became more direct. The working group was an informal coalition of government representatives, members of Parliaments, scholars and NGOs and was recognised as a dialogue partner by ASEAN in 1998. The working group presented concrete proposals to ASEAN (Draft Agreement in 2000, and a Road Map for an ASEAN human rights mechanism in 2003). The Draft Agreement was ambitious and called for the creation of a commission with investigative powers and the ability to hear individual communications. The Road Map contained a list of concrete actions that could be taken to further the creation of a human rights mechanism. The working group received help from civil society coalitions and think-tanks such as ASEAN-ISIS, which comprised NGOs, scholars, high-level civil servants and members of NHRIs. ASEAN refusal to act on these proposals led the working group to examine more moderate alternatives and to adopt a one-step-at-a-time approach.

ASEAN finally created an “Eminent Persons Group” (2005-2006) to examine the creation of a formal human rights mechanism and to reflect upon the institutionalisation of ASEAN as a whole. It was in this context that civil society pushed for the inclusion of provisions for a human rights mechanism in ASEAN basic laws.¹¹⁷

115. See Rodan, *supra* note 29, pp. 77-80.

116. See <http://www.forum-asia.org>

117. For further details, see Tinio, *supra* note 11, pp. 119-145; and Hao, *supra* note 33, pp. 91-101.

B. Advancements in policies and institutions: the ASEAN Charter, the AICHR and the Human Rights Declaration

The Eminent Persons Group's work led to the drafting of the ASEAN Charter; the organisation's "founding" text. Forty years after its creation, ASEAN finally and formally had legal personality. In 2007, the efforts of civil society led to the Cebu Declaration and the Phnom Penh Summit which were instrumental in the inclusion of a provision on a human rights mechanism in the ASEAN Charter. The latter was formally adopted during the 13th ASEAN Summit held in Singapore in November 2007.

From then on, things went rather quickly. A high-level panel was created in 2008 to draft the terms of reference for the mechanism which were then submitted to ASEAN. The terms of reference for AICHR were adopted in July 2009 and the latter was created in October of the same year. It soon started to examine the possibility of the adoption of an ASEAN human rights declaration.

All of these factors were important for institutionalisation. The Charter gave ASEAN legal personality and also visibility to its aims and principles. The Charter also formally set down institutional changes (establishment of a secretariat, rules on decision-making, etc.) and provided for a mechanism for the settlement of disputes, albeit limited. With the creation of the AICHR, ASEAN acknowledged that human rights were a legitimate subject matter for cooperation and dialogue within the organisation, and were no longer the exclusive domain of domestic affairs.¹¹⁸ The AICHR remains a weak institution, however. It has no protection mandate, and its members are not independent; they represent the governments that have appointed them.¹¹⁹

The process of adopting the ASEAN Human Rights Declaration (2012) also made it clear just how powerful the old habits remained. The Declaration was adopted at the Phnom Penh Summit in November 2012, after several years of negotiations during which the level of civil society consultation was very low. Moreover, it is not compliant with international standards. It expounds on the duties of individuals with respect to their rights, and on "national security" and "public morality" as being the basis for numerous restrictions. The Declaration also mentions "national and regional contexts" which is another acceptance of the "particularities" that appeared in the 1993 Bangkok Declaration. General Principle no. 7 of the ASEAN Declaration clearly illustrates the attempts to revive the relativist discourses of the past in a sub-regional framework:

"All human rights are universal, indivisible, interdependent and interrelated. All human rights and fundamental freedoms in this Declaration must be treated in a fair and equal manner, on the same footing and with the same emphasis. At the same time, the realisation of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds".¹²⁰

Many civil society organisations denounced the futility and dangerousness of the 2012 Declaration because it undermines the universality of human rights and could be used by states to justify their failure to comply with international standards, despite the Declaration's non-binding nature.¹²¹

118. Hao, *supra* note 33, pp. 103-104; also, in Davis's opinion the existence of the AICHR is proof of the powers of persuasion of the international human rights system, Thomas W. D. Davis, "Human Rights in Asia: Institutions, Norms and Politics", in Davis and Galligan, *supra* note 29, p. 1.

119. See FIDH's press release: <https://www.fidh.org/International-Federation-for-Human-Rights/asia/asean/ASEAN-Human-rights-body-weak>

120. The ASEAN Human Rights Declaration, <http://www.asean.org/news/asean-statement-communicues/item/asean-human-rights-declaration> (accessed 2 May 2014).

121. See <http://www.fidh.org/en/asia/asean/Civil-society-rejects-flawed-ASEAN-12429>



Kuala Lumpur, Malaysia: banners are displayed during the 2015 edition of the ACSC-APF to raise awareness about the disappearance of Lao activist Sombath Somphone.

C. Have there been any real advancements?

What has been the real impact of developments within ASEAN? As discussed above, the AICHR's mandate is weak; it is limited to raising awareness on human rights: creating strategies and frameworks for cooperation, technical assistance, research, information, etc. The mandate does not include human rights protection – investigation and judicial or quasi-judicial inquiries into communications or individual complaints. The members of AICHR are government appointees, they are not independent and can be replaced at any time and, in reality, some have no human rights competencies. In fact, the AICHR is nothing more than a formal venue for dialogue. But it is the only one of its kind in Asia.

And things could not be otherwise. ASEAN has never really abandoned its founding principles of non-interference and non-confrontation, the “ASEAN Way”. Any change towards a stronger system of human rights protection would involve completely new forms of concessions that many states are not willing to make. Which brings us back to the squaring the circle predicament whereby governments that are guilty of violations refuse to be subjected to any strong monitoring mechanisms, except when exceptional circumstances arise (when pressure from the international community becomes too high, for example).

The ASEAN Human Rights Declaration may even have detrimental effects on rights because states could be tempted to use it to weaken the international human rights system. Its adoption and what has been observed during the early phases of the AICHR indicate that ASEAN plans to go no further in the near future and it is highly unlikely that a strong mechanism will be created. However, strengthened cooperation among certain states (for instance, Indonesia and the Philippines) that seem prepared to make progress may have salutary effects. Their attitude, especially towards civil society, is markedly different from that of Vietnam, Laos, Burma or Cambodia, which have been closed to civil society, have lacked transparency and have been adamant in their position during the negotiations for the Declaration.

Civil society's active involvement with the ACSC-APF and with other initiatives or regional NGO networks is also a key factor for change because such developments act as a sounding board for peoples' aspirations.

* * *

Paradoxically, perhaps Asia is subjected to greater scrutiny by international mechanisms than it would be if it had its own regional human rights protection system. Several Asian states are on the agenda of various UN bodies and their mechanisms. UN special procedures increasingly look into the situations in Asian countries through their reports, requests for country visits, urgent appeals, or communications to governments.

The relationship that Asian countries have with the international system is a two-way street where both sides influence each other. International mechanisms are increasingly looking at what is happening in Asia and Asian countries have demonstrated greater commitment to, and engagement with, these mechanisms. There is growing interpenetration of national and international systems, despite differences in the degree of commitment across countries.

Part Four: The role of the international human rights protection system

The international system plays an essential role in the protection of human rights. It provides forums for discussion, negotiation, confrontation and for the crystallisation of norms, and is sometimes the last recourse for persons who have no access to justice within national legal orders. In certain cases, it is able to exert pressure on national authorities. What real impact do international mechanisms have on the human rights situation in Asian countries? What roles do Asian states play in international bodies?

The responses require an assessment of the effect or reach of international mechanisms into the domestic legal orders of Asian states and an analysis of states' behaviours before international bodies. The results provide a complex picture, but certain trends are salient.

1. How the international system influences human rights protection in Asia

The international human rights system has undergone rapid change in recent decades. The scope of international law has grown because of the adoption of many treaties and of customary international law, which has become richer. There have also been practical developments: the number of bodies in charge of human rights has increased, the Office of the UN High Commissioner for Human Rights (OHCHR) has been institutionalised and the number of treaty bodies and special procedures has increased. The global human rights discourse has also changed to become more steadfast and human rights play a greater role in the conduct of international relations. In addition to being the subject of multilateral diplomatic exchanges, human rights have become the object of bilateral cooperation programmes.

