



OHCHR REGIONAL OFFICE FOR SOUTH-EAST ASIA

REPORT OF EXPERT DIALOGUE WITH CIVIL SOCIETY AND NHRIS ON REGIONAL HUMAN RIGHTS MECHANISMS IN AFRICA, THE AMERICAS AND EUROPE

JAKARTA, 4-5 MAY 2009

I. INTRODUCTION

From 4-5 May 2009, OHCHR South-East Asia Regional Office in Bangkok (ROB), the civil society Solidarity for Asian People's Advocacy Task Force on ASEAN and Human Rights (TF-AHR), and the CIDA funded Southeast Asia Regional Cooperation in Human Development (SEARCH) jointly organised a workshop on regional human rights mechanisms in Africa, the Americas and Europe. The participants for the workshop were the thematic and national focal points of the TF-AHR and National Human Rights Institution (NHRI) representatives from the region, with experts on the human rights systems in Africa, the Americas and Europe acting as resource persons throughout the two days. The aim of the workshop was to share experiences of how civil society and NHRIs in the regions of Africa, the Americas and Europe contributed to the establishment and development of credible regional human rights mechanisms. Through the course of sharing these experiences, civil society organisations (CSOs) and NHRIs from South-East Asia were able to consider new ideas on how to contribute to the creation of credible and effective ASEAN human rights mechanisms.

II. STRUCTURE OF THE MEETING

Persons of recognised expertise from the regions of Africa, Europe and the Americas¹ gave 45 minute presentations on their respective human rights systems (see III.1 to III.3 below). Each lecture was followed by a 30 minute interactive discussion between the experts and the participants. There was then a presentation on the relationship between national, regional and international human rights mechanisms and inter-regional cooperation (III.4), which was followed by a panel discussion comparing the roles of civil society/NHRIs in Africa, the Americas and Europe in developing credible regional human rights mechanisms (III.5). Day 2 featured a series of workshops in which participants split into three groups to discuss the following topics: "Facing off the return of the 'Asian values' thesis" (III.6); "Considering the 'evolutionary approach' to the development of human rights norms and standards in ASEAN" (III.7); and "Working with different regional human rights mechanisms to create an effective system" (III.8). The final session of the day featured a Panel discussion entitled, "Thoughts on civil society and NHRIs strategy for the months and years ahead to help develop credible and effective regional human rights mechanisms" (III.9), which brought the two-day meeting to an end.

¹ Mr. Constantin Cojocariu for Europe (Interights, UK); Prof. Frans Viljoen for Africa (University of Pretoria, South Africa); Prof. Christina Cerna for the Americas (Inter-American Commission on Human Rights and Georgetown University Law Center, Washington, US)

III. SUMMARY OF THE MEETING

Day One:

Following opening remarks by Mr. Arief Patra M. Zein of SAPA's Executive Committee and by Mr. Daniel Collinge on behalf of the Regional Representative of OHCHR South-East Asia Regional Office, Mr. Homayoun Alizadeh, the three experts gave presentations on their respective regional human rights systems.

III.1 The European Human Rights System

Main points from Mr. Constantin Cojocariu's presentation:

- Of all the regional human rights systems, the European system is the most complex and the most well-established.
- Regarding the human rights institutions in Europe, the most well established human rights body is the **Council of Europe** which has adopted approximately 150 treaties, many of which concern human rights. Some of these treaties have been the basis for the establishment of human rights bodies, the most prominent of which are the European Court of Human Rights, the Committee for the Prevention of Torture, and the Framework Convention for the Protection of National Minorities.
- In addition to the Council of Europe, another important body which has addressed human rights is the **European Union (EU)**.
- The **Organisation of Security and Cooperation in Europe (OSCE)**, established in 1975, also concerns itself with human rights.
- Regarding the contributions that **National Human Rights Institutions (NHRIs)** and **Non-Governmental Organisations (NGOs)** (domestic and international) have made in the development of these institutions, 50 years ago not many such groups and institutions existed.
- The **Council of Europe** was established in 1949 in London by ten countries, with its seat in Strasbourg, France. Its aspirations were as follows: i) A desire to end all wars. It was believed that committing to human rights law at the international level would contribute to avoiding wars in the future; ii) To set itself out as an ideological counterpart to Communism, based around the pillars of human rights, democracy and the rule of law; iii) To bound Germany, France and the UK in a common international framework to help avoid armed conflict in the future.
- Over time, respect for human rights has become part of the common European identity.
- For most of its history, the Council of Europe has only included Western European democracies. It was only after 1989 and the fall of communism in Europe that it widened considerably to include countries in **Eastern Europe**. Today it has **47 state parties** incorporating approximately 800 million people.
- After 1989, countries sought to enter the Council of Europe in order to **demonstrate their credentials** as democratic countries.
- The conditions for entering are a formal commitment to human rights and the rule of law, the acceptance of the European Convention on Human Rights and acceptance of the compulsory jurisdiction of the European Court of Human Rights.
- The most important **statutory bodies** in the Council of Europe are the Parliamentary Assembly and the Committee of Ministers.
- The **Committee of Ministers** is made up of the Ministers of Foreign Affairs of each of the countries of the Council of Europe, which meets on a regular basis. It is the executive arm of the Council of Europe, adopting decisions and issuing resolutions on a variety of human rights issues. The Committee of Ministers also supervises the implementation of the judgements by the European Court of Human Rights and has a role in the implementation of the European Social Charter and the Framework Convention for National Minorities.

- The **Parliamentary Assembly** is formed of parliamentarians from each of the countries of the Council of Europe. It provides a useful forum for discussion of human rights in Europe in general and provides the research and debate necessary before the adoption of treaties by the Council of Europe. It has a series of working groups on issues such as the reform of the European Court of Human Rights (which NGOs have enjoyed good access to).
- The **European Court of Human Rights** is the most advanced regional human rights mechanism in the world. The Court was created following the entry into force of the **European Convention on Human Rights** which is one of the many treaties of the Council of Europe. It was signed in 1950, with the drafting of the Convention taking place in parallel with the drafting of the Universal Declaration of Human Rights (UDHR). It entered into force in 1953.
- Presently, the European Convention on Human Rights has been ratified by 47 countries, and is now a precondition to entering into the Council of Europe. It is a civil and political rights charter, although it includes some rights relating to social and economic rights and is inspired by the UDHR.
- It establishes the **European Court of Human Rights**, which is the body implementing the provisions of the European Convention on Human Rights.
- The Court is competent to receive **individual complaints** (from any of the 800 million people within the Council of Europe) and hear **inter-state complaints**. The Court also gives **advisory opinions** to the Committee of Ministers concerning interpretation of the articles of the European Convention on Human Rights.
- After the European Convention on Human Rights entered into force, a part time court worked in cooperation with the European Commission on Human Rights. The Commission would examine the case at first instance and issue its judgement and then submit to the Court for its legally binding judgement, with the Committee of Ministers playing a key role in the implementation of these judgements.
- In 1998, with the entry into force of Protocol 11 to the European Convention, the part time Commission and part time Court were merged and replaced by a **permanent European Court of Human Rights**.
- The Court developed as circumstances changed in Europe with the fall of communism and the adoption of the Convention by former communist states. There has been constant pressure for reform, and the Court has changed to a very large extent.
- The implementation of judgements continues to be entrusted to the Council of Europe's **Committee of Ministers**. It is a very effective mechanism and is based on political consensus and peer pressure.
- Once the Court renders a judgement, it goes for consideration to the Committee of Ministers which meets periodically and examines whether the state party against which the judgement has been rendered has complied with obligations coming from the judgements.
- Judgements give rise to **individual** and **general measures**. Individual measures may include compensation and states generally comply with this. The general measures are more wide ranging measures (e.g. legislative or policy change) which aim at eliminating the underlying systemic causes of the violation, and this is where it is more difficult to get states to comply.
- Implementation of judgements is linked to one of the biggest problems facing the Court, which is its huge **pending case load**. If states do not implement the judgements, more complaints will come to the Court.
- The Committee of Ministers calls on states periodically to implement judgements, and they will not close the files on these judgements until the states can demonstrate convincingly that the judgement has been thoroughly implemented.
- There have been no **sanctions** for non-compliance. However, there is the possibility of expelling a state from the Council of Europe, but this has never happened.
- Historically, states have complied with the Court's judgements. However, more recently states such as Russia and Ukraine have not been so compliant.

- The Court is composed of **judges** equal in number to that of contracting states. The **independence** and **professionalism** of the judges is obviously essential for maintaining the quality of the judgements and the credibility of the mechanism.
- State parties submit a list of 3 judges to the Parliamentary Assembly which attempts to achieve gender balance. Both the Parliamentary Assembly and the Committee of Ministers chooses one judge from the list of three. There has been much controversy surrounding the recent lists submitted by states in Eastern Europe which did not include very good candidates; they did not comply with the conditions of independence and professionalism but have still sometimes been elected to the Court. As a result, there has been much discussion on reforming this process.
- The Court acts as a Court of Appeal for human rights for the whole of Europe, meaning it has a **subsidiary** role to that of **domestic courts**. One has to exhaust domestic remedies before going to the European Court of Human Rights. Domestic courts have the primary role in implementing the rights set forth in the European Convention on Human Rights.
- Complaints have to comply with the **admissibility criteria** before the substance is examined. Approximately 95% of applications which reach the Court are declared inadmissible. So, only about 5% reach the merit stage.
- The **European Social Charter** is another important treaty adopted within the Council of Europe. It complements the European Convention on Human Rights, as it is concerned with social and economic rights. It entered into force in 1965 and was revised in 1996.
- The operation of the European Social Charter is quite complicated, with states having different levels of commitment to the Charter; some are bound by the 1965 version and some by the 1996 version. States can also adopt various combinations of the articles in the Charter.
- The social and economic rights in the Charter include rights concerning employment, social cohesion, health, and protection of children and the family.
- The implementation of the Charter is based on a **reporting mechanism** whereby states submit reports for consideration to the Social Charter Committee and the Committee of Ministers on how they comply with their obligations under the Charter.
- Rights in the Social Charter are non-binding and are subject to **progressive implementation**. Supervision of implementation of the provisions in the Charter is also not as strict.
- Recently, the final protocol to the European Social Charter introduced a **collective complaints mechanism**. Collective complaints may be introduced by international non-governmental organisations concerning systematic violations of the rights in the Charter (e.g. housing conditions for the Roma minority in Greece). The Social Charter Committee will give a decision on the merits of the complaint. States are formally obliged to comply with the decision of the Committee, although the record of compliance is not very good. The Committee of Ministers is entitled to oversee implementation of decisions on these collective complaints, and it makes recommendations to the states regarding compliance.
- There are also thematic mechanisms within the Council of Europe. There is the **Committee for the Protection against Torture (CPT)**, which is essentially a preventative mechanism which aims at preventing torture of detainees (covering not only prisons but any persons deprived of their liberty, such as persons in psychiatric hospitals). The CPT will make ad hoc and periodic visits to places of detention in the Council of Europe's member states. Reports are produced following these visits, which are confidential but which may be made public with the agreement of the state.
- Other human rights mechanism/instruments within the Council of Europe include the **Framework Convention for the Protection of Minorities**, which sets forth standards for the protection of minorities. The **Commissioner for Human Rights** is a recently created office which aims at assisting states in implementing human rights standards developed within the Council of Europe. And the **European Commission against Racism and Intolerance** does country monitoring and publishes reports on the situation of racism and intolerance in different European countries.

