

NGO Proposals for an Asia-Pacific Human Rights System

by Ralph Wilde

¶1 The Asia-Pacific region is the only area of the world without a human rights regime. This piece evaluates current NGO proposals.¹

¶2 Since 1982, regional workshops have been held between Asia-Pacific state representatives under the aegis of the United Nations. The most recent was held in Tehran from February 28 to March 2 1998.² At that meeting it was agreed that the first building block for a regional regime would be a technical cooperation program to further develop national human rights structures and education programs. This approach would help to foster *local* human rights protection, and explore the possibilities of regional co-operation by identifying the issues of concern common to the countries involved.³

¶3 NGOs are skeptical of these developments. They agree on the importance of promoting a local culture of human rights, but find no inconsistency between this local development and a robust regional human rights regime.⁴ In addition, states were very reluctant to allow full NGO participation in the workshops. Despite these obstacles, a series of activist meetings developed in tandem, and, as is the zeitgeist, this was a highly participatory process involving NGOs and human rights activists from across the region.⁵ A Human Rights Charter ("The Charter") was agreed

1. Comments relating to the proposals of human rights activists in the region are based on remarks made at the *Issues Surrounding the Creation of A Regional, Asia-Pacific Human Rights System* meeting at the International Law Association, November 8, 1997 [hereinafter Comments relating to the proposals of human rights activists].

2. Telephone interviews with Dr. Clarence Dias, head of the International Center for Law and Development, February and March, 1998 [hereinafter Interview with Dias].

3. *Id.*

4. See Comments relating to the proposals of human rights activists, *supra* note 1; Interview with Dias, *supra* note 2. Such a regime would indeed have to reflect the human rights needs of the region, and so would engage much more in fostering meaningful human rights development initiatives than, say, the European system which presupposes a particular human rights tradition.

5. See HUMAN RIGHTS AND INTERNATIONAL RELATIONS IN THE ASIA PACIFIC REGION 194-200 (J.T.H. Tang ed., 1995) (discussing the activities of human rights NGOs in the region). For the meetings, see <<http://www.hk.super.net/~ahrchk/>>, and then select <http://www.hk.super.net/~ahrchk/ahr_consult.htm>, <http://www.hk.super.net/~ahrchk/ahr_south.htm>, <<http://www.hk.super.net/~ahrchk/southeas.htm>>, and <<http://www.hk.super.net/~ahrchk/east.htm>>.

upon, and was most recently updated on 30 March 1998.⁶ The Charter posits three guiding principles (art. 2); divides rights into groups with a set of considerations for each (arts. 3-7); identifies particularly vulnerable groups (arts. 8-14); and makes enforcement suggestions (arts. 15-16). The Charter is an interesting document because it illustrates how human rights discourse has evolved since the foundational documents like the ICCPR⁷ was drafted. It reflects current human rights issues such as the role of non-state actors, the public/private divide,⁸ and the impact of globalization.⁹ In the sections that connect universal rights with the particular situation and history of Asia-Pacific countries, it makes a powerful contribution to the meaningfulness of human rights discourse to the region, rebutting the "Asian Values" critique:¹⁰ "While drawing from the cultural wells of the region, it also points to the need for cleaning these wells that have been polluted by millenniums of prejudice, discrimination, inequality and violence." (Charter, preface).

¶4 Positions range from the conventional, such as freedom of religion (art. 6.3), to the radical, such as the use of affirmative action to promote women to positions of power in the private spheres of business and land ownership (art. 9.4).

¶5 The Charter highlights three "guiding principles," two of which are expressed merely rhetorically in the jurisprudence of other systems—the universality and indivisibility of human rights (arts. 2.2-2.4) and the simultaneous international, and domestic responsibility for their

6. For the most recent draft, see ASIAN HUMAN RIGHTS CHARTER- A PEOPLES' CHARTER (visited July 15, 1998) <http://www.hk.super.net/~ahrchk/ahr_charter.htm> [hereinafter CHARTER]. The Asian Human Rights Commission in Hong Kong promotes it. For the Asian Human Rights Commission generally, see (visited July 15, 1998) <<http://www.hk.super.net/~ahrchk>>.

7. International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967), U.N. Doc. A/6316 (visited July 15, 1998) <<http://www.tufts.edu/departments/fletcher/multi/texts/BH769.txt>>.

