

NGOS EFFORTS TOWARDS THE CREATION OF A REGIONAL HUMAN RIGHTS ARRANGEMENT IN THE ASIA-PACIFIC REGION

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I feel honored to be given an opportunity to speak at this panel on an issue which has a lot to do with a part of the world I belong to. NGOs

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in Asia and the Pacific have been crucial to the struggle for a regional human rights arrangement. Indeed it is they who have kept both the debate over and the struggle for an Asian human rights system alive. It is they who have exposed the sophistry, prevarications, evasions, and contradictions that Asian governments have brought to the discussions regarding a Regional System for the Protection and Promotion of Human Rights in the Asia-Pacific region.

In my presentation, I will attempt to highlight some of the contributions made by Asia-Pacific NGOs on the subject.

I think that the time has come that all the Asian States should take necessary practical measures towards the creation of an Asian Human Rights Mechanism. No doubt the Governments have reasons to remain silent and not get exposed, though their silence is the *silence of the lamb*. Today, large sections of our people continue to be exploited and oppressed and many of our societies are torn apart by hatred and intolerance. Increasingly, the people realize that peace and dignity are possible only when the equal and inalienable rights of all persons and groups are recognized and protected. They are determined to secure peace and justice for them and the coming generations through the struggle for human rights and freedoms. Towards that end they are committed as an affirmation of the desire and aspirations of the peoples of Asia to live in peace and dignity.

The problems in this region are typically of its own nature. For example, in Pakistan, three martial laws brought an end to the political life, reducing the political participation to zero. Fundamentalist religious revivalism has prompted violation of human rights in certain parts of Asia. Women's rights violations are also a major factor in the violation of human rights. Above all, governmental lawlessness is an increasingly frequent phenomenon in many Asian countries, as is the abuse of power and authority by public officials entrusted with implementing the law, such as local police, etc. Concentration of power in the executive branch of government is resulting in increased arbitrariness and decreased accountability. This proves that like all other regions of the world, this region also has a variety of human rights violations. What is missing in Asia compared with other regions is a Regional Human Rights Commission.

The need for an Asian Human Rights Commission and its priority first emerged in 1982, when a United Nations sponsored seminar was held on this issue in Colombo, whereafter three workshops further examined this issue in Manila in 1990, in Jakarta in 1993, in Seoul in 1994, and more recently, in Kathmandu in 1996, and Amman 1997.

I. BRIEF INTRODUCTION TO THE OTHER THREE COMMISSIONS

The other three Commissions: The European Commission, the Inter-American Commission, and the African Commission are working in their respective regions. Before moving further, I think it will be useful to give a brief introduction of each of these three Commissions.

A. The European Commission

The development of a regional Human Rights system in Europe was in critical ways a response to the genocidal horrors of the Second World War. Michael Reisman, in his paper at the Fourth Workshop On Regional Human Rights Arrangements in the Asian and Pacific Region at Katmandu (Feb. 26-28, 1994), stressed that the post-mortem by elites and scholars concluded, in part, that disrespect for the rule of law and fundamental individual rights was a transitional destabilizing force with a potentially strong regional reach. Post war European leaders promoted the creation of a European Human Rights system as a way of checking at an early stage the growth of regimes that based their rule on violations of individual rights. Another factor which contributed towards making a regional European system was a political stance against communism and also the East-West differences. In 1948, at the Congress of Europe, Winston Churchill called for a European Charter of Human Rights. Later, the Council of Europe became the forum in which most of the discussions leading to the creation of European Human Rights instruments took place and finally the ongoing process was completed in 1950.

1. Supplementary Law Making

At the bureaucratic level, the law making process leading to the adoption of European Convention was complex and quite unique. A system of accommodation emerged when claims of minimalists, such as the United Kingdom and the Scandinavian countries, favored less institutionalization, and the claims of maximalists, such as France and Benelux countries, were reconciled. The drafting of relatively non-controversial parts of the Convention was accelerated, and political confrontation regarding the more controversial provisions of the so-called political questions was avoided.

2. Protocol System

The protocol system has been used to add rights to the convention or implement new procedural rules in an incremental optional fashion. Presently, eight out of ten protocols submitted by the council have been ratified by the parties. The European Commission of Human Rights, the

committee of ministers of the Council of Europe and the European Court of Human Rights are the bodies responsible for enforcement.

The task of the commission can also be divided into three categories:

- a) Determining the admissibility;
- b) Fact finding; and
- c) Resolving disputes.