- The **European Union** is a different institution, overlapping to some extent geographically with the Council of Europe. Although it began as an economic union, human rights have become an issue of discussion within the EU.
- The **European Court of Justice** is the judicial court enforcing EU legislation, though it invokes general human rights principles and common constitutional provisions. EU legislation only really touches on human rights incidentally, with the legislation primarily concerned with economic integration and federalism.
- The **Fundamental Rights Agency** is an EU monitoring body, established in 2007, that provides fundamental rights assistance and expertise to the 27 EU member states in implementing community law.
- A **Fundamental Rights Charter** of the EU will become legally binding once the Lisbon Treaty enters into force. However, the Lisbon Treaty has not yet been ratified by all EU member states.
- The EU generally works closely with the Council of Europe in matters concerning human rights, and there is talk of the EU joining the European Convention on Human Rights.
- The **Organisation for Security and Cooperation in Europe (OSCE)** is a Cold War institution in the sense that at the time of its formation, during the Cold War, there were wide disagreements between the East and the West. The OSCE provided a forum for discussions on the issues of common interest, which included to some extent human rights, though commitments to human rights were not very pronounced before the 1990s.
- It was a **compromise solution**, which may be relevant in certain senses to Asia. It has a big geographical ambit, with 57 members, and its standards are non-binding with no convention having been adopted by the OSCE.
- The OSCE developed detailed and non-binding standards in relation to democracy, the rule of law, national minorities, freedom of expression etc.
- Although the standards are non-binding, they are useful nevertheless and sometimes reach a greater level of detail than within the Council of Europe.

Questions from the participants:

Q: What was the role of civil society organisations in the establishment of the European Human Rights Commission and Court?

- The Court was established about 50 years ago, just after World War II, with the level of development of civil society far behind what it is now. This is in contrast to present day conditions, where NGOs are involved to a large extent in discussions surrounding the reform of the European Court of Human Rights and the development of human rights standards.

Q: Although it is clear that the European mechanisms are some of the best, it is also to a certain extent undermined by its own fame. For example, now the European Court has almost 100,000 backlog cases. I believe that one of the causes of delay is the expansion of the EU, because you have a lot of member countries and, from what I understand, the issue is now to transfer some of the workload to national mechanisms. So I want to learn more about the existing national mechanisms in European countries.

- Yes, the European Court of Human Rights is a victim of its own success and it is clear that if the caseload before the Court continues to increase it may result in the Court closing down altogether. Therefore, there has been lots of debate and discussion around reforming the Court so that it may successfully face this challenge. It is clear that the solution should include more effective remedies at the domestic level, so that complaints do not reach the Court in the first place. This is a matter under discussion and nobody has come up with any solution to the problem. States in Europe have varied records of implementation; in Western Europe there are states that do not have any judgements against them, whereas some states in Eastern Europe have hundreds of judgements and thousands of complaints

pending before the Court against them. So there is a problem of commitment and implementation of judgements given by the Court. It is important for states to actively take some of the burden of implementing their obligations under the Convention. Protocol 14, which was seen as the solution to the problems of the European Court of Human Rights, has been adopted by all countries apart from Russia, which refuses to adopt it. Therefore, the reform proposal included in that protocol has been stalled. By this time, the Protocol is already outdated in terms of providing effective solutions to the problems faced by the Court.

Q: The European Court of Human Rights is an adjudication body and therefore its findings or conclusions are meant to be legally-binding and enforceable. Could you please tell us a bit more about how this is done regarding the enforcement of the conclusions or the findings of the European Court, and could you please cite certain cases or illustrations where there has been a problem with the enforcement or implementation of any of its findings.

- The Committee of Ministers has the power to supervise implementation of judgements from the European Court of Human Rights. The Committee of Ministers is made up of the foreign ministers from every country in the Council of Europe. It is essentially a political mechanism. States, as a general rule, voluntarily comply with the judgements rendered by the European Court of Human Rights. In an example where implementation has not been efficient, the European Court of Human Rights has rendered numerous judgements condemning Italy for the breach of article 6 concerning the right to a fair trial, specifically in relation to length of proceedings. There is a systemic problem in the Italian judicial system in that the civil proceedings last for a very long time. Although the Court has found against Italy on numerous occasions, Italy has not yet solved the problem. They need to adopt a very profound and effective reform of their civil procedure code to deal with this problem. During the Committee of Ministers meetings, they draw the attention of the Italian Government to resolve the problem and issue recommendations to help. The Italian Government has adopted some reform of the civil procedure code but it has not been effective so far. There is no means whereby the Committee of Ministers can oblige member states to comply with the judgements; it is just a matter of formal agreement around a common set of principles. In so far as a state does not want to comply, there is very little that the Committee of Ministers can do. But generally, states have complied. So the system is based on voluntary compliance to a large extent.

Q: Regarding the NHRIs, is there any particular role they take when there is a problem regarding enforcement of specific decisions or conclusions of the Court?

- In cases, for example, involving violence by the police, one of the possible measures of compliance may be a recommendation for training to be carried out by NHRIs for these forces. They have a role in the effort to bring domestic standards into line with international standards, including the European Convention on Human Rights, and the implementation of these standards. States have the primary role to comply with obligations, and NHRIs can assist with the fulfilment of this role.

Q: How does the European Social Charter protect the rights of migrant workers?

- With regard to migrant workers coming from members states of the EU, there is the principle of free movement of workers within the EU. With regard to non-EU workers, states have a wide margin to decide on policies concerning migrant workers but, in principle, discrimination against migrant workers is prohibited. It does not matter if you are, for instance, a worker from the Philippines coming to work in the UK; you can sue the British state before the European Court of Human Rights and they can hand down a judgement.

Q: Regarding the European Social Charter, does it deal with non-state actors (e.g. private companies) and, if so, how?

- Under the European Court of Human Rights, states have developed a notion of positive obligations which apply to relations between individuals. This means that states have to react and put an end to a breach of a right by a private person or private company. However, under the European Social Charter there has been no case under the collective complaint mechanism concerning the duties of non-state actors.

Q: You said that 95% of complaints are not admitted by the European Court. What are the admissibility criteria they have to comply with?

- Regarding the admissibility criteria of the Court, the complaint has to be submitted within six months after exhaustion of domestic remedies; it has to be submitted by the victim of the violation; and it has to be directed against a state party to the Convention. Because of its heavy caseload, the Court interprets these criteria quite strictly which is why 95% of the complaints are rejected.

Q: Is it required that the complainants are also citizens of the European Union or can, for instance, Filipinos in the Philippines file a case before the court? Furthermore, is it possible that violations by European countries in the Philippines can be admitted as cases before the European Court?

- In relation to the jurisdiction of the European Court of Human Rights, the complainants have to come within the jurisdiction of a state party to the Convention, which means that you do not have to be a national of that state to file a complaint with the European Court of Human Rights. So, if one of your rights has been breached while you have been under the physical jurisdiction of one of the state parties, you can file a complaint to the Court. At the same time, the Convention also has effect outside of Europe; for example, when armed forces of one of the state parties to the European Convention occupy an area outside of the Council of Europe, and breaches of human rights occur, those people are entitled to file a complaint with the European Court of Human Rights.

Q: Regarding the absence of sanctions following non-compliance by the European Court for Human Rights, how then can the Council of Europe ensure that human rights victims gain justice?

- The only sanction available to the Committee of Ministers is the removal a state from the Council of Europe, but it has not been applied yet. There is a lot of talk about possibly doing this with Russia now, with Russia also threatening to pull out of the European Convention system. But generally, in Europe the system works effectively through peer pressure, pressure from civil society and a genuine commitment to human rights.

Q: I am very interested that at the start of the Council of Europe there was also a challenge in terms of the question of sovereignty. In relation to ASEAN there has always been this issue of sovereignty and non-interference. With the development of the Council of Europe and human rights standards in the region, how did they go about this issue?

- In 1953, when the European Convention on Human Rights was adopted, in the run up to the adoption of the Convention there was wide disagreement in relation to the existence of an individual complaints mechanism. For a very long time, the mechanism of individual complaints was optional. States such as the UK and France expressed very serious concerns in relation to what they saw as surrendering parts of their sovereignty to a body of international judges in Strasbourg coming from very different jurisdictions and with different systems of law. Even after the UK adopted the individual complaints mechanism, throughout the 1970s they threatened periodically to withdraw from the

complaints system. France only accepted the individual complaints mechanism in 1991. Only relatively recently did the individual complaints become a more significant feature of the Convention system, with states now automatically having to accept the right to individual petitions upon ratification of the Convention. But it was a process, with states only gradually coming to accept this mechanism.

Q: Regarding admissibility requirements, would you say that the 95% rejections in terms of admissibility are all correct or should the European Court be more lenient? My concern is that, with a large number of dismissals, this would really have an impact in terms of defeating the purpose of providing a last remedy for human rights violations. I have similar concerns with the UN Committee on the Elimination of Discrimination Against Women.

- The European Court of Human Rights faces specific problems and is really one of a kind. I would not compare it to UN bodies or other courts. Interrights cannot adopt a line suggesting that the admissibility criteria should not be implemented so strictly given the caseload that the European Court is facing and the danger that the Court might collapse under the weight of this caseload. Yes, admissibility is seen to some extent as a tool for releasing some of that pressure. But there is a limit here; the individual complaint should not be compromised by too serious an approach to the admissibility criteria and there is a fine line to be tread.

Q: You mention that voluntary compliance by the state parties is very high; but if you look at governments around the world, we find that this is very unusual. What then motivates the European countries to comply with the judgements?

- The system is based on voluntary compliance as a general rule. Countries in Eastern Europe, former communist countries, have joined the European Union. Compliance with human rights principles and compliance with the judgements of the European Court of Human Rights has been one of the criteria for joining the European Union. They therefore have an interest in showing that their record on human rights protection is a positive one. It is also a process of peer pressure to adhere to a set of commonly agreed principles. However, it is not just Eastern European countries that have problems with implementation; well established countries such as Italy also do. Peer pressure from NGOs, civil society, the Committee of Ministers and from other governments is important in the various mechanisms that exist at the European level, and is often effective.

