

A Blueprint For a Southeast Asian Court Of Human Rights

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I. INTRODUCTION

At the 13th ASEAN Summit on November 18 to 20, 2007, in Singapore,¹ ASEAN leaders agreed to adopt the Charter of the Association of Southeast Asian Nations (hereinafter ASEAN Charter),² including an article that mandates the creation of an ASEAN human rights body (AHRB).³ Since ASEAN has never had any human rights organ, the adoption of the ASEAN Charter could be viewed as a major step forward in the process of establishing a human rights mechanism for ASEAN. It is, however, too soon to have any sense of accomplishment. The process is not over yet. In fact, it has just started. The ASEAN Charter does contain elements that could affect the prospect of a strong AHRB. In the ASEAN Charter, the non-intervention principle retains its supremacy and is placed above the adherence to human rights norms. The traditional decision-making rule of consensus remains the working principle of the ASEAN. While the ASEAN Charter respects human rights and fundamental freedoms, it does not explicitly refer to any universally accepted human rights standards, such as the Universal Declaration of Human Rights⁴ and other major human rights treaties that have set expectations for state behaviors on human rights. This leaves a lot of room for ASEAN states to interpret the contents of human rights in a way that fits with their interests. Moreover, the ASEAN Charter fails to provide any concrete guidelines regarding the setting up of the body or a timeframe for establishing a human rights body even if it calls for its creation.

¹ The Association of Southeast Asian Nations (ASEAN) was established in 1967 and currently consists of Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Viet Nam.

² ASEAN, Charter of the Association of Southeast Asian Nations (hereinafter ASEAN Charter), Nov. 20, 2007, *available at* <http://www.aseansec.org/21069.pdf>. ASEAN is a treaty establishing the legal and institutional framework for ASEAN. It has three chapters, 55 articles, and four annexes. While it has been signed by ASEAN Leaders, the Charter has to be ratified by each member country, according to each one's ratification and legislative processes. Singapore, Brunei, Malaysia, Laos, Viet Nam, Cambodia and Myanmar have submitted instruments of ratification. This leaves Indonesia, the Philippines and Thailand as the last three ASEAN nations which have not ratified the Charter yet.

³ ASEAN Charter, *supra* note 2, art. 14, "ASEAN shall establish an ASEAN human rights body". This body will operate in accordance with the terms of reference to be adopted by ASEAN Ministerial Meeting.

⁴ Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A (III), U.N. DocA/810.

Changes have been made and impetus created for further developments but human rights activism within ASEAN is still at its very initial stage.⁵ Almost all human rights mechanisms are non-legally binding. They are much more of general political commitment by nature rather than plans of concrete steps to be taken. They exist without a monitoring and reporting procedure. Though many conferences and forums for discussion have been organized and some technical cooperation and information exchange frameworks have been promoted, human rights cooperation in the region has primarily been restricted to capacity building. It is understandable, therefore, if one casts doubts over the possibility of a really strong ASEAN human rights mechanism, based on this loose and rhetoric framework that ASEAN has established so far.

Domestic political security concerns, internal circumstances,⁶ the discussion on the Asian values,⁷ the debate over an ASEAN human rights mechanism,⁸ the principle of non-interference,⁹ and the “ASEAN way”¹⁰

⁵ In total, after 40 years since its establishment, ASEAN has been able to produce five declarations on human rights: the Declaration of the Advancement of Women in the ASEAN Region (1988), Declaration on the Commitments for Children in ASEAN (2001), Declaration against Trafficking in Persons Particularly Women and Children (2004), Declaration on the Elimination of Violence Against Women in the ASEAN Region (2004), and Declaration on the Protection and Promotion of the Rights of Migrant Workers (2007). These declarations, however, are not legally binding. They merely include political commitments and do not specifically say how they will implement their provisions.

⁶ In Southeast Asia, differences could be found from all perspectives. In terms of economic development, there are a group of nations with a higher level of development, including Brunei, Indonesia, Malaysia, the Philippines, Singapore and Thailand, and a group of nations with a lower level of development which is composed of Cambodia, Laos, Myanmar and Viet Nam. In terms of politics, the region comprises of socialist-oriented regimes (Viet Nam and Laos), a military government (Myanmar), a capitalist group (Indonesia, Malaysia, the Philippines, Singapore, and Thailand), a monarchy (Brunei), and two states which have just ended their internal conflicts (Cambodia and Timor Leste). In terms of religion, Indonesia is a Muslim nation; Cambodia, Laos and Thailand are Buddhist states, the Philippines and Timor Leste are mainly Christian.

⁷ Although the debate on Asian values is not as contentious as it was in the 1990s, the “Asian values” thesis still constitutes a common approach for many nations in the region to addressing the issue of human rights.

⁸ During the process towards an ASEAN human rights body, Malaysia and Indonesia went ahead with a proposal for the establishment of a mechanism involving only member-countries who were ready for it. *See Working Group for an ASEAN Human Rights Mechanism, Roundtable Discussion on Human Rights in ASEAN: Challenges and Opportunities for Human Rights in a Caring and Sharing Community – Summary of Proceedings* (Jakarta, Dec. 18 - 19, 2006), *available at* http://www.aseanhrmech.org/conferences/summary_of_proceedings_final.pdf.

⁹ Non-interference has been recognized as a guiding principle for ASEAN since 1967 when the leaders of Indonesia, Malaysia, the Philippines, Singapore and Thailand adopted the Bangkok Declaration on 8 August 1967 to establish ASEAN, determining

suggests a growing gap between two groups of nations in the region. Even Singapore's Minister of Foreign Affairs Tommy Koh recognized the division within ASEAN between the two groups: the first one comprised of Indonesia, Malaysia, the Philippines and Thailand and the second one comprised of Myanmar, Laos, Cambodia, and Vietnam.¹¹ The first group attempts to rethink traditional norms or even calls for norm changes. The second group tries to preserve the status quo, which could best serve their political interests. Impetus for change among some ASEAN original countries is countered by the cautious conservatism of new members. These divergent political orientations of ASEAN members in their approaches to human rights cooperation may have a negative impact on the prospect for adopting a terms of reference to establish a regional inclusive human rights body, as mandated in the ASEAN Charter.¹²

In the process of building a human rights mechanism for ASEAN, challenges are certainly still ahead. Protection of human rights in Southeast Asia needs more than a spokesperson agency with no real power. What the region needs is a strong mechanism that is composed of independent experts who are able to: investigate and evaluate reports of human rights violations; consider individual complaints free from outside

that their stability cannot be affected by any forms or manifestations of interference. Recent events, however, might indicate that there have been some positive developments among a group of regional nations in terms of understanding and interpreting the non-interference principle. Calls for the need to rethink the principle have been made by officials from Malaysia, the Philippines and Thailand. See John Funston, *ASEAN and the Principle of Non-Intervention: Practice and Prospects*, in *Non-Intervention and State Sovereignty in the Asia-Pacific* 9, 10 (David Dickens & Guy Wilson-Roberts eds., Centre for Strategic Studies, 2000); Robin Ramcharan, *ASEAN and Non-Interference: A Principle Maintained*, 22 *CONTEMP. SOUTHEAST ASIA* 60-89 (2000); Amitav Acharya, *How Ideas Spread: Whose Norms Matter? Norm Localization and Institution Change in Asian Regionalism*, 58 *INT'L ORG.* 239, 262 (2004).

¹⁰ The "ASEAN way" is generally characterized by four elements: (1) respects for the internal affairs of other members; (2) non-confrontation and quiet diplomacy; (3) non-recourse to use or threat to use of force; and (4) which is more unique to ASEAN: decision-making through consensus. See Hiro Katsumata, *Reconstruction of Diplomatic Norms in Southeast Asia: The Case for Strict Adherence to the 'ASEAN Way'*, 25 *Contemp. Southeast Asia* (2003); see also Beverly Loke, *The 'ASEAN Way': Towards Regional Order and Security Cooperation*, 30 *MELBOURNE J. POL.* 8 (2005). According to Jurgen Haacke, 'the ASEAN way' is decomposed into six elements: sovereign equality, quiet diplomacy, non-recourse to use or threat to use of force, non-involvement in bilateral disputes, non-interference and quiet diplomacy. See Jurgen Haacke, *ASEAN's diplomatic and security culture: a constructivist assessment*, 3 *INT'L REL. OF THE ASIA-PACIFIC* 57, 59 (2003).

¹¹ Agence France-Presse, *ASEAN rights body should include all members: panel*, <http://www.asiaone.com/News/Latest%2BNews/Asia/Story/A1Story20080613-70743.html> (last visited Apr. 9, 2009).

¹² *Supra* note 3.

interference; and make decisions that the concerned nations are obligated to follow.

Given that it is unlikely that an ASEAN human rights body to be established by the ASEAN Charter will adequately and effectively respond to human rights problems in the region, an earlier study¹³ suggested that there may be a group of nations within Southeast Asia that may be more ready for a stronger human rights mechanism.¹⁴ This sub-regional group of countries may have conditions to establish a more effective human rights mechanism that they as well as people across the region deserve to have. Therefore, a selective approach should be adopted among more advanced states that have better human rights records and stronger political will to establish a human rights court. The reason is that there are existing conditions that contribute to realizing the idea in the future, although much remains to be done before that goal can be reached. The proposed Southeast Asian Court of Human Rights (SEACHR) will exist and operate in parallel with the AHRB under the ASEAN Charter and will gradually expand to include other nations in the region which at that time are capable and willing to do so.

With these ideas in mind, this article attempts to discuss the institutional design of the SEACHR, including its founding treaty (Part II), contentious jurisdiction (Part III), advisory jurisdiction (Part IV), compositional details (Part V), organizational structure and procedure (Part VI), financial and administrative arrangement (Part VII), the issue of enforcement (Part VIII), and the Court's relationships with other important actors within and without the region (Part IX). This article aims to provide a preliminary, yet relatively comprehensive blueprint for a regional human rights court in Southeast Asia. Since the development of a SEACHR is

¹³ Hao Duy Phan, *A Selective Approach to Establishing a Human Rights Mechanism in Southeast Asia: A Case for a Southeast Asian Court of Human Rights*, Asian Society of International Law, Young Scholars Workshop, Singapore, Sept. 10-12, 2008, available at http://law.nus.edu.sg/asiansil/workingpapers/2008/doc/10_Hao%20Duy%20Phan.pdf.

¹⁴ As a point of departure Indonesia, Malaysia, the Philippines and Thailand are considered important actors to initiate the process. They appear to be in a better position than other regional states in terms of managing human rights issues and participating into the global framework of human rights protection. Officials and members of Congress from these four countries have been more active in pushing for changes in the matters of human rights in within ASEAN. Among the 10 ASEAN members, only Indonesia, Malaysia, the Philippines and Thailand currently have their own independent national human rights bodies. The NGOs networks, an important force behind any idea of human rights evolution, are stronger in these four countries. They also have a long history of cooperating with each other in many fields. They were all founders of ASEAN. Even before that, Indonesia, Malaya and the Philippines also established the Association of Southeast Asia (ASA). Of course this does not mean that they will accept the proposal immediately without reservation. One cannot rule out the possibility that Malaysia may be hesitant to join the Court while Cambodia may consider and Timor Leste might prove willing and ready.

understandably a very complicated process, this article does not attempt to provide the best answers to all questions or seek to produce solutions to all problems. Rather, this article endeavors to provoke a much needed debate on certain important aspects of the proposed SEACHR and advance some recommendations that might be open to further discussions.

While this article focuses its attention on a human rights court for Southeast Asia, it is important and instructive to refer to three other regional human rights courts in Europe, America and Africa.¹⁵ Experiences of other regional human rights courts are useful because these regions have come a considerably longer way than Southeast Asia in successfully establishing and designing their own human rights courts. Also, their developments may provide important insights into many problems that Southeast Asia will probably encounter in the future. In fact, international and regional courts have many lessons to learn from each other. For instance, the International Court of Justice (ICJ) inherited from its predecessor, the Permanent Court of International Justice, which was in turn influenced by the rules of procedure of the Permanent Court of Arbitration.¹⁶ Creators of the International Tribunal of the Law of the Sea did learn a lot from their colleagues at the ICJ. Similarly, experiences of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) were useful and instrumental in the subsequent establishment of the International Criminal Court. The creation and operation of the European Court of Human Rights (ECHR) provided various lessons for the Inter-American Court of Human Rights (IACHR)¹⁷ and both of them were invoked as models for the African Court of Human and Peoples' Rights (ACHPR).¹⁸ It is advisable, therefore, to refer to these courts for both inspirations and practical suggestions to address problems that a future SEACHR might face. The purpose would be to weigh both the advantages and disadvantages of most

¹⁵ The European Court of Human Rights was founded by the European Convention for the Protection of Human Rights and Fundamental Freedoms to monitor and ensure compliance by Signatory Parties; *see generally* European Court of Human Rights Homepage, <http://www.echr.coe.int/echr/> (last visited Apr. 13, 2009). The Inter-American Court of Human Rights was established in 1979 with a view to enforcing and interpreting the provisions of the American Convention on Human Rights; *see generally* Inter-American Court of Human Rights Homepage, <http://www.corteidh.or.cr/> (last visited Apr. 13, 2009). The African Court on Human and Peoples' Rights was established by the Protocol to the African Charter on Human and Peoples' Rights. It came into being in 2004 after the 15th state in the region submitted its ratification of the Protocol.

¹⁶ DANIEL TERRIS ET AL., *THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES* 108 (2007).

¹⁷ *See* SCOTT DAVIDSON, *THE INTER-AMERICAN HUMAN RIGHTS SYSTEM* 31 (1997); VINCENT O. ORLU NMEHIELLE, *THE AFRICAN HUMAN RIGHTS SYSTEM: ITS LAWS, PRACTICE, AND INSTITUTIONS* 58 (2001).

¹⁸ TERRIS, *supra* note 16.

of basic institutional features of a selective court of human rights in Southeast Asia in order to propose a feasible and arguably optimal institutional design for the SEACHR.