In this context Asia has been submitted to growing international scrutiny. Conflicts (the Vietnam War, the civil conflict in Cambodia), crises (Indonesian occupation of East Timor), killings and popular uprisings (from Tiananmen Square to Burma) have captured the attention of the international community and ghastly brought to the fore human rights violations on the continent. During the 1990s and 2000s, several Asians received the Nobel Peace Prize (a symbol of the fight against arbitrary power and for the rule of law): Shirin Ebadi (Iran), Aung San Suu Kyi (Burma), José Ramos-Horta (Timor-Leste), and Liu Xiaobo (China). The reactions of the international community also led to changes in country attitudes and approaches. China, for example, published its first White Paper on human rights in 1991, after the Tiananmen Square killings,¹²² and Indonesia made concessions that led to the independence of East Timor. The international community played a crucial role in the resolution of the conflict in Cambodia, by structuring the dialogue between the parties and by insisting on the inclusion of a human rights component in the 1991 Paris Peace Agreements.

In practice, the level of human rights protection provided by a state is not necessarily linked to the acceptance of international conventions. The ratification of a treaty does not automatically lead to full respect for the rights enshrined therein. Ratification does imply *prima facie* acceptance of a state's obligation to guarantee the rights.¹²³ The system of treaties and international bodies facilitates the creation, promotion, monitoring and application of human rights promotion and protection standards.¹²⁴ This applies to Asia and the rest of the world.

In Part Four, we focus on the UN system, to the exclusion of the international criminal legal system and human rights aspects of international humanitarian law. The international human rights system is, to a great extent, part of the practice of the UN system, be it through the law enshrined in treaties (including monitoring of their implementation) or customary law (including codification and progressive development) or the norms arising from diplomatic practice.

122. See Kent, *supra* note 51, p. 188.

123. Hao, *supra* note 33, pp. 67-68.

124. *Ibid.*, p. 68.

A. The growing influence of the UN system

Asia was involved in the creation of the international human rights system, from the founding of the United Nations and the drafting of the Universal Declaration of Human Rights to the 1993 Vienna Conference. Recently, Asian states participated in the transition from the Commission on Human Rights to its successor, the Human Rights Council (2006) where 13 seats out of 47 are held by states from the Asia-Pacific region.¹²⁵ During this time, Asian human rights NGOs gained strength: their number and capacity to influence grew exponentially. They have contributed to the growing acceptance of human rights language by Asian states and to greater penetration of the UN system in the region. States, including the most repressive, now generally respond to criticism by providing their own interpretation of human rights norms rather than by outright contesting their validity. Furthermore, customary international law today, to a great extent, includes obligations that are similar to those arising from treaty law. Much has been accomplished since the Universal Declaration, and the numerous resolutions of the UN General Assembly, the UN Commission on Human Rights and the UN Human Rights Council, as well as other actions that have contributed to the crystallisation of a wide array of standards and the result is that states which are not parties to the main treaties are bound by obligations similar to those contained therein. For instance, Asian states that have not ratified the ICCPR are nonetheless under the obligation to respect the rights to freedom of expression, association and peaceful assembly, and those related to the independence of justice. The status of “persistent objector” is increasingly difficult to invoke in connection to these standards. The principal obligations contained in the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) are peremptory norms of international law for which no derogation is permitted (*jus cogens*), and are therefore binding even for states which are not parties to it, such as Iran.

UN bodies and mechanisms influence the way human rights are addressed by Asian states. Firstly, UN bodies regularly adopt resolutions that concern Asian states. Security Council resolutions are legally binding and can lead to sanctions (those imposed on Iran are a recent example), military intervention (Afghanistan) or peacekeeping operations (Cambodia). In each of these examples human rights are taken into consideration and included in the resolution. Judgments handed down by the International Court of Justice (ICJ), which are binding on states that have accepted its jurisdiction, may also touch upon human rights law. Finally, resolutions adopted by the General Assembly or by the Human Rights Council, which from a formal point of view are not legally binding (although they contribute to the crystallisation of customary norms of international law), are nonetheless important political acts. No state likes being the object of official condemnation, especially when this can lead to unwanted political pressure; this is the only possible explanation for the enormous efforts states make to influence (i.e., weaken) the language used in resolutions that concern them.

Secondly, when one looks at the way resolutions on Asian countries are negotiated, the influence of the UN system is evident. The Human Rights Council can adopt country-specific resolutions mostly under two agenda items: item 4 (“Human rights situations that require the Council’s attention”, i.e., the most serious situations) and item 10 (“Technical assistance and capacity-building”).¹²⁶ In practice, the adoption of a resolution under item 10 requires the consent of the country concerned. Countries that are on the Council’s agenda often have no alternative: if the situation (on the ground or diplomatic) is such that they cannot reasonably expect to be withdrawn from the agenda they have to fully engage with the system and negotiate the terms of the resolution as best they can, otherwise they may end up being considered under item 4 of the agenda. Also, a state considered under item 4 may be interested in cooperating with the international community in the hope that its situation will then be moved to item 10, thus relieving some of the pressure to which it had been subjected – a strategy which has been obvious in the case of Burma. Indeed, in recent years Burma has authorised visits from the UN Special Rapporteur on the country and at the same time opened dialogue with the international community. The Burmese representative to the HRC has clearly stated that the goal of his country was to be removed from item 4. Consequently, Burmese national authorities have engaged in negotiations with the OHCHR to open an office in Rangoon. The understanding is that the opening of OHCHR office will either enable Burma to be moved from item 4 to item 10 or to be removed from the HRC’s agenda completely.¹²⁷ This way of proceeding

125. It includes the Middle East and the Pacific regions; for the current composition of the Council go to: <http://www.ohchr.org/EN/HRBodies/HRC/Pages/MembersByGroup.aspx>

126. The UNHRC can adopt country-specific resolutions under other agenda items, notably item 2 (which concerns the High Commissioner’s reports) and item 7, which is set aside for matters related to Palestine and other occupied Arab territories.

127. At the beginning of 2015, negotiations were at a standstill and Burma was entering a pre-elections period.

is characteristic of African states that have typically been more cooperative and more committed to the Council, especially through the African Group, which holds frequent coordination meetings, takes initiatives¹²⁸ and requests more technical assistance from the Council. A comparison of the resolutions concerning Asian and African countries shows a significant difference between the two regional groups. In Africa, most country situations are managed under item 10, while in Asia, they fall under several items (see Table 1). This is no doubt indicative of the fact that Asian states are less cohesive¹²⁹ than African states and that they have less influence within the UNHRC and are also less cooperative.

Table 1: Resolutions concerning Asian and African countries and the items they fall under in the UNHRC agenda

	Asia	Africa
Item 2: Annual report of the UN High Commissioner for Human Rights and reports of the OHCHR and the UN Secretary-General	2 (Sri Lanka, Iran)	0
Item 4: Human rights situations that require the Council's attention	3 (Burma, North Korea, Iran)	1 (Eritrea)
Item 10: Technical assistance and capacity-building	2 (Afghanistan, Cambodia)	9 (Côte d'Ivoire, Mali, CAR, Guinea, Libya, Somalia, South Sudan, Sudan, DRC)

(Source: Annual Programme of Work of the Human Rights Council, 2014)

Thirdly, the OHCHR, through its activity and constant interaction with national authorities, has helped to give visibility to human rights and to make the monitoring of country situations usual international practice. The geographical and thematic divisions of the OHCHR interact continuously with governments and civil society organisations. The reports, communications, letters and other documents published by OHCHR, as well as the public pronouncements and visits of the High Commissioner (who is also Under-Secretary-General of the United Nations), all contribute to exert constant pressure on states. The guidelines developed by OHCHR, including those regarding NHRIs, have a direct influence on the legitimacy and credibility of institutions established by states. Finally, interactions between OHCHR staff and civil society representatives, in addition to being crucial for documenting situations, have a protective effect, as they reduce the risk of reprisals for the people concerned.

Fourthly, the bodies responsible for monitoring the implementation of treaties ("treaty bodies") have an increasing influence on Asian states. Currently there are ten such bodies.¹³⁰ States that ratify or accede to a treaty agree to regularly report on the implementation measures and to appear before the competent body to submit their report and respond to questions from its members. Treaty body members present their conclusions and recommendations in the form of "concluding observations".¹³¹ In recent history, Asian states that ratified conventions were reviewed by the treaty bodies. Indonesia appeared before the Committee Against Torture for the first time in 2002, before the Human Rights Committee in 2013 and before the CESCR Committee in 2014. In 1996, China was examined for the first time by the Committee on the Rights of the Child, and in 2005 by the CESCR Committee. In 2007, Pakistan appeared before the Committee on the Elimination of Discrimination against Women; it is scheduled to be reviewed by several other treaty bodies.