There are certain limitations as well, such as:

- a) The NGOs cannot file a petition;
- b) European Commission is restricted to the states that have ratified the European convention; and
- c) The committee of ministers has no power to grant specific remedies. Nevertheless, the ministers may order publication of a commission report on violations and may, although this is unlikely, expel a state from the council of Europe for violations of article 3 of its statute requiring observance of human rights.

B. The Inter-American System

In 1959, the Inter-American Commission on Human Rights was created for overseeing national implementation of human rights commitment. Composed of seven members elected in their individual capacity, the Commission started operating in 1960 with a rather vague mandate. In 1965, its competence was expanded to accept communications, request information from governments, and make recommendations with the objective of bringing about more effective observance of human rights. In 1967, the Organization of American States (OAS) Charter was amended and the Commission became a principal organ of the organization. The American Convention of Human Rights, adopted in 1969, incorporated the commission and assigned it specific competencies.

The Convention also created the Inter-American Court of Human Rights. The commission has three forms of jurisdiction. Its conventional jurisdiction applies to the twenty-five states that have, to date, become parties to the American convention. Its judicial invocatory jurisdiction, i.e. its competence to invoke the Inter-American court, applies to the state

parties to the American convention that have declared that they accept the Courts jurisdiction. While these two forms of jurisdiction depend on adherence to the American convention, the Commission declaration jurisdiction applies to all parties to the OAS Charter — indeed, to all states in the Americas. Hence, every independent state in the hemisphere, even those which have not yet become parties to the convention, is subject, in some form, to the commission's jurisdiction. With the responsibility for thirty-four countries and more than 600 million human beings, the commission faces a daunting mandate with a staff of ten lawyers, a secretarial staff of seven, and an annual budget of less than \$1.6 million.

1. The United States and the Commission

The United States has not ratified the American Convention on Human Rights, but as a party to the OAS Charter it remains subject to the jurisdiction of the commission, which is an organ of the OAS. Complaints that have led to formal decisions by the Commission on allegations of human rights charges by the United States are:

- a) Haitians applying for asylum in the United States;
- b) Challenge to legalized abortion (the baby boy case);
- c) Allegations that the death penalty is imposed in a radically discriminatory manner; and
- d) A complaint concerning police misconduct and alleged murder of members of move organization in Philadelphia, which was declared inadmissible for the failure to exhaust domestic remedies.

The only case in which the commission has found a violation of the American declaration by the United States, involved imposition of the death penalty on persons who committed a crime when under age eighteen. The commission found that in Member States of the Organization of American States, there is a recognized norm of *jus cogens*, which prohibits the state execution of children. It agreed with the United States that there was no consensus as to the minimum age for imposition of death penalty. It nevertheless continued.

C. The African Commission

The African Conference on the rule of law, held in Lagos in 1961, gave an idea of a regional human rights system. The International Commission of Jurists invited all the concerned states to study the

possibility of adopting a regional Human Rights Convention. In 1969, a seminar jointly sponsored by the United Nations and Egypt proved instrumental in attaining general support for an African Human Rights Commission. In 1981, efforts finally reached success when experts in Dakar prepared a final draft.

At the end of this year, the African Charter on Human and Peoples' Rights was adopted by the Organization of African Unity (OAU). In 1986, a simple majority of OAU membership ratified the instrument to come into force.

The African Charter is consistent with its predecessors in Europe and America. However, it goes well beyond civil and political rights, covering economic, social, and cultural rights, as well as a number of collective or peoples rights. The African Charter also explicitly lists duties. The commission has 3 sets of responsibilities: Promotional, Investigative; and Advisory.

The ambitious scope of rights mentioned in the charter makes it difficult for the enforcement bodies because it requires significant resources. The Commission in its first five years undertook no country studies. One of the most serious problems is that human rights NGOs have yet to take root in Africa. The commission received 100 petitions but had not taken any steps. Some states failed to submit their reports and those which have submitted did not meet required standards. The commission has no function other than to attempt to settle, or, failing that, to pass the matter on to the assembly. The Assembly may assign the case to commission for reporting. The African system has no court. The executions were condemned world wide, political influence on the commission did not condemn the executions of nine leaders of the Ogoni.

II. ASIAN NGOS STATEMENT OF PRINCIPLES GOVERNING ANY REGIONAL ARRANGEMENT

This statement has been supported by 240 participants representing 110 NGOs who attended the historic event in Bangkok, of the Asia Pacific NGO conference on human rights. (March 25-28, 1993). These participants have addressed the question of the development of human rights instruments and mechanisms in this region, and realize that this is the only region which has not been able to achieve regional human rights machinery for the protection and promotion of human rights. The participants have reached the following consensus.