A note of clarification is in order with regard to the case of the African human rights system. It might be noted that when the Organization of African Unity (OAU) decided to adopt the Constitutive Act of the African Union (AU) and transform itself from OAU to AU,¹⁹ it also established an African Court of Justice (ACJ) in charge of resolving disputes relating to regional economic and political integration.²⁰ Accordingly, there were two different Courts under the AU, namely the ACJ and ACHPR. This was similar to the European system, which includes both the European Court of Justice (ECJ) and the ECHR. Due to resource constraints, the Assembly of Heads of States and Government of AU, in their 11th Ordinary session in July 2008, decided to merge these two courts by adopting the Protocol on the Statute of the African Court of Justice and Human Rights (hereinafter the new Protocol). The new Protocol shall enter into force thirty days after the deposit of the instruments of ratification by fifteen member states of the AU.²¹ After the entry into force of this new Protocol and for a transitional period not exceeding one year or any other period determined by the AU Assembly, the Protocol to the African Charter of Human and Peoples' Rights shall remain to enable the ACHPR to take the necessary measures for the transfer of its prerogatives, assets, rights and obligations to the new Court.²² As provided in the new Protocol, the new Court will have two sections, including a General Affairs Section and a Human Rights Section, each composed of eight judges.²³ Key changes also include an expansion in the new Court's jurisdiction,²⁴ an increase in the number of judges from

¹⁹ The Constitutive Act of the African Union art. 18, OAU Doc. CAB/LEG/23.15, was adopted on July 11, 2000 and entered into force on May 26, 2001.

²⁰ The Constitutive Act of the African Union art. 25, July 11, 2000, OAU Doc. CAB/LEG/23.15.

²¹ Protocol on the Statute of the African Court of Justice and Human Rights art. 9, July 2008, *available at* <http://www.interights.org/documentbank/index.htm?id=509>.

²² *Id.*

²³ *Id.*

²⁴ According to article 28 of the Protocol on the Statute of the African Court of Justice and Human Rights, the new Court shall have jurisdiction over all cases relating to: "a) the interpretation and application of the Constitutive Act; b) the interpretation, application or validity of other Union Treaties and all subsidiary legal instruments adopted within the framework of the Union or the Organization of African Unity; c) the interpretation and the application of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relating to human rights, ratified by the States Parties concerned; d) any question of international law; e) all acts,

eleven to sixteen,²⁵ and the absence of a provision that grants allegedly victims of human rights direct access to the new Court.²⁶ For the purpose of this research and as the new Protocol has not entered into force, this article refers to the currently existing ACHPR as a separate court, which was established by the African Charter on Human and Peoples' Rights (hereinafter African Charter) and the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples Rights' (hereinafter the African Protocol), instead of a Human Rights Section under the new Court.

II. FOUNDING TREATY: SUBSTANTIVE LAW VS. PROCEDURAL LAW

A regional court with an authority to issue binding judgments cannot be established by a political statement or a regional conference resolution. The reason is that political documents do not create legal obligations upon member states. A SEACHR should therefore be established by a treaty concluded in accordance with the Vienna Convention on the Law of Treaties.²⁷ This founding treaty shall have binding force and be performed by all parties to it in good faith (*pacta sunt servanda*).²⁸ Member states cannot invoke their domestic laws as a justification for their failure to implement the treaty.²⁹ Prior to the entry into force of the founding treaty, those states that have signed it shall refrain from acts which may defeat its object and purpose.³⁰ Articles within the treaty shall be interpreted in accordance with the ordinary meaning and in light of its object and purpose.³¹

The ECHR was established by the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter

decisions, regulations and directives of the organs of the Union; f) all matters specifically provided for in any other agreements that States Parties may conclude among themselves, or with the Union and which confer jurisdiction on the Court; g) the existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the Union; h) the nature or extent of the reparation to be made for the breach of an international obligation." *Id.* art. 28.

²⁵ *Id.* art. 3(1).

²⁶ Three groups of entities shall be entitled to submit cases to the new Court: State Parties; the Assembly, the Parliament and other organs of the Union authorized by the Assembly and a staff member of the African Union on appeal, in a dispute and within the limits and under the terms and conditions laid down in the Staff Rules and Regulations of the Union. *Id.* art. 29(1).

²⁷ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

²⁸ *Id.* art. 26.

²⁹ *Id.* art. 27.

³⁰ *Id.* art. 18.

³¹ *Id.* art. 31(1).

European Convention).³² Similarly, the IACHR was founded by the American Convention on Human Rights (hereafter American Convention).³³ The ACHPR was created with the adoption and entry into force of the African Charter³⁴ and its Additional Protocol.³⁵ All of these instruments are international treaties negotiated and concluded under the three regional organizations: the Council of Europe, the OAS, and the OAU (now the AU) respectively. For Southeast Asia, the proposed SEACHR is only for a certain number of regional countries and does not necessarily have to be placed under the ASEAN aegis. First, it is unlikely that ASEAN as a whole will accept this proposal in any form and under either selective or inclusive approach. Second, if the SEACHR were to be operated under ASEAN, then Timor Leste would not be able to join it.³⁶ Third, ASEAN has its own working method: the principle of consensus may lead to a weak mechanism and cannot produce a strong court. The best way forward may be to convene meetings of regional states for consideration of this proposal and to start drawing up a regional convention. The Rome Statute of the ICC, for instance, was in fact adopted on July 17, 1998 by a meeting of states, not under a specific international or regional organization.³⁷

With regards to the content of the treaty, SEACHR prospective members have two options to select: (1) a treaty on both substantive rights and procedural issues, or (2) a treaty on procedural issues only. On the other hand, founding instruments of other regional human rights courts are treaties of both substantive issues and procedural matters. Framers of the European Convention sought to pursue two purposes at the same time: (1)

³² Convention for the Protection of Human Rights and Fundamental Freedoms art. 13, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953, *as amended by* Protocols Nos. 3, 5, 8, and 11 *which entered into force* on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 *respectively*.

³³ American Convention on Human Rights, Nov. 22, 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* Jul. 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

³⁴ African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986.

³⁵ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III).

³⁶ At the moment, Timor Leste is not a member of ASEAN.

³⁷ The ICC was established by the Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 and started its operation in operations in 2002 after the Rome Statute came into effect upon obtaining the necessary 60 ratifications. *See generally* International Criminal Court Homepage, <http://www.icc-cpi.int/> (last visited Apr. 13, 2009).

laying out a catalogue of rights and freedoms, and (2) setting up a strong system for human rights protection and promotion.³⁸ In the Western hemisphere, OAS states followed the same approach, adopting a convention with a list of substantive rights and two mechanisms to ensure enforcement of these rights. Prior to that, American states had shortly come up with the idea of a treaty of procedural law but then rejected it. In 1948, the Ninth International Conference of American States asked the Inter-American Judicial Committee to prepare a draft statute on the establishment of a regional court of human rights. The Inter-American Judicial Committee submitted a report, suggesting that because of the “lack of positive substantive law on the subject,” there should be a treaty on substantive rights before such a court could be created.³⁹

In the case of Africa, although the ACHPR was not directly established by the African Charter but by its Additional Protocol, which is a procedural law document, it is required by Article 34(1) in the Protocol that every state wishing to become a party to the Protocol must firstly be a member of the African Charter. The two documents are not separate but rather complementary of each other in bringing the ACHPR into existence. While its Additional Protocol focuses on procedural issues of a human rights court, the African Charter stands out as one of the most comprehensive human rights treaties, covering a wide range of rights including civil, political, economic, social and cultural and group rights.⁴⁰ It also established an African Commission on Human and Peoples’ Rights (hereinafter African Commission) under the institutional framework of the OAU. The substantive rights provided in these instruments are all inspired by the Universal Declaration of Human Rights.⁴¹ These rights are stated in relatively general terms as the more precise contents of specific obligations are given through the precedents set by regional courts.⁴²

³⁸ European Court of Human Rights, *Survey Activities* 3 (2005) (hereinafter *Survey Activities*).

³⁹ CECILIA MEDINA QUIROCA, *THE BATTLE OF HUMAN RIGHTS: GROSS, SYSTEMATIC VIOLATIONS AND THE INTER-AMERICAN SYSTEM* 161 (1988).

⁴⁰ Robert Eno, *The Place of the African Commission in the New African Dispensation*, 11 *AFRICAN SECURITY REV.* (2002), available at <http://www.iss.co.za/Pubs/ASR/11No2/Eno.html>.

⁴¹ See *Survey Activities*, *supra* note 38; Hans Corell, *Judicial Redress: Can the European Court of Human Rights Set an Example?* 35 *U.N. Chronicle* 35 (1998); A. GLENN MOWER JR., *REGIONAL HUMAN RIGHTS: A COMPARATIVE STUDY OF THE WEST EUROPEAN AND INTER-AMERICAN SYSTEMS* 63 (1991); NMEHELLE, *supra* note 17, at 58; DAVIDSON, *supra* note 17, at 31; Nsongurua J. Udombana, *Toward An African Court of Human and Peoples’ Rights: Better late than never*, 3 *YALE HUM. RTS. & DEV. L.J.* 45, 60 (2000).

⁴² Hans Corell, *Judicial Redress: Can the European Court of Human Rights Set an Example?* 35 *U.N. CHRONICLE* 35 (1998).

Learning from these experiences of other regions, Southeast Asia should make attempts to conclude a treaty on both substantive and procedural issues. First, Southeast Asia is very much in need of clear and consistently shared legal human rights standards. Second, a substantive and procedural legal document can help more clearly delineate the subject-matter jurisdiction of the SEACHR, based on which judges may find it easier carry out their work without worrying about the possibility of duplication.⁴³ Third, with a substantive document for itself, Southeast Asia can later decide to broaden or narrow the scope of rights, insert additional rights, and adjust the content of some rights to reflect the actual practices of the region in accordance with regional particularities.⁴⁴ The American Convention, for example, added a number of rights that are not found in its European counterpart, i.e., compensation for miscarriage of justice, the right to have name and nationality, equality before the law, the right of reply, the right of the child, and the right to asylum.⁴⁵ African states also created in the African Charter the concept of individual duties (Articles 27 and 29)⁴⁶ and collective rights (Articles 20 and 21).⁴⁷ They inserted in the African Charter certain group rights that do not exist in other regional treaties, such as the rights to self-determination, to the equality of peoples, the non-domination of one people by another and the right to dispose of natural wealth and resources in the interest of the people.⁴⁸

On the other hand, while drafters of a substantive legal document may flexibly leave out certain unenforceable rights or insert additional

⁴³ This will be further discussed later.

⁴⁴ During the drafting process of the American Convention on Human Rights, some countries were of the view that the Convention should follow the wording of the United Nations covenants. The majority of delegates, however, did not agree, arguing that "it was appropriate to introduce any modifications that were desirable in the light of circumstances prevailing in the American Republics." Jo M. Pasqualucci, *The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law*, 26 U. MIAMI INTER-AM. L. REV. 297, 305 (1995).

⁴⁵ A note on the inclusion of economic, social, and cultural rights: there was debate as to whether the American Convention should cover economic, social, and cultural rights. This debate was a compromise to insert Article 26 under which member states undertook to take appropriate legislative and other measures to achieve progressively the full realization of these rights. See MOWER JR., *supra* note 41, at 47.

⁴⁶ The idea is that there exists the reciprocity of rights and duties as an individual's rights will never be divorced from their obligations towards society. See Vincent O. Orlu Nmeielle, *Towards an African Court of Human Rights: Structuring and the Court*, 6 ANN. SURV. INT'L & COMP. 27, 36 (2000).

⁴⁷ Individual rights are not to be invoked atomistically by individuals separated from their community. Rights are always embedded in society, with individuals invoking their rights as a collective people from within a society.

⁴⁸ African [Banjul] Charter on Human and Peoples' Rights, *supra* note 34, arts. 19-24.

rights into the treaty, they may also create a “claw back clause,” for example, stating that certain rights can only be ensured within domestic law, as in the case of the Africa Charter.⁴⁹ Moreover, negotiation of such a treaty may take much more time than drafting a treaty which adjusts merely procedural matters because position differences are not always easy to be compromised. A simpler way is to refer to the international treaties to which the member countries have acceded at the time a given case is brought to the court as the legal basis for the court’s contentious jurisdiction.

Unlike the world in 1948 when the American Declaration on the Rights and Duties of Man was adopted or in 1950 when the European Convention was opened for signature, the international community has now established a relatively comprehensive legal framework of human rights protection, covering a variety of rights and including many instruments such as the International Covenant on Civil and Political Rights (ICCPR),⁵⁰ the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁵¹ (known together as the International Bill of Human Rights),⁵² the Convention on the Prevention and Punishment of the Crime of Genocide,⁵³ the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),⁵⁴ the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),⁵⁵ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT),⁵⁶ the Convention on the Rights

⁴⁹ *Id.* arts. 9, 11.

⁵⁰ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (Dec. 16, 1966), 999 U.N.T.S. 171.

⁵¹ International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200a (XXI), 21 U.N. GAOR Supp. (No. 16) at 49; U.N. Doc. A/6316 (Dec. 16, 1966), 993 U.N.T.S. 3.

⁵² Amy Howlett, *Getting Smart: Crafting Economic Sanctions That Respect All Human Rights*, 73 Fordham L. Rev., 1199, 1204 (2004); Fact Sheet No. 2 (Rev. 4).

⁵³ Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 (III), Dec. 9, 1948, 78 U.N.T.S. 277.

⁵⁴ International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (Dec. 21, 1965), 660 U.N.T.S. 195.

⁵⁵ International Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46 (Dec. 18 1979), 1249 U.N.T.S. 13, 19 I.L.M. 33.

⁵⁶ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (Dec. 10, 1984), 1465 U.N.T.S. 85.

of the Child (CRC),⁵⁷ the International Convention on the Protection of the Rights of All Immigrant Workers and Members of their Families (ICRMW),⁵⁸ and the Convention on the Rights of Persons with Disabilities (CPD).⁵⁹ In Southeast Asia, the Philippines, Indonesia, Malaysia, Thailand, Timor Leste and other regional nations have ratified these treaties and committed to many universal human rights standards. The treaties themselves could serve as substantive law for the work of a regional court. Under this approach, the SEACHR, for instance, would apply ICCPR, ICESCR, ICERD, CEDAW, CAT, CRC to the Philippines and CERD, CEDAW, CAT and CRC to Indonesia.

One potential problem with this approach is that among recognized economic, social and cultural rights, certain rights in those universal treaties may not be enforceable or justiciable immediately, given their aspirational nature.⁶⁰ This problem might be solved by the SEACHR's case-law and practice: it would decide which enforceable rights have been actually violated, whether states have negative or positive obligations to respect and protected the rights in question, and how to preserve the indivisibility of all human rights given the aspirational nature of economic, social and cultural rights. Although ICESCR framers failed to establish a body to receive and consider individual communications,⁶¹ the draft Optional Protocol to the ICESCR on that possibility is now pending before the General Assembly for adoption.⁶² According to the draft

⁵⁷ Convention on the Rights of the Child, G.A. Res. 44/25, Annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (Nov. 20, 1989), 1577 U.N.T.S. 3.