III.2 The Inter-American Human Rights System

Main points from Prof Christina Cerna's presentation:

- International concern with human rights begins with the UN's adoption of the Universal Declaration of Human Rights (UDHR).
- The inter-American system is the oldest regional organization of its kind in the world. It has been in existence since 1890 and was known earlier as the Pan American Union.
- The Organization of American States (OAS) was created at an inter-American Conference in Bogota, Colombia, in May 1948, following the creation of the UN. For 58 years, comparable to the 40 years of the existence of ASEAN, the inter-American system had no constituent document. At this 1948 meeting, the 21 states of the inter-American system adopted not only a Charter but also the **American Declaration of the Rights and Duties of Man**. The UDHR was adopted 7 months later, on December 10, 1948.
- Article 18 of the OAS Charter enshrines the principle of **non-intervention**. In 1823, US President Monroe enunciated what is known as the "Monroe doctrine", declaring the Western Hemisphere (except Canada) its area of influence, and it warned European powers not to encroach upon it. Simon Bolivar's response was to convene the Congress of Panama, held in June-July 1826 to which the US was not invited. Bolivar wanted a

Spanish-American league with Great Britain, as its protector, against the other European powers and the United States.

- It was the United States, however, that helped to make Bolivar's idea of regional integration and cooperation a reality in 1889-1890, as the First International Conference of American States was held in Washington DC. Bolivar is still revered in much of Latin America.
- The original 21 OAS member states did not include Canada (which did not join the OAS until 1990) nor the island states of the Caribbean since they did not become independent until the 1960s. Today, approximately one third of the OAS membership is English-speaking.
- It has been suggested that since, at its founding, the inter-American system was comprised of one very powerful and 20 comparatively weak nations that it should be compared to the Soviet Union's relations with the countries of Eastern Europe rather than to a union of more or less equal states, such as the Council of Europe or the African Union.
- The OAS today includes every independent nation of the Americas and represents approximately 900 million people in 35 countries. The European system, in comparison, does not include all independent states (Belarus is excluded).
- It is a contradiction of the inter-American system that the military dictatorships that dominated the region from the 1960s through the 1980s were not considered to have violated the principles of the OAS Charter and were not excluded from participation as was Cuba in 1962.
- The official languages of the Organization are four, but most of the work is conducted in Spanish and English.
- Unlike the European human rights system, which was created by the entry into force of a treaty (the European Convention on Human Rights), the Inter-American Commission was created by a **political resolution** in 1959, in part as the inter-American system's response to the Cuban revolution which threatened to ignite revolutions across the hemisphere.
- The **Inter-American Commission** met for the first time in October 1960. Its work consisted of exchanging information with governments and making proposals for measures of cooperation. The Commission immediately began to **receive complaints** alleging violations of human rights but it was not authorized by the OAS political bodies to take individual decisions on these complaints. The scope of the Commission's activity was restricted, of course, by the principle of non-intervention.
- Closely related to the issue of the respect for human rights was that of promoting **democracy**. The 1959 Meeting of Foreign Ministers (our equivalent of the Security Council) that mandated the creation of the Commission also affirmed that "the existence of anti-democratic regimes constitutes a violation of the principles on which the OAS is founded, and a danger to united and peaceful relationships in the hemisphere." The 1959 "Declaration of Santiago, Chile" set forth for the first time some of the attributes of democracy such as rule of law, free elections and not perpetuating oneself in power.
- In 1991, the OAS General Assembly, symbolically, was again held in Santiago, Chile, and celebrated the fact that for the first time all the governments in the hemisphere, except for Cuba, were the result of free elections. They adopted Resolution 1080 by which the OAS Foreign Ministers resolved to meet should the democratic process be interrupted in any OAS member state.
- On September 11, 2001, Resolution 1080 was converted into the Inter-American Democratic Charter, which in Article 1 affirms that the peoples of the Americas have a right to democracy.
- In 1966, the UN adopted the two Covenants to give binding legal force to the rights set forth in the UDHR. In 1969, the OAS member states adopted the American Convention on Human Rights, a treaty that set forth civil and political rights that was supplemented, in 1988, by the Protocol of San Salvador, which set forth economic, social and cultural rights. Experts from the European system attended the 1969 Conference and the inter-American system is modelled on the European system.

- The UN Covenants took until 1976 to enter into force and similarly the **American Convention** took until 1978 to enter into force. The Protocol of San Salvador entered into force in 1999.
- During the first two decades of the **Inter-American Commission's** existence (1959-1979), when the hemisphere was still dominated by dictatorships (and before the American Convention was adopted), the Commission's work focused on carrying out **on-site visits**.
- The entry into force of the American Convention in 1978 initiated the second stage (1979-2001) in the evolution of the inter-American system's protection of human rights, which is characterized by the processing of **individual complaints**.
- A number of states have not yet ratified the American Convention, and are subject to the Commission's application of the American Declaration of the Rights and Duties of Man which the Commission interprets as legally binding on those states.
- The Convention's member states now include all Latin American states, and 21 of those states have accepted the compulsory jurisdiction of the inter-American Court.
- The American Convention created the **Inter-American Court**, which exercises contentious jurisdiction over cases that have been brought first to the Commission for decision and then may be presented to the Court by either a state party to the Convention, or by the Commission itself, for binding legal adjudication. The Court is empowered to declare that a member state has violated an individual's human rights in a binding legal judgment that provides for reparations for the violation. The Court also has the competence to issue advisory opinions. In addition, the Court is empowered to issue provisional measures, a kind of injunction, to protect the individual from irreparable harm until it has time to issue a judgment on the case.
- The Commission applies the American Convention to the 24 member states that have become parties thereto, and it applies the Declaration to the 11 states that have not yet ratified the American Convention.
- The Commission is composed of **7 members** (Commissioners), who are proposed by their governments but **elected** by the OAS General Assembly and serve in their **individual capacity** for a term of office of four years. They may be re-elected only once. The President and the two Vice-Presidents of the Commission are elected by the Commission during the first session of the year and serve for that year. The Commissioners are not salaried but they receive an honorarium and their travel and expenses for their work for the Commission are paid.
- The functions of the Commission also include presenting an **Annual Report** to the OAS General Assembly every year on its work.
- The most important functions of the Commission are the **processing of individual cases** and **litigating** these cases before the Inter-American Court. In 2001, we entered the third stage (2001- present) of the Commission's evolution, when it was decided that the Commission would submit to the Court all cases in which the state has not complied with the Commission's recommendations.
- The Commission holds two regular periods of sessions per year and special sessions as needed (unlike the European Court of Human Rights, it is not a permanent body). Regular sessions are held at the Commission's Headquarters in Washington DC or at a different location with the consent, or at the invitation of, a member state.
- During its regular sessions the Commission holds **hearings** both on individual cases and on issues (thematic hearings) of interest to victims of violations and to NGOs. The Commission holds approximately 100 hearings a year, and another approximately 70 closed working meetings during the session. Many of the hearings can now be viewed live or on tape on the internet.
- As mentioned, the first stage (1959-1979) of the Commission's history was characterized by **on-site visits**. The Commission would carry out an on-site visit to examine the situation of human rights in a certain country for one or two weeks which would be followed by the production of a report on that visit. The visit would only take place at the invitation of the member state and with a great deal of publicity.

- The Commissioners, during the on-site visit, meet with many representative sectors of society (e.g. the government, judges, the press, union leaders, prisoners, human rights groups, etc.) in order to collect as much information as possible on the situation of human rights in the country. These large, comprehensive visits have been mostly replaced by smaller on-site visits involving one or two Commission members to study a specific problem, e.g. access to justice in Bolivia. Last year however, the Commission carried out one general on-site visit, to Jamaica.
- Following the on-site visit, the Commission **publishes a report** on the visit, or it may report on the visit in its Annual Report to the General Assembly or to a Meeting of Ministers of Foreign Affairs.
- The Commission has conducted approximately 100 on-site visits in its history, the greatest number having been to Haiti.
- With the entry-into-force of the American Convention and the creation of the Court, **individual petitions** replaced on-site visits as the most important activity of the human rights system. Since 1965, when the political bodies granted the Commission the power to examine and decide individual complaints, the Commission has processed over **12,000** petitions. It is important to recall in this context that the work of the inter-American system is **subsidiary to the national system** and the most important requisite for the admissibility of petitions is the exhaustion of domestic remedies.
- The Commission receives between 900 and 1,500 petitions per year. Of that number, only about **150 petitions** are opened and communicated to the state per year. The Commission rejects at least 90% of all petitions received for failure to comply with the requisites for admissibility.
- There are of course **exceptions** to these **admissibility requirements**. If the domestic law does not afford due process for the protection of the right(s) that have been allegedly violated, then domestic remedies need not be exhausted; if the party has been denied access to remedies under domestic law or has been prevented from exhausting them; or if there has been an unwarranted delay in rendering a final judgment under the domestic remedies.
- The **Inter-American Court** has its seat in San Jose, Costa Rica and has seven judges. The judges are not elected by all the member states of the OAS but only by the states parties to the American Convention. They are elected for a term of six years and may be re-elected only once.
- The Court has issued **195 judgments** to date, a modest number when compared to the approximately 1,500 judgments issued annually by the European Court of Human Rights, but a substantial number when compared to the African Human Rights Court which has yet to issue its first judgment.
- The human rights protected by the inter-American system are primarily **civil and political rights**.
- Whereas in the past, the issues that dominated in the inter-American system involved situations with massive numbers of **forced disappearances, extrajudicial executions and torture**, today we are dealing with issues that have more to do with **due process of law**. I call this the Europeanization of the inter-American system whereas Europe, with its expanded membership now including Russia and countries of Eastern Europe, is confronting the kinds of issues that the inter-American system traditionally dealt with; I call that the Latin Americanization of the European system.
- In the late 1990s the Commission began to create **rappoteurships** to give special attention to certain issues and groups of concern such as freedom of expression, prison conditions, children, women, migrant workers, afro-descendants, internally displaced, economic, social and cultural rights and citizen security. These rapporteurships are each headed by a member of the Commission, except for freedom of expression (which is headed by a staff member), and are financed by donations from observer governments or from private foundations. These rapporteurships permit the Commission to promote reforms in areas of concern in the hemisphere and to organize seminars and conferences throughout the region. These promotional funds (US\$5.1 million) today (2009) comprise

more than the Commission's regular budget (US\$ 3.6 million), and facilitate a balance between the promotion and protection functions of the Commission.

Questions from the participants:

Q: You mentioned the issues of the dictatorships in the region. How do human rights mechanisms address the political reality in the region, because we have quite similar issues in ASEAN?

