

AMNESTY INTERNATIONAL



**Submission to the Joint Standing Committee on Foreign Affairs,
Defence and Trade**

Inquiry into Human Rights Mechanisms and the Asia-Pacific

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Executive Summary

The Asia-Pacific region contains the broadest range of political systems, cultures and levels of economic development in the world. Many of its countries are characterised by grave human rights abuses, some perpetrated by repressive regimes, others the result of entrenched poverty.

Accession to international human rights instruments is patchy, and even in countries where nominal legal safeguards exist, real protection and enforcement of human rights is often illusory. Asia is the only continent that does not have an overarching international human rights instrument, lagging behind other regions of the world.

The following principles should guide any regional mechanism for the protection of human rights:

- There should be no compromise on international standards;
- Instruments should have a binding legal effect and be implemented in practice;
- Monitoring should be enabled by independent, impartial, professional and well-resourced bodies;
- The mechanism should be accessible to victims; and
- There should be cooperation with civil society.

The diversity of the Asia-Pacific region, together with the political environment, make it unlikely that there will progress in the near future towards a human rights mechanism for the whole region. However, in both Southeast Asia and the Southwest Pacific, early steps are being taken towards the establishment of sub-regional mechanisms to protect human rights. Australia should, as part of a broader foreign policy agenda prioritising the protection of human rights in the regions, encourage and support these sub-regional developments.

The ASEAN grouping is currently developing the Terms of Reference for the operation of an ASEAN Human Rights Body. Amnesty International has made a number of recommendations with regard to how this body should be constituted and how it should operate, consistent with principles outlined above.

The Pacific Island States are also examining mechanisms for the protection of human rights. Key among these is the potential development of a regional human rights commission, an initiative that would encourage the protection of human rights in a sub-region that is characterised by severe resource constraints.

About Amnesty International

Amnesty International is a worldwide movement of more than 2.2 million people across 150 countries working to promote the observance of all human rights enshrined in the Universal Declaration of Human Rights and other international standards.

Amnesty International Australia has almost 80,000 supporters. It undertakes research and action focused on preventing grave abuses of human rights, including rights to physical and mental integrity, freedom of conscience and expression, and freedom from discrimination.

Introduction

The Asia-Pacific region contains both some of the world's wealthiest and poorest states. It is home to the two most populous countries in the world – China with 1.3 billion people and India with 1.1 billion. These two states' economies have also been among the fastest-growing globally. Not all citizens have benefitted, however. The growth has been accompanied by a widening gap between rich and poor, exacerbating entrenched patterns of discrimination. The challenge to match economic development with an increase in economic, social and cultural rights for the region's poor remains unmet, and this challenge will increase as economic growth slows.

Politically, the region also contains a broad spectrum, ranging from vibrant democracies to brutally repressive authoritarian regimes with little, if any, popular legitimacy. Ongoing conflicts and violence perpetrated by armed groups have continued to commit grave abuses across the region, undermining the security of millions. In addition to refugee populations denied a durable solution, hundreds of thousands remain internally displaced by conflict. Meanwhile in many countries security forces have enjoyed impunity for decades of human rights violations, including extrajudicial executions, enforced disappearances, torture and other ill-treatment perpetrated in the name of national security. Political instability and the reassertion of military authority – often via the imposition of states of emergency – have undermined institutions crucial for the protection of human rights, or stalled their reform, in several countries.

Even where legal systems are well established, and fundamental rights enshrined in constitutions, protection and enforcement are often undermined for political expediency. Asia-Pacific countries that have ratified the core UN human rights treaties have been reluctant to adopt optional protocols providing international mechanisms for individual complaints. National human rights institutions have been established in 13 countries, but their independence and efficacy in many countries has been seriously challenged.

Asia remains the only continent that does not have an overarching human rights instrument. However, in a major recent development, the leaders of the Association of Southeast Asian Nations (ASEAN) 10 member countries – Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam – marked ASEAN's 40th anniversary by signing and subsequently ratifying their first formal charter, which included a commitment to establish a human rights body for the sub-region. The Pacific Islands Forum began examining similar mechanisms within initiatives to promote Pacific integration and co-operation.

Bangladesh, China, India, Indonesia, Japan, Malaysia, Pakistan, the Philippines and South Korea are current members of the recently-established UN Human Rights Council. Each member state has committed to respecting human rights, co-operating with UN human rights mechanisms, creating and maintaining strong national human rights frameworks and ratifying and upholding international standards. Time will tell whether new Council mechanisms, notably the Universal Periodic Review, will facilitate robust international scrutiny and response when members fail to honour such commitments, and make a real difference to the day-to-day lives of the people of the Asia-Pacific region.