⁵⁸ International Convention on the Protection of the Rights of All Immigrant Workers and Members of their Families, G.A. Res. 45/158, Annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (Dec. 18, 1990).

⁵⁹ Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Jan. 24, 2007).

⁶⁰ JULIE A. MERTUS, *THE UNITED NATIONS AND HUMAN RIGHTS: A GUIDE FOR A NEW ERA* 102 (2005). See Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 156 (1987) (discussing debate on the justiciability of economic, social and cultural rights); Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT'L L. 365 (1990); Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should there be an International Complaints Mechanism to adjudicate the Rights to Food, Water, Housing, and Health?*, 98 AM. J. INT'L L. 462, 462-513 (2004).

⁶¹ It should be noted that the ICESCR Committee was established by an ECOSOC resolution, rather than through the ICESCR itself.

⁶² The ICESCR Committee has been studying the possibility of an optional protocol to the IESCR since 1990. It submitted a draft proposal for to the UN Commission on Human Rights (now Human Rights Council) in 1996. An Independent Expert was assigned to work on the possibility from 2001 to 2003. An open-ended Working Group was then established in 2004 to discuss the draft. In April 2008, the

Optional Protocol, all rights under the ICESCR are justiciable, except for the right to self-determination.⁶³

Another concern is the issue of overlapping jurisdiction. A violation of the ICCPR committed by the government of the Philippines, for example, could be submitted to either the SEACHR or the Human Rights Committee which may arguably lead to duplication and inconsistent interpretation.⁶⁴ This problem might be solved by inserting into the founding treaty an admissibility criterion requiring that SEACHR will not receive any application previously or currently dealt with by another international or regional mechanism.

In the process of working towards an ASEAN human rights body (AHRB), the Working Group for an ASEAN human rights mechanism recommended the procedural approach. They submitted to ASEAN a draft agreement on the establishment of an ASEAN Human Rights Commission which basically regulates only procedural matters.⁶⁵ This is a practical move as it was unlikely that ASEAN was able to conclude any substantive human rights treaty at that time. Even the draft agreement was not accepted by ASEAN. After nearly ten years, the situation in Southeast Asia is now not exactly the same as it was before. While a substantive legal document is not feasible for ASEAN as a whole, it may become a possibility for certain nations in the region that have better human rights records and more receptive attitudes towards the idea of a strong regional human rights mechanism. Even though the negotiation of such a treaty will not be easy, it will not be impossible since it is expected that the treaty will basically restate those rights provided by the commonly accepted Universal Declaration of Human Rights while making some adjustments or adding some elements reflecting regional practice and particularities. On the plus side, the contentious jurisdiction of the future SEACHR will be much clearer with a substantive and focused legal basis.

A substantive human rights document for Southeast Asia will also help deal with the problems of overlapping jurisdiction or justiciability. States are more likely to join the Court knowing the specific subject-

Working Group submitted the draft Protocol to the Human Rights Council. The Human Rights Council adopted the draft Protocol in June 2008 by resolution HRC Res. 8/2. The draft Protocol is now pending before the General Assembly for adoption. See Michael J. Dennis & David P. Stewart, *supra* note 60, at 462-513 (2004).

⁶³ Draft Optional Protocol to the ICESCR art. 2, as adopted by the Human Rights Council by resolution HRC Res. 8/2.

⁶⁴ For the issue of duplication, see Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should there be an International Complaints Mechanism to adjudicate the Rights to Food, Water, Housing, and Health?*, 98 AM. J. INT'L L. 462, 504-05 (2004), *supra* note 60, at 504-05.

⁶⁵ (Draft) Agreement on the Establishment of the ASEAN Human Rights Commission, available at <http://www.aseanhrmech.org/downloads/draft-agreement.pdf> (last visited Aug. 29, 2008).

matter jurisdiction to be applied and the criteria to be used to determine whether and to what extent their conduct will be reviewed.⁶⁶ Thus, the best option is to start the process with a draft of both substantive rights and procedural issues. Opting for a treaty on merely procedural issues should only be the last resort if regional states find it impossible to conclude, for the time being, a substantive human rights treaty.

III. CONTENTIOUS JURISDICTION: THE ISSUES OF ACCESSIBILITY AND ADMISSIBILITY

Regardless of whether it is an instrument of substantive law or a document of procedural law, the SEACHR founding treaty still has to address the principal question regarding the SEACHR's jurisdiction. Jurisdictional provisions are usually considered one of the most important issues of a founding treaty as they will determine who might bring a case before the SEACHR and what types of human rights violations that the SEACHR would examine.⁶⁷ Usually, the founding treaty would confer upon the SEACHR both adjudicatory (contentious) and advisory functions. The ECHR, IACHR and ACHPR, for example, are all authorized not only to deliver judgments in contentious cases but also to respond to requests for advisory opinions.⁶⁸ The former function involves the court's power to adjudicate on contentious cases relating to claims that a state party has committed a human rights violation. The latter involves the court's power to issue interpretative opinions and offer legal advice on a certain legal subject. It should be noted that the court's jurisdiction is not unlimited. The court can only deal with the authorized scope of rights (subject-matter jurisdiction), receive contentious complaints and advisory requests from authorized actors (personal jurisdiction), and accept cases that meet all authorized admissibility criteria.

A. *Subject-matter Jurisdiction (Jurisdiction Ratione Materiae): Legal Bases for the Court's Contentious Jurisdiction*

Article 32(1) of the European Convention provides that the ECHR's jurisdiction covers all matters concerning the interpretation and application of the European Convention and its protocols. Article 62(3) of the American Convention affirms that the IACHR's jurisdiction comprises all cases concerning the interpretation and application of the American Convention. The African Protocol, in Article 3(1), goes even further than

⁶⁶ See Dennis & Stewart, *supra* note 60, at 489.

⁶⁷ See Udombana, *supra* note 41, at 86.

⁶⁸ Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 32, art. 32, 33, 34, 47; American Convention on Human Rights, *supra* note 33, arts. 62-64; Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, *supra* note 35, arts. 3 & 4.

its European and American counterpart in extending the jurisdiction of the ACHPR to include all cases concerning the interpretation and application of the African Charter, the Protocol and any other relevant human rights instruments ratified by the states concerned. The fact that the ACHPR's subject matter includes all "other relevant human rights instruments ratified by the states concerned" in addition to the African Charter and the Protocol is remarkable as it allows cases to be submitted on the basis of any human rights treaty to which the states concerned are party.⁶⁹ This, on the one hand, gives judges of the ACHPR a very broad mandate to do their job. On the other hand, it may render the work of the Court more complicating and less predictable, compared to a specific and clear subject-matter jurisdiction assigned to the ECHR and IACHR. That is in addition to the problems of overlapping jurisdiction and the enforceability of certain rights as discussed earlier. Given the pros and cons, the best option for Southeast Asia is to try to conclude a substantive human rights treaty and limit the contentious subject-matter jurisdiction of the SEACHR only to that treaty.

B. *Personal Jurisdiction (Jurisdiction Ratione Personae): Accessibility to the Court*

Under the Inter-American and African human rights systems, the use of regional courts' contentious jurisdiction is optional. State parties to the American Convention and the African Charter can choose to accept the compulsory jurisdiction of the courts if they wish to do so. In the case of the IACHR, they can make a declaration recognizing as binding, *ipso facto* or on an *ad hoc* basis by special agreement for a particular case.⁷⁰ In the case of the ACHPR, members of the African Charter may become a party to the ACHPR by ratifying the African Protocol.⁷¹ The European system goes further by requiring all state parties to the European Convention to accept the court's contentious jurisdiction.⁷² This is probably the best option for Southeast Asia because that option is the strongest version and because the SEACHR is not an organ of ASEAN, unlike IACHR and ACHPR. Rather, the SEACHR is a human rights court for only some regional states. States that conclude the SEACHR founding

⁶⁹ Frans Viljoen, *A Human Rights Court for Africa, and Africans*, 30 BROOK. J. INT'L L. 1, 46 (2004).

⁷⁰ Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. American Convention on Human Rights, *supra* note 33, art. 62.

⁷¹ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, *supra* note 35, art. 34(1).

⁷² Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 32, art. 19.

treaty are those that wish to be its members. The founding treaty, therefore, can directly establish compulsory contentious jurisdiction over all of its state parties without exception.

1. Individuals

When it comes to human rights promotion and protection, individuals have become the center of the judicial process. In the areas of human rights law, the state-centric paradigm that states are the only subjects does not stand any longer.⁷³ Human rights violations are mostly committed by states against individuals. Thus individuals are the usual complainants of human rights violations as well as recipients of reparations in human rights cases.⁷⁴ As individuals mark their presence at the beginning and at the end of the process, they should be given the right to make complaints to the SEACHR.⁷⁵ In terms of procedure, that would make the process more transparent and avoid repetition that may occur if a case has to go through a commission or a body for that matter before reaching the SEACHR.⁷⁶

Some may be concerned that granting individuals access to the SEACHR's jurisdiction would effectively open its floodgate of claims, making it administratively impossible especially for a part-time human rights court to handle.⁷⁷ Nevertheless, while caseload is an important factor to consider in designing a court, it has more to do with procedural and organizational issues of the SEACHR rather than with the rights of direct access of the victims. Individuals should not be dispossessed of their rights to direct access to the SEACHR just because the SEACHR could face the problem of caseload or there needs a commission to serve as a filtering mechanism and accordingly reduce the SEACHR's caseload. As a matter of organization, the SEACHR can establish a filtering body within itself to do preliminary examinations and make decisions on the admissibility of a case.⁷⁸

⁷³ Abdelsalam A. Mohamed, *Individual and NGO Participation in Human Rights Litigation before the African Court of Human and Peoples' Rights: Lessons from the European and Inter-American Courts of Human Rights*, 8 MICHIGAN STATE UNIVERSITY - DCL J. INT'L L. 377, 393 (1999).

⁷⁴ NMEHIELLE, *supra* note 17, at 64.

⁷⁵ Antônio Augusto Cançado Trindade, *Current State and Perspectives of the Inter-American System of Human Rights Protection at the Dawn of the New Century*, 8 TUL. J. INT'L & COMP. L. 5, 44 (2000).

⁷⁶ *Id.* at 43.

⁷⁷ Pasqualucci, *supra* note 44, at 318. The issue of the Court's status (full-time or part-time) is discussed later in the article.

⁷⁸ This is one of the measures the ECHR is considering adopting with a view to remedying the problem of workload that the ECHR is facing. See Report of the Group of Wise Persons to the Committee of Ministers, Nov. 15, 2006, CM (2006) 203, ¶¶ 51-65.

Experiences from other regions suggest that individual right of direct access to human rights courts has been increasingly recognized. Prior to the entry into force of Protocol 11,⁷⁹ an individual could not have direct access to the ECHR although he or she could appear before the ECHR to give assistance to the delegates of the European Commission on Human Rights (hereinafter European Commission). Protocol 11 to the European Convention now empowers the ECHR to receive applications directly from any individual or group of individuals claiming to be the victim of violations by one of the states parties.⁸⁰ The Inter-American and African systems are not that accessible in allowing direct individual access: individual petitions can only go to the courts after the admissibility phase and the merits phase conducted by the Inter-American Commission on Human Rights (hereinafter Inter-American Commission). It is then up to the Inter-American Commission to submit the case to the IACHR. The African human rights system basically applies a similar approach to the Inter-American human rights system. However, both systems are going in the right direction in increasingly recognizing the standing of individuals before their courts. Specifically, the African system allows direct access to the ACHPR in the event that the states concerned have made a specific Optional Declaration to that effect.⁸¹ The IACHR defines the term “parties to the case” to include the “victim or the alleged victim, the State and, only procedurally, the Commission,”⁸² which permits the alleged victim to participate in all stages of the proceedings before the IACHR once the application has been filed with the IACHR.⁸³ It is interesting to note that both systems do not require that petitioners be the actual victims of the violations. Neither is it required that the complainants or petitioners be within the jurisdiction of the respondent state.⁸⁴ Clearly, all regions are going in the same direction to recognize more and more the right of individuals before their human rights courts. As a court of a limited number of certain states established under a selective approach, the

⁷⁹ Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, (ETS No. 155), Strasbourg, 11.V.1994.

⁸⁰ *Id.* art. 34.

⁸¹ Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, *supra* note 35, arts. 3(5) & 34(6).

⁸² M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 20 (2003).

⁸³ Douglas Cassel, *The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights*, in *OUT OF THE ASHES, REPARATION FOR VICTIMS OF GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS* 191 (K. De Feyter et al. eds., Intersentia, Antwerp 2005).

⁸⁴ NMEHIELLE, *supra* note 17, at 204.

SEACHR should allow direct access to individual to the Court, bearing in mind that unlike the Inter-American and African systems, the proposed SEACHR does not have a commission to serve as a filtering mechanism. SEACHR, however, can create a body within itself to be in charge of this important function to ensure that while an individual has the right to file a complaint to the court, the SEACHR must have the ability to handle the caseload and avoid delay in bringing justice to the victims.⁸⁵

2. States

In terms of who can file a complaint to regional human rights courts, the single common actor that one can find in the three existing regional systems of human rights is the state (inter-state complaints). Under Article 33 of the European Convention, the ECHR has contentious jurisdiction over inter-state cases, which are dealt with by its Grand Chamber. As provided in Article 61 of the American Convention, only state parties and the Inter-American Commission on Human Rights have the right to submit a case to the Court. This, however, does not grant American states unlimited access to their regional court of human rights. Before one state party may bring charges of human rights violations against another state party, both states must have made a separate declaration recognizing the competence to receive inter-state complaints by the Inter-American Commission.⁸⁶ According to Article 5 of the Protocol to the African Charter, the ACHPR can directly receive a complaint from a state whose citizen is victim of a human rights violation. A state which has lodged a complaint to the African Commission or a state party against which the complaint has been lodged at the African Commission can also submit complaints to the ACHPR.⁸⁷ For states, access to the ACHPR is automatic upon a state's ratification of the Protocol.⁸⁸

It is reasonable to expect that if a human rights court is to be established in Southeast Asia, states are allowed to bring cases to the court. Ultimately, it is states that will establish the SEACHR and approve its jurisdiction. Generally speaking, allowing states to directly use international courts could contribute to peacefully resolving international disputes. Granting states the right to make complaints to the SEACHR also helps redress human rights violations and bring justice to the victims.