- The way dictatorships were dealt with in the inter-American system differs over time. During the time that dictatorships existed in the region, they were treated as any other government. Today, because of the important landmark resolution in 1991 stating that all governments in the region are now the result of free elections followed by the adoption of the Inter-American Democratic Charter, the inter-American system now talks about the dictatorships that existed in countries A, B or C, and even those countries talk about their previous governments as being dictatorships, which is literally a sea change from the way that they were dealt with and the respect they were granted while in power.
- Today, it is basically through cases involving amnesty laws that the inter-American system deals with the issues that came up during these dictatorships.
- The most important decisions of the Inter-American Commission deal with the declaring of the incompatibility of amnesty laws in 1992 in Argentina and Uruguay. These were Commission decisions and the states did absolutely nothing to implement them. They were not enforced and there was the question as to whether the Commission's decisions were actually legally binding. The Court noted in a judgement that the decisions of the Commission are purely recommendatory in nature (with only the Inter-American Court granted the competence under the American Convention to issue legally binding decisions). However, the Commission is not totally in accord with this viewpoint and argues that while a Commission decision may be soft law, it is still law.
- It was not until 2001, with a judgement in the Barrios Altos case (concerning a neighbourhood in Peru), that the Inter-American Court at the request of the Commission declared amnesty laws incompatible with a state's obligations under the American Convention. Peru had a transitional government (Fujimori had fled to Japan) at the time the case was being argued before the Court and the new representatives of the Paniagua Government were supportive of the decision and sought ways to have it implemented. A few years later, the Commission took the case of the Chilean amnesty law to the Court. However, the situation was very different because the Chilean Government was not ready to give up its amnesty law. The Chilean Government today states that it does not apply the amnesty law, but it is still on the books and could be invoked at any time.
- It is also through the "guarantee" of democracy in the Inter-American Democratic Charter that the past is addressed and a preventive measure against future dictatorships is established.

Q: I am interested to know the involvement of civil society in the beginning of the inter-American human rights system up until now, including in the process of implementing recommendations.

- Although I do not know the role of civil society from the beginning, their increasing role in the work of the inter-American system has been phenomenal. I believe, as in any regional or international mechanism, it is civil society that drives the mechanism forward, pushing for the creation of new mechanisms and treaties and constantly seeking ways to improve effectiveness. The NGOs in the inter-American region are very well organised and are very effective and active.
- I would say that perhaps in Peru more than any other country there are more NGOs that work in human rights, which probably explains why we have more petitions from Peru than any other country in the region.
- NGOs are actively involved in vetting candidates for the Commission and judges for the Court; they promote candidates and criticise some candidates who are nominated by governments for not being recognised experts in human rights.

- NGOs also take an active role in the amendment of rules of procedure for bodies such as the Commission. Presently, the inter-American system has a process by which any amendments are presented to the states and to civil society for their comment. Members of civil society are present at relevant meetings and are given the floor to present their positions. So, civil society today is a very active player and clearly the main user of the system.
- Following amendments to the Inter-American Court's rules of procedure, NGOs are now permitted to have autonomous standing before the Court. It is still the Commission or the state party that must present the case to the Court but, once the case is presented, the NGO that is defending the victim has an independent role to play in presenting its own pleadings, evidence, witnesses and request for reparations. So there are now 3 actors in our system in any court case; there is the state party, the Commission and the NGO, together with the victim, and that has significantly raised the profile of civil society in these suits. Also, NGOs that are not connected to the victim but have an interest in the case may bring *Amicus* briefs to present their points of view before the Court.

Q: You mention that under the Convention there exists the principle of non-interference, but on the other hand the Court is authorised to issue legally binding decisions. How is the principle of non-interference reconciled with this authority to issue legally binding decisions? On the part of ASEAN, it has been impressed on us time and again that non-interference would be non-negotiable in the TOR of this body.

- I think it is best to quote a Mexican diplomat who stated that it is in the exercise of our sovereignty that we have become a state party to this convention and that we accept the decisions of the inter-American Court. There is no contradiction between accepting, by the political will of a state, the decisions of an international body and the principle of non-intervention.
- Since the reforms of 2001, we now send every case in which a state does not comply with our recommendations to the Inter-American Court. This was designed to strengthen the legal nature of the Commission's decisions. What we have seen in practice is that, curiously, the states do not comply with the Commission's decisions and the case still goes to the Court. But then on the first day of the hearing before the Court, initially in 25% of the cases the Court would either totally or partially accept state responsibility for the violations alleged before the Commission even litigated anything. That number has now gone up to 40%. So there is either an expression that the state is not interested in litigating, or that the state prefers to dispose of the case at the beginning of the litigation rather than carry out the litigation before the Court.
- The Commission, under the Convention, has a three month window from the adoption of the merits decision within which the state must comply with the recommendations in that decision. States are now requesting an extension of time to comply. For example, the Commission's merits decisions are rather formulaic in that they contain two main elements: i) The state must investigate, prosecute and punish those responsible for the violation, and ii) The state must make reparations, both material and moral, for the victims of those violations. As part of the moral reparations they must make guarantees of non-repetition. So states are saying in order to deal with these underlying defects, for example to change a law, they cannot do this in 3 months. Subsequently, the Commission is granting extensions of up to a year and requesting the state to present interim reports every two or four months on the acts that they take to comply with these recommendations. Therefore, compliance is being shifted to the Commission level before the case is brought before the Court for litigation.

Q: Both Europe and the Americas have been able to adopt Conventions on human rights, and it is their respective Commissions or Courts that are tasked to interpret any issues arising from the implementation of the rights declared under these conventions. We do not have an ASEAN

Convention on human rights; is it safe to assume that the adoption of such a convention would be an essential or desirable pre-requisite?

- With regard to the interpretation of the American Convention, our Court has the competence both to decide contentious cases and to issue advisory opinions on what the Convention means. I think it is essential that the ASEAN system has a human rights instrument to define what it means by human rights. I am surprised not to have seen any drafts floating around, especially because in the 1980s and 1990s, including in the Vienna Conference, the whole “Asian values” debate was taking place. What are these different Asian values and where are the instruments which set these forth?

Q: In the European system, they chose to combine the Commission and the Court. But in the inter-American system, you still maintain the Commission and the Court separately. What is your view of the pros and cons of merging into one or maintaining two?

- I think one of the main reasons why the European Commission and Court were merged in 1998 is because they have so many members. They had 46 members of the Commission and another 46 judges on the Court and that is a lot of people to have on board. Personally, I think that number is unworkable both in terms of expense and in terms of reaching a consensus.

Q: Can you explain a little more the process of selecting and electing the 7 members of the Commission?

- How and what kind of individuals get selected and elected is an extremely important question. In our Statute, we have a provision that deals with incompatibility where the members of the Commission must determine whether the functions or acts of any member are incompatible with his or her service on the Commission. It is one of the most important provisions in the Statute and has been repeatedly invoked, because as much as the system will protest that it is not a political system, it cannot escape politics.
- Only states can nominate candidates, and it is all the states from the General Assembly that elect the members of the Commission. Regarding the Court, it is only the states parties to the American Convention that can nominate and elect judges to the Court. In the past, the Commission had very different members; retired statesmen, former presidents, former foreign ministers, and active ambassadors all featured. These functions were progressively questioned as being incompatible with the member’s service on the Commission. Today, the non-written working rule is that if an individual takes instructions from his/her government, that is considered to be an incompatible function. So if he/she is a governmental functionary, this is considered to be a position that is incompatible and he/she must resign from that position for the period of service on the Commission. In recent years, members of the Commission and Court have been individuals with a recognised competence in the field of human rights, and have come more from academia (e.g. professors of international law or human rights law). Currently, there is a female (Venezuelan) President of the Commission, and a female (Chilean) President of the Inter-American Court.
- I am not 100% sure that this is better; there is a certain prestige in having a former president or a former foreign minister on the Commission. It is something that you have to try and see. Clearly civil society has a very important role to play in vetting the qualifications of the nominees. But it is, in the last analysis, up to the members of the Commission to determine whether they consider an incompatibility regarding a member exists and, if it does, then they send the issue to the General Assembly. The Commission has had a number of discussions about the incompatibility of members but it has never gone to the General Assembly.

Q: Does the inter-American region have its own set of region-specific values? And how do you utilise these values?

- You would have to derive them from principles such as non-intervention, which is as important and fundamental a principle in the inter-American system as it clearly is in the ASEAN system. I think it is also very much interpreted as a non-intervention message to the US not to intervene in the affairs of Latin American states, because there is long history of US intervention in Latin American affairs.
- There is also Article 4, which is our “right to life” provision of the American Convention, which protects “the right to life, in general, from the moment of conception.” At face value, this looks as though abortion is prohibited. In fact, the Commission issued a decision in the early 1980s in a case presented against the US, which held that the words “in general” meant that states that permitted abortion did not have to change their laws. Instead, it was up to the states to determine this issue at the domestic level. One assumes that there are certain values in the sense that the region is one of the most Christian regions of the world; Catholicism is very important in many member states. In some constitutions there used to be a provision that a president had to be Catholic. Those provisions have been changed in recent years. In the sense of Asian values, the argument in the 1993 Vienna Conference was that Asian values were somehow different from the international standard; the inter-American system has never made that argument.

Q: The new UN Convention of the Rights of Persons with Disabilities (CRPD) has already entered into force with many inter-American countries having already ratified it. I would like to know whether the Commission has future plans to implement the CRPD.

- The inter-American system has its own Convention on the Elimination of all Forms of Discrimination against Persons with Disabilities, which entered into force in 2001. This convention is the newest human rights convention in the inter-American system and, in 2006, a working group was established which prepared a “Program of Action for the Decade of the Americas for the Rights and Dignity of Persons with Disabilities” (2006-2016).

Q: Regarding your argument that the American system started off as more of a political body; we also see ASEAN as a political body. It is concerned with cooperation among states, consensual in nature and focused on the protection of the sovereignty of every state and the recognition of Asian values. The ASEAN human rights body (AHRB) is the body that will be tasked with drafting the ASEAN Declaration on Human Rights. So that is a difference; it does not start with a common understanding on human rights standards because it is the AHRB which is going to be developing it, and the AHRB will be a creation of ASEAN based on the ASEAN Charter, which civil society is fearful of. In relation to your comment about being a political body, how did the inter-American Commission develop and how can we learn some lessons there in relation to confronting ASEAN and its development of the human rights mechanism?

- The Inter-American Commission was created in 1959, I argue, in response to the Cuban revolution which took place on 1 January 1959. There was a threat at the time that the leaders of the Cuban revolution wanted to spread revolutions throughout the Americas and, in response, the inter-American system created the Inter-American Commission to deal with human rights issues and the Inter-American Development Bank to deal with economic and social questions. My point was that it was in reaction to a political event that the Commission was created and, unlike the European system which was created as a result of the adoption of a legally binding convention (the European Convention on Human Rights), our system was not created by a convention. So it could have been abolished at any point; states could have decided that they did not really need a human rights commission any more and do away with it. Also, the inter-American system was not created with an instrument. It was created to do as little as possible; only to make very general recommendations to states.