128. For example, given the worsening of the situation in the field towards the end of 2013 and start of 2014, the African Group requested a special session on the Central African Republic (CAR) that was held in January 2014, and expedited the appointment of an Independent Expert (under agenda item 10) for the CAR.

129. Dynamics within the HRC are such that when the African group is united in their support for the position held by a state, which wants to be treated or remain under item 10, it is very difficult to generate the pressure needed to have the state moved to item 4.

130. The Human Rights Committee monitors the application of the ICCPR, the Committee on Economic, Social and Cultural Rights monitors that of ICESCR, the Committee Against Torture monitors that of the Convention Against Torture, etc., see <http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx>

131. In recent decades the activities of treaty bodies have risen sharply due to the increase in the number of states that are parties to treaties and to the institutionalisation of methods of work and procedures of treaty bodies.

Concluding observations and recommendations issued by the treaty bodies are increasingly stronger. They include prescriptive language and measures that states must take to fulfil their obligations: make treaty provisions enforceable in the domestic legal order, withdraw reservations and interpretative declarations, amend laws and regulations, adopt new laws, train civil servants, and elicit changes in societal attitudes. The periodicity of the process is in itself a monitoring mechanism, additional to specific monitoring mechanisms.¹³² The review procedure applies to all states parties, but the inspection procedures or individual complaints concern a limited number of Asian states, because few have accepted these, more intrusive procedures (see below).

Fifthly, HRC special procedures involve independent experts in charge of specific countries or issues and have a growing influence on the exercise of human rights in Asia. Consequently, requests for special procedure visits are increasing. Two of the four states that are the objects of country mandates (Burma and Cambodia) have agreed to visits from mandate holders. Notwithstanding, the Special Rapporteur on Cambodia, Surya Subedi, like his predecessors (Michael Kirby and Yash Ghai), has had his independence challenged by the government. Personal attacks were launched against him in 2012 and 2013, and the authorities have repeatedly refused to meet him during his visits and few of his recommendations have been implemented. Similar attacks have been wielded in Burma by religious leaders and student groups, with the acquiescence of states authorities. The other two Asian states that are concerned by special procedure country mandates, North Korea (DPRK) and Iran, do not authorise visits from UN experts. In March 2014, the Commission of Inquiry on North Korea appointed by the Human Rights Council presented its report before the Council after hearing victims and witnesses in South Korea, Japan, the United States and Europe because visits to North Korea were not authorised. The practices of Asian states with respect to thematic mandates are ambivalent; states authorise visits more frequently but some states refuse to substantively interact with protection mandates. Other states accept the visits, but are slow to set a date or try to negotiate the terms of the visit (regions to be visited, people to meet or not to meet, etc.) with mandate holders, which are sometimes deemed unacceptable by the latter. A review of visit requests from special procedures¹³³ for Asian countries showed that there were many pending requests and some for many years. Afghanistan has yet to respond to requests filed in 2005 by the Special Rapporteur on torture and the Working Group on arbitrary detention. In early 2014, Bangladesh had nine requests pending, and China had 12. Despite five reminders, Nepal has still not accepted the visit of the Special Rapporteur on human rights defenders, filed in 2003. Between 1999 and 2012, Pakistan had three visits from special procedures, but eleven requests for visits went unanswered, and some of the requests were followed by at least three reminders.

“Communications” (requesting information and explanations on individual cases) and “urgent appeals” (requiring immediate action from the state concerned) sent by special procedures are not subject to any rules of ratification of specific acceptance; they concern all UN member states and can be sent at any time to any state where a violation is alleged. There are Asian NGOs (e.g., Forum-Asia) that have representations to the United Nations in Geneva, or are members of networks or federations (e.g., FIDH) which routinely submit information on individual cases and communications to special procedures. Although rates of responses by states vary and Asian countries’ response rates are generally low, communications and urgent appeals sent to governments do help to keep the pressure on national authorities, especially if individual cases are then mentioned in the reports submitted by the holders of special procedure mandates to the Human Rights Council or the UN General Assembly, or in the “communications reports” of special procedures.¹³⁴

Finally, the Universal Periodic Review (UPR) mechanism established by the Human Rights Council applies to all states, which are reviewed at regular intervals (every four and a half years). The UPR definitively validated the notion that the international community has a say on the situation of human rights in each state; state sovereignty no longer provides immunity from scrutiny. States are accountable for the way they promote and protect human rights. In this regard, it should be noted that authoritarian states increasingly tend to defend the UPR within UN forums, presenting it as a guarantee of objectivity and impartiality and as non-confrontational. During the 24th session of the Human Rights Council (September 2013), the representative of Laos said that the UPR was “the only legitimate mechanism” at the international level. This strategy is of course a challenge to

132. Ineke Boerefijn, “International Human Rights in National Law”, in Krause and Scheinin, *supra* note 7, pp 598-599.

133. See <http://www.ohchr.org/EN/HRBodies/SP/Pages/countryvisitsa-e.aspx>

134. For an overview of HRC special procedures go to: <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>

the legitimacy of the expert bodies (treaty bodies, special procedures)¹³⁵ and of the Human Rights Council, which adopts “selective” resolutions¹³⁶ while promoting the UPR, which is a diplomatic mechanism to which all states must submit. But the UPR validates the idea that human rights are a legitimate matter of inter-state relations. By accepting the UPR, the Asian states that are most protective of their sovereignty become involved in a process that weakens their traditional position and strengthens the universality of human rights.

The picture described above should not let us forget that there are many and many types of barriers to greater influence from the international human rights system in Asian countries; but not all of them are specific to Asia.



The Human Rights Council meets at the Palais des Nations, the United Nations' headquarters in Europe.

B. Obstacles and resistance

The obstacles are first and foremost political. There are regimes that have drawn red lines which, when crossed, lead to the locking out of the UN system. These red lines affect what these regimes see as their vital interests. Freedom of expression, pluralism of the press and free assembly represent threats to the survival of the regimes in China, Laos or Vietnam. A number of taboo subjects are also seen as a threat, the ethnic structuring of state institutions in Malaysia, for example. Finally, the international human rights system has to contend with the impunity from which benefit the elites and the members of the military in many Asian countries.

What results from this type of situation is a lack of cooperation with UN mechanisms, namely special procedures (denial of access, failure to respond or to substantively respond to communications, rejection of reports) and treaty bodies (refusal to enter into meaningful dialogue, rejection of observations and recommendations), and tension within diplomatic forums such as the Human Rights Council. A recent example of this occurred during the 25th session of the Human Rights Council in March 2014. During the adoption of the report on its UPR, China raised a point of order when an NGO, the International Service for Human Rights (ISHR), requested a minute of silence in memory of Cao Shunli, an activist arrested at the Beijing airport in September 2013 as she was about to fly to Geneva; she later died in custody for lack of medical attention. In Laos, in December 2012, Sombath Somphone, one of the most prominent activists in the country, disappeared. He was filmed being taken away by unidentified persons at a police road checkpoint. The authorities refused any international cooperation to help shed light on the abduction, including proposals from other countries to provide technical assistance to

¹³⁵ Treaty body members serve in their personal capacity and do not represent their countries of citizenship and are appointed for their skills and expertise. Similarly, special procedure mandate holders are independent.