⁸⁵ This is one of the measures the ECHR is considering adopting with a view to remedying the problem of workload that the ECHR is facing. *See* Report of the Group of Wise Persons to the Committee of Ministers, Nov. 15, 2006, CM (2006) 203.

⁸⁶ Thomas Buergenthal, *The Inter-American Court of Human Rights*, 76 AM. J. INT'L L. 231, 237 (1982).

⁸⁷ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, *supra* note 35, art. 5.

⁸⁸ *Id.*

The problem is that in all of the existing regional human rights systems and predictably in the proposed SEACHR, states rarely initiate cases against one another regarding human rights violations.⁸⁹ The records of the United Nations (UN) treaty-based bodies, for example, indicate that very few inter-state communications have been filed to the bodies. No state has ever referred any case to the IACHR.⁹⁰ The African Commission has not received a single inter-state communication, despite grave human rights violations in the African region such as the Rwandan genocide.⁹¹ One of the reasons is that states may be reluctant that the relationship between them and the respondent state would be affected. Another reason is that doing so may come back to hurt them in the future since they may face retaliatory actions from neighboring states. As a result, by law, states should be allowed to bring cases to the SEACHR, but at least for practical reasons, they should not be the only one claimant.

3. Non-Governmental Organizations (NGOs)

With regards to NGO right to file a complaint before the court, the ECHR stands out as the most developed system. Article 34 of the European Convention authorizes the ECHR to receive applications from any NGOs regardless of their nationality or whether not they have observer status with the Council of Europe, provided that it must be a victim by one of the state parties' violations of the rights set forth in the European Convention or the protocols thereto. While the American Convention does not require that the NGOs must be the victim of a human rights violation, it allows only those NGOs legally recognized in one or more member states of the OAS to submit petitions, as said, not directly to the IACHR but to the Inter-American Commission. It is then left to the Inter-American Commission to refer the case to the IACHR.⁹² In the African system, the competence of the ACHPR to receive NGO petitions is made contingent upon a declaration by states parties accepting such competence of the ACHPR.⁹³ It should be noted that NGO *locus standi* is limited to those with observer status before the African Commission. In deciding on the admissibility of a case submitted by a NGO, the ACHPR requests the opinion of the African Commission.⁹⁴ Similar to the Inter-

⁸⁹ Mashood A. Baderin, *Recent Developments in the African Human Rights System*, 5 HUM. RTS. L. REV. 117, 145 (2007).

⁹⁰ Douglas Cassel, *Book Review of J.M. Pasqualucci, The Practice and Procedure of the Inter-American Court of Human Rights*, 100 AM. J. INT'L L. 504 (2006).

⁹¹ Baderin, *supra* note 89. *See also* Dennis & Stewart, *supra* note 60, at 499.

⁹² American Convention on Human Rights, *supra* note 33, art. 44.

⁹³ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, *supra* note 35, art. 5(3) & 34(6).

⁹⁴ *Id.* art. 6(10).

American human rights system, there is no requirement under the African system that the NGO presenting the complaint be the victim of a violation or be located in the country against which the complaint is made. In fact, many entities based outside of Africa are among the most active litigants to appear before the African Commission on behalf of African victims.⁹⁵

For Southeast Asia, it is advisable that NGOs should be authorized to bring cases to the SEACHR. Compared to individuals, NGOs usually have more extensive resources to investigate and file complaints.⁹⁶ They can be found at all levels of society and across all regions, including in-conflict zones such as Aceh (Indonesia) or ex-conflict zones such as Timor Leste. They have broad working relationships with trade unions, the media, academia and the private sector. Their participation does not only assist the victims to fight justice for themselves, but also help the Court perform its mandate, not to mention that sometimes NGOs are also victims of human rights violations. It is nonetheless still unclear whether regional states will accept this option. In case it proves so difficult for them to approve this option, then some restriction on NGO *locus standi* can be added as an alternative solution: NGOs must be recognized by state parties and be the victims by one of the state parties before they can submit petitions to the SEACHR.

4. AHRB

As said, an AHRB is going to be established under the ASEAN Charter. If this proposal can be translated into reality, when the SEACHR comes into existence, the region will have two human rights mechanisms. Questions will be raised about the relationship between these two mechanisms, including the possibility of the AHRB bringing cases to the SEACHR. AHRB should have the right to refer cases to the Court in case it is authorized by ASEAN to receive individual communications, which is unlikely to happen. Under the Inter-American and African human rights systems, the Inter-American Commission and the African Commission both act as the primary actors in bringing cases to the IACHR and the ACHPR. The European human rights system also had a similar format prior to the entry into force of Protocol 11.⁹⁷ Granting the AHRB the right to bring cases to the SEACHR will not only help to enhance cooperation between the two mechanisms and contribute to regional human rights protection, but also enable the Court to make an impact on human rights

⁹⁵ Curtis F. J. Doebbler, *A Complex Ambiguity: The Relationship between the African Commission on Human and Peoples' Rights and Other African Union Initiatives Affecting Respect for Human Rights*, 13 *TRANSN'T L. CONTEMP. PROB.* 7, 13 (2003).

⁹⁶ Pasqualucci, *supra* note 44, at 315.

⁹⁷ Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, *Restructuring the Control Machinery Established Thereby*, *supra* note 79.

situations in countries it normally does not have access. Myanmar, Laos, and Viet Nam, for example, will not accept the SEACHR's jurisdiction although they will likely be a part of the AHRB's jurisdiction.⁹⁸

C. *Admissibility: Constitutional Justice Function v. Individual Justice Function*

A brief check of the admissibility criteria required by the European, Inter-American and African human rights systems suggests that one of the most common admissibility rules is the requirement to exhaust domestic remedies.⁹⁹ This should also be a primary admissibility requirement of the SEACHR. The basic rationale of this admissibility rule is that human rights must be protected first and foremost at the national level. A regional human rights court is not created to replace but rather to supplement national protective mechanisms. Human rights court should only deal with the violation that domestic remedies have been exhausted. The concerned states usually have more resources in terms of evidence, witnesses and documents to try cases, not to mention the impact that national courts may have, compared to a remote regional court, on the society. Nevertheless, to ensure that this complementarity rule is not abused by state parties, it should be further provided that if the application of local remedies is unreasonably prolonged or not in accordance with due process to bring effective relief, the Court may declare the petition admissible. Under the Inter-American system, the petitioner need not exhaust domestic remedies if domestic law does not afford due process, if he is prevented from exhausting domestic remedies, or if there is an unwarranted delay in rendering final judgment.¹⁰⁰ According to the African Charter, the requirement of local remedy exhaustion will not apply in cases of unduly prolonged procedures and unjustified delay.¹⁰¹

Another admissibility criterion that is shared by all three human rights systems in Europe, America and Africa and should be adopted by Southeast Asia as well is the requirement that cases submitted to the courts have not already been examined by another court or international proceeding.¹⁰² By virtue of this requirement, the possibility of duplication or overlapping jurisdiction may be avoided. Also, anonymous applications

⁹⁸ Viljoen, *supra* note 69, at 37.

⁹⁹ Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 32, art. 35(1); American Convention on Human Rights, *supra* note 33, art. 45(1); African [Banjul] Charter on Human and Peoples' Rights, *supra* note 34, art. 56(5).

¹⁰⁰ American Convention on Human Rights, *supra* note 33, art. 46(2).

¹⁰¹ African [Banjul] Charter on Human and Peoples' Rights, *supra* note 34, art. 56(5).

¹⁰² Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 32, art. 35(2); American Convention on Human Rights, *supra* note 33, art. 46(1); African [Banjul] Charter on Human and Peoples' Rights, *supra* note 34, art. 56(7).

may not be dealt with by the court.¹⁰³ The European and Inter-American systems further set a time limit of six months for the submission of communications since the date of local remedy exhaustion.¹⁰⁴ The African Charter includes two additional criteria regarding the written style being used (not in disparaging or insulting language)¹⁰⁵ and the sources of information on which the communication is based (not exclusively news from the mass media).¹⁰⁶ These are the two requirements that Southeast Asia should not apply.¹⁰⁷ The SEACHR's decision to deal with a human rights case should be made on whether human rights violations have been committed, rather than the writing style of the complaint. Moreover, if these two requirements are interpreted broadly, legitimate cases could be withheld.¹⁰⁸

Facing the critical problem of dramatically growing caseload,¹⁰⁹ the European human rights system has carried out a reform by adopting Protocol 14,¹¹⁰ according to which additional admissibility criteria are inserted, allowing the ECHR to declare inadmissible application where the

¹⁰³ Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 32, art. 35(2); American Convention on Human Rights, *supra* note 33, art. 46(1); African [Banjul] Charter on Human and Peoples' Rights, *supra* note 34, art. 56(1).

¹⁰⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 32, art. 35(2); American Convention on Human Rights, *supra* note 33, art. 46(1).

¹⁰⁵ African [Banjul] Charter on Human and Peoples' Rights, *supra* note 34, art. 56(3).

¹⁰⁶ *Id.* art. 56(4).

¹⁰⁷ Written style and information sources are admissibility criteria under the Human Rights Council's complaint procedure. *See* HRC. Res. 5/1 U. N. Doc. A/HRC/5/1 (June 18, 2007).

¹⁰⁸ Rebecca Wright, *Finding an Impetus for Institutional Change at the African Court on Human and People's Rights*, 24 BERKELEY J. INT'L L. 463, 480 (2006).

¹⁰⁹ Over the last 25 years, the ECHR's caseload has increased dramatically. In 1981, the Court received only 404 applications. By 1997, the number had increased almost twelve-fold to 4750. Eight years later, in 2005, it had increased almost another twelve-fold, to 35,400. Gregory S. Weber, *Who killed the friendly settlement? The Decline of Negotiated Resolutions at the European Court of Human Rights*, 7 PEPP. DISP. RESOL. L. J. 215, 221 (2007). *See* Luzius Wildhaber, *The European Court of Human Rights in Action*, 21 RITSUMEIKAN L. REV. 83, 84 (2004); *see also* Patricia Egli, *Protocol No. 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms: Towards a more Effective Control Mechanism?* 17 TRANSNAT'L L. & POL'Y. 17, 1, 5 (2007); Dinah Shelton, *The Boundaries of Human Rights Jurisdiction in Europe*, 13 DUKE J. COMP. & INT'L L. 95, 151 (2003).

¹¹⁰ Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, (ETS No. 194), Strasbourg, 13.V.2004.

applicant has not suffered a “significant disadvantage.”¹¹¹ Furthermore, for repetitive cases, a committee of three judges could rule on admissibility and render at the same time a judgment on the merits under a simplified summary procedure.¹¹² This reform, however, has sparked a debate within the system as to what extent admissibility criteria should be regulated and how admissibility could determine the basic function of a human rights court: a court of individual justice function or a court of constitutional justice function.¹¹³ Advocates of the former, human rights NGOs in particular,¹¹⁴ view that the right of individual petition is the centerpiece of the European human rights system.¹¹⁵ All individuals should have the right to access to the ECHR as it is the only way left for the individuals whose rights have been violated and whose states have failed to provide an adequate remedy.¹¹⁶

Proponents of the latter position, including many judges and its Registrar,¹¹⁷ argue that the only way to resolve the caseload problem is to emphasize the constitutional justice function over the individual justice function¹¹⁸ by focusing on cases of particular significance which raise substantial, new or complex issues of human rights law.¹¹⁹ This in effect requires tightening up the admissibility criteria so that the ECHR only

¹¹¹ *Id.*, art. 35(3, b); David Milner, Directorate General of Human Rights and Legal Affairs of Council of Europe, Presentation in Moscow, *Reforms of the European Court of Human Rights: Implemented, Planned and Proposed Changes in the Organisation and Functioning of the Court*, (Feb. 12, 2008), available at <http://www.nhc.no/php/files/documents/Tema/Reform%20The%20European%20Court%20of%20Human%20Rights/2008/Milner.doc>.

¹¹² Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, *supra* note 110, art. 28(1, b); Milner, *supra* note 111.

¹¹³ Patricia Egli, *supra* note 109, at 23; David Milner, *supra* note 111.

¹¹⁴ See AI Index: IOR 61/005/2004 Amnesty International’s Comments on the Interim Activity Report: Guaranteeing the Long-Term Effectiveness of the European Court of Human Rights, Feb. 1, 2004, available at <http://asiapacific.amnesty.org/library/Index/ENGIOR610052004?open&of=ENG-312>.

¹¹⁵ Laurence R. Helfer, *Redesigning the European court of human rights: Embeddedness as a deep structural principle of the European human rights regime*, 19 EUR. J. INT’L L. 125, 127 (2008); Egli, *supra* note 109, at 24.

¹¹⁶ Christina G. Hioureas, *Behind the Scene of Protocol No. 14: Politics in Reforming the European Court of Human Rights*, 24 BERKELEY J. INT’L L. 718, 721 (2006).

¹¹⁷ *Id.* at 744; Helfer, *supra* note 115, at 127.

¹¹⁸ Egli, *supra* note 109, at 23; Paul Mahoney, *New Challenges for the European Court of Human Rights Resulting from the Expanding Case Load and Membership*, 21 PENN ST. INT’L L. REV. 101, 103 (2002).

¹¹⁹ Helfer, *supra* note 115, at 127.

deals with cases involving widespread or particularly serious violations. The core of their argument is that it is better to have fewer but timely delivered and extensively reasoned judgments which establish the “jurisprudential principles with a compelling clarity that will render them *de facto* binding *erga omnes*.”¹²⁰ By doing so, individual applications would be a means to an end, rather than an end in itself.¹²¹

Since it is still early to raise question about the SEACHR’s caseload and given the rationales provided earlier for direct access of individuals, the SEACHR should operate as a court of individual justice function to hear cases from any victims of alleged human rights violations. Caseload problem, if it arises, should be dealt with by organizing the SEACHR and streamlining procedures, rather than arguing about whether to convert the SEACHR into one of constitutional justice function.