- However, from the very beginning the Commission received complaints of human rights violations because once you create a human rights body you are going to get complaints. That is the nature of the animal; if it is out there people will send it complaints and say “my human rights are being violated”. So the question was what could the Commission do with these complaints, and the political bodies basically said “not much”. The political bodies concluded that the Commission could not examine or decide on individual complaints or do fact finding but instead could only make general recommendations and study the human rights situation in the region.
- That did not change until 1965, again as a result of a political event which was a civil war in the Dominican Republic. The Commission played a humanitarian role at this time, assisting in the exchange of political prisoners. Because of its successful activity in the Dominican Republic, the political body rewarded the Commission with the competence to decide individual complaints. That was the beginning of the opening of individual complaints. But, as I said, this was not effective because many of the countries in the region were dictatorships and the individual complaints system really does not work under a dictatorship because it is subsidiary. You have to be able to exhaust your domestic remedies, and in order to exhaust your domestic remedies you have to have a functioning judiciary, and you have to have a state that responds to your requests for information.
- For years the Commission had states that did not respond to its requests for information about cases, so the Commission invented a presumption that the facts were true as alleged if there was no information provided by the state to contradict those facts. And so the Commission would decide, one after another, cases on this presumption which really does not produce good law. So it took a long time for this individual complaints procedure to become relevant.
- In the absence of such a procedure in these first two decades, the work of the Commission centred on the carrying out of on-site visits. The Commission was able to do that, not because it had the specific competence to carry out fact-finding or monitoring throughout the region but because its statute said that the Commission could hold its sessions in any state in the region, and by its own initiative it started translating that competence into a competence to carry out fact-finding missions. These missions gradually became more and more elaborate and came to involve the setting up of an office in-country for the mission.
- The most famous mission was the one to Argentina in 1979 while Argentina was still under military dictatorship. The Commission went in with a lot of fanfare; it held a press conference when it arrived in the country and said it was there to carry out a human rights mission to find out what the complaints of the people in the country were. The most important thing was the setting up of an office in a centrally located hotel and inviting people to come and present their complaints. The Commission had lines 20 blocks long of people waiting to present their complaints and it went away with 5,000 individual pieces of paper of names and complaints. These people waiting in line, with their desire to present these complaints to the Commission, had a huge impact in the country
- The information contained in the 5,000 petitions was used to build a report. The Commission prepared a report on the human rights situation in Argentina in 1980 which was about 300 pages, most of which was derived from those complaints which described the pattern of how persons were detained, and then taken off to secret detention centres and then extra-judicially executed.
- Argentina threatened to withdraw from the Organisation if it were condemned by the OAS General Assembly when that report was presented. Argentina argued that the report should omit the name of Argentina when it was presented to the General Assembly and that only the number for the report would be used, and they won on that point. Argentina also insisted that the names of any government official or government agent be taken out of the report, because to leave the names in deprived the individual of his/her due process; so all the names were taken out as well. But it remains today one of the most important reports produced by the inter-American system. So there are strategies other

than individual complaints if you find that the complaints system is not yet right for the ASEAN mechanism.

Q: With Cuba being excluded from the OAS, what are the power dynamics between countries such as the US, Canada and the Latin American countries? How do these dynamics influence the functioning of both the Court and the Commission?

- Cuba was not excluded from the organisation because there is no provision in the OAS Charter to expel any member state. The legal fiction that was invented in 1962 was that because Fidel Castro declared himself a Marxist-Leninist Communist that this was considered incompatible with the purposes and principles of representative democracy and free elections contained in the OAS Charter. So the government of Fidel Castro was suspended from participating in the activities of the OAS, but Cuba to this day is still considered a member state of the OAS.
- The issue of Cuba was a very controversial issue for the organisation until about 1994. The Commission had prepared more reports on Cuba than any other state even though it was not permitted to visit Cuba and because Cuba was not allowed to defend itself in the political organs of the organisation. By 1994 the organisation was so divided on the issue of Cuba that it was incapable of taking any decision. So the Commissioners stopped doing special reports on Cuba, though it continues to include it in its Annual Report. It does so because under its general mandate, one of the functions is to raise the awareness of human rights in the Americas.
- Cuba continues to be a live issue, as seen during last month's summit in Trinidad and Tobago, the first Summit to be held in the Caribbean. Just prior to the Summit, the President of Venezuela held a pre-Summit with certain like-minded states to unify their position at the OAS Summit. At that pre-Summit meeting, Evo Morales, the President of Bolivia, declared that he was a Marxist-Leninist Communist and challenged the OAS to expel him from the organisation. To this point nothing has happened on that declaration, but the issue of the reintegration of Cuba is both an expressed wish of the current Secretary-General of the OAS and a number of the member states of the region, who very much want to see Cuba reintegrated into the OAS.
- Cuba, for its part, has stated that the OAS is the Ministry of Colonies and that it has no interest or desire to be reintegrated, but a lot of this is political posturing. I think Cuba will certainly be an issue at the next General Assembly which will be held in June.
- With regard to the role of the US and Canada, there are some scholars who think that the OAS should be looked at in the same way that the Soviet Union and its satellites were looked at, rather than an organisation of equals, because we have one Superpower and a number of states that are clearly much less influential.
- Until this current administration (it is still not clear which direction it will head) the US has very much been an outlier. It participates in the system in the sense of providing money; for instance, it created the funds for the creation of the rapporteur on freedom of expression. It consistently states how much it supports the inter-American system and the Inter-American Commission. When it comes to cases it responds, it sends officials to defend against cases at hearings and at working groups during the session, but when a decision or a precautionary measure is issued, as was the case with the Guantanamo detainees (the Commission issued precautionary measures as early as March 2002; the detainees were brought there in January 2002), the US does not comply with these measures. The US argued that international human rights law does not apply in this situation; only international humanitarian law applies, and the US has never consented to letting the Commission apply international humanitarian law. So the US created a legal black hole for these detainees and ignored the precautionary measures issued by the Commission.
- Canada is a much lower level player. Its Senate has indicated to us that it is interested in ratifying the American Convention but very little movement has been made and we expect that this conservative government would be unlikely to do so at the current time.

- Unfortunately, the English speaking countries are very much marginalised in this system and, despite the organisation's best efforts, the human rights system has become in many ways a "Hispanic" system. It is the Latin American countries that have ratified the Convention, accepted the treaty and are participating in litigation and cases before the Court.

III.3 The African Human Rights System

Main points from Prof Frans Viljoen's presentation:

- The African System, I think, comes third in the line because it is the youngest of the three systems. If it were a human being, it would have just come of age, just slightly over 21 years old. That I think is something that one should keep in mind in terms of expectations of accomplishments of this system. Linked to that, one has to concede, despite the optimistic picture which I will try to paint, it is surely the weakest of the three systems. But, despite these remarks, I think it may also be a system that has certain resonances for this region.
- There are **53 member states** of the African Union (AU) at the moment (Morocco is the one state in Africa that is not a member of the AU, which withdrew due to recognition of the plight of the right to self-determination for the people of Western Sahara), making it bigger in number than the other regional systems.
- Like the other two systems, the African human rights system is located within a **political arrangement**. That arrangement was formed in 1963 as the **Organisation of African Unity (OAU)**.
- The OAU was founded as an embodiment of the idea of **pan-Africanism** and was a vehicle that brought together the newly independent African states. So, when the OAU was formed in 1963, it was not really directing itself in any significant way towards human rights protection. This was demonstrated by the fact that human rights were not enshrined in the mandate of the OAU when it was founded.
- Over time, however, the OAU adopted some human rights instruments. In 1969, due to the pressure on states in Africa, it adopted the first instrument of significance: an OAU **refugee convention** which became a first erosion of this idea that the OAU was not really established to deal with human rights.
- More recently, the OAU has transformed itself into a new body called the **African Union (AU)**, which took place through the African Union Constitutive Act, adopted in 2000. This is the organisation within which the African human rights system exists. There is now a much clearer understanding that human rights forms part of the political institutional arrangements within Africa.
- If one looks at the AU 2000 Constitutive Act, one finds that it does still embrace, as the OAU did before it, the principles of **sovereign equality** and **non-interference**. But at the same time, states also give up part of their sovereignty to accept the principle of respect of **human rights**. So it is not a boundless, uncontrolled sovereignty which is at stake here but a sovereignty circumscribed and limited by the other principles of the AU. The most significant is that in article 4h of the AU's Constitutive Act which says that the African Union has the **right to intervene** in the domestic affairs of a member state, but only in very limited circumstances; namely when crimes against humanity, war crimes and genocide have been committed. So, for the most serious manifestations of human rights violations, there is a very explicit right of collective intervention in the name of all the members together in the domestic affairs or domestic arena of African states, again reinforcing the acceptance of sovereignty but its erosion at the same time.
- The principle of sovereignty must also be further eroded by the principles of the promotion of **gender equality**, which is enshrined as one of the basic principles of the AU, as well as respect for democratic principles, human rights, the rule of law and good governance.
- Regarding the broader political sphere of the AU, just like the European system, it has a parliament (**Pan-African Parliament**) where matters pertaining to human rights may be

discussed, although this parliament only has consultative status (it cannot adopt binding legislation).

- The **Economic, Social and Cultural Council (ECOSOCC)** is an innovative structure which brings together civil society and helps to make their voices heard within the AU.
- The **Peace and Security Council** within the AU has importance to emergency situations and the resolution of human rights violations pertaining to those.
- The **membership** of the AU is not conditional on human rights as an entry requirement. But there may be **sanctions** imposed against the states if they do not observe the decisions and policies of the AU, which includes decisions and policies on human rights (art 23(2) of the Constitutive Act).
- Also, in a relatively innovative formulation in the AU Constitutive Act, governments which come to power through **unconstitutional means** shall not be allowed to participate in the activities of the AU (art 30). The AU has acted on this, for example in the cases of Madagascar and Mauritania. The membership of Madagascar was suspended in 2002, after disputed presidential elections, and that of Mauritania in 2005, following a coup d'état. Both states were subsequently readmitted as members.
- The substantive/normative part of the human rights system is principally derived from one particular document (as is the case with the other systems), which is the **African Charter on Human and Peoples' Rights**.
- The Charter was adopted in 1981 and entered into force in 1986. The African Commission, which is the monitoring body of the African Charter, started functioning in 1987.
- The African Charter has also been supplemented by **further normative texts** that have been adopted. For example, there is the Protocol on the Rights of Women in Africa which was adopted in 2003 and entered into force in 2005.
- A dichotomous situation in the African human rights system was created in 1990 with the adoption of a new substantive treaty dealing with the rights of children (the **African Charter on the Rights and Welfare of the African Child**). Not only were a new set of standards created, but that treaty also established a new body, the Committee of Experts on the Rights of the African Child. This is not a sub-committee of the African Commission but is a totally independent body created to oversee the Charter on Children, with basically the same competences as the African Commission. One needs to understand that the adoption of a separate body took place at a time of great optimism in the early 1990s. With the spread of democracy, windows of opportunity were seen everywhere. Subsequently, African states were prepared to adopt this treaty and to install a new body to implement it with the optimistic hope that it would become a focal point for the protection of children. In practice, however, this body has not been given the resources required and has not taken up issues in an effective way. It took nearly a decade for the African Charter on the Rights and Welfare of the African Child to enter into force (1999) and the body has still not considered any communications and has just started to consider state reports.
- It is interesting that the **Protocol on the Rights of Women**, when it was adopted in 2003, extended the substantive scope of the African Charter to allow for very specific rights of women. But in this instance the states opted not to create a new body but to place this Protocol under the auspices of the already existing African Commission on Human and Peoples' Rights. Perhaps having learnt the lessons from the relative failure of the Committee on the Rights of the Child, the idea now was to strengthen and enlarge the mandate of the central body rather than creating a further proliferation of institutions.
- There has been an extension of the human rights system with the adoption of the **Protocol to the African Charter on the African Human Rights Court** in 1998 (entered into force in 2004), supplementing the African Commission with a court.
- The AU is primarily concerned with furthering economic integration and regional unity, and in this context has a court of justice, similar to the European Court of Justice. This means there is one court to deal with economic integration and one to deal with human rights. However, the AU member states decided in 2008 to integrate these two courts into a single institution with the **Protocol on the African Court of Justice and Human**

Rights, and this process is under way. The Protocol providing for a merged Court has been signed by 15 states; none of the required 15 ratifications have been secured, so the establishment of this Court is still some way off.