Prospects for a Regional Mechanism

The development of a regional, or sub-regional, human rights protection mechanism will need to draw upon the varied international experience in this field. While Europe, Africa and the Americas have all established regional human rights courts, the Asia Pacific region does not have a similar system through which to enforce international human rights standards

Furthermore, Europe, the Americas and Africa have all recognised individual and collective regional complaints mechanisms for social and economic rights. A group complaints procedure of the European Social Charter came into force in 1999. An Optional Protocol to the African Charter on Human and Peoples' Rights was adopted in 1998. This will establish the African Court on Human and Peoples' Rights with the power to enforce the rights of the African Charter. The Organisation of American States has recently adopted the San Salvador Protocol to the Inter-American Convention on Human Rights to provide a complaint mechanism for particular social and economic rights.

Drawing on the experience of these regional mechanisms, Amnesty International believes that the following basic principles should form the basis of any regional mechanism for the protection of human rights:

- There should be no compromise on international standards - any regional instruments must provide the level of protection reached by the international community as enshrined in UN human rights treaties and other instruments.
- Instruments should have a binding legal effect and be implemented in practice - not just empty declarations or legislation that is then ignored. These instruments should include provisions for ensuring implementation, including monitoring bodies. Implementing legislation must not yield to emergency powers, anti-terror legislation etc. (beyond provisions on derogation in accordance with international standards, preserving non-derogable rights and the principle of derogating only "to the extent strictly require by the exigencies of the situation").
- Monitoring should be enabled by independent, impartial, professional and well-resourced bodies - it is crucial that persons not beholden to governments and with the proper expertise sit on professional treaty-bodies (including a human rights court, committees overseeing specific treaties or issues, special rapporteurs etc.) which engage in actual monitoring.

- The mechanism should be accessible to victims – the instruments and institutions must not remain remote, aloof and out of reach. Every person whose human rights have been violated or are under threat must, within reasonable procedures (such as exhaustion of domestic remedies), be able to access the human rights bodies and seek redress.
- There should be cooperation with civil society, including human rights NGOs, as well as with international human rights mechanisms.

In comparison with other regions of the world, the Asia-Pacific region possesses a relatively broad diverse grouping with regard to levels of economic development, cultures and political systems. Despite some moves towards greater regional cooperation, notably the Asia Pacific Economic Cooperation forum, the government and civil society leaders of the various sub-regions, such as Southeast Asia, or the Pacific, do not naturally identify themselves as part of a broader Asia-Pacific community.

The development of the political consensus required to develop and establish a human rights protection mechanism is far more likely to emerge at the sub-regional level, where in some cases there are more shared values and political priorities. At this level, there are encouraging, albeit embryonic, moves towards the development of such mechanisms, most notably in ASEAN. This submission includes Amnesty International's outline of the desirable key components of an ASEAN human rights mechanism.

To some extent the environment in Southeast Asia is more conducive to such developments than it is in other parts of the Asia-Pacific region. North Asia for example, contains two authoritarian states, China and North Korea, as well as two economically-developed liberal democracies, Japan and South Korea, and the dynamics between them is characterised by historical tensions and continuing rivalries. These political sensitivities between these states make prospects for a sub-regional agreement on a human rights protection mechanism in the foreseeable future bleak.

As consensus for an Asia-Pacific regional mechanism is unlikely to be achieved in the near future, Australia should concentrate on promoting and assisting the development of sub-regional mechanisms for the protection of human rights, such as those emerging in the ASEAN and Pacific Island contexts. This approach needs to be complemented by a foreign policy that makes it a key priority in bilateral dealings to actively and consistently encourage individual regional governments to uphold human rights standards.

Furthermore, Australia should strengthen its promotion and support for groups and sectors of society in the region that advocate the observance of human rights. It should sponsor the establishment of stronger networks of NGOs, and greater collaboration between national human rights commissions.

ASEAN

The establishment of an ASEAN Human Rights Body (AHRB) is provided for under Article 14 of the ASEAN Charter. The Terms of Reference for the AHRB will be determined by the ASEAN Foreign Ministers Meeting, and are likely to be endorsed at the ASEAN Summit to be held in Thailand at the end of February 2009.

The AHRB has the potential to lay the foundation for a new regional approach to human rights in Southeast Asia. For this to happen, however, the commendable language of the ASEAN Charter regarding the promotion and protection of human rights must be translated into concrete action. A key observation that is relevant is that only four ASEAN member states – Indonesia, Malaysia, Thailand and the Philippines – have established national human rights institutions. Without the focus and impetus provided by such domestic institutions, it would be hard to see an effective ASEAN mechanism for the protection of human rights being sustainable.