IV. ADVISORY JURISDICTION: A PROSPECT OF THE COURT’S INFLUENCE ON NON-MEMBER STATES

All founding treaties of regional human rights courts, including the European Convention, American Convention, African Charter and African Protocol, endow those tribunals with advisory jurisdiction.¹²² Article 47(1) of the European Convention allows the ECHR to issue, at the request of a member state of the Committee of Ministers, advisory opinions on legal questions concerning the interpretation of the European Convention and all protocols thereto. Article 64 of the American Convention vests the IACHR with a much wider advisory jurisdiction *ratione personae* and an almost unlimited advisory jurisdiction *ratione materiae*. OAS organs and any OAS member States, irrespective of whether they have ratified the American Convention or not, may consult the IACHR for the interpretation of the American Convention or other treaties concerning the protection of human rights in OAS member states as well as regarding the compatibility of their domestic laws with these treaties. In its opinion, *Other Treaties*, the IACHR interpreted the phrase “other treaties” to include any provisions relating to human rights protection provided in “any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever be the principal purpose of such a treaty, and whether or not non-member states of the inter-American system are or have the right to become parties thereto.”¹²³ Similar to the

¹²⁰ Luzius Wildhaber, *The European Court of Human Rights in Action*, 21 RITSUMEIKAN L. REV. 83, 92 (2004).

¹²¹ *Id.* at 91.

¹²² Jo M. Pasqualucci, *Advisory Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law*, 38 STAN. J. INT’L L. 241, 247 (2002).

¹²³ “Other Treaties” Subject to the Consultative Jurisdiction of the Court (*supra* note 33, art. 64), Advisory Opinion OC-1/82, Sept. 24, 1982, Inter-Am. Ct. H.R. (Ser. A)

IACHR, the ACHPR's advisory jurisdiction *ratione materiae* includes all legal matters regarding the interpretation of the African Charter or other treaties. However, it has more extensive advisory jurisdiction *ratione personae*, under which the AU, AU member states, AU organs, and African organizations recognized by the AU are authorized to request advisory opinions (Article 4).¹²⁴ This probably represents a tendency that regional human rights courts have been increasingly empowered with broader advisory jurisdiction.

The SEACHR should have the authority to issue advisory opinions, not only because they may follow the experiences of other tribunals but, more importantly, because of the significance and impact that advisory opinions have on the understanding and application of human rights norms. In fact, advisory opinions may have a greater significance than their formal status would seem to suggest.¹²⁵ They can contribute to building the uniformity and consistency in interpreting and understanding substantive and procedural provisions of regional and international human rights treaties.¹²⁶ Specifically, they can provide a guideline to the application of important yet disputed concepts and principles of human rights law, such as the non-reciprocal character of human rights treaties, the incompatibility of reservations with treaties' objects and purposes, and the universal nature of human rights, in the case of the IACHR, to name just a few.¹²⁷ Governments might sometimes find it even more comfortable to comply with advisory opinions because such rulings do not regard them as violators of human rights.¹²⁸

The SEACHR's advisory jurisdiction *ratione personae* should cover both the SEACHR's member states and non-state members, thus including all countries in Southeast Asia, the AHRB, and other ASEAN organs such as the ASEAN Secretariat or the future ASEAN Commission on the Promotion and Protection of Women's and Children's Rights.¹²⁹ Extending the SEACHR's *locus standi* will assist these actors in better fulfilling their jobs of complying with international and regional human rights norms and increase the cooperative relationship between the SEACHR and the AHRB in dealing with human rights problems. It will also enable the SEACHR to examine issues involving non-member states

No. 1 (1982), available at http://www1.umn.edu/humanrts/iachr/b_11_4a.htm.

¹²⁴ The word "organization" is said to encompass both intergovernmental and non-governmental bodies.

¹²⁵ DAVIDSON, *supra* note 17, at 213.

¹²⁶ PASQUALUCCI, *supra* note 82.

¹²⁷ *Id.*

¹²⁸ Buergenthal, *supra* note 86, at 245.

¹²⁹ ASEAN, Vientiane Action Programme, Nov. 29, 2004, <http://www.aseansec.org/VAP-10th%20ASEAN%20Summit.pdf>.

and bring the Court's influence to bear on those nations that are generally not eager to join the SEACHR soon, thus opening a prospect of building a common human rights standard for all countries in the region. Of particular significance, the SEACHR should also be allowed to render advisory opinions on their own motion—a mandate which other regional human rights courts do not have.¹³⁰ NGOs also may want to be authorized to consult with the SEACHR. Whether doing so would open the floodgates¹³¹ or if regional states may reach an agreement to collaborate with NGOs such right is still an open question.

With regards to the SEACHR's advisory jurisdiction *ratione materiae*, issues that the SEACHR may address should not be limited to only the interpretation of the SEACHR's founding treaty. During the future course of time, regional states may conclude other human rights instruments, including the currently discussed ASEAN Convention on the Rights of Women and Children, all of which should be under the SEACHR's subject-matter advisory jurisdiction if the situation requires. It will be very helpful if states can request for the SEACHR's advisory opinions regarding the compatibility between their domestic laws with the international human rights obligations to which they have committed so that they can make changes to bring their laws into line with these obligations. To avoid the potential duplication between the SEACHR and the AHRB, the SEACHR's founding treaty could follow the African Protocol in clearly specifying that the subject matter of the opinions will not be related to a matter that is being examined by the AHRB.

V. COMPOSITION: JUDGES OF THE COURT

A. *Requirements and Qualifications*

The ability of state parties to elect outstanding, independent and competent judges is an important factor that may shape the SEACHR's work and determines its effectiveness, prestige and integrity. As reflected in the experience of other regional human rights courts and the UN human rights treaty-based bodies,¹³² morality and professional competence are usually the most common requirements for electing judges or individual members, in the case of the UN human rights treaty-based bodies. All regional human rights systems demand that judges must sit in their individual capacity to ensure the independence of judges in their work. This essentially means that they do not represent any nations or governments and are able to exercise independent judgment when

¹³⁰ Pasqualucci, *supra* note 122, at 253.

¹³¹ See PASQUALUCCI, *supra* note 82, at 44.

¹³² See JULIE A. MERTUS, ARTICLE 4: UN TREATY BODIES, IN THE UNITED NATIONS AND HUMAN RIGHTS: A GUIDE FOR A NEW ERA 80-114 (2005) (providing more information about the composition of the UN human rights treaty-based bodies).

deciding cases. Their independence is emphasized by the requirement that during their period of office they must not engage in any activity which is not compatible with their judicial functions. For their part, member states agree to grant diplomatic privileges to the judges, as well as immunity from liability for any decisions or opinions issued in the judge's exercise of their functions. If Southeast Asia wants to establish a regional court of high legitimacy and authority which will succeed in enforcing human rights norms and offering effective remedies to victims, experiences from all other courts suggest that they should give careful consideration to meeting these criteria in selecting judges and ensuring their independence.

In addition, there are some other criteria that could be added in electing judges for a regional human rights court to reflect the specific context of each region. According to the European Convention, judges at the ECHR have to retire when they reach the age of seventy-years old (Article 23(6)). This age limit was opposed by the old SEACHR but was later enshrined in Protocol 11 on the grounds that the workload for the judges of the new full-time ECHR would be much more demanding than that of the former part-time ECHR.¹³³ The SEACHR does not need to impose an age limit on judges because reaching the age of seventy-years old does not mean that judges are unable to do their job. Moreover, it is also unlikely that the SEACHR's workload will be as heavy as the ECHR's, at least in a near future. More importantly, if heavy caseload is in fact accumulating in the future, other appropriate solutions can be reached without forcing judges to leave office when they reach a certain age, bearing in mind the fact that their term of office is limited to one or two.

Article 52(1) of the American Convention requires judges to be among jurists of "the highest moral authority and of recognized competence in the field of human rights, who possess the qualifications required for the exercise of the highest judicial functions in conformity with the law of the state of which they are nationals or of the state that proposes them as candidates." The qualifications of "highest judicial functions" and "recognized competence in the field of human rights" were set at a higher level than they would have been under a proposal advanced by the United States, which suggested that the standards be either the qualifications required for appointment to the highest judicial office or recognized competence in the field of human rights.¹³⁴

Article 11 of the African Protocol provides that judges shall be elected from among "jurists of high moral character and of recognized practical, judicial or academic competence and experience in the field of human and peoples' rights." In other words, the judges could be attorneys, judges or academics. This is one area where the African Protocol differs

¹³³ ALASTAIR MOWBRAY, *CASES AND MATERIALS ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 15 (2007).

¹³⁴ MOWER JR., *supra* note 41, at 115.

with European and Inter-American practice where judges must possess qualifications required for appointment to only high judicial office (or “highest judicial functions,” in the case of the IACHR) or be juriconsults of recognized competence.¹³⁵ Even with its relatively more flexible requirement, after the entry into force of the African Protocol, the election of the ACHPR judges was postponed for several times due to the fact that too few nominees had been proposed and many did not meet the statutory criteria.¹³⁶ A suggestion for Southeast Asia is that while requirement on professional competence should be high, it should not be too strict so as to give the process of selecting judges some flexibility, especially given the level of regional development. A

With respect to the nationality of judges, in the case of the ECHR, judges do not have to be nationals of the member states of the Council of Europe.¹³⁷ Judges for the IACHR and ACHPR, however, are required to be nationals of member states of the OAS and AU respectively.¹³⁸ Moreover, no two judges may be nationals of the same state in these two regional courts.¹³⁹ For Southeast Asia, it is advisable that judges of the SEACHR have the nationality of a regional country although they do not have to be nationals of only state parties to the SEACHR. Nationals of Cambodia, Laos, Viet Nam and Myanmar could be nominated to be elected as judges if they meet other requirements. The reason is that judges for the SEACHR must act independently in their personal capacity, not on behalf of the countries of their nationality. Moreover, as the proposed SEACHR will be established on a sequential basis, it aims to be eventually a court for the whole region. The presence of judges of non-state members at the SEACHR would contribute to raising awareness and promoting the participation into the SEACHR of these nations. It would also be a good idea to include judge candidates from various legal systems and traditions in Southeast Asia, including civil law, common law, and even Islamic law.¹⁴⁰

Of particular importance, consideration should also be given to the gender representation in electing judges for the SEACHR even though

¹³⁵ NMEHIELLE, *supra* note 17, at 284.

¹³⁶ TERRIS ET AL., *supra* note 16, at 22.

¹³⁷ Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 32, art. 21(3); American Convention on Human Rights, *supra* note 33, art. 46(1).

¹³⁸ American Convention on Human Rights, *supra* note 33, art. 52(2); Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, *supra* note 35, art. 11(2).

¹³⁹ American Convention on Human Rights, *supra* note 33, art. 52(2); Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, *supra* note 35, art. 11(2).

¹⁴⁰ Viljoen, *supra* note 69, at 60.

neither the American nor European human rights systems includes specific provisions regarding gender representation. At the IACHR, Cecilia Medina Quiroga was the second woman in its twenty-five-year history to serve as a judge.¹⁴¹ All the initial members of the ECHR were male judges and only three of the 58 judges who served through the end of 1989 were women.¹⁴² This overall under-representation of women is certainly not confined in human rights courts. There was only one woman on the ICJ judge's bench when Rosalyn Higgins was elected in 1995 to be the first female judge in the ICJ's history. The first woman to be elected to the WTO Appellate Body was Merit Janow in 2003.¹⁴³ Southeast Asia should therefore make efforts to emphasize in the SEACHR founding treaty adequate gender representation in the composition of the Court. This is what African states did by inserting two provisions on gender representation in its African Protocol in relation to both the nomination and election of judges.¹⁴⁴ It is not just a matter of equality as more than a half of regional population is female; it is also an important factor of the Court's work since female judges may contribute to the diversity of the Court's understanding of several issues, including the violations of women's rights.

B. *Number of Judges*

Basically, there are two ways to proceed in establishing the number of judges for the SEACHR. The first one is to agree on a provision that that the SEACHR will be composed of a number of members equal to that of state parties. This is the approach that the European Convention has adopted.¹⁴⁵ During the *travaux preparatoires* of the European Convention, numerous proposals were put forward, including a call for an ECHR of nine judges.¹⁴⁶ This consideration was not accepted however. A decision was eventually made to have as many judges as the number of member countries in the Council of Europe. All of these countries would take part in the election of judges and share the cost of maintaining the ECHR.¹⁴⁷ It

¹⁴¹ TERRIS ET AL., *supra* note 16, at 19.

¹⁴² Donald W. Jackson, *Judging Human Rights: The Formative Years of the European Court of Human Rights: 1959-89*, 13 WINDSOR Y.B. ACCESS JUST. 217, 233 (1993).

¹⁴³ TERRIS ET AL., *supra* note 16, at 18.

¹⁴⁴ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, *supra* note 35, arts. 12(2) & 14(3).

¹⁴⁵ Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 32, art. 20; American Convention on Human Rights, *supra* note 33, art. 46(1).

¹⁴⁶ MOWER JR., *supra* note 41, at 132.

¹⁴⁷ *Id.*

is possible that representatives of Southeast Asian nations might adopt the same approach, which would help ensure the representation of all nations on the SEACHR and establish an informal link between the Court and judges' national judiciary.¹⁴⁸ The flip side is that, if the number of states parties, hence the number of judges, is even, it would make judicial decisions more difficult to reach among judges in case the numbers of ayes and noes are the same. Ultimately, judges are supposed to be independent judicial officers, not representatives of their countries. It will be incomprehensible if on the one hand, judges are required to act in their independent capacity and on the other hand, they are elected to represent each individual state party of the system.

An alternative option for SEACHR is to have a fixed number of judges for the court. The IACHR has seven judges (Article 52(1)) while the number of ACHPR judges as provided in the African Protocol is eleven (Article 11(1)).¹⁴⁹ The Working Group for an ASEAN Human Rights mechanism also supported an ASEAN Human Rights Commission of seven members.¹⁵⁰ For a region of eleven countries, if the SEACHR is going to be structured into single court formation, the SEACHR may have five judges. This number may be adjusted when need arises or in case the SEACHR is going to be divided into smaller sections and chambers, as discussed later in the section on the Court's structure. Judges will be elected from a list of candidates nominated by states parties, three by each state, which is also a practice that the European, Inter-American and African systems all apply.¹⁵¹ Also, it needs to be emphasized that this list of candidates should be put forward in consultation with the civil society.

C. *Terms of Office*

With regard to the issue of terms of office, the three regional human rights courts all adopted a six-year term for their judges. Under the European Convention, judges are elected for a six-year period and they may be reelected.¹⁵² Judges of both the IACHR and the ACHPR are

¹⁴⁸ See Thomas Buergenthal *New Upload - Remembering the Early Years of the Inter-American Court of Human Rights*, 37 N.Y.U. J. INT'L L. & POL. 259, 279 (2005).

¹⁴⁹ All UN human rights treaty bodies have a fixed number of members, some of which are even and some of which are not even. The Human Rights Committee, for example, has eighteen experts, while the CEDAW Committee has twenty-three members.