8. Because it is solely applicable to the relationship between the individual and the state, international human rights law focuses on issues in the public sphere directly, and those in the private sphere (such as relationships between individuals) indirectly through the state. For a discussion of the state's obligations vis-à-vis the private sphere, see the Velasquez Rodriguez Case, Inter-Am Ct. H.R. 43, OEA/ser. L./V./3.19, doc. 13 (1988), reprinted in 9 Hum. Rts. L.J. 212, 233 (1988) (holding that a state is liable for the actions of private actors involved in the phenomenon of disappearances in Honduras). For a critical evaluation of the effect of the public/private divide on the protection of women's rights, see Hilary Charlesworth, C. Chinkin & S. Wright, *Feminist Approaches to International Law* 85 AM. J. INT. L. 613 (1991); Karen Engle, *After the Collapse of the Public/Private Distinction: Strategizing Women's Rights in*, RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 143 (Dorinda Dallmeyer ed., 1993); Catherine MacKinnon, *On Torture: A Feminist Perspective on Human Rights in HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY* 21 (Kathleen Mahoney & P. Mahoney eds., 1993); Elizabeth Schneider, *The Violence of Privacy* 23 CONN. L. REV. 973, 974 (1992).

9. For an interesting thesis on this topic, see BENJAMIN BARBER, *JIHAD VS. MCWORLD: HOW GLOBALISM AND TRIBALISM ARE RESHAPING THE WORLD* (1995).

10. "Asian Values" are a cultural relativism thesis that sees the Enlightenment-based concept of human rights as irredeemably incompatible with the traditions and culture (often described in terms of Confucian notions of filial obedience) in Asia. For a discussion of these issues, see JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 118 (1989); Yash Ghai, *Human Rights and Governance: The Asia Debate* 15 AUST. Y. B. INT. L. 1 (1994); Bilhari Kausikan, *Asia's Different Standard*, 92 FOREIGN POLICY 24 (1993).

promotion and protection (arts. 2.5-2.8)—and one of which (that sustainable development is crucial for human rights (art. 2.9)) is connected to, but different from, Article 22 of the Banjul Charter (the right to development). On responsibility, the Charter makes an NIEO¹¹-style connection between human rights and the "inequities of the international world economic and political order", declaring the "responsibility of the international community for the social and economic welfare of all people" (art. 2.6). Developments in economics since the NIEO era are reflected in the focus not only on developed states, but also on "financial and other corporations" with what are seen as "narrow and short sighted economic policies which cause so much misery to so many people," (art. 2.8). In a suggestion that finds no echo in previous human rights instruments, but is increasingly on the agenda of human rights discourse,¹² the Charter argues that "it is necessary to strengthen the regime of rights by making corporations liable for the violation of rights." (art. 2.8).

¶6 The Charter does not attempt to restate the rights contained in international human rights law.¹³ Instead, it draws holistic categories of rights, within which considerations particular to the Asia-Pacific region are conceptualized (art.3.1). The categories are life (arts. 3.2-3.7); peace (arts. 4.1-4.5); democracy (arts. 5.1-5.5); cultural identity and freedom of conscience (arts. 6.1-6.3); and development and social justice (arts. 7.1-7.2). The scope of rights covered among them is broad, including both justiciable civil, political, economic, cultural, and social rights, and those rights that might be considered aspirational, such as the right to peace.

¶7 The right to life includes employment, personal integrity, education, habitat, environment, healthcare and nutrition. It identifies the particular risk to these rights of "war or ethnic conflict or incitement to hatred and violence." (art. 3.4). A pragmatic approach is taken to the death penalty, insisting that it should be abolished, but that "where it exists, it may be imposed only rarely for the most serious crimes," with the observance of

11. The New International Economic Order, a movement precipitated by the decolonization of many developing countries in the 1960s and 1970s, and characterized by an agenda of reconceiving the international economic order so as to redistribute wealth from north to south, and the use of the one-member-one-vote General Assembly legislation process to pass supportive resolutions. See Declaration on the Establishment of a New Economic Order, GA Res. 3201, UN GAOR, 6th Spec. Sess., Supp. No. 1, at 3, UN DOC. A/9559 (1974); Programme of Action on the Establishment of a New International Economic Order, GA Res. 3202, *id.* at 5.