- There is also a parallel process within the AU dealing with human rights issues which comes under the **New Partnership for Africa's Development (NEPAD)**. NEPAD is an economic programme within the AU which drives the integration and growth objectives of the AU. Within NEPAD there is the **African Peer Review Mechanism (APRM)**, which is similar to the UN's Universal Periodic Review. The APRM requires a state to submit a report to its peers, who in this instance are the highest political leaders of the participating states (i.e. presidents/prime ministers). States have to opt in to the APRM, and a majority of AU states have done so. Quite a number of countries have already gone through the process. In contrast to the UN system, the APRM is also very closely tied to the economic objectives of development plans. So it is broader than just human rights, dealing also with economic policies and governance.
- So what brought about the adoption of the **African Charter on Human and Peoples' Rights** in 1981? If the OAU was founded without an explicit human rights mandate, the climate changed in the 1970s. At the international level there was the entry into force of the International Covenant on Civil and Political Rights in 1976, with the establishment of the Human Rights Committee creating a certain atmosphere and reality check in terms of human rights protection. Perhaps most importantly, 1979 saw the coming to an end of brutal dictatorships in Uganda, the Central African Republic and Equatorial Guinea. The OAU reflected on its inaction during these dictatorships and was brought over to the idea of adopting some fundamental human rights standards that would help to ensure that these kinds of dictatorships would not recur in Africa.
- If one looks at the African Charter there is a sense in which you could see that it was, for some states, a form of window dressing to placate criticism. But other states were seriously committed to the idea of creating a structure that would give human rights protection to the individual.
- The Charter seems sometimes to go both ways. If one looks only at the wording of the Charter, you would not really understand its full potential. One has to look at how, subsequently, the Charter was in fact **interpreted and used** by the Commission. One of the main lessons of the African system is the importance of the body interpreting the standards, because if it were not for a body that was independent and progressive these standards could have been interpreted in very different ways.
- The drafters also had to look at the possibility of **norm recognition** and **norm enforcement**. Interestingly, at the very beginning the idea was floated that there should just be a commission established without any human rights instrument. Although it is difficult to surmise exactly how the process evolved, it seems that some African academics wanted to articulate an African conception of human rights and did not just want to rely on the existing legal frameworks that were in place (that would have been assumed to be the texts that an African commission would have to implement). We find then a drafting process mainly by states but involving a few NGOs and academics that emanated in the adoption of the African Charter.
- The African Charter does give some expression to an **African conception** of human rights. It deals not only with individual rights but also group rights, referred to in the Charter as **peoples' rights**. So there is a notion of the collectivity of rights because of the traditional understanding of Africaness.
- **Individual duties** are also referred to, such as duties towards your family. They are understood mainly to be of a **moral nature** rather than of a legal nature but important in underscoring certain understandings of human rights.
- Another important feature is the **justiciability** of not only civil and political rights but also economic and social rights. With social and economic rights such as the right to health and education included in the Charter, there is no differentiation in terms of their applicability or enforcement. They are equal, with no separate structure and are all integral to the African Charter.

- At this time **norm enforcement** took place through a non-judicial body. The **African Commission on Human and Peoples' Rights** was created, as a quasi-judicial body functioning similarly to a court but with only a recommendatory mandate, not a legally-binding mandate. There was some debate about having a court, but it was at this point in time thought to be too intrusive.
- The African Commission consists of **11 Commissioners**, serving in their personal capacity. They are nominated by the states, and are elected by the AU Assembly but they do not pledge any allegiance to a particular state. They meet twice a year in ordinary sessions for approximately two weeks. They are part time but get a small honorarium for their work during sessions.
- The **sessions of the African Commission** are divided into public and private sessions. The private part is where the Commission exercises its protection mandate, such as dealing with individual communications. However, most of the meeting is open (public sessions), concerning the exercise of its promotional mandate which would be, for example, the consideration of state reports.
- The Commission has its secretariat or headquarters in Banjul, The Gambia. The secretariat has, for many years, been **underfunded** and not very well supported by its political masters, but this has been changing over time.
- In terms of **gender composition**, of the 11 commissioners at the moment a majority are women, and the Chair, Vice-Chair and Secretary of the Secretariat are women. In the beginning, in 1987, all were men. So there has been a very definite evolution in this regard.
- Regarding the mandate of the Commission, it can consider **inter-state** and **individual complaints**.
- The same kind of **admissibility requirements** apply: exhaustion of local remedies, insulting language may not be used in a communication, it must be submitted within a reasonable time. The Commission has heard about 400 communications to date (quite a small number). It is much more likely to find that a case is admissible than, for example, the European system, but this may be because it has received relatively few cases.
- When a state has accepted the African Court on Human and Peoples' Rights' jurisdiction, once the Commission has expressed its non-binding views the matter then may be referred by the Commission to the Court (similar to the inter-American system).
- Regarding **on-site visits**, once a number of communications against a particular state have been received the Commission will undertake an on-site visit to inspect and verify the situation and then come up with a report. In a place like Zimbabwe, one cannot underestimate the value of such a report because of the tendency of the government to deflect any criticism by the notion that criticism is inspired by Western imperialist forces. But if a body set up by Africans themselves comes up with a critical report, it has a certain resonance and value.
- The African system is the only regional system that has a system of **state reporting** which, to some extent, mirrors the UN state reporting function. It is a similar system of reporting, with concluding observations, although this system is not yet fully developed.
- The African Commission can also adopt **resolutions** in which it essentially gives its views on thematic issues such as the right to a fair trial, and also can adopt resolutions on human rights situations in a particular country (which are recommendatory in nature).
- The Commission has created **special mechanisms** such as special rapporteurs and working groups. Working groups, as opposed to special rapporteurships, may also comprise members of civil society. For example, the working group on indigenous peoples in the African system consists not only of members of the Commission but also members of civil society and indigenous communities themselves. These special mechanisms bring out thematic reports, highlighting particular issues and emerging situations.
- The Commission also undertakes **promotional visits**, which is perhaps different from other systems. Each commissioner is assigned a number of countries and that commissioner has to go on a regular basis to those countries, speak to the President (on issues such as the late submission of state reports) or engage with other government

officials and create a climate of better understanding and cooperation with the African human rights system.

- Regarding the **independence of the Commissioners**, the African Charter says that they must be people of the highest reputation, known for their morality, integrity, impartiality and so forth. Despite this provision being in the African Charter from the beginning, the members of the Commission that were elected were often very closely associated with governments. Christina made the point that there is a certain value to having high placed officials, but it also obviously has a downside. If the person is an ex-diplomat or sitting diplomat, someone who is representing a country or is a sitting member of the executive, as was the case in Africa, then the independence or at least the appearance of independence is compromised.
- Over a period of time, criticism from civil society emanated in the adoption of a statement (note verbale) by the AU setting out to states that they should not nominate people who are members of government (a minister, undersecretary, diplomatic representative etc). This was a political instruction by the AU to the member states on how to nominate candidates for the Commission. Fortunately, this has been largely implemented and today we find a different kind of composition.
- Regarding the role of **National Human Rights Institutions**, in the African system they have what is called “affiliate status”. NHRIs can apply for such a status, though unfortunately this does not mean so much in practice. Bodies with affiliate status are able to sit in on the Commission’s sessions and are invited to bring agenda points, but their meaningful involvement needs to be further extended and more meaningfully implemented.
- **NGOs** form a more integral part of the African Commission’s work than NHRIs. They can acquire formal “observer status”; more than 400 NGOs have acquired such a status. NGOs have been involved in **standard setting**; for instance, the protocols on the Court and on Women’s Rights would not have seen the light of day had it not been for the NGO movement pushing forward these agendas. They have been pivotal in the creation of new institutional **mechanisms** such as special rapporteurs, working groups, and the Court itself.
- During the sessions in the Commission that deal with the promotional part of its mandate, NGOs will be seated there as well as members of the different government delegations. In a very real sense, sessions of the African Commission present an opportunity for governments and NGOs to engage in dialogue which may not even be possible at the domestic level, such as issues concerning **marginalised** people. For example, issues concerning indigenous people have been heard at the regional level whereas domestically they have not been granted much of a voice. Increasingly, this is also the case with sexual minorities.
- **Individual communications** have been mostly brought by NGOs. If it had not been for NGOs’ awareness raising, training, bringing of cases and advocacy for better follow up, the system would certainly not be where it is now.
- Also for **state reporting**, as with the UN, shadow reports and the development of the system has been driven by the NGOs.
- The **African Court on Human and Peoples’ Rights** has been in existence since 2004. Currently, 11 judges have been elected, but the Court has not heard a case yet. Most of its time has been dedicated to elaborating its rules of procedure, developing its systems and coordinating its new systems with that of the African Commission.
- The Court will give **binding decisions** whereas the Commission’s decisions are recommendatory. The Commission is the main channel through which cases may be brought to the Court.
- If a state agrees, under a **protocol** a state may also accept that individuals may go directly from the state (after exhausting domestic remedies) to the Court (bypassing the Commission). Only 2 states have accepted this protocol.
- The judges must be jurists of high moral character, nominated by the state parties, elected by the AU Assembly.