¹⁵⁰ Agreement on the Establishment of the ASEAN Human Rights Commission, *supra* note 65.

¹⁵¹ Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 32, art. 22; American Convention on Human Rights, *supra* note 33, art. 82; Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, *supra* note 35, art. 14.

¹⁵² Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 32, art. 23(1).

elected for a term of six years and may be reelected only once.¹⁵³ To ensure smooth and uninterrupted continuity in the courts' work, the terms of half of ECHR and IACHR judges selected in the first election shall expire at the end of three years.¹⁵⁴ In the case of the ACHPR, the term of four ACHPR judges elected in the first election shall expire at the end of two years, and the term of four more judges shall expire at the end of four years.¹⁵⁵

It should be noted, however, that Under Protocol 14 to the European Convention judges would serve for one non-renewable term of nine years.¹⁵⁶ This rule is intended to ensure judges' security of tenure of office and therefore reinforce their independence and impartiality.¹⁵⁷ The ECHR judges support this change because it would make them appear more impartial and may remove their need to campaign for re-nomination at the sending states.¹⁵⁸ Judges from other dispute settlement mechanisms also share this view. Claus-Dieter Ehlermann of the WTO Appellate Body has called for replacing his body's four-year renewable term with a single-term of eight years.¹⁵⁹ One ICJ judge also suggested that the ICJ would be better served with a single twelve-year term than the current renewable nine-year term.¹⁶⁰ Thus, in order to remove the politics from appointments of judges and to make sure judges would not have to worry about campaigning in their sending states for re-election, the term of office for the SEACHR judges should be limited to a single-term of six to eight years.

D. *Part-time vs. Full-time Status*

Ideally, the SEACHR should have a bench of full-time judges. First, a court of human rights with full-time judges is better in dealing with

¹⁵³ American Convention on Human Rights, *supra* note 33, art. 54(1); Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, *supra* note 35, art. 15(1).

¹⁵⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 32, art. 23(1); American Convention on Human Rights, *supra* note 33, art. 54(1).

¹⁵⁵ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, *supra* note 35, art. 15(1).

¹⁵⁶ *Id.* art. 23(1).

¹⁵⁷ AI Index: IOR 61/005/2004 Amnesty International's Comments on the Interim Activity Report: Guaranteeing the Long-Term Effectiveness of the European Court of Human Rights, Feb. 1, 2004, *available at* <http://asiapacific.amnesty.org/library/Index/ENGIOR610052004?open&of=ENG-312>.

¹⁵⁸ Hioureas, *supra* note 116, at 748.

¹⁵⁹ TERRIS ET AL., *supra* note 16, at 155.

¹⁶⁰ *Id.*

cases of emergency than a court of part-time personnel. Second, a court that operates full-time could reduce delay and backlog. Given that the number of cases submitted to the SEACHR might increase considerably in the future, part-time status of its members is problematic. Third, the part-time status of the SEACHR may lead to a situation in which its judges pursue additional employment in other domains and assume additional official or unofficial positions that could distract them from the court's work. In some cases, it might even cause their interests in the secondary positions to be in conflict with their judicial duties. There is good reason to think that the judges should serve full time so that they could devote utmost attention to their judicial functions. Full-time status may also contribute to increasing the SEACHR's prestige and accordingly attract more attention and petitions from human rights victims in the region.

It might be the case, however, that states are not always eager to adopt that approach, at least on the ground that a full-time court would be too expensive, especially given the lack of financial resources that many regional institutions of developing countries are facing. In fact, the framers of the Statute of the IACHR originally envisaged a permanent tribunal consisting of full-time judges¹⁶¹ but the OAS General Assembly rejected the same proposal and only relented if the SEACHR had a substantial caseload.¹⁶² During the deliberations of the African Protocol, a plan for a full-time court was also submitted, but only to be rejected for the same reasons.¹⁶³ As a result, neither of these courts has full-time members, except for their presidents.¹⁶⁴ Judges are not required to live at the location of the court and they are free to engage in whatever activities they would like to provided that their activities are not in conflict with their judicial positions at the courts. On the other hand, the ECHR has a full-time bench as provided by the European Convention.¹⁶⁵ Judges at the ICJ, ICC, ICTY and ICTR also serve on a full-time basis. It should be noted, however, that these tribunals are mostly funded by a group of developed nations. Circumstances are different in Africa, Latin America and Southeast Asia,

¹⁶¹ Buergenthal, *supra* note 86, at 233.

¹⁶² *Id.*

¹⁶³ UDOMBANA, *supra* note 41, at 85.

¹⁶⁴ Statute of the Inter-American Court on Human Rights art. 16, O.A.S. Res. 448 (IX-0/79), O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, Vol. 1 at 98, Annual Report of the Inter-American Court on Human Rights, OEA/Ser.L/V.III.3 doc. 13 corr. 1 at 16 (1980), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 133 (1992); Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, *supra* note 35, art. 15(4).

¹⁶⁵ Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 32, art. 19.

which are composed of developing countries with limited financial resources.

Given that financial constraint, a feasible and acceptable solution for Southeast Asia may be, therefore, to follow the precedents of the IACHR and ACHPR in appointing part-time judges for the first few years of the SEACHR, except for the SEACHR's President. If the SEACHR's workload subsequently increases, affecting its ability to deal with cases in a timely manner, the judges could propose to the Meeting of State Parties to modify the rules and allow it to grow into a full-time court. This is exactly what African states did with the African Protocol by providing that "the Assembly may change this arrangement as it deems appropriate."¹⁶⁶ The Statute of the IACHR also requires the judges to "remain at the disposal of the Court" and to "travel to the seat of the Court or to the place where the Court is holding its sessions as often and for as long a time as may be necessary, as established in the Regulations."¹⁶⁷

VI. STRUCTURE AND PROCEDURE: INCREASING THE COURT'S EFFECTIVENESS

A. *Structure*

As provided in the European Convention and the Rules of the ECHR, the ECHR has a very complicated organizational structure.¹⁶⁸ It has a Grand Chamber of seventeen judges¹⁶⁹ and four geographically balanced sections, each of which is divided into three smaller Chambers.¹⁷⁰ Each of the three Chambers then set up a Committee.¹⁷¹ The ECHR as a whole is administered by a President and two Vice Presidents, elected by the entire judges.¹⁷² The admissibility of most cases is decided by committees of three judges.¹⁷³ When a case is heard on the merits, it is usually assigned to a Chamber of the Section which includes the judge from the defendant state. Under Protocol 14, the ECHR will also be able

¹⁶⁶ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, *supra* note 35, art. 15(4).

¹⁶⁷ Statute of the Inter-American Court on Human Rights, *supra* note 164, art. 16.

¹⁶⁸ See Paul L. McKaskle, *The European Court of Human Rights: What It Is, How It Works, and Its Future*, 40 U.S.F. L. REV. 1, 17 (2005).

¹⁶⁹ Rules of the European Court of Human Rights, July 2007, Rule No. 24.

¹⁷⁰ *Id.* Rule No. 25.

¹⁷¹ *Id.* Rule No. 27.

¹⁷² *Id.* Rule No. 8.

¹⁷³ Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, *supra* note 110, art. 17.

to sit in single-judge formation to declare a case inadmissible or strike it out of the ECHR's list of cases.¹⁷⁴ However, when sitting as a single judge, the judge shall not examine any application against the state by which that judge has been elected.¹⁷⁵ Committees shall be entitled to decide unanimously on both of the admissibility and merits of a case as long as the matter is "well-established case-law of the Court."¹⁷⁶ Some proposals have been made for the creation of a "filtering" unit within the ECHR;¹⁷⁷ yet, they have not been adopted, pending on further consideration.¹⁷⁸

Compared to the ECHR, the organizational structure of the IACHR is much simpler. It has a single court structure without being divided into chambers or sections. It is led by one President and a Vice President.¹⁷⁹ Five judges constitute a quorum for the IACHR's transaction of business.¹⁸⁰ The organization of the ACHPR is almost the same except that a quorum requires seven, rather than five, judges.¹⁸¹

As the proposed SEACHR is expected to be a small human rights court, it should probably have a simple organizational structure. The first option is to follow the model of the IACHR and ACHPR in establishing a single-court formation, without dividing into smaller chambers or sections. The SEACHR as a whole will then be in charge of making decisions on admissibility and rendering judgments on merits.

The second option is to divide the SEACHR into two chambers as a way to address the possibility of heavy caseload and long delay. Each chamber could be composed of three judges. The judges will then divide one-half of their term serving on each chamber on a rotational basis. The two chambers could be assigned with the same functions of ruling on

¹⁷⁴ *Id.* arts. 6, 7, 26 & 27.

¹⁷⁵ *Id.* art. 26(3).

¹⁷⁶ *Id.* art. 28(1, b); Milner, *supra* note 111.

¹⁷⁷ To cope with the workload problem of the ECHR, the Council of Europe decided to establish a Wise Group to consider the long-term effectiveness of the ECHR. The Wise Group recommended a wide-range reform, including the establishment of a "new judicial filtering mechanism" composed of judges to decide the admissibility of cases while ensuring that individual applications result in a judicial decision. *See* Report of the Group of Wise Persons to the Committee of Ministers ¶¶ 129-133, Nov. 15, 2006, CM (2006) 203.

¹⁷⁸ Lucius Caflisch, *The Reform of the European Court of Human Rights: Protocol No. 14 and Beyond*, 6 HUMAN RIGHTS L. REV. 403, 414 (2006).

¹⁷⁹ Statute of the Inter-American Court on Human Rights, *supra* note 164, art. 12.

¹⁸⁰ American Convention on Human Rights, *supra* note 33, art. 56.

¹⁸¹ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, *supra* note 35, art. 23.

admissibility and issuing judgments on merits or be empowered with either function. In the latter scenario, the chamber on admissibility will in effect serve as a filtering mechanism and is authorized to decide whether or not to transfer cases to the chamber on merits. The purpose of such a *modus operandi* is to reduce the number of applications that have to be considered in-depth. In either scenario, the majority of cases should be decided by the two chambers. The plenary court would be invested with the power to decide only cases of great importance and deliver advisory opinions on its own motion or when requested. The President of the Court, who will be elected by the entire bench of judges, will administer the SEACHR during his or her term of Presidency. This might be an issue to be directly regulated in the SEACHR's founding treaty or assigned as a matter within the competence of the court to deal within its Rules of Procedure.

B. Procedure

1. Rules of Procedures

One of the first tasks of the judges will be to deliberate and adopt the Rules of Procedure. Rules of Procedure do not merely address matters of internal organization of the SEACHR but also govern issues directly affecting the parties such as conduct of proceedings (written/oral phases), representation of the parties, timelines and evidence.¹⁸² As they cover a wide range of issues, the SEACHR's Rules of Procedure may have an important impact on its effectiveness and the role of individuals before the SEACHR.¹⁸³ The SEACHR should therefore establish its rules in a detailed and comprehensive manner. Different actors, including government actors, international organizations, NGOs and other actors within the civil society should be given the opportunity to participate in the drafting process and voice their opinions. In drafting its Rules of Procedure, the SEACHR should consult the Rules of Procedure of the ECHR and the IACHR as these two systems have gone a considerably long way in establishing and developing their rules and practice. Again, in this respect, learned lessons and best practices are significant. In fact, the original IACHR Rules of Procedure took the ECHR Rules as a model.¹⁸⁴ The ECHR Rules of Procedure, in turn, found inspiration and precedents in the procedures set forth in the Rules of the ICJ.¹⁸⁵

¹⁸² TERRIS ET AL., *supra* note 16, at 104.

¹⁸³ Viljoen, *supra* note 69, at 61.

¹⁸⁴ TRINDADE, ANTÔNIO AUGUSTO CANÇADO, THE OPERATION OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS, IN THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 133, 146 (David J. Harris & Stephen Livingstone eds., Oxford: Clarendon Press 1998).

¹⁸⁵ *Id.*

2. Procedure Before the SEACHR

It is very important that procedure before the SEACHR should be explicit, clear and transparent. Hearings should be open, unless the SEACHR decides otherwise. In principle, the SEACHR's judgements and annual reports should be made accessible to the public, something not provided for under the African system.¹⁸⁶ Publicity is one way to put pressure on member states, making visible a situation that must be addressed and helping to bring the SEACHR closer to the population. Experience from the ECHR, however, indicates that the practice of holding a hearing is now the exception rather than the rule,¹⁸⁷ with very few cases being set for oral argument.¹⁸⁸ Applications are decided basically on written submissions as a way to increase the efficiency of the Court.¹⁸⁹ Hearings will only be held if further clarification is needed on the facts of the case, domestic law or practice.¹⁹⁰

During the whole hearing process, the SEACHR should be able to work with the parties of a case to achieve a friendly settlement of the dispute, either at the request of the parties or on its own initiative. Friendly settlements can be of benefit to states as they help resolve the dispute quickly. Individual applicants might sometimes have more to gain from a swifter and more generous settlement. From the perspective of the SEACHR, an active settlement program can help reduce its case backlog.¹⁹¹ However, in all cases friendly settlement can only be reached on the condition of "respect of human rights."¹⁹² Friendly settlement proceedings should be ended at any time when the SEACHR finds that this condition is violated.

In cases of emergency or extreme gravity, the SEACHR should be authorized to issue provisional measures, which are referred to by the ECHR and some UN treaty-based bodies as "interim measures" and sometimes by the Inter-American Commission as "precautionary measures."¹⁹³ Under the European and Inter-American human rights

¹⁸⁶ HELLE BORGSTROM ET AL., EVALUATION 1998: THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS 31 (1999).

¹⁸⁷ See Rules of the European Court of Human Rights, *supra* note 169, Rule 59(3).

¹⁸⁸ McKaskle, *supra* note 168, at 23.

¹⁸⁹ ALASTAIR MOWBRAY, CASES AND MATERIALS ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS 35 (2007).

¹⁹⁰ PHILIP LEACH, TAKING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS 84 (2005).

¹⁹¹ Weber, *supra* note 109, at 216.

¹⁹² Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 32, art. 38(1).

¹⁹³ Rules of the European Court of Human Rights, *supra* note 169, Rule No. 39;

courts, the power to issue provisional measures is provided in the court's rules of procedures. For SEACHR, with a view to creating an extra stimulus for member states to comply with such measures,¹⁹⁴ the Court's power to take these measures should be included in the founding treaty. It should be clearly provided that member states are obliged to follow the SEACHR's provisional measures and the implementation of the SEACHR's provisional measures shall be inserted in the SEACHR's Annual Report.