12. For a discussion of corporations and human rights, see Sudhir K. Chopra, *Multinational Corporations in the Aftermath of Bhopal: The Need for a New Comprehensive Global Regime for Transnational Corporate Activity*, 29 VAL. U. L. REV. 235 (1994); Human Rights, Business and International Financial Institutions, 1994 PROC. AM. SOC. INT. L. 271 (1995); Diane Orentlicher & T. Gelatt, *Public Law, Private Actors: The Impact of Human Rights on Business Investors in China* 14 NW. J. INT. L. & BUS. 66 (1993); Hari M. Osofsky, *Environmental Human Rights Under the Alien Tort Statute: Redress for Indigenous Victims of Multinational Corporations*, 20 SUFFOLK TRANSNAT'L L. REV. 335, 336-42, 391-95 (1997); Reebok International Ltd.'s *Human Rights Production Standards*, reprinted in HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS: TEXT AND MATERIALS 878-79 (1996) (visited July 15, 1998) <<http://www.reebok.com/humanrights/product.html>>.

13. For a list of international human rights treaties, see (visited July 15, 1998) <http://www.unhchr.ch/html/intlinst.htm>.

various familiar due process guarantees, and never conducted in public (art. 3.7). The right to peace discussion states that the militarization in some countries has led to a situation where "all scores are settled by force and citizens have no protection against the intimidation and terror of state or private armies." (art. 4.1). Just as international humanitarian law can be seen as moving towards criminalizing gross violations of human rights irrespective of a nexus with "international" conflict,¹⁴ the Charter right to peace makes no distinction between security-related abuses that are internal, and those with inter- or trans-national characteristics. Moreover, it takes on board critiques that have been made of the distinction between public and private in human rights law by covering both conventional public order concerns,¹⁵ and those issues in the private sphere such as "oppression, exploitation, violence." (art. 4.3). It insists that even though many countries in the region have had to fight "fascist invasion, colonialism and neo-colonialism," the struggle against these forces should not be used to by states to justify resistance to the adoption and adaption of human rights norms that were originally formulated by "hegemonic powers," (art. 4.4).

¶8 The right to democracy is prefaced with the challenges for governance that prevail in post-colonial states where the "traditional systems of accountability and public participation in affairs of state as well as the relationship of citizens to the government were altered fundamentally." The inclusion of this right, a relatively recent topic in human rights scholarship,¹⁶ is a first for a (proto-) regional human rights treaty. The right to cultural identity and freedom of expression focuses on what is seen as the "moral conditions which permit a person to lead a meaningful existence," that is to say engagement with the "common cultural identities" that the "Asian traditions" stress (art. 6.1). It takes a firm line, however, against "those features in our cultures which are contrary to the universal principles of human rights" (art. 6.2) such as gender discrimination. Freedom of religion includes the explicit right to change one's belief. The right to development and social justice attempts to outline

14. See Appeals Chamber Decision on the Tadic Jurisdictional Motion, Case No. IT-94-1-AR72, International Criminal Tribunal for the Former Yugoslavia, Oct. 2, 1995, para. 77 <<http://www.un.org/icty/tadic/appeal/decision-e/ace1-1.htm>> (holding that the Tribunal has jurisdiction to adjudicate internal and international violations of international humanitarian law); Rome Statute of the International Criminal Court, adopted July 17, 1998, pt. 2, art. 8(2)(c),(d),(e),(f) <<http://www.un.org/icc/part2.htm>> (defining "War Crimes" without an international character that the International Criminal Court will have jurisdiction over).

15. See *supra* note 8.

16. See JAMES CRAWFORD, *DEMOCRACY IN INTERNATIONAL LAW* (1994); SUSAN MARKS, *DEMOCRACY, IDEOLOGY AND INTERNATIONAL LAW* (forthcoming, 1998) (Oxford University Press); Gregory H. Fox & Georg Nolte, *Intolerant Democracies* 36 HARV. INT'L L.J. 1 (1995); Gregory Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539 (1992); Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992); Susan Marks, *The "Emerging Norm": Conceptualizing "Democratic Governance,"* PROC. AM. SOC'Y INT'L L. (1997); W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law* 84 AM. J. INT'L L. 866 (1990); Henry Steiner, *Political Participation as a Human Right* 1 HARV. HUM. RTS. Y.B. 77 (1988).

some key aspects and makes a stand against cultural imperialism through the promotion of "the cultivation of . . . cultural and spiritual capacities . . . free from hegemonic pressures and influences."