¹³⁶ “Selective” in the sense that they can be country-specific.

analyze the videotapes of Sombath Somphone's arrest. Yet another example is what occurred after the Human Rights Council adopted a resolution to establish a mechanism to investigate human rights violations connected to the conflict between the government and the Tamil Tigers; Sri Lanka notified the OHCHR that they would refuse to cooperate with investigators and intensified their clampdown on civil society.¹³⁷ Finally, there is North Korea – a case so unique that it should be dealt with separately because of the extent and seriousness of the violations (qualified as crimes against humanity by the United Nations) and because of the near-complete refusal of the authorities of any form of cooperation with the UN. North Korea is a unique case of non-cooperation with the UN system. In its first UPR, North Korea did not accept any of the recommendations made by UN member states.¹³⁸

The examples provided above are not representative of the practices of all Asian states; however, a practice that is common to many Asian states is the refusal to accept individual complaint mechanisms at the international level. Unlike the obligation to report to the treaty bodies, the acceptance of individual complaint procedures is left to the discretion of state parties, according to the optional protocols. Such procedures are contained in most treaties; in addition the Optional Protocol to the Convention against Torture (OPCAT) provides a preventive control mechanism, the Subcommittee on the Prevention of Torture. Despite the fact that in the case of individual complaints, decisions handed down by treaty bodies are not legally binding, with very few exceptions Asian states do not accept them.¹³⁹ Finally, the “general comments” drafted by treaty bodies to clarify the legal obligations contained in treaty provisions receive little acceptance in Asia. General comments¹⁴⁰ are intended to guide the interpretation of treaties, especially interpretation by national courts. However, in practice, general comments are given little consideration by the courts and tribunals of Asian countries. This is even the case with states that are relatively open to the international system. In Japan, for example, UN authorities have failed to obtain substantial changes in the approach given to the rights of non-resident foreigners, which is not protective; moreover, Japanese courts have rejected the general comments and recommendations made by treaty bodies in this regard.¹⁴¹

There are also legal obstacles to greater influence from the international system on Asian states. They range from problems of interpretation of national law (which is not carried out in the light of international obligations, as it should) and erroneous readings of international law (for example, on the acceptability of corporal punishment) to constitutional obstacles to the extension of rights to certain categories of the population (foreigners) or citizens in extraterritorial situations.¹⁴²

* * *

But Asia is no exception in this matter. The question that arises at this point is to what extent are Asian states receptive or unreceptive to the UN system of human rights? Is it possible, despite their heterogeneity, to identify similarities in receptiveness, commitment and behaviours among Asian states in UN forums?

To conduct this type of analysis we focus on the UN and specifically on the Human Rights Council. The analysis is not exhaustive, but it pools criteria that are indicative of states' behaviours and strategies.

2. How Asian states respond to and influence the UN system

This section looks at the influence of Asian states on the international system. The international system is not static; it responds to changes in the balance of power, discourses and practices that are deployed by states. In this regard, the Human Rights Council is an appropriate venue to observe the behaviours and strategies of Asian states.

137. This occurred before the presidential elections in January 2015, which resulted in the defeat of the incumbent president, Rajapaksa. Relations between Sri Lanka and the UN seem to have started afresh since then.

138. Later, in the run-up to its second UPR, it accepted some of the recommendations from the first cycle.

139. See below for ratification rates for the OP-CAT and other optional protocols.

140. See general comments made by the UN Human Rights Committee, for instance: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11

141. Iwatake, *supra* note 32, p. 133.

142. For examples of situations in the Philippines and Malaysia see Pangalangan, *supra* note 33; and Milner, *supra* note 30.

A. Levels of commitment vary

To assess the level of commitment of a state to the international human rights system, a certain number of parameters must be analysed. First, looking at the rates of ratification of key international treaties for Asian states (see table 2), several trends can be observed.

Table 2: Ratifications of main international conventions by Asian states

	ICCPR	ICESCR	CAT	CEDAW	ICERD	CED	CRC	CMW	CRPD	OP-ICCPR	OP-ICESCR	OP-CEDAW	OP-CAT	OP2-ICCPR	OP-AC-CRC	OP-SC-CRC
AFGHANISTAN	√	√	√	√	√		√		√						√	√
BANGLADESH	√	√	√	√	√		√	√	√			√			√	√
BHUTAN				√	S		√		S						√	√
BURMA				√			√		√							√
BRUNEI				√			√		S							√
CAMBODIA	√	√	√	√	√	√	√	S	√	S		√	√		√	√
CHINA	S	√	√	√	√		√		√						√	√
KOREA (N.)	√*	√		√			√		S							√
KOREA (S.)	√	√	√	√	√		√		√	√		√			√	√
INDIA	√	√	S	√	√	S	√		√						√	√
INDONESIA	√	√	√	√	√	S	√	√	√			√			√	√
IRAN	√	√			√		√		√						S	√
JAPAN	√	√	√	√	√	√	√		√						√	√
LAOS	√	√	√	√	√	S	√		√						√	√
MALAYSIA				√			√		√						√	√
MALDIVES	√	√	√	√	√	S	√		√	√	S	√	√		√	√
MONGOLIA	√	√	√	√	√	√	√		√	√	√	√	√	√	√	√
NEPAL	√	√	√	√	√		√		√	√		√		√	√	√
PAKISTAN	√	√	√	√	√		√		√						S	√
THE PHILIPPINES	√	√	√	√	√		√	√	√	√		√	√	√	√	√
SINGAPORE				√			√		√						√	
SRI LANKA	√	√	√	√	√		√	√	S	√		√			√	√
THAILAND	√	√	√	√	√	S	√		√			√			√	√
TIMOR-LESTE	√	√	√	√	√		√	√			S	√	S	√	√	√
VIET NAM	√	√	√	√	√		√		S						√	√

(As of 22 February 2015)¹⁴³

Legend:

√: Ratified

S: Signed but not ratified

*: On 23 August 1997, the Democratic People's Republic of Korea (DPRK) notified the Secretary-General of the United Nations of its desire to withdraw from the ICCPR. As the Covenant does not contain a withdrawal provision, the Secretariat of the United Nations forwarded an aide-mémoire to the government of the DPRK explaining the legal position arising from the above notification. As elaborated in this aide-mémoire, the Secretary-General is of the opinion that a withdrawal from the Covenant would not appear possible unless all states parties to the Covenant agree with such a withdrawal. The above notification of withdrawal and the aide-mémoire were duly circulated to all states parties.

ICCPR: International Covenant on Civil and Political rights (ICCPR)

OP-ICCPR: Optional Protocol to the ICCPR

OP2-ICCPR: Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty

ICESCR: International Covenant on Economic, Social and Cultural Rights (ICESCR)

OP-ICESCR: Optional Protocol to the ICESCR

143. Data available at: <https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>

CAT: United Nations Convention Against Torture
 OP-CAT: Optional Protocol to the CAT Convention
 CEDAW: Convention on the Elimination of All Forms of Discrimination against Women
 OP-CEDAW: Optional Protocol to the CEDAW
 ICERD: International Convention on the Elimination of All Forms of Racial Discrimination
 CED: International Convention for the Protection of All Persons against Enforced Disappearances
 CRC: Convention on the Rights of the Child
 OP-AC-CRC: Optional Protocol to the CRC Convention on the involvement of children in armed conflict
 OP-SC-CRC: Optional Protocol to the CRC Convention on the sale of children, child prostitution and child pornography
 CMW: International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
 CRPD: Convention on the Rights of Persons with Disabilities

Firstly, not all Asian states have ratified the two 1966 Covenants. Bhutan, Brunei, Singapore, Burma and Malaysia have ratified neither the ICCPR nor the ICESCR and are part of a small group of states worldwide in this situation.¹⁴⁴ There are Asian states that have yet to join instruments such as the Convention Against Torture (CAT) (Iran, Brunei, Burma, Malaysia) or the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (Brunei, Burma, Malaysia, Singapore). A review of the actions taken by states with regard to treaties guaranteeing specific protection against some of the violations that are frequent in Asia (enforced disappearances and violations of the rights of migrant workers) reveals that the number of instruments signed or ratified by Asian states is low when compared to that of states in Europe, Latin America and Africa. Cambodia, Japan and Mongolia are the only Asian countries to have ratified the International Convention for the Protection of All Persons against Enforced Disappearance (CED). India, Indonesia, the Maldives, Laos and Thailand have signed but not ratified the Convention. Bangladesh, Indonesia, the Philippines, Sri Lanka and Timor-Leste have ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), but very few other countries in the region have signed it. Overall, the group of “good performers” (states that have ratified most international conventions) comprises a handful of states: Bangladesh, Cambodia, Japan, the Maldives, Mongolia, Nepal, the Philippines and Timor-Leste. Bhutan, Brunei, Burma, Iran, Malaysia and Singapore have ratified very few international instruments compared to the average for all countries. Most Asian states have a rate of ratification of international instruments that is below the international average (see Table 3). The number of Asian states having ratified the Convention Against Torture and the Convention against Enforced Disappearance is particularly low.