- Regarding the problematic issue of **enforcement**, the Commission has not been very concerned about the effective implementation of its own findings or decisions. Initially it observed a relatively rigid divide between its own role (quasi-judicial) and enforcement (which seemed to be political). Increasingly, it has also taken it upon itself to adopt resolutions which indicate to states that they have to observe the decisions of the Commission. The Commission also now has a rule which requires states to inform the Commission within 90 days of a decision having been given against a state of what has been done to give effect to the decision or the finding of the Commission.
- In essence, **enforcement stays political** because the reports of the Commission and Court ultimately are considered by the political organs, the Executive Council of Ministers of Foreign Affairs and finally the AU Assembly (the highest summit of the AU).
- Enforcement by political bodies revolves around the principle of mobilisation of **shame** and **peer pressure**. Increasingly, as African states become more democratic and democracy becomes engrained, these methods of enforcement become more effective. But if the national levels of consent for human rights and democracy are low, then one has to accept that the level of mobilisation of shame and peer pressure will also result in something far from ideal. However, there is the possibility of the AU applying **sanctions** for non-compliance.
- Although a majority of the findings of the Commission have not been implemented, a significant number have been implemented resulting in some important changes.
- Some of the salient characteristics of the African system are as follows:
 - It has a strong commitment still to the principle of **non-interference** but **married** to the collective responsibility for **human rights protection**.
 - It is a system that has both **promotional and protective** aspects to its mandate.
 - It expresses a uniquely **African conception** of human rights but without compromising the **universality** of human rights.
 - The **independence** of the Commissioners has been strengthened over the years, and the gender composition has grown.
 - The Commission has adopted a **progressive approach to interpreting** the African Charter. The Commission (at least when it came to consist of more independent members) has been the driving force in this process towards making the Charter more progressive and human rights friendly.
 - The Commission involves, quite actively, NGOs and has also carved out a role for NHRIs.
 - It holds its sessions not only in one place but **roams around the continent**.
- The African human rights system has **overlapping mandates** with the other systems; African states are also members of the UN and other regional bodies.
- Regarding ratification of **UN human rights instruments**, African states have a high rate of ratification which does not always translate into implementation.
- There are a number of **sub-regional units** in Africa consisting of maybe 10 or 15 states. The overriding objective of these sub-regional units is economic integration. Ultimately, these sub-regional bodies will move the African Union towards an economically integrated unit (although that is quite a distance away). At least two of these sub-regional organisations (the Economic Community of West African States (ECOWAS) and the Southern African Development Community (SADC)) have established not only economic integration systems but also courts, and those courts have been approached to deal with human rights cases. The intention was never for these courts to be human rights courts, but the wording in the treaties of the courts has enabled them to tackle human rights issues. For instance, the SADC Treaty makes mention in one article to the principle of human rights, democracy and good governance and in another to the principle of equality. Farmers from Zimbabwe who have been dispossessed of their land have approached this Court and received a favourable judgement; the Court found that the conduct of the Zimbabwean Government conflicted with the SADC Treaty which contained this modicum of human rights and served as the basis for this judgement. These were desperate measures by people who did not really have another form of recourse, but it showed how

the smaller units, such as these sub-regional bodies, could also be exploited for human rights purposes.

- There are also other regional initiatives which are relevant to Africa, such as the **League of Arab States** and the **Organisation of the Islamic Conference (OIS)**. They have a membership that is broader than just Africa but African states are also part of this. If one looks at the Arab Charter and the Commission that has also been created under the Arab League to ensure the protection of human rights, the African states also fall within its ambit. Regarding the OIS, the Cairo Declaration on Human Rights has been serving as a source of inspiration.
- The principle would apply that the higher level of protection will always be that which is to be applied in a particular state so that the membership of different organisations **does not diminish** or detract from the higher level that may be set by the African Union.

Questions from the participants:

Q: You have mentioned about sanctions imposed against non-complying states in Africa. Could you give us examples of these sanctions?

- Unfortunately, the AU has not imposed sanctions, apart from suspending members. One could say though that the AU is still in its infancy. Sub-regional bodies such as ECOWAS have imposed sanctions in particular circumstances. However, because of the principle of non-interference, states are generally still very reluctant to impose sanctions on non-complying states.

Q: How and why does the African Charter cover both human rights and peoples' rights?

- The idea of what a people is has not been defined. If one looks at the drafting of the African Charter, it was omitted deliberately. It was too contentious because the idea of people could have some resonance with minority status; is it linguistic, ethnic or other minorities that are understood to be under peoples? Is it really just saying that peoples refers to those within the geographical boundaries of a state? And is everyone within the boundaries of the state entitled to these rights? Or is it somehow a more politicised notion that is linked to decolonisation or some socialist understanding of rights?
- The Commission has had a number of opportunities to look at what peoples as a concept means. For example, there has been a case where people from a particular province invoked the right of peoples to self-determination in order for them to make a claim to secede from the geographic unit of the state. The Commission found that although they were a linguistic and cultural group, they would not be entitled to self-determination in the form of secession because that would be in conflict with the principles of the AU which, amongst other things, are concerned with territorial integrity.
- But the Commission interestingly leaves the door open on this matter. In one of its findings on an individual communication, *Katangese Peoples' Congress v Zaire*, the Commission expressed the view that if the rights of a people are so seriously violated that they would not be entitled to self-determination in any sense, that they have exploited all possibilities and they have experienced only refusals and they have undergone human rights violations of an extent that makes them really lose their right to self-determination completely within that state, it is possible for them to be entitled to self-determination, which could even include secession. In other cases, the idea of a people is linked to the geographic unit. For example, there is a case of *Jawara v The Gambia* (Jawara was the President of The Gambia who was deposed in a military coup d'état). Jawara brought a case against the new Government saying that not his rights, but the people of The Gambia's rights to political self-determination had been violated by his being deposed by military force.

Q: I would like to come back to the link between human rights and a region's culture and also to the often made claim by leaders in developing countries that civil and political rights need to give way to economic and social development.

- The African Charter is one of the first instruments that talk in a legally binding document about the right to development, which has an internal dimension but also an international dimension of cooperation. However, African conceptions and understandings of human rights, such as the idea of “individual duties” and “peoples”, are largely of symbolic value compared to the distinctly legal and operational mechanism to realise individual rights. Also, notions of African cultural understandings of human rights helped to legitimise the African Charter in the eyes of many Africans. Notions such as individual duties and peoples, although symbolically important, have not been used by a progressive Commission to undermine individual rights or to detract from their protection.

Q: I would like to ask you about the complementarity between the African Court and the International Criminal Court (ICC). What kinds of measures were taken by the African Court before the ICC issued arrest warrants in the cases of Darfur and the Democratic Republic of Congo?

- The African Court has the jurisdiction to make a finding on the violation of the African Charter by the member states. The member states have committed themselves to uphold these rights and values and individuals or other states can complain to the Commission that a state party has not lived up to its obligations. So it is possible that an individual could have brought a case against Sudan as a government not living up to its obligations under the African Charter. Indeed, there have been a number of cases arising from the Darfur crisis; not against the politicians as such but against the State for violating the rights of women who have been raped, with the State not having taken sufficient measures to protect their rights.
- The African Court, just like the other regional human rights courts, does not have the jurisdiction to pronounce on individual criminal responsibility. So the African Court and the ICC really play two different roles. It could be interesting if the African Commission or the Court had to find on facts which could be linked to a case that the ICC brings.
- We know that the African Union has been quite reluctant and obstructionist against the ICC's efforts to get Omar al-Bashir (the Sudanese president) indicted. In the process, the AU is now throwing the ball to the AU's Legal Affairs Department saying that they should now look to see if the African Court can become a court of criminal jurisdiction. So there is, because of what has happened in this particular instance, an effort to investigate the potential for the African Court to become a court of criminal jurisdiction, especially when considering that the African Human Rights Court is going to be merged with the African Court of Justice, which will be a much more broad-based court with a human rights chamber and a general affairs chamber that will deal with economic integration. So the idea would be to also have a criminal chamber in the newly integrated court. I personally think that this would be the wrong way to go, because a criminal prosecution is much more complex than either a human rights matter or other matters that would fall under the jurisdiction of the to be established African Court of Justice and Human Rights; it is a totally different matter to prosecute a criminal trial than it is to deal with a human rights violation case.

Q: In the case of Darfur, is the debate on whether genocide is occurring restrictive when considering the scale of human rights violations occurring there?

- If article 4(h) of the Constitutive Act allowed collective intervention by the AU only in respect of genocide, then it would be very controversial because then all these debates on whether it is genocide or not will come into play. However, because article 4(h) is linked to crimes against humanity and war crimes it is such a big pool of very serious human rights violations that the circumstances will not really open these kinds of technical

debates. It is clear that the situation constitutes at least crimes against humanity which should be sufficient for the AU to intervene. Although let me concede that the AU did not use force to intervene in Darfur; a possible explanation is that at the time the AU had just been set up and it did not really have the forces on the ground to legitimise such a finding. The AU did, in ad hoc ways, deploy forces and intervene but it never used its formal legal powers under 4h) to do so, perhaps to save face because it was not prepared to do so in the beginning.

Q: Can you speak more about the exhaustion of local remedies requirement.

- It is true that the regional system is supplementary to the national system in the sense that you have to first exhaust the local remedies. However, in many African local systems the remedies may not be available because of lengthy delays, ineffectual systems, and over-burdensome costs. Subsequently, the Commission has been very flexible when it comes to the admission of cases. For example, if you can show that you could not use a local remedy because of your poverty, you are exempted from the “exhaustion of local remedies” provision. It also says in the African Charter that you must exhaust local remedies, if any, unless they are unduly prolonged. So the Commission has gone very far to say that the local remedy has to be effective, which means that the state cannot just defend itself by saying “here is a local remedy that has not been exhausted” if it is not effective and adequate in practice. Maybe it is because the Commission has had relatively few cases that it has been prepared to bend over backwards to allow many more cases to come to it.

Q: After the general election violence in Kenya last year, the African Union created another body to look into it. Why was the African Commission on Human and Peoples’ Rights not given this task?

- At present, there is a lack of integration and taking the Commission seriously to give it these tasks. It does not speak well within the AU if you create a body and then somehow you do not use it to its full potential. So that is certainly a problem.

Q: Can you say a little bit more about how the Protocol on the Rights of Women has been implemented. You said that it was integrated into the African Commission; how is it also integrated into the Court, and has there been any kind of decision or move on the issue of sexual violence in armed conflict?

- The Women’s Protocol entered into force in 2005, so it is still quite young. It takes as a starting point that women have all the rights in the African Charter but you need to spell out in more specificity the rights of women. So how do women’s rights in Africa look specifically compared to the general statement of all rights that are in the African Charter or if you compare it to UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)? If one looks at the Protocol, it really looks at African women in a holistic way and tries to focus on issues particular to the African woman.
- The Protocol is integrated with the African Commission in the sense that when a state submits its state report, if it has ratified the Protocol, it also needs also to report on the provisions of the Protocol.
- Individuals may submit communications on both the African Charter and the Protocol (if the state has ratified it). So far, unfortunately, no case has yet been decided under the Protocol (there are some cases pending). One also has to be realistic; in a sense, the women’s movement looked at the African Charter and looked at the lack of cases being brought by women against states and, for that reason principally, they fought for the adoption of a protocol. But the same obstacles that inhibited women and prevented them from bringing complaints under the Charter may still be in place under the Protocol. So, it is also important that access to the Protocol is taken seriously by CSOs on the ground to ensure that it is not an empty promise.

- The Protocol also speaks in more detail about sexual violence and armed conflict, but unfortunately, again, no particular case has yet been decided on this matter.

Q: One fear we have of the ASEAN human rights body is the most probable absence of independence on the part of the would be Commissioners who will be chosen and paid by the member states of ASEAN. In the case of the African Commission on Human and Peoples' Rights, how has the independence of the Commissioners been strengthened through the years and what role did civil society play to contribute to the achievement of this independence?