If the SEACHR finds that there has been a violation of human rights, it may order an appropriate measure to remedy the violation.¹⁹⁵ Forms of reparation, however, may vary.¹⁹⁶ The European Convention states that "just satisfaction" shall be made to the injured party when necessary and if the domestic law of the concerned party does not provide complete reparations to the victims.¹⁹⁷ As provided in the ECHR Rules, "just satisfaction" includes pecuniary damage, non-pecuniary damage and costs and expenses.¹⁹⁸ Article 63(1) of the American Convention subsumes two categories of judicial remedy: the first is a ruling that the injured party be ensured the enjoyment of the rights and freedoms that are violated; the second is the award of fair compensation to the injured party.¹⁹⁹ The IACHR has been very active in expanding its reparation scheme, including not only money compensation, but also legislation revision requirements, litigation costs and attorneys' fees, public apology, commemorative scholarships, and government development programs.²⁰⁰ The African

Rules of Procedure of the Inter-American Commission on Human Rights art. 25, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, July 2003; Optional Protocol to CEDAW art. 5(1); Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, *supra* note 35, art. 24(3).

¹⁹⁴ See JULIE A. MERTUS, *THE UNITED NATIONS AND HUMAN RIGHTS: A GUIDE FOR A NEW ERA* 80-114 (2005).

¹⁹⁵ Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 32, art. 13; American Convention on Human Rights, *supra* note 33, art. 25; African [Banjul] Charter on Human and Peoples' Rights, *supra* note 34, art. 7.

¹⁹⁶ The United Nations Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law defines reparation as consisting of restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. General Assembly Resolution 60/147, Preamble, Annex: The Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law, U.N. Doc. A/RES/60/147.

¹⁹⁷ Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 32, art. 41.

¹⁹⁸ Rules of the European Court of Human Rights, *supra* note 169, Rule No. 64; *see also* LEACH, *supra* note 190, at 57.

¹⁹⁹ See DAVIDSON, *supra* note 17, at 214.

²⁰⁰ During its first 15 years of existence, the IACHR awarded reparations in 47

Protocol also authorized the IACHR to declare that fair compensation or reparation must be paid to the victims if the IACHR determines that there has been a violation of human rights.²⁰¹

At the SEACHR, individual applicants should be allowed to present their cases or ask for legal representation. A legal aid program should be established to provide assistance to those who need it. The best aid package would probably be the one granted by the ECHR. As provided by the Rules of the ECHR, a set fee to cover representatives' fees, travelling and subsistence expenses and other expenses necessarily incurred by applicants or their representatives is payable by the ECHR in respect of each stage that a case reaches in the ECHR proceedings.²⁰² Nevertheless, not all regions are as wealthy as Europe. Under the IACHR, if individual applicants do not have a lawyer, they will have to rely on the Inter-American Commission to litigate their case. Under the African Protocol, free legal representation "may be provided where the interests of justice so require,"²⁰³ which also means that legal aid is not automatically available to all parties. Since it is likely that the SEACHR may have a limited budget, the legal aid could cover legal presentation but not travelling expenses and other incurred fees as in the case of the ECHR. The SEACHR's legal aid program could accept assistance from external sources from NGOs and international organizations. Legal aid may only be awarded after the case is declared admissible. In this regard, human rights lawyers and NGOs should also assist the SEACHR in providing free legal representation to clients of the SEACHR.²⁰⁴ Under the African system, NGOs have become important in representing and providing legal aid to human rights victims in bringing their communications before the system.²⁰⁵

cases, with two thirds of the judgments on reparations issued from 2001 to 2004. Douglas Cassel, *The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights, in Out of the Ashes, Reparation for Victims of Gross and Systematic Human Rights Violations* (K. De Feyter et al. eds., Intersentia, Antwerp, 2005), 191, 191. See also Douglas Cassel, *supra* note 90, at 507.

²⁰¹ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, *supra* note 35, art. 27(1).

²⁰² Rules of the European Court of Human Rights, *supra* note 169, Rule 94.

²⁰³ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, *supra* note 35, art. 10(2).

²⁰⁴ UDOMBANA, *supra* note 41, at 109.

²⁰⁵ Sabelo Gumedze, *Bringing communications before the African Commission on Human and Peoples' Rights*, 3 AFRICAN HUM. RTS. L.J. 122 (2003).

VII. FINANCIAL AND ADMINISTRATIVE ISSUES: FUNDING AND OPERATING
THE SEACHR

A. *Funding the Court*

As the proposed SEACHR is not an organ of ASEAN, it should have a separate budget to be financed by the parties and annually decided by the Meetings of State Parties. This, however, might differ from the way the ECHR, IACHR and ACHPR are financed. The budget of the ECHR is part of the Council of Europe's general budget²⁰⁶ while the IACHR's budget is approved by the General Assembly of the OAS.²⁰⁷ Expenses of the ACHPR, including emoluments and allowances for judges and the budget of its Registry, shall be determined and borne by the OAU.²⁰⁸

At a minimum, funding must be available to build or buy an office for the SEACHR, arrange for the necessary facilities, provide accommodation for judges, and provide salaries to the judges, registrar, lawyers, administrative assistants, specialists, translators, interpreters, and accountants.²⁰⁹ This is certainly not a small amount of money. The IACHR and ACHPR experiences show that providing enough funding for the operation of a court is particularly a difficult issue for developing countries. In fact, the AU has been criticized repeatedly for failing to provide its human rights mechanisms with adequate resources.²¹⁰ The IACHR has to deal with serious financial shortages because the OAS does not allocate sufficient funds for the operation of its regional human rights court.²¹¹ UN-funded *ad hoc* tribunals such as the ICTY and ICTR were at times reportedly on the verge of bankruptcy.²¹² Even the ECHR sometimes faces

²⁰⁶ Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 32, art. 50; *see also* ALASTAIR MOWBRAY, *CASES AND MATERIALS ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 19 (2007).

²⁰⁷ American Convention on Human Rights, *supra* note 33, art. 72.

²⁰⁸ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, *supra* note 35, art. 32.

²⁰⁹ *See* Viljoen, *supra* note 69, at 63; Nsongurua J. Udombana, *An African Human Rights Court and An African Union Court: A Needful Duality or a Needless Duplication?* 28 *BROOK. J. INT'L L.* 811, 861 (2003).

²¹⁰ Lennart Wohlgenuth & Ebrima Sall, *Introduction: Human Rights, Regionalism and the Dilemmas of Democracy in Africa*, in *HUMAN RIGHTS, REGIONALISM AND THE DILEMMAS OF DEMOCRACY IN AFRICA* 1, 9 (Lennart Wohlgenuth & Ebrima Sall eds., Dakar: Council for the Development of Social Science Research in Africa 2004); RACHEL MURRAY, *HUMAN RIGHTS IN AFRICA: FROM THE OAU TO THE AFRICAN UNION* 55 (2004); Eno, *supra* note 40.

²¹¹ *See* Cassel, *supra* note 90, at 504; Wright, *supra* note 108, at 493; PASQUALUCCI, *supra* note 82, at 347.

²¹² TERRIS ET AL., *supra* note 16, at 226.

this problem.²¹³ Southeast Asia should be well aware of the financial challenges prior to the establishment of its own human rights court. This requires strong willingness and determination from member states to support the SEACHR since most of the SEACHR's financial resources will come from the contributions its member states.

Although every member state has to provide funding for the SEACHR and their contributions will probably be the main financial resource for the Court's budget, external contributions should not be excluded. The IACHR receives voluntary aids from the EU, EU individual members, and the UNHCR.²¹⁴ The African Commission and its Secretariat also accept contributions from international development agencies and NGOs through different ways in terms of providing interns, temporary staff and arranging workshops and courses on behalf of the Commission.²¹⁵ For Southeast Asia, external aid donors could provide money in at two different ways: (1) offering aid to the victims for legal presentation, travel expenses and other incurred fees, and (2) providing money to specific groups within the civil society that have a mandate to work with the SEACHR or promote its work. Certainly, contributions from external donors and their use should be well monitored by a trust fund, for instance, and be independently audited by a separate auditing body.

B. *Administration, Language, and Location*

Administrative work of the SEACHR will be carried out by the SEACHR's Registry, whose functions include important tasks of assisting judges, preparing cases, attending hearings, drafting decisions and running the daily work of the SEACHR. The Registrar should be appointed by judges of the SEACHR and empowered to recruit his or her supporting staff. This process should be provided in the Rules of Procedure.

The official language of the SEACHR is English,²¹⁶ which is also the working language of ASEAN as provided under the ASEAN Charter.²¹⁷ The fact that the SEACHR uses only one official language may help the SEACHR lower expenses and reduce translation and

²¹³ As stated by a judge of the ECHR in a meeting organized between the ECHR and a Summer Human Rights Court of Utrecht University, Aug. 25, 2008.

²¹⁴ Wright, *supra* note 108, at 485; Gerald L. Neuman, *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT'L L. 101, 105 (2008).

²¹⁵ Wohlgemuth & Sall, *supra* note 210, at 11; HELLE BORGSTROM ET AL., EVALUATION 1998: THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS 21 (1999).

²¹⁶ However, applications should be allowed to be in one of the official languages of the state parties until they are declared admissible.

²¹⁷ ASEAN Charter, *supra* note 2, art. 34.

interpretation work while increasing its productivity and lightening caseload. This is one of the few areas where Southeast Asia may outdo all other regions in terms of efficiency. The ECHR has two official languages, namely English and French.²¹⁸ The IACHR has four official languages, including Spanish, English, Portuguese and French.²¹⁹ The working languages of the ACHPR are Arabic, English, French and Portuguese.²²⁰

The location of the SEACHR may be decided by a Meeting of States Parties before or after the adoption of the founding treaty. It is likely that the seat of the SEACHR will be in one of the states parties to the founding treaty. As the location of the Court is also the place where oral hearings will be held, except in special circumstances, due consideration should be given to the accessibility and the cost of transportation to and from the location of the SEACHR. The state in which the SEACHR is located should also have relatively good infrastructure facilities, an enabling environment, necessary information technology, and the ability to support the SEACHR and its Registry in terms of personnel. The most important factor will be the state party's commitment to undertake major financial and political responsibilities for the operation of the SEACHR.²²¹ With these factors being properly considered, Jakarta (Indonesia) seems to be a good choice if Indonesia will become a member of this future SEACHR and be willing to host the SEACHR. The country is known to be in a good geographical position in the region and have regular connections to international and regional travel routes. It is also hosting many international media bureaus, diplomatic corps, NGOs and international organizations, particularly the ASEAN Secretariat. Moreover, given that the regionally inclusive ASEAN human rights body probably will be based in Jakarta, placing the two human rights mechanisms in the same place would contribute to improved communication and coordination between them, thus strengthening the work and organization of Southeast Asian human rights system.

²¹⁸ Rules of the European Court of Human Rights, *supra* note 169, Rule 34(1).

²¹⁹ Rules of Procedure of the Inter-American Court of Human Rights art. 20(1), Annual Report of the Inter-American Court of Human Rights, 1991, O.A.S. Doc. OEA/Ser.L/V/III.25 doc.7 at 18 (1992), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 145 (1992).

²²⁰ *See* Constitutive Act of the African Union art. 25, OAU Doc. CAB/LEG/23.15 (May 26, 2001) (“[T]he working languages of the Union and all its institutions shall be, if possible, African languages, Arabic, English, French and Portuguese.”); *see also* Rules of Procedure of the African Commission on Human and Peoples’ Rights rule No. 34, *adopted on* October 6, 1995.

²²¹ Viljoen, *supra* note 69, at 56.

VIII. ENFORCEMENT: EXECUTING THE COURT'S JUDGMENTS

Under the European Convention, the ECHR judgment shall be transmitted to the Committee of Ministers for supervision.²²² While the ECHR judgments shall be final²²³ and members states undertake to abide by them in any case to which they are parties,²²⁴ the ECHR nonetheless has no direct power to enforce its judgments.²²⁵ It is up to the Committee of Ministers of the Council of Europe to obtain compliance with the ECHR judgments.²²⁶ The Committee of Ministers supervises and furthers the execution of judicial judgment by keeping the matter on their agenda until the respondent state has, in the Committee's view, complied with the judgment.²²⁷ The aim is to put an end to any continuing violations, redress to the greatest extent possible their effects, and achieve the outcome sought by the ECHR's judgement. To date, member states have, for the majority of cases, honored the judgments of the ECHR, although in some instances not without considerable delay.²²⁸ The ECHR also sets a time period within which the specified sum must be paid to the individual in cases involving monetary awards.²²⁹ Under Protocol No. 14 to the European Convention, in the event of a refusal to implement, the Committee of Minister after a warning given to the state concerned may bring proceedings before the Grand Chamber of the ECHR to request the ECHR to determine whether that state has met its implementation obligations.²³⁰ In addition, the Committee may ask the ECHR to interpret the latter's judgments.²³¹ If the answer is in the negative, the case will go back to the Committee of Ministers for consideration of the measures to be

²²² Convention for the Protection of Human Rights and Fundamental Freedoms. *supra* note 32, art. 46(2).

²²³ Convention for the Protection of Human Rights and Fundamental Freedoms. *supra* note 32, art. 44; *see also* ALASTAIR MOWBRAY, *CASES AND MATERIALS ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 19 (2007).

²²⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 32, art. 46(1).

²²⁵ McKaskle, *supra* note 168, at 31.

²²⁶ *Id.*

²²⁷ Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 32, art. 46.

²²⁸ JEAN-FRANCOIS. RENUCCI, *INTRODUCTION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS: THE RIGHTS GUARANTEED AND THE PROTECTION MECHANISM* 124 (2005).

²²⁹ Caflich, *supra* 178, at 411.

²³⁰ Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, *supra* note 110 art. 46.4.