Secondly, conventions on less politically sensitive topics are those that have been ratified the most. The Convention on the Rights of the Child (CRC) has been unanimously ratified. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) has been ratified by all states in the region, except Iran. In these cases Asian states are indistinguishable from the international community, whose practice is close-to-universal ratification. But this does not mean that the “protection of rights” is given the same weight as their “promotion”. In practice, there is still a high number of violations because judicial protection for victims is weak, because of the dominant socio-economic forces and because of societal attitudes towards women. However, it must be noted that there are Asian states that are among those that have done the most to advance women’s rights in recent decades (the Philippines, China, Singapore and Vietnam). Moreover, the conditions exist in most Asian states for a commitment to women’s rights via conventions, legislations and political rhetoric. The coexistence of the social movement against sexual violence that was created in India in the aftermath of the gang rape and murder of a student on a bus in 2013, and of a high number of rapes that continue to be committed there illustrates the region’s ambivalence that is described in the present paragraph.

Thirdly, Asia is characterized by a low rate of ratification of the optional protocols to the major human rights treaties, including those establishing individual communication (complaint) mechanisms (see Table 4). The Optional Protocol to the ICCPR (OP-ICCPR) has been ratified by very few states in Asia (6 out of 25, 24%). The Optional Protocol to the CAT has an even lower rate of ratification (16%, or 4 states out of 25, compared with 39% worldwide). Only a few states stand out from the crowd: the Maldives and Mongolia (which are parties to both) and Nepal, the Philippines and Sri Lanka (which are parties to the first Optional Protocol). But the picture is quite different in the case of the optional protocols to the CEDAW and CRC (OP-CEDAW and OP-CRC¹⁴⁵) for which rates of ratifications in Asia are in line with the rest of the world. But mere ratification does not imply

¹⁴⁴. As of 22 February 2015, the ICCPR and the ICESCR had been ratified by 168 and 163 state parties, respectively.

¹⁴⁵. The Convention on the Rights of the Child had two optional protocols. A third protocol, on individual communications, entered into force in April 2014.

that individual communication procedures have been accepted; reservations may be filed with respect to Articles 8 and 9 of OP-CEDAW, which establish individual procedures. Finally, the Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty, is very poorly accepted in Asia (16% against 41% globally). The only regional group with a rate of ratification similar to that of Asia is Africa.

Table 3: Rates of ratification for selected human rights conventions

	Asia (25)		World (196)	
ICCPR	19	76%	168	86%
ICESCR	20	80%	163	83%
CAT	15	60%	157	80%
CEDAW	24	96%	188	96%
CED	3	12%	45	23%
CRC	25	100%	194	99%
CMW	5	20%	47	24%

(As of 22 February 2015)

Table 4: Rates of ratification for selected optional protocols

	Asia (25)		World (196)	
OP-ICCPR	6	24%	115	59%
OP-ICESCR	1	4%	19	10%
OP-CAT	4	16%	77	39%
OP2-ICCPR	4	16%	81	41%
OP-AC-CRC	20	80%	159	81%
OP-SC-CRC	24	96%	169	86%

(As of 22 February 2015)

A second criterion that can be used to assess Asia's commitment to the international human rights system is the use of reservations and interpretative declarations. Although the objective here is not to consider all the reservations made by Asian states within the framework of all of the international conventions to which they are parties, a few remarks are in order. Some of the most problematic reservations and interpretative declarations under the ICCPR and the ICESCR concern issues of territorial integrity. Thus, some states ratify or accede to instruments but in parallel they file declarations to restrict the right to self-determination (by limiting it to the colonial past) in the face of potential desire for independence from regions or dependencies. Indonesia, India and Bangladesh are good examples of this practice.¹⁴⁶ Other states (China, India, Iran) may invoke the primacy of their Constitution or of their national laws in cases of conflict with treaty articles; thus reducing to nil the effectiveness of treaties in the domestic legal order. This type of behaviour is incompatible with the object and purpose of the treaties¹⁴⁷ and with the logic underpinning international law and its relationship with national law. Similar reservations or declarations have been filed with regard to the Convention Against Torture and have left sections of the convention devoid of their substance.¹⁴⁸ Asian states have also filed a few reservations or interpretative declarations under CEDAW and the CRC. A number of Muslim states (Brunei, Malaysia, the Maldives, and Iran) have also done so in ways that are largely inconsistent with the object and purpose of the conventions.¹⁴⁹ For example, in flagrant violation of the Convention on the Rights of the Child, Iran continues to sentence to death and execute people who were under 18 at the time of their arrest.¹⁵⁰ For these cases, Iran pleads the general reservation it made under the Convention, submitting that the latter's implementation has to be consistent with Islamic criminal law. Many of the recommendations made by relevant treaty bodies and by states (within the framework of the UPR), concern the withdrawal or reformulation of reservations by the concerned Asian states.

146. For the ICCPR see https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en and for the ICESCR see https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en

147. The prohibition of this type of reservations is set out in Article 19 of the Vienna Convention on the Law of Treaties.

148. See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en

149. See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en

150. See the emblematic case of Saman Naseem: <https://www.fidh.org/International-Federation-for-Human-Rights/asia/iran/17023-iran-illegal-execution-of-juvenile-offender>



Iran continues to apply the death penalty against persons who were under 18 at the time of their crime – and even sometimes at the time of the execution.

A third criterion is cooperation with OHCHR and the mechanisms put in place by the Human Rights Council, including special procedures. Without repeating what has been discussed above, we note that Asian states, with few exceptions, are on average less amenable than other states to visits from special procedure mandate holders, especially holders of “protection” mandates (torture, extrajudicial executions, enforced disappearances, arbitrary detention, slavery, etc.). Few Asian states have extended a standing (open) invitation to all special procedures,¹⁵¹ with the exception of India, Japan, Mongolia and Thailand. In practice, however, a visit has to be prepared months ahead of time and is the object of a memorandum of understanding. Thus, a standing invitation does not mean that mandate holders may enter a country without notice and have access to all parts of the country. States that have accepted a visit can drag out the negotiations on the programme (persons to meet, places to visit, etc.). Similarly, a state for which there is a country-specific mandate can plead its “good” level of cooperation with the mandate holder to refuse visits from thematic mandate holders, arguing that the former already covers all human rights issues in the country. This situation compels some thematic mandate holders (e.g., Maina Kiai, Special Rapporteur on the rights to freedom of peaceful assembly and of association) to conduct unofficial visits by attending conferences or seminars, but these visits unfortunately cannot be documented in official UN reports. Countries that have undergone some form of democratisation are more inclined to invite special procedures – Indonesia, Timor-Leste and the Philippines, for example. Closed states either decline visits or only accept those of less sensitive mandates or that will not place them at odds with their conventional obligations; for instance, at the close of 2013, China received a visit from the UN Working Group on discrimination against women.

As for treaty bodies, in general, Asian states submit their reports late, but so do states in other regional groups. Tardiness ranges from several months to several years. When the state review is finally conducted, treaty body members have no qualms asking government delegations to explain the delay. Of course, states that have not ratified a treaty are not subject to the obligation to report on its implementation of the treaty. But for treaties that have been ratified, overall few Asian states have been reviewed because of delays in submitting their reports. For instance, Brunei has appeared only once before a UN body, the Committee on the Rights of the Child. Malaysia appeared once before the CEDAW Committee and once before the Committee on the Rights of the Child, a scant number in all.

The majority of Asian states do not accept individual complaint procedures before treaty bodies provided for by the relevant treaties.¹⁵² Their position is based on the concept of sovereignty and on

151. The list is available at: <http://www.ohchr.org/EN/HRBodies/SP/Pages/Invitations.aspx>

152. The HRC complaint procedure is restrictive and rarely used, see <http://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/HRCComplaintProcedureIndex.aspx>

weak political and legal arguments. From a legal standpoint, governments argue against individual procedures because they claim to want to give priority to the strengthening of national mechanisms and do not want to create competition between different mechanisms. This position is specious, because individual complaint procedures do not override the national justice system; complaint procedures play a complementary role, serving as a guide for national authorities. Furthermore, the decisions taken by treaty bodies on individual cases are not legally binding, although their consequences are not negligible. Politically, governments that refuse such procedures obviously seek to “shield” their domestic legal order and domestic judicial decisions from criticism or questioning. This type of reaction is futile because there are international standards regarding access to justice, reparation and fair trial, which are in any case binding on states. Domestic court decisions are legitimately subject to scrutiny by the international system.