A. NGO Perspective

Universal human rights standards are rooted in many cultures and afford protection to all of humanity. The international, regional, and national orders should complement one another. The specificity of each context shall serve as constructive element to strengthen universal human rights standards and mechanisms designed to achieve global respect for human rights. Human rights are indivisible and interdependent. The protection of human rights concerns both individuals and collectives. Cultural practices which derogate from universal human rights and women's rights, in particular, shall not be tolerated. Resources must be used to promote human development, not militarization. Women's rights, that are human rights, must be addressed in both public and private spheres of life. All people have the right to self-determination. Promotion of human rights and democracy requires both human rights education and training of various sectors of society.

The effective promotion and protection of human rights in Asia and Pacific regions requires governments in the region to ratify and implement without delay the International Covenant on Civil and Political Rights, CEDAW & Torture Convention. In this regard, the Asia Pacific NGOs recommend the following points about human rights charter and implementation mechanism:

- 1) The charter should not permit *any* limitations or derogations of rights from existing international human rights norms and standards, for example on the grounds of national security, law and order, state of emergency, or the equivalent. We reiterate that states are bound to respect human rights in all situations.
- 2) The charter must respect the principles of universality, indivisibility, and non selectivity of human rights. In addition, it must reflect the new sets of rights, for example, women's rights as human rights, rights of children and the indigenous people, the rights to develop as a human right, and the rights of refugees.
- 3) The Asian system of government, culture, and traditions should not be used as a pretext for the continuation of authoritarian regimes and the violation of human rights.
- 4) A Commission on human rights must have jurisdiction to conduct fact finding missions, and undertake country, thematic and other studies; to examine the reports of state parties under various

treaty bodies; and to receive complaints by member states, NGOs, victims, and other individuals against violations of human rights.

5) The Commission should be composed of independent experts appointed in consultation with NGOs; its meetings and reports should be accessible to the public, including NGOs; and petitions or appeals under consideration should not preclude action on the same issue by other United Nations human rights bodies.

6) There should be a separate Court on human rights with the power to adjudicate complaints, and make binding judgments, including compensation; and the court should have the power to enforce its decisions through appropriate measures.

7) State parties must provide for adequate budgets and personnel to carry out these budgets.

8) States of the Asia-Pacific region must establish adequate national human rights institutions to enforce the existing international human rights instruments and standards, including regional human rights instruments upon their implementation.

III. ASIAN NGO ACTIVITIES TO PROMOTE A REGIONAL ARRANGEMENT

A. *Drafting of a Declaration and Charter*

The Declaration seeks to show the relevance of human rights to the Asian and Pacific societies. Declaration and Charter are also meant as a vehicle for human rights education to develop solidarity action. Thus, they often tend to be reactive and drawn empirically from patterns of existing human rights abuses and denials. The relevant articles of the *Declaration of The Basic Duties of Asian Peoples And Governments* are herein under summarized. It is clear from the title that the article only discusses the duties of both, people and governments, unlike Western documents, which would discuss the rights as well. In order to talk about the rights, it is not wrong that they should be guaranteed by corresponding duties

IV. NGO STRATEGIES IN RAISING HUMAN RIGHTS ISSUES AND AGENDA IN THE MEETING OF EXISTING SUB-REGIONAL BODIES

A. *Subregional Approach*

An effective regional arrangement is only possible where there is an excellent understanding between the Governments as to the development of a subregional machinery.

It is pertinent to mention that several of the human rights problems in the region are of cross national boundary nature. Interestingly, there is already a sub-regional co-operation on such problems, e.g. drug trafficking, terrorism. As pointed out by Dr. Clarence Dias in his paper that in areas where both redress and prevention of human rights violations require trans-border co-operation, there is every incentive for human rights co-operation on a Bilateral, sub-regional or regional basis as appropriate. Four examples drawn from the South Asian Association for regional Cooperation (SAARC) may help to illustrate this approach:

- 1) Trafficking in women.
- 2) Migrant workers.
- 3) Refugees.
- 4) Indigenous peoples.