Amnesty International believes that the Terms of Reference for the AHRB should refer, as sources and authorities for its work, to the UN Charter and UN declarations that form the basis of human rights law, including, as a minimum, the Universal Declaration on Human rights (UDHR, 1948) and the Vienna Declaration and Programme of Action (1993), as well as those human rights treaties to which all ASEAN member states are currently states parties – that is, the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979) and the UN Convention on the Rights of the Child (CRC, 1989).

Additionally, the AHRB's charter should refer to the human rights treaties that form the legal bedrock of the system protecting human rights globally – that is, as a minimum, the International Covenant on Civil and Political Rights (ICCPR, 1966) and the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966). Amnesty International is well aware that not all ASEAN member states are party to these Covenants and other key human rights treaties, and we have repeatedly called for their universal ratification. Nevertheless, the AHRB could be instrumental in moving ASEAN towards much wider ratification, incorporation and implementation of these human rights treaties.

The AHRB's mandate and tasks should include:

1. Monitoring and investigating: including the investigation of specific human rights situations in response to submissions by individuals, organisations or states, or of its own instigation. The AHRB should work to ensure that states allow human rights defenders to carry out their work unhindered. Governments should grant the AHRB's investigators full access to all relevant information and persons.

The body should have the power to issue recommendations for concrete action in relation to individual cases, specific and general human rights situations, such as changes in law, policy and practice; prosecution of perpetrators (including those in positions of responsibility) and reparations for victims. Governments must at the very least be required take these into serious consideration, and respond to the human rights body with detailed descriptions of the steps they have taken to remedy the situation. Special procedures must be instituted to ensure swift and effective action on urgent cases.

In addition, the AHRB should be mandated to carry out routine examinations of the situation of human rights in each of the member states, as well as on cross-border human rights issues such as migrant workers and people trafficking. The human rights body should also be authorised to determine that a state's human rights violations amount to "a serious breach of the Charter or non-compliance" under Article 20(4) of the

Charter, in which case the situation must be referred to the ASEAN Summit in accordance with that provision.

2. *Reporting*: including an annual report to ASEAN bodies, among them the Summit, on its investigation, and monitoring and other activities at all the above levels, and other reports on individual, thematic, country or regional issues, as the AHRB sees fit. The reports should be made public, unless the AHRB decides otherwise for reasons such as the protection of individuals from danger.

3. *Advising*: including on the ratification, incorporation into domestic law and implementation in practice of international human rights and other relevant treaties, the implementation of recommendations of UN treaty bodies and Special Procedures, and the establishment and operation of national human rights institutions in accordance with international standards, as well as assisting the work of these institutions. In addition, the AHRB should provide advice at the request of national and regional non-governmental human rights defenders.

4. *Promoting*: including urging member states to ratify, incorporate and implement international human rights treaties, to report to human rights monitoring bodies and to invite UN Special Procedures to visit.

5. *Educating*: including the development of tools and materials for human rights education and helping member states to provide human rights education and training, for state officials, for vulnerable groups such as members of ethnic minorities, migrants and detainees, and for the public as a whole.

While Amnesty International does not take a position on the precise structures the AHRB should work within, the organisation urges ASEAN to ensure the following:

1. Nomination through a transparent process with civil society involvement

As noted below, Amnesty International believes that the core human rights work of the AHRB must be done by independent, impartial professionals. To meet these requirements, an open, transparent procedure both on the national and the ASEAN level is called for, involving extensive and meaningful consultations with civil society.

2. The need for independence, impartiality and professionalism

As in other regional systems, ASEAN's inter-governmental bodies could have a role in supporting the promotion and protection of human rights. It is crucial that the core human rights work is carried out by independent, impartial human rights professionals – working either individually - such as country or thematic Special Rapporteurs - or in bodies such as working groups, commissions or committees.

'Independent' means that the person or body is not answerable to a government or other political or interested group, nor can they be fired, suspended, deprived of resources or otherwise controlled by a government.

'Impartial' means that the person or body is not prejudicial or otherwise predisposed to take one side or the other, judging or assessing cases and situations on their merits only.

'Professional' in this context would mean that the person or persons are knowledgeable, experienced and competent in the theory and practice of international human rights law and standards. Specific posts or tasks would require specific expertise, for instance in children or women's rights, international humanitarian law or forensic pathology.