Finally, cooperation with the UN, and particularly with the OHCHR, also involves the physical presence of the latter, which is clearly rather rare in Asia. There is a regional office for Southeast Asia in Bangkok, but it is the only one on the continent. As January 2015,¹⁵³ of the twelve regional OHCHR offices, only one was located in Asia. Members of the OHCHR staff (human rights officers) can also be assigned to UN country teams on the ground, but their presence is minimal (both in numbers and in financial resources) when compared to agencies and programs (such as UNDP) or to integrated missions. The mandates of OHCHR officers are largely on technical assistance and advice rather than on monitoring. When their mandate includes monitoring, the information is often used internally rather than for public reporting. This is not the case for country offices with mandates to promote and protect human rights. The serious human rights situation in Cambodia led to the establishment of an OHCHR national office with, *de facto*, a protection mandate. This is but one national office of the 14 that the OHCHR had up and running in early 2015. Negotiations with the Burmese government on the opening of an OHCHR country office are currently at a standstill.

To gain greater understanding of Asia's level of commitment to the international human rights system it is necessary to consider another factor: the behaviour of Asian states in international forums. The dynamics observed in the Human Rights Council in this regard are informative.

B. The behaviour of Asian states in international arenas: the case of the Human Rights Council

The Human Rights Council (HRC) is, of course, not the only international human rights body and the current study is not meant to be exhaustive. The scope of our analysis does not include the UN General Assembly or its committees or the dynamics within other bodies, agencies and programs within the United Nations family. We do not examine the behaviour of Asian states *vis-à-vis* the International Criminal Court or in relation to concepts which have a human rights dimension, such as extraterritorial or universal jurisdiction. We will examine the behaviour of Asian states in the HRC in connection with a few recent resolutions (country-specific and thematic), during general debates and with respect to other parties who participate in the work of the HRC.

The UN Human Rights Council was created in 2006; its predecessor was the Commission on Human Rights. Formally a subsidiary body of the UN General Assembly, its main purpose is to address situations of human rights violations and issue resolutions thereon.¹⁵⁴ HRC resolutions are not legally binding (they are only “recommendations”), but they do have political importance; this explains the amount of work states put into resolutions and the meticulous care given to the language that they use, both written and spoken. Along with other diplomatic venues, the HRC is a place where customary international law and in particular its psychological element (*opinio juris*) crystallise.

The first observation is that the “Asian group” is not a uniform whole at the HRC. The Asian geographic group comprises states with widely differing priorities, alliances and positions and is probably less cohesive than other regional groups, including the WEOG,¹⁵⁵ GRULAC¹⁵⁶ and the African Group. Secondly, certain non-geographic alliances are relevant when analyzing the behaviour of Asian countries. Some Asian countries (e.g., Japan and South Korea) are

153. See <http://www.ohchr.org/FR/Countries/Pages/WorkInField.aspx> Another regional office for the Pacific region (which is outside of the scope of the present paper) is located in Suva, Fiji.

154. For an overview of the composition, functioning and work of the HRC see: <http://www.ohchr.org/FR/HRBodies/HRC/Pages/AboutCouncil.aspx>

155. Western European and Others Group.

156. Group of states from Latin America and the Caribbean.

traditionally allied to the WEOG; however the dynamics of the “Like Minded Group” (LMG), a grouping of (developing and emerging) countries that share certain characteristics (such as authoritarianism and a lack of engagement with, or even hostility towards, civil society)¹⁵⁷ influence or are influenced by the behaviour of other states (China, India, Bangladesh, Iran, Vietnam, Pakistan, etc.). Bearing these considerations in mind, in the following sections we look at the conduct of various Asian states at the HRC over recent years.

(1) Conduct with regard to country resolutions

Yet another trait shared by many Asian states is a relative reluctance to make use of HRC agenda item 4.¹⁵⁸ Even in cases of serious human rights violations, most Asian states prefer to avoid condemnatory language (“naming and shaming”) as much as possible and instead seek the cooperation of the country concerned. Asian states prefer to use item 10 of the HRC agenda, which can lead to “buying time” by the state concerned, which can in turn use and abuse the “technical assistance” aspects of resolutions adopted under item 10 to avoid tackling key issues such as the fight against impunity for perpetrators of violations. Recently, the Asian Group made considerable efforts to ensure that resolutions on Burma are adopted by consensus and not by vote.¹⁵⁹

When there is a vote on a resolution tabled under item 4,¹⁶⁰ the practices of Asian states that are members of the Council reflect their ambivalence. The Maldives, Japan and South Korea almost always vote in favour of draft resolutions (presented, for instance, on Iran,¹⁶¹ Sri Lanka¹⁶² or Belarus¹⁶³); however, many other members of the Asian group, among them India, Indonesia, Thailand and Malaysia, usually abstain. The Philippines also frequently abstains.¹⁶⁴ Finally, a small group of countries always (China and Vietnam) or almost always (Pakistan) vote against the resolutions presented under HRC agenda item 4, even concerning situations that are deemed extremely serious by cross-regional consensus (e.g., Syria and North Korea).¹⁶⁵ The attitude of the two major Asian powers (China and India) contrasts with that of Brazil and South Africa, which are part of the “BRICS” countries. The latter two have adopted more progressive positions within the Council, although South Africa recently supported amendments that were hostile to resolutions aimed at protecting civil society and human rights defenders (see below).

When political conditions make it impossible to adopt a resolution, states sponsoring the initiative may anyway choose to send a signal to the country concerned by issuing a joint oral statement under a relevant item on the Council’s agenda. This was recently the case for Syria and Bahrain.¹⁶⁶ But Asian states rarely join these joint statements; in the case of the joint statement concerning Syria, only Japan, the Maldives and Korea joined their voices. For statements on Bahrain, Korea was the only Asian state to add its voice in March 2013; no Asian state, however, joined the statement delivered in September 2013.

In general, during negotiations on country resolutions, Asian states often try to water down the language used by including terms that are less condemnatory of national authorities and by attempting to reduce the number of human rights violations listed. Finally, the appointment of Asian nationals is preferred for special rapporteur positions involving Asian countries, but other groups behave similarly: the African Group almost always supports African candidates for special procedure mandates involving for African countries.

Human Rights Watch (HRW) analysed the voting record of HRC member states.¹⁶⁷ Although the study uses a small sample of resolutions (adopted under item 4 of the HRC agenda), voting behaviour analysis shows that fewer Asian states supported resolutions under item 4 (49%) than

157. They frequently join forces to try to block resolutions submitted by WEOG states.

158. Item 4 is used for the most serious situations (See Part Four, A of the current paper).

159. Resolutions A/HRC/22/14, A/HRC/25/L.21/Rev.1, and A/HRC/28/L.21/Rev.1.

160. This is frequently the case with item 4, not so for most of the other items on the agenda.

161. Resolutions A/HRC/19/12, A/HRC/22/L.22, A/HRC/25/L.9 and A/HRC/28/L.17.

162. Resolutions A/HRC/22/L.1/Rev.1 and A/HRC/25/L.1/Rev.1.

163. Resolutions A/HRC/20/L.7 and A/HRC/23/L.18.

164. Especially on resolutions concerning Asian countries (Iran and Sri Lanka).

165. China has voted against resolutions concerning Syria in recent sessions, while India and the Philippines abstained and a large set of Asian states (Bangladesh, Indonesia, Malaysia, Maldives, Thailand, Japan, South Korea, etc.) voted in favour. During the 25th session of the HRC, China, Pakistan and Vietnam were part of a very small group of states that voted against the resolution condemning the North Korean regime for crimes that qualify as crimes against humanity and asking the Security Council to refer the situation to the ICC. These same states systematically vote for resolutions under item 7, which concerns Palestine and other occupied Arab territories.

166. Inter alia during the 20th and 22nd sessions and the 22nd and 24th sessions of the HRC, respectively.

167. See <http://votescount.hrw.org> and for an analysis by regional group see <http://votescount.hrw.org/explore/grid/collection/regions/slice/0/24>

states in other regional groups: 61% of the states in the Africa Group supported items 4 resolutions, 77% of those in the GRULAC, 76% of those in the Eastern Europe Group and 84% of those in the WEOG. Asia and Africa are the groups that most often oppose country resolutions adopted by the HRC (32%) compared to 4% for the Eastern European Group, 9% for GRULAC and 11% for the WEOG.