In each of the above examples, the problems are of a transborder nature and addressing them requires transborder cooperation. Unfortunately these are not perceived as human rights problems and therefore the only solution because addressing international human rights standards are not considered an effective solution. The governments can carefully examine the international human rights norms and standards and select regional approaches which adopt the relevant norms and incorporate them into a regional cooperation agreement. This would enable the governments to apply the norm through their regional agreement without having to ratify the related international instrument. This experience in working with the norms could help the states to decide whether to ratify the related human rights instrument and would give a state the incentive to ratify. The experience of working together and regional cooperation could help for an effective and broader human rights cooperation, also meant as a vehicle for human rights education and to develop solidarity action. Thus, they often tend to be reactive and drawn empirically from patterns of existing human rights abuses and denials.

V. CREATING AND SUPPORTING NATIONAL HUMAN RIGHTS INSTITUTIONS

A strong regional program necessitates strong national human rights institutions as well. Thus programs to strengthen national institutions (e.g the judiciary, law enforcement officers, parliaments) could be designed from perspectives of regional comparability and undertaken concurrently, especially within a sub-region. This could lay a very sound foundation for future regional co-operation.

National human rights institutions, as the international community has defined, form a very particular species of organization. As pointed out by Brian Burdekin in his paper for Kathmandu, national commissions can:

- 1) Firstly, encourage the creation of and work with similar bodies at the state and provincial levels;
- 2) Secondly, they can do this consistent with the standards prescribed in the international treaties, while accommodating constitutional peculiarities and the extraordinarily different challenges posed by local conditions and cultures, thus respecting ethnic, cultural, religious and linguistic diversity;
- 3) Thirdly, they can do this in a more informed and sensitive manner than any regional or international body;
- 4) Fourthly, they can do this without compromising a vigorous defense;
- 5) Fifthly, national commissions can contribute to and monitor the integrity of governmental reports to international bodies; and
- 6) Lastly, they can provide constructive and well informed criticism.

National commissions have now been established in the Philippines, India, Indonesia, Australia, and New Zealand. These institutions are domestic institutions, responding to the national realities of the countries they serve. Their focus on alternative dispute resolution, mediation, and conciliation, makes them particularly appropriate to the range of cultural traditions. In some Asian countries, the national commissions are playing a central role in training the military, for example, in the Philippines and India.

VI. GOVERNMENT OBSTACLES AND NGOs' RESPONSES IN OVERCOMING THE DEAD LOCK

A. *Government Obstacles*

Governments face many obstacles, including:

- 1) In consistency of the national laws with International human rights law.
- 2) Ratification and incorporation in their constitutions of covenants and conventions.
- 3) Governmental law breaking.
- 4) So called Asian values which are emphasized on duties rather than rights.

B. *NGO Responses to the Deadlock*

NGOs provide several responses to the deadlock, such as:

- 1) We call upon the governments to pledge that they will ensure that their national legal orders enshrine the basic international human rights principles contained in the United Nations Charter, the Universal Declaration of Human Rights, the Covenant on Economic Social and Cultural Rights and the Covenant on Civil and Political Rights.
- 2) Sign and ratify all the existing international human rights covenants and conventions without reservations or derogatory clauses which have the effect of nullifying the very act of signature and ratification; call upon the governments to adopt in their constitutions the principle that such covenants shall be deemed to be automatically incorporated into domestic law by the very act.
- 3) Human rights in this region have also formed the basis of struggles against authoritarian regimes and military rule. Mass movements (e.g, for gender justice, for environmental protection) have gained strength and sustenance from human rights. Such movements have in turn empowered the peoples of this region to not tolerate any attempts at turning the clock back on human rights.

4) **Universality:** So far as this region is concerned, we stress that human rights is not a western concept but have been invoked by the peoples in this region both historically and contemporaneously.

5) **Indivisibility:** Both civil & political as well as economic, social, and cultural rights have validity. In this region there has been a woeful and willful neglect on the part of the governments to recognize and implement each sets of rights. The governments of this region are called upon to remedy their continuing neglect in implementing and realizing both economic, social, cultural, civil and political rights.

6) **Individual and collective rights:** Recognize the importance and the role of both individual and collective rights. There is, however, no hierarchy and no superiority between the two sets of rights. There is nothing which stops governments from redressing such imbalance at the national levels. If they have failed to do so at the national level their criticism of imbalance at the international level lacks credibility.

In the end it is important to state as provided in the task force document (Bangkok, March 28, 1993) that human rights are already universal for the people of Asia. It is they who press for more effective human rights mechanisms even while their governments demur and desist. So far as human rights are concerned, the people of South Asia are running — their governments are crawling.