¶9 The Charter then covers another frequently highlighted topic in human rights discourse which has never previously been articulated in a regional instrument: the particular vulnerability of certain groups. Interestingly, it not only devotes sections to certain groups (women (arts. 9.1-9.4), children (arts. 10.1), differently abled persons (arts. 11.1-11.2), workers (arts. 12.1-12.2), students (art. 13.1), prisoners and political detainees arts. 14.1-14.3)), but also mentions in a preamble (art. 8.1) that other groups (refugees, minorities and indigenous people, gays and lesbians, and economic groups such as peasants and fishing communities) suffer from discrimination and oppression. There is no coherent conceptual reason to justify such a distinction, and therefore it may have occurred because of a political compromise between the NGO drafters. However unsatisfactory such a two-tier approach might be, it is encouraging to see lesbians and gay men mentioned explicitly as they have never been before in any treaty. The section on women highlights particular regional problems such as sexual slavery and trafficking in women; includes "private" issues "within the domestic and patriarchal realm";¹⁷ connects with humanitarian law by advocating rape as a war crime;¹⁸ covers sexual and reproductive self-determination; and argues for the promotion of women in public and private positions of power through affirmative action. The section on children¹⁹ paints a grim picture which includes familiar concerns like child labor, and issues that are depressing *motifs* of our times like the sale of organs and child pornography. It highlights the wide practice of "female infanticide due to patriarchal gender preference and female genital mutilation" without taking an outright position, and argues for the ratification and implementation of the Convention on the Rights of the Child.²⁰ The rights of workers blends typical provisions such as forming trade unions, with issues particular to the region such as the phenomenon of migrant workers. Students are included because of their vulnerability as "targets for counter-insurgency operations and internal security laws and operations" and lack of academic freedom (art. 13.1).

¶10 Perhaps the most innovative section concerns enforcement, which moves beyond looking at human rights as exclusively about the relationship between the individual and the state, to a more holistic framework of application wherever power is exercised over individuals

17. See *supra*, note 8.

18. See CHARTER, *supra* note 3, Art. 9.2, p. 7. See Rome Statute of the International Criminal Court, *supra* note 14, art. 7(g) (defining rape as a crime against humanity).

19. For background on this issue, see, for example, Amnesty International's recent report: *Children in South Asia: Securing Their Rights* (April 22, 1998) (visited July 15, 1998) <http://www.amnesty.org/ailib/intcam/childasia/report.htm>.

20. Adopted 20 Nov. 1989, Convention on the Rights of the Child, G.A. Res. 44/25, 44 UN GAOR, Supp. (No. 49), UN Doc. A/44/49, at 166 (1989), reprinted in 28 ILM 1448 (1989) (visited July 15, 1998) <http://www.unhchr.ch/html/menu3/b/k2crc.htm>.

(art. 15.2.a). Thus the Charter emphasizes the importance of curbing restrictive customs "particularly those related to caste, gender or religion" (art. 15.2.e); declares that enforcement is the responsibility of all groups in society (arts. 15.2.b and 15.2.g); and insists that governments are required to play not only a reactive but a proactive role (art. 15.2.b). It lays out some of the essential building blocks for fostering national human rights governance, from constitutional protections (art. 15.3.a) to education and awareness-raising (art. 15.3.b), and training of key players like the police, prison officers and the armed forces (art. 15.3.c). As far as national legal institutions are concerned, it highlights the importance of the independence of the judiciary, stressing that "more women, more underprivileged categories and more of the Pariahs of society must by deliberate State action be lifted out of the mire and instilled in judicial positions" (art. 15.4.a); calls for greater access to legal representation (art. 15.4.b); supports the activities of Human Rights Commissions (art. 15.4.c); and advocates the establishment of People's Tribunals to bring human rights considerations to local issues, emphasizing that "the responsibility for the protection of rights is wide, and not a preserve of the state," (art. 15.4.d). The Charter declares that "The protection of human rights should be pursued at all levels, local, national, regional and international. Institutions at each level have their special advantages and skills," (art. 16.1). For the Asia-Pacific region it envisions the Convention and commission/court model that the other regional systems have adopted. It expands this model to cover violations by "groups and corporations in addition to state institutions" and with right of access not only for individuals, but also for "NGOs and other social organizations," (art. 16.2).

¶11 At present, the Charter is an agreed text around which NGOs can campaign. It is intended to

Be used as an educational document . . . [and] as a basis to develop solidarity action for the protection and promotion of human rights in Asia.²¹

Under the banner of "Asian Values,"²² there is powerful resistance to human rights initiatives, whether national or regional, amongst the elites of many countries in the region. Unlike the NGO initiative, the intergovernmental meetings have not seriously begun the task of considering regional machinery, instead focusing on issues of technical cooperation. A regional human rights regime remains, therefore, largely in the realm of human rights activism at present.

21. See *Process and Consultations*, http://www.hk.super.net/~ahrchk/ahr_process.htm.

22. See *supra* note 10.