(2) Conduct with regard to thematic resolutions

Discussions during recent negotiations on certain thematic resolutions that were subsequently adopted by the HRC were tense.¹⁶⁸ In September 2013, during the 24th session of the HRC, two resolutions on the role of civil society and on reprisals clearly brought out the tensions between WEOG, most of GRULAC and their supporters, on the one hand, and the LMG and their allies, on the other.¹⁶⁹ The resolution on civil society space aimed to remind states of their obligations to guarantee a safe and enabling environment for civil society, and the resolution on reprisals,¹⁷⁰ to protect persons who communicate information to the United Nations from reprisals, notably through the creation of a UN focal point on the matter. During the negotiations, the LMG, especially many of its Asian members (China, Pakistan, India and Malaysia), tried to water down the language in the resolutions regarding states' obligations and insisted that reference be made in the resolutions to the duty of civil society to provide "credible" information to the United Nations. These elements were contrary to the purpose and spirit of the resolutions. They also even challenged agreed language, especially used in the 2013 resolution on human rights defenders.¹⁷¹ The proposed amendments were eventually voted down. For the resolution on the role of civil society, proponents of the amendments eventually did not oppose consensus but a vote was called for on the resolution on reprisals, with more Asian states abstaining (India, Indonesia, Malaysia, Pakistan, and the Philippines) than voting in favour of the resolution (Japan, Maldives, Korea, and Thailand).

In 2014, attempts at obstruction took on a new dimension with the arrival of new members to the HRC (China, Vietnam, Russia, Saudi Arabia etc.), particularly because of those from Asia. A resolution on the right to freedom of peaceful assembly had been adopted by consensus in 2013,¹⁷² but in 2014 the situation was quite different. Several states, including China and India, submitted amendments that were aimed at weakening the draft text.¹⁷³ A group of states, foremost among them several from Asia (China, India and Vietnam) – tried to weaken a resolution renewing the mandate of the Special Rapporteur on the situation of human rights defenders;¹⁷⁴ they used obstruction during negotiations (a Vietnamese delegate went as far as to state that the concept of "defender" did not exist in his country) and submitted proposals for amendments that weakened the draft resolution (and the appreciation expressed by the HRC of the report of the outgoing Special Rapporteur, Margaret Sekaggya).

Asian states are sometimes co-sponsors of thematic resolutions (including those establishing or renewing special procedure mandates), but rarely exercise a leadership role.¹⁷⁵ Certain Asian members of the HRC served their entire three-year term without presenting a single resolution, of their own initiative. Other Asian states, however, played a leading role at the HRC. The Ambassador of the Maldives, for example, served as Vice-President in 2013 and the country has a progressive voting record. More recently, several Asian states (India, Indonesia, the Philippines, China and Vietnam) – as well as NGOs and NGO coalitions¹⁷⁶ in the region – supported the Ecuadorian initiative (26th session of the HRC, June 2014) calling for intergovernmental negotiations on a legally binding legal instrument that would cover human rights violations arising from the activities

168. Thematic resolutions can relate to any human right and are aimed at stating a position, endorsing a report (of the OHCHR or by special procedure mandate holders), creating a particular event (panel, high-level dialogue, etc.) and/or creating or extending a special procedure mandate.

169. Resolution A/HRC/24/L.24, Civil society space: creating and maintaining, in law and in practice, a safe and enabling environment, presented by Ireland and a group of sponsors.

170. Resolution A/HRC/24/L.17/Rev.1, Cooperation with the United Nations, its representatives and mechanisms in the field of human rights, presented by Hungary.

171. Resolution A/HRC/22/L.13, Protecting Human Rights Defenders.

172. Resolution A/HRC/24/L.7, The rights to freedom of peaceful assembly and of association.

173. Resolution A/HRC/25/L.20, The promotion and protection of human rights in the context of peaceful protests. The amendments would have weakened protection for demonstrators; they stated that demonstrations must not constitute a threat to national security, pointed to the duties and responsibilities of demonstration organisers and recalled that national legislation established conditions for demonstrations (this was a way of weakening the guarantees provided by international law). India (and South Africa, one of the co-authors of the amendments) was criticised for having denied its own history of struggle and peaceful protests symbolised by Gandhi (and by Mandela in South Africa). See <http://www.opendemocracy.net/mandeep-tiwana/india-and-south-africa-risk-forsaking-their-proud-histories-on-human-rights> (accessed on 4 May 2014).

174. Resolution A/HRC/25/L.24.

175. As discussed earlier in the paper, Asian countries more often sponsor country resolutions under item 10 (technical assistance).

176. Such as the Treaty Alliance, a global movement for a binding treaty: <http://www.treatymovement.com/>.

of transnational corporations. To conclude, the situation can be summarized as follows: among Asian states, there is a group of states that plays a negative role; a second group of states that have a more pragmatic and ambivalent approach and that can change their approach depending on the circumstances or the countries concerned; and a third group that plays a positive role.

(3) During general debates

Similarly, the conduct of Asian countries during general discussions on various agenda items differ. States can deliver oral statements to the HRC. Under item 4, which is reserved for the most serious situations of human rights violations, states can explain what, in their opinion, justifies action from the Council. While many states use oral statements to denounce the conduct of governments and call for action from the HRC, on average Asian states are less inclined to intervene on item 4, and when they do they are more reluctant to make condemnations. Certain Asian states, and particularly South Asian states (Bangladesh, Pakistan and Sri Lanka), use part of their speaking time – when they speak – to defend the states that are criticised at the Council.

When it comes to the other agenda items, Asian states behave no differently from other states: they underscore their efforts, boast the merits of their policies and place their priorities (for many Asian countries this means economic and social rights) in the limelight. Special events organized by the HRC (panels on specific issues, high level dialogues) can also be an opportunity to reaffirm the positions. During the High-Level Dialogue on the death penalty organised during the 25th session of the HRC (March 2014), Singapore, joined by several other Asian states, refuted the claim that capital punishment was a human rights matter and emphasized that it fell exclusively under the scope of criminal law. But in this case, it would be difficult to identify an “Asian attitude” that is different from that of other regional groups.

(4) In the framework of the UPR

One area that seems to bring together many members of the Asian Group at the HRC is the rhetoric used to promote the UPR as a diplomatic peer review mechanism – or, reading between the lines, a calling into question of expert mechanisms such as special procedures and treaty bodies. In September 2013, Laos has made this clear (and awkwardly so) when it described the UPR as the only legitimate international mechanism for human rights. The will to favour the UPR over non-diplomatic, expert mechanisms clearly underpins the statements made by many Asian states. This position is in line with those traditionally adopted relative to the respect for sovereignty, non-selectivity and non-confrontation. UPR recommendations issued by Asian states are generally weak, vague and not measurable. They allow for very little “cross-fertilization” with recommendations offered by special procedures, treaty bodies or OHCHR reports.

(5) Relations with other stakeholders

Relations between the Asian Group and other regional groups within the HRC do not call for any special comment, except that the group is probably more politically, culturally and economically diverse than others. This explains why, within the HRC, the “pressure” exerted by the Asian Group as a whole, on its individual members is not felt as strongly as that which may be exerted by other regional groups on their respective members.

Relations between Asian states and other stakeholders at the HRC is characterised by a low level of cooperation with civil society. On the one hand, some Asian diplomatic missions refuse any contact, even informal, with NGOs working in Geneva and active at the HRC (FIDH, Amnesty International, Human Rights Watch, CIVICUS, etc.); this is the case for North Korea, Vietnam, China, Laos and Iran. On the other hand, there are states with a progressive voting record (South Korea, Japan, and Maldives) that are nonetheless less available and open to meet with civil society to talk about their demands, the work of the HRC or of their respective priorities. Meetings do take place, but they are rarer and tend to be on an *ad hoc* basis and in connection with a specific event (the UPR of the country concerned, the aftermath of a special procedure country visit, etc.). This situation is partly due to human resources problems, but it is also due to a lack of a culture of consultation. Conversely, members of WEOG and GRULAC and, to a certain extent the African Group, generally respond positively to requests for meetings from NGOs and also have informal exchanges with NGO representatives. It is noteworthy that Indonesia increasingly engages with Geneva-based NGOs.