²³¹ RENUCCI, *supra* note 228, art. 124.

taken.²³² The only coercive sanction is threat of expelling the non-complying state by a two-thirds vote of the Committee of Ministers in extreme situations, which is considerably powerful measure because membership in the Council of Europe is a prerequisite to membership in the European Union.²³³

The American Convention does not provide for direct and formal enforcement of the IACHR's judgments.²³⁴ Rather it prescribes only that the judgment of the IACHR is final and not subject to appeal.²³⁵ In case of disagreement as to the meaning or scope of the judgment, the IACHR shall interpret it at the request of any of the parties, provided the request is made within ninety days from the date of notification of the judgment.²³⁶ A progress in this regard has been made recently when the IACHR decided to hold hearings on the implementation of its judgments. At the OAS General Assembly sessions, the IACHR shall submit a report on its work during the previous year.²³⁷ It shall specify, in particular, the cases in which a state has not complied with its judgments and make any pertinent recommendations.²³⁸ This provision prescribes some functions which are, to some extent, similar to the role of the Committee of Ministers of the Council of Europe,²³⁹ although the American Convention does not empower any political organ within the OAS to impose sanctions under any form on non-complying states to implement decisions.²⁴⁰ In fact, the OAS General Assembly has never issued a comment on state non-compliance with IACHR judgments.²⁴¹

As provided by the African Protocol, judgment of the IACHR shall be final and not subject to appeal.²⁴² State parties undertake to comply

²³² Caflisch, *supra* 178, at 411.

²³³ MICHAEL D. GOLDBABER, A PEOPLE'S HISTORY OF THE EUROPEAN COURT OF HUMAN RIGHTS 6 (2007).

²³⁴ It should be noted that the compliance record of member states with the IACHR's judgments is considerably impressive. No government has openly defied any judgment of the IACHR. States generally implement the judgments, albeit sometimes partially or after delay. Cassel, *supra* note 90, at 505.

²³⁵ American Convention on Human Rights, *supra* note 33, art. 67.

²³⁶ *Id.*

²³⁷ *Id.* art. 67.

²³⁸ *Id.*

²³⁹ PASQUALUCCI, *supra* note 82, at 344.

²⁴⁰ Neuman, *supra* note 214, at 105.

²⁴¹ PASQUALUCCI, *supra* note 82, at 344.

²⁴² Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, *supra* note 35, art. 25(1).

with the judgment in any case to which they are parties and to guarantee its execution.²⁴³ These provisions heavily borrow from the IACHR.²⁴⁴ The Executive Council (formerly the Council of Ministers) of the AU shall have the responsibility of monitoring the execution of the judgment on behalf of the AU.²⁴⁵ The African Protocol especially requires the IACHR to submit a list of those states that fail to comply with the latter's judgments in its annual reports to the AU General Assembly.²⁴⁶ This "shaming" mechanism is aimed at helping enforce the IACHR judgments.²⁴⁷ The African Protocol, however, does not expressly confer upon the AU Assembly the right to act against non-complying states parties after receiving that list from the IACHR.

The above examination of the European Convention, American Convention and African Protocol demonstrates that the three systems apply a relatively similar mechanism of enforcement in which the court shall issue final and binding judgments and a political organ shall supervise the execution of judgments. In other words, the judicial body has the power to deliver judgments while the political body monitors their enforcement. With the exception of the possibility of expelling the non-complying state in extreme situations by a two-thirds vote of the Committee of Ministers of the Council of Europe, these three regional systems lack a direct coercion mechanism to compel compliance.²⁴⁸ Enforcing court judgments, in short, remains a political undertaking rather than a judicial duty.²⁴⁹

For Southeast Asia, it may not be able to deviate from that rule. In terms of enforcement mechanism, all that it can possibly do is to follow the model of its European, American and African counterparts, meaning that the SEACHR shall rule on human rights violations and the Meeting of State Parties shall supervise the execution of that judgment. The SEACHR judgments shall be final and not subject to appeal. The SEACHR shall be authorized to interpret its judgments if disputes arise and hold hearings about its judgment implementation, a practice that the IACHR has recently decided to apply. The SEACHR should also be required to submit reports to the Annual Meeting of States Parties, specifying cases in which

²⁴³ *Id.*

²⁴⁴ Nmehielle, *supra* note 46, at 57.

²⁴⁵ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, *supra* note 35, art. 29(2).

²⁴⁶ *Id.* art. 31.

²⁴⁷ UDOMBANA, *supra* note 41, at 94.

²⁴⁸ Laurence R. Helfer, *Towards a Theory of Effective Supranational Adjudication*, 107 *YALE L. J.* 273, 285 (1997).

²⁴⁹ Udombana, *supra* note 209, at 834.

members states have failed to comply with the SEACHR's judgment and offering recommendations. If the concerned states fail to comply with the SEACHR's judgment, the Meeting of States Parties shall adopt a resolution, asking those states to provide explanations or to take the necessary action. This is perhaps the most feasible mechanism Southeast Asia could have to enforce the judgments of the SEACHR at least for the time being.

IX. THE SEACHR IN A BROADER CONTEXT: RELATIONSHIP WITH DIFFERENT ACTORS

Cooperation and coordination with other actors is particularly important for the success of the SEACHR because, as a judicial institution, it could not on its own complete all of its mandates in protecting human rights and redressing human rights violations. Relationship between the SEACHR and the governments of its member states is of paramount importance. An agreement should be signed between the SEACHR and the nation where the SEACHR will be located concerning the hosting of the SEACHR. Another agreement concerning the immunity and privileges of the SEACHR's judges should also be concluded in case the matter is not dealt with in the SEACHR Statute. Consultations and meetings between the SEACHR and states parties should be held regularly to produce progress and address challenges facing the SEACHR, including amending the founding treaty or the SEACHR's Statute.

Although the SEACHR and the AHRB have different origins and characters, they share a common objective which is the protection and promotion of human rights in the Southeast Asia. Although the SEACHR is not an ASEAN institution, it will still function within the broad context of the Southeast Asian region. Therefore, the two should not work in isolation but rather to coordinate with each other. Framers of the SEACHR and the AHRB should consult with each other on major issues, including designing the two mechanisms, drafting rules of procedure, and reforming the two organs to increase their effectiveness. With regards to the SEACHR's jurisdiction, as earlier proposed, the AHRB should have direct access to the SEACHR and be authorized to request the SEACHR's advisory opinions. In certain cases, the SEACHR could be able to rely on the fact findings previously undertaken by the AHRB, which will enable the SEACHR to devote more of its time to its primary function of adjudicating claims.

Nevertheless, a clear and proper division of labor between the two human rights mechanisms is necessary. While the AHRB shall represent all ASEAN member countries; the SEACHR shall primarily represent its own state parties. The main function of the AHRB will likely be promotional while the proposed SEACHR will assume a great deal of human rights protection, both of which are equally important. While it is

true that human rights promotion in Southeast Asia has a long way to go, there are many human rights violations in the region for which victims need to be redressed. If the mandates and jurisdictions of these two mechanisms are carefully designed and implemented, the possibility of overlapping jurisdiction will be avoided.

There should also be a high degree of coordination between the SEACHR, other ASEAN organs and ASEAN as a whole. The SEACHR should not only coordinate with the AHRB but also with the ASEAN Secretariat as well as ASEAN's potential Commission on Women and Children Rights. This requires at a minimum an exchange of information on human rights activities and decisions and joint approaches to problems of human rights. The SEACHR should also reach out of Southeast Asia to initiate and strengthen its cooperation with other regional human rights courts, which may be likely and willing to offer assistance to the SEACHR in terms of expertise, technology and matters regarding procedures, administration and organization. International and regional organizations such as the UN and EU can also help by contributing to the proposed legal aid fund with a view to assisting with legal representation for alleged victims of human rights violations.

There is also the need for NGOs in Southeast Asia to be engaged during the whole process. NGOs operating in the region should actively participate in the negotiations to establish the SEACHR. They should build a coalition that speaks with a unified voice in discussing specific measures. The best approach is to have some leading NGOs to formulate a plan and reach out to all NGOs working in potential member states by urging them to voice their opinions, consulting with them to strengthen a position on a certain measure, and asking for other NGOs to sign on. Such a strategy may benefit from similar one that Amnesty International managed to do during the *travaux preparatoires* of Protocol 14 to the European Convention.²⁵⁰ Once the SEACHR is established, NGOs should continue to play their important role in raising the awareness of the existence and operation of the SEACHR and offering assistance to individuals who are seeking a remedy at the domestic level. NGOs can appear before the SEACHR in their own capacity as an applicant or as *amicus curiae* under the title of third party intervention. They can participate by requesting provisional measures and protection of witnesses and monitoring state compliance with decisions of the SEACHR. They should also be involved in the SEACHR proceedings through an attorney representing the applicant who is affiliated with the organization. Under the Inter-American human rights system, for instance, most of the petitions are initiated by NGOs.²⁵¹ NGOs may contribute by reviewing

²⁵⁰ Hioureas, *supra* note 116, at 754.

²⁵¹ Martin A. Olz, *Non-governmental Organizations in Regional Human Rights Systems*, 28 COLUM. HUM. RTS. L. REV. 307, 358 (1997).

and reflecting on how to enhance the effectiveness of the SEACHR. The pressure of challenges and constructive criticisms from NGOs will undoubtedly be an encouraging, positive force for improving the Court's performance. In sum, NGOs have a vital role to play in continuing to act as a critical watchdog in this respect.

X. CONCLUSION: TOWARD A SOUTHEAST ASIAN COURT OF HUMAN RIGHTS

Much progress is needed to realize the idea of a SEACHR. Although the realization of such a proposal may proceed very slowly in the face of many challenges, there is evidence indicating that in a group of regional countries, positive change is possible and initial impetus may be created for further developments in favor of establishing a regional human rights court. It is about time that the region moved ahead and acted towards that goal. Though human rights advocacy in the region needs to be patient and realistic, they should not waver in their actions.

The first task in the way forward is to promote the idea of a regional human rights court to those governments which are likely to be more receptive to the prospect of a strong human rights mechanism: the Philippines, Indonesia, Thailand, Malaysia, and possibly Timor Leste and Singapore. Although it is possible that these government leaders will not accept the proposal immediately without any reservations, there are nevertheless bases for work to be done and motivation to be created so that the proposal would be seriously considered, discussed and finally accepted. The establishment of other regional courts of human rights and the ICC has demonstrated that while it is difficult at first to initiate the process of establishing a regional or international human rights court, it is not impossible to realize this goal, not least with a selective, rational and sensible approach. Certain segments within each of the above-mentioned government may be in favor of the idea while other groups may oppose it. In light of the domestic politics approach to international cooperation, it might generally be the case that the national security apparatus and military departments are less inclined to support the establishment of international and regional human rights institutions as they are understandably afraid that this could curb the extent of their liberty in executing national policies. Foreign affairs services or departments are usually more receptive to international cooperation in general and international institutions in particular. Governmental human rights departments or agencies are probably the most supportive. Promotional work needs to be carried out with a view to increasing the likelihood of accepting the idea from the supportive segments and decreasing the intensity of the opposition from domestic opposition groups. Much attention is also needed to lobby the national Congress in each potential member state since, according to internal law of these nations; it is the Congress that will eventually ratify international treaties. Furthermore, if

Congress support is secured, then, the governments are under more pressure to consider and eventually approve the proposal.

Without any doubt, the whole process must be undertaken with a high level of civil participation. Priorities should be to increase people's awareness of the existence of human rights courts in other regions and to popularize the idea of a Southeast Asian court of human rights in regional countries. This is the area where NGOs can play an especially important role. The international community can make valuable contributions by supporting the idea and encouraging its realization. European, American and African human rights systems can offer advice and assistance to Southeast Asia from their experiences in the last several decades. After all, Southeast Asia still badly needs multilateral assistance for this probably will help regional countries focus more attention on the issues, work out a feasible regional strategy, and move toward the establishment of a regional human rights court.

On the way to establish a regional human rights court for Southeast Asia, challenges certainly abound ahead, especially when rapid changes have uncovered violations of human rights in all nations in the region. While challenges should be acknowledged, they nevertheless should not be an excuse for doing nothing and do not eliminate the possibility of a human rights court for Southeast Asia. Compared with other regional states, Indonesia, the Philippines, Thailand and Malaysia appear to be in a better position to manage human rights issues and participate into the global framework of human rights protection.²⁵² They have been more ready to accept a bolder foreign policy and deeper regional cooperation.²⁵³ Officials from these countries have been more active in pushing for change in the matters of human rights in ASEAN.²⁵⁴ They all have

²⁵² That is not to say that human rights practice in these countries is perfect as a lot of problems still persist; nevertheless, in comparison to other regional nations, they have come a long way in their prospects for human rights protection and promotion. They all have independent national human rights bodies and a network of human rights NGOs that play significant role in monitoring the governments' compliance with international human rights standards and promote human rights throughout the countries.

²⁵³ Thailand was the one who raised the "flexible engagement" initiative. The Philippines supported Thailand's call for a "flexible engagement" policy, pushed forward the notion of a democratic peace in Southeast Asia, frankly expressed concerns over human rights abuses taking place in other countries and went as far as to publicly announce that it would have problems ratifying the ASEAN Charter if Myanmar refuses to reform or release Burma opposition leader Aung San Suu Kyi. Indonesia, for its part, was the author of the democracy component in the ASEAN Security Community plan. This country's democratization process resulted in many changes in its attitude concerning democracy and human rights protection. Malaysians in the post Mahathir period, however, have witnessed their government's progressive change in its stand on ASEAN political and institutional reform.

²⁵⁴ In their speeches and statements, officials in these four nations frequently expressed their commitments to the idea of a regional human rights mechanism. They also held bilateral dialogues with NGOs on a regular basis to discuss the possibility of a

independent national human rights institutions accredited with status “A” and a vibrant network of human rights NGOs that has been playing an important force behind any steps of human rights evolution.²⁵⁵ If experience from other regions is any indicator, Europe, Americas and Africa started their process to establish human rights courts while their human rights violations still persisted in many places and certain governments were not yet parties to major international human rights treaties. For a regional human rights system to be strong, sufficient and effective, a human rights court should be set up. A human rights court for all ASEAN members is not possible at this time, but the idea of a court for some nations in the region is worth exploring. The way toward this end is never an easy one. The region, however, possesses favorable conditions to translate that goal into reality in the future.

regional human rights mechanism. In those dialogues, the government delegations were usually composed of very high-level officials.

²⁵⁵ The list of national human rights institutions (NHRIs) with accreditation status granted by the International Coordination Committee of NHRIs (ICC) is conducted on the basis of the Paris Principles. The following classifications for accreditation are used by the ICC: A: Compliance with the Paris Principles; A(R): Accreditation with reserve –insufficient documentation is submitted to confer A status; B: Observer Status - Not fully in compliance with the Paris Principles or insufficient information provided to make a determination; and C: Non-compliant with the Paris Principles. Chart of status of NHRIs, *available at* <http://www.ohchr.org/Documents/Countries/ChartStatusNHRIsDec2007.pdf> (last visited Sep. 5, 2008).