3. The need for sufficient resources

To ensure its independence, impartiality, professionalism and efficiency, the AHRB, including any professional body working under it, must be provided with ample budgetary resources, facilities and administrative support.

4. Gender parity and geographical representation

The AHRB should have gender parity, and its membership should reflect the region's diverse peoples and cultures.

With regard to the role of the ASEAN Secretariat, it is important to ensure that the Secretariat's role is generally a supporting and facilitating one, and must not include any type of control, veto or censorship of the AHRB, its staff, work or reports.

The AHRB should learn from the experience and expertise of other regional human rights bodies, as well as the UN human rights bodies. The AHRB should make use of the extensive experience of the Office of the UN High Commissioner for Human Rights as well as be in dialogue with more specific institutions, internationally and regionally.

The AHRB should be in constant dialogue with national and regional, as well as international civil society organisations. The AHRB should be accessible to all, and in particular human rights defenders, victims of human rights violations and those populations which would otherwise find it difficult to access the AHRB – these tend to be the populations most vulnerable to human rights violations. To achieve this, the AHRB should have representatives in each member state, who would conduct outreach work beyond the big cities and communication centres, to reach as widely as possible, and in particular to marginalised communities. The AHRB's reports, educational and other materials should be disseminated in as many languages and through as many communication channels as possible.

Amnesty International believes that ultimately, ASEAN should develop, like other regions, a comprehensive human rights treaty, or treaties, reflecting international human rights law and standards, as well as establish robust bodies, such as a human rights court and a committee for the prevention of torture, to monitor and if need be enforce their provisions. In view of the current human rights situation in several member states, combined with ASEAN's tradition of working through consensus among member states, it appears that ASEAN is likely to opt for a gradual, or evolutionary approach to such development.

This evolutionary process could include the following benchmarks:

1. Ratification by all member states of the core international human rights treaties, at the very least the ICCPR and the ICESCR;

2. The incorporation of these treaties' provisions into national law, and legal, administrative and practical steps to ensure their implementation;
3. The establishment of national human rights institutions, in accordance with the Paris Principles, in all member states.

The Pacific

The Pacific Island countries provide another example of a relatively cohesive sub-regional grouping where early steps towards cooperation on human rights protection are occurring. The sub-region has a low ratification rate of international human rights treaties: PNG and Solomons have now ratified or acceded to ICESCR, and PNG, Samoa and Vanuatu the ICCPR (while Nauru is a signatory). However, almost all PICs have ratified CEDAW. Reporting to UN human rights treaty bodies has been less than consistent, underlining the major resource constraints that characterise the PICs.

In 2006, the leaders of the Pacific Islands Forum launched the Pacific Plan (see www.pacificplan.org). The Plan mirrored the Millennium Development Goals and introduced Pacific-centred development goals. It set targets for countries to achieve these goals and a whole range of initiatives. There are 4 pillars of the plan: economic growth, sustainable development, governance and security.

One of these initiatives, under the governance head, encourages PICs to ratify international human rights treaties and to implement the principles in these treaties. The fact that a human rights initiative was incorporated into the Pacific plan was in itself a major achievement as PIC governments had until then constantly resisted the mention of human rights in Pacific Forum documents, utilising cultural relativist objections.

The Pacific Plan requires a 6 monthly report by the Forum Secretariat on the implementation by the member countries. It has seen a number of key collaborations on human rights - the New Zealand Law Reform Commission, the New Zealand Human Rights Commission and the Forum Secretariat - to examine the cultural relativist argument and to determine how human rights are relevant and fundamental for everyone in the Pacific.

As the debate on human rights in the Pacific developed, political developments in several countries, such as the military takeover in Fiji, the civil war in the Solomon Islands and Tonga's democratic changes, further raised the profile of human rights issues.

One of the areas under discussion has been the establishment of a regional human rights mechanism. Only Fiji has a human rights commission, which has existed since 1999. Papua New Guinea is in the process of establishing such a body. Other countries in the Pacific have maintained that their size and lack of resources cannot allow them to have a human rights commission. This has led to discussion in the smaller island countries about expanding the role of the Pacific Island Network of Ombudsman to include that of a human rights commission.

Another option that would address resource constraints is the establishment of a regional human rights commission. A number of regional organisations are putting together a joint proposal for the EU to fund the setting up and work of a working group to

investigate this option. The Pacific Islands Forum Secretariat will be the focal point but the initiative will be lead by the Pacific Regional Rights Resource Team, a project of the Secretariat of the Pacific Community and the UN Development Program. Amnesty International is currently providing advice to this process, which is envisaging a 5-10 year timeframe for the establishment of a functioning commission.