By the start of 2014, the growing power of a deleterious coalition within the HRC became clear. The group, led by several Asian states (China, Pakistan and Vietnam, and backed by India and Malaysia) in collaboration with Egypt and Russia, has not only obstructed several negotiation processes and

tried to weaken key resolutions on civil society, but has also openly challenged the established rules for the participation of NGOs in the work of the HRC. A group of predominantly Asian States (China, Pakistan, India, Malaysia, Vietnam) has repeated the number of attempts made at UN conferences (including in Durban in 2001) to restrict the access of NGOs or to establish a “code of conduct” for their representatives and increasingly raises points of order when NGOs express their opinions at the HRC.¹⁷⁷ During the 25th session of the HRC (March 2014), China prevented the observance of a minute of silence in memory of Cao Shunli, an activist arrested on her way to Geneva in the run-up to the UPR of China and who died in custody due to lack of adequate medical care – a clear case of reprisals for trying to cooperate with the UN system. Before the vote on its point of order, China conducted an intense campaign to obtain support from the Latin American and African members of the HRC. The tactic paid off;¹⁷⁸ a few minutes after the resumption of discussions, China interrupted another representative of civil society and called into question the speaker’s right to cite an NGO that does not have consultative status with ECOSOC.¹⁷⁹ Previously, in the summer of 2013, the same group of states had sent a letter to the President of the HRC, calling for a debate on the right of NGOs to designate their representatives during HRC meetings. In this respect, China seems to have gone from a pragmatic policy of alliances and arrangements with other states in the HRC (beyond the group of non-aligned countries) entirely aimed at the preservation of its vital interests to a more aggressive policy that includes, if necessary, putting strong pressure on African and Latin America states. What remains to be seen is how other Asian states will react to what this new situation may bring about.

* * *

The levels of commitment and the behaviours of Asian states vis-à-vis the international human rights system are ambivalent. Looking beyond heterogeneity of the continent, the increasing involvement and relative mistrust of states are two driving forces that coexist and that are not mutually exclusive. Asia’s role and position within the international system are clearly evolving.

177. The same states are active at the NGO Committee of the UN Economic and Social Council, which has the power to grant consultative status to civil society organisations that have made the request and meet the conditions. Having ECOSOC status allows NGOs, inter alia, to submit officially written contributions, participate in sessions held by UN bodies such as the HRC and make oral statements. NGOs which have been recognised for the quality of their work, such as Human Rights in China, have had their applications for ECOSOC status rejected because of the influence China has within the NGO Committee. See: <http://csonet.org/index.php?menu=128>

178. See FIDH’s press release: <http://www.fidh.org/en/united-nations/human-rights-council/15041-mounting-attacks-against-ngos-the-human-rights-council-should-take-a-firm>

179. China let the NGO in question (FIDH) continue once the HRC secretariat pointed out that accredited NGOs had the right to refer orally to other NGOs. For more information on the procedural gimmicks used against NGOs see the analysis of the events on March 2014 by Human Rights in China at: <http://www.hrichina.org/en/press-work/statement/china-deploys-procedural-challenges-control-civil-society-voices-human-rights>, accessed on 4 May 2014. One of the means used by states that were hostile to the resolution on reprisals (it was adopted by the HRC and finally voted down by the Third Committee of the UN GA in December 2013) was a procedural device; the resolution included budget information that was too detailed, the type of micromanagement that does not fall within the purview of HRC resolutions.

Conclusion: the prospects

On 23 October 2013, the Chinese daily *Xinkuai Bao* published an article calling on the authorities to release one of its journalists who had been arrested a few days earlier as part of an anti-defamation campaign. The only offence committed by Chen Yongzhou was to investigate embezzlement in a powerful industrial corporation. The next day, the newspaper insisted: "Everything must be solved within the framework of the law. It is not possible [for the police] to arrest first and look for grounds later".¹⁸⁰

This advocacy in favour of the principle of legality and presumption of innocence – a heartfelt plea made by the colleagues of an imprisoned journalist – was formulated in legal language. The case of *Xinkuai Bao*, as rare as it is risky in China, shows the universal nature of the rejection of injustice. It also shows that, everywhere, human rights are the most powerful language that can be used to denounce the illegitimate exercise of power.

Ultimately, in Asia as elsewhere, invoking cultural particularities has everything to do with politics and nothing to culture.¹⁸¹ Similarly, the emphasis placed on the "non-politicization" of human rights by authoritarian regimes is absurd. Human rights are inherently political: they concern relations between individuals, social groups and the state; they set limits to power and create standards of behaviour for people in authority. Beyond the Asian features, which we have tried to describe, human rights provide people everywhere with the tools needed to build more just societies.

The absence of the rule of law, of strong institutions and of structures to guarantee respect for rights fosters and facilitates abuses of power. Human rights violations and their causes, be it greed, hatred, impunity or hunger for power, and the ensuing physical and psychological suffering, are universal and, in that respect, Asia is no exception.

The international community has employed different strategies in the most closed states, from confrontation to engagement;¹⁸² each of these strategies has its limitations and none, on its own, can be described as leading toward greater openness. Conditioning aid does not appear to be as fruitful as some had expected at the end of the Cold War. The "naming and shaming" approach can sometimes be used to exert pressure to levels that can lead a country to make concessions; but this approach can only be used under specific conditions. And there are no guarantees for success: President Obama's visit to Cambodian Prime Minister Hun Sen, in 2012,¹⁸³ was glacial; it followed his historic visit to the Burmese President Thein Sein. The outcomes do not support the application of separate strategies in two ASEAN states where violations are still very serious.

Notwithstanding, the international system has created practices and a discourse on human rights. The way China addresses human rights today, the very fact that it sees human rights as worthy of inclusion on the international agenda, shows how much progress has been made. International standards and internal factors may explain why the Chinese regime has taken positive measures, such as reducing the number of crimes punishable by death. International bodies also help to keep the pressure on national authorities with regard to issues such as impunity and accountability. For instance, the Human Rights Committee placed significant importance on the murder of Munir during Indonesia's first review, in July 2013.

Asia has produced innovative solutions, especially in transitional justice, and plays a role in advancing matters such as the rights of LGBTI persons. On the world's major areas of debate and disagreement (the death penalty, "defamation of religions", "traditional values", sexual orientation and gender identity (SOGI) and civil society space), there is no salient cleavage between Asia and the West, or between Asia and any other region; Asia itself is home to differing points of view. The staunchest opponents of the international human rights system are not Asian states (anymore); Saudi Arabia, the Persian Gulf countries and a handful of African countries propagate more cultural

180. See articles in the French daily *Le Monde*: http://www.lemonde.fr/Asia-pacifique/article/2013/10/23/le-journal-chinois-xinkuai-bao-se-rebelle_3501528_3216.html and http://www.lemonde.fr/Asia-pacifique/article/2013/10/25/l-appel-du-xinkuai-bao-a-la-liberation-de-son-journaliste-emprisonne-rencontre-un-large-echo-dans-la-presse-chinoise_3503382_3216.html. Chen Yongzhou subsequently "confessed" before the cameras to having fabricated evidence: http://www.lemonde.fr/Asia-pacifique/article/2013/10/26/le-journaliste-interpelle-du-xinkuai-bao-a-reconnu-de-fausses-informations_3503410_3216.html

181. Ghai, *supra* note 10.

182. For further reading on Burma see Andrew McGregor, "Human Rights Coalitions in Myanmar", in Davis and Galligan, *supra* note 29.

183. Hun Sen's name was not mentioned in official White House statements. The US President openly condemned the human rights situation in Cambodia during his visit and pointed out that he was in Phnom Penh for the ASEAN summit and not for a bilateral state visit – a diplomatic humiliation for his host.

relativist discourses. And while there are Asian countries that have the same stance as the latter on particular issues – e.g., Brunei and Pakistan on the restriction of freedom of expression on the basis of religion; Singapore and Malaysia on the death penalty; Vietnam and China on human rights defenders – there is no clearly identifiable “Asian position”. The dividing lines are dynamic; they move and coalesce in accordance with rationales that do not run along continental lines. We must demystify Asia.

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