- I agree with you that the independence and impartiality of the Commissioners is absolutely crucial. It is not good enough that there is a legal text which says that there should be independence. In practice, the persons should serve not as an instructed government employee but as an independent expert. It is interesting that even with the Arab Charter and the Arab Commission, the body that is created guarantees the independence of the members; they are not government instructed individuals. But even if there are guarantees on paper, the African Commission has, over the years, consisted of diplomats and people who served in government. It was only through pressure on states (because, in a sense, it is unfair to approach the Commissioners who has been nominated by a state and elected by the AU) from NGOs over a long period of time that changes occurred in practice. Memorandums were written, examples were given of other systems, information was given to the Commission and to the state parties and, after a number of years change in the AU's policy came about. Critical voices, ultimately, were heard and the system changed.

Q: The principle of non-interference exists alongside the right to intervene in cases of genocide and crimes against humanity. Does that limit the mandate of the Commission and the Court to investigate human rights violations that cannot be defined as genocide or crimes against humanity but still serious human rights violations?

- The principle of non-interference in the AU Constitutive Act, which is the political body's constitution, exists alongside the principle of collective interference by the AU in the domestic affairs of a state in the instance of genocide, war crimes or crimes against humanity. This means that the AU could send a military force to intervene in a state when genocide is taking place there. This provision was inspired by what happened in Rwanda in 1994. It does not relate specifically to the Court and the Commission's competence, because the Constitutive Act of the AU allows for this form of collective intervention only in respect to very grave human rights violations, while the African Charter allows for the submission of communications by individuals against the state on all the rights contained in the Charter. So if you ratify the African Charter, you also give up your sovereignty in a much broader sense.

Q: How is the right to democracy defined in the African system? Also, the system mentions that it would not recognise governments that come to power through unconstitutional means. What do you mean by unconstitutional means? If we take the cases of the colour revolutions in Europe, people removed the governments through demonstrations. Would that be considered as an unconstitutional means?

- Democracy is not very well defined in the African Charter. The Charter, when it was adopted in 1981, spoke very ambiguously about the right to participate in political affairs and it was only progressively that a new understanding of democracy grew. Indeed, the AU recently adopted a Charter on Democracy, Elections and Good Governance (only two states have so far ratified) which clarifies the meaning of democracy. So, understanding of the concept is still evolving, as is the "unconstitutional means" concept.
- The examples of the colour revolutions in Eastern Europe would probably not be seen as a means which will be included because the understanding of unconstitutional means is very state-centred. It is still understood to be when the power of a state is diminished in ways which other states would not want to have their own power diminished.

Q: You told us about the role of the NGOs that can apply for observer status and can even bring individual communications to the Commission and give shadow reports. What about NHRIs? Are they accredited the same role? And the exhaustion of domestic or local remedies would surely include the National Human Rights Commissions (NHRC). What happens if a NHRC does not adequately respond or react to particular human rights complaints? Would the African Commission be able to hold the NHRC to account for, say, a dereliction of duty, or is it covered also by the principle of non-interference?

- Unfortunately, NHRIs have a much less clearly defined role in the African Commission. I think it is a product of a lack of understanding of their role. For example, if one looks at state reporting, some of the NHRIs that have affiliate status with the Commission would really be responsible for drafting the state reports within their countries. Others, which see themselves as totally removed from the process, are not so much in a position to submit shadow reports. The NHRIs have never really grouped themselves together and come up with a clear understanding of what their role would be. The Commissioners facilitated a number of meetings and this is ongoing, but there is a lack of a clear cohesive approach. What is emphasised is that whatever their mandates are, the Commission depends on the NHRIs to domesticate whatever its findings and norms are. What seems clear is that the NHRIs have that role to take from the Commission level to the national level, and through their particular processes, make effective and translate into domestic reality what is relevant from the African Commission.

Q: What was the driving force for a strong African Human Rights Charter in 1981? Who were the main actors?

- Although the Charter was adopted in 1981, one needs to remember that the more progressive elements in the AU Constitutive Act are from 2002. That was when there was a very different African community of states. In the 1980 document, one could also look at it very cynically and say that if you look at the African Commission's mandate, it is not even clear that the Commission was supposed to deal with individual communications. At that point in time in the international community you had two models: the ECOSOC 1503 model whereby if there were systematic violations, ECOSOC would conduct a confidential inquiry; and the Human Rights Committee model, which considered individual human rights complaints. If you look at the Charter and the role assigned to the Commission, it hinges between the two models. It was only through the activism of the African Commission's members that its individual complaints competence was established. So, I am with the colleagues who have emphasised the role of the institution, the members of that institution, and the independence and the competence of the members of that institution, more than the text (though one obviously needs the text as well).

Q: How is the working relationship between the Court and the Commission? What is the motivation to retain the Court and the Commission?

- The Commission and the Court are both working on the final versions of their rules of procedure to clarify their relationship, so we have not yet had a case go to the Court.
- Ordinarily the system would say that individuals first go to the Commission for a recommendation. If the state does not implement the decision or the finding of the Commission within a certain period of time, then the case will go to the Court for the legally binding decision, which in international law has a different value to a recommendation and will serve within a different framework to enforce that finding.
- Maybe in the years ahead we could see the integration of the Commission and the Court into a unified system, as they are talking about in the inter-American system. But in the short term, one will see the two institutions coexisting.
- Also, it should be remembered that the Commission will still be the institution to go to for all of those states that have not ratified the Protocol on the Court, of which there are many.

So the Commission really still has to be there with an individual complaints mandate, otherwise the individuals within the states that had not accepted the Court's jurisdiction would have nowhere to go.

- One needs to keep in mind that the Commission still has its promotional mandate; all the state reporting and promotional visits and so forth may become more important now that we may eventually have more cases going directly to the Court from individuals and states that have accepted its competence.

III.4 The Relationship between National, Regional and International Human Rights Mechanisms/Inter-Regional Cooperation

Main points from Prof Maureen Maloney's presentation:

- Common features of Regional Human Rights Mechanisms:
 - Subsidiary to national human rights protection systems.
 - Normative Framework (political consensus, convention, declaration etc):
 - Not lower than international standards.
 - Independent, impartial experts in human rights and persons of integrity:
 - Process of nomination by states and election of members at regional level;
 - Serve in individual capacity;
 - Plurality of membership;
 - Privileges and immunities for members;
 - Procedure of removal in cases of incompatibility.
 - Do both promotion and protection work:
 - Receive and decide on both individual and interstate complaints;
 - Can declare violations of human rights and provide access to a regional court that can order legally binding decisions and reparations;
 - Make country visits and engage in country level activity;
 - Hold meetings in different member states;
 - Hearings which are widely publicised;
 - Develop other mechanisms (e.g. special rapporteurs) that engage in both promotion and protection work;
 - Preventative mechanisms (e.g. emergency procedures);
 - Transparency of documentation regarding decisions and recommendations which is widely disseminated.
 - Competent and full time secretariat support with sufficient resources (including budgetary and human resources).
 - Established procedures for interaction with civil society and NHRIs.
 - Cooperation with international human rights mechanisms.
- Benefits of regional systems:
 - Better able to understand the shared characteristics of the region (economic, geographic, social and cultural);
 - Criticism from the region can be more effective;
 - Help to provide regional input into the development of international human rights norms and standards;
 - Better placed to provide capacity building to assist national governments in fulfilling their human rights obligations and in the establishment of NHRIs.

Main points from Mr. Homayoun Alizadeh (Regional Representative, OHCHR South-East Asia Regional Office):

- The fact that the AHRB is likely to consist of members appointed by the national governments and is likely to abide by the principle of non-interference will make it difficult for the body to engage in any human rights protection work. The question is

how can CSOs compensate for this missing protection mandate? The UN Universal Periodic Review (UPR) is a new process which Indonesia, Malaysia, and the Philippines have already undergone. This process has encouraged NGOs to create networks to write the national reports and to look into the violation of human rights. Civil society also has to work with governments and the UN to help ensure the recommendations that come from the UPR are implemented.

- Civil society, alongside the ASEAN human rights body, should help to ensure the implementation of recommendations of treaty bodies, special procedures and the UPR (which includes recommendations on protection issues). These recommendations are currently not being implemented.
- Civil society should push the AHRB to look into regional human rights issues such as migration and human trafficking, including questions of protection which these issues raise.
- Civil society has to work with NHRIs because NHRIs have human rights protection mandates. The ICC Sub-Committee on Accreditation is becoming increasingly strict in downgrading NHRIs which do not abide by the Paris Principles. This acts as an incentive for NHRIs to engage properly with CSOs in carrying out their protection work.

Questions from the participants:

Q: Can we file cases of human rights violations before the Office of the High Commissioner for Human Rights in South-East Asia at the same time as with the ASEAN Human Rights Body?

- *Mr. Homayoun Alizadeh:* OHCHR is the secretariat of the treaty body mechanisms, and can assist in forwarding complaints to the relevant treaty body committees. Our task at the regional level is to ensure that we have a follow up system in place to help address these individual cases (e.g. closed door diplomacy with government officials, following up with regional human rights mechanisms etc).
- *Prof Christina Cerna:* If you mean can you apply to a UN mechanism and the regional body with the same case, in the inter-American system it depends on if it is a similar mechanism. We used to consider the UN Human Rights Committee the only similar mechanism to the inter-American Commission, so that if you presented the case to the Commission you could not also present it to the UN (and vice-versa). The inter-American Commission is now saying that none of the UN mechanisms is sufficiently similar to the inter-American system because there is no access to a court. You cannot get a legally binding decision from the UN, so you can apply to wherever you want in the UN and to the inter-American Commission. But there is a provision in the American Convention that says you cannot present your case to another international proceeding for settlement. All of the regional bodies have this, so it depends on the respective regional body to determine what they consider as a similar proceeding.

Q: What is the role of regional mechanisms in the UPR process?

- Regional human rights mechanisms can acquire observer status in the Human Rights Council for the UPR sessions.

Q: One of the advantages of having a regional human rights mechanism is that it can assist with the establishment of NHRIs at the national level. I would like to hear how the regional mechanisms in the different regions have helped to establish NHRIs.

- Article 13 of the European Convention on Human Rights does not require the creation of an NHRI to provide for remedies of human rights violations. However, legislation adopted by the EU has provided an impetus for the creation of NHRIs in terms of it being a condition for joining the EU. In addition, a network was created of NHRIs in the EU, the Council of Europe and other regional bodies and these networks have acquired consultative status within these regional institutions. Also, regional

mechanisms in the Council of Europe (such as the Commissioner on Human Rights) provide governments with technical assistance in the establishment of NHRIs.

- The Human Rights Institute (not an OAS body) in Costa Rica has connections with the inter-American system, and one of the roles of the Institute is to serve as a secretariat for human rights ombudsmen in the region. Frequently, human rights ombudsmen serve as experts in inter-American Court hearings.
- In Africa, not all member states have NHRIs. I do not think the system should be premised on some form of conditionality that there should be an NHRI established because some of the states that give the best effect to the work of the Commission are states that do not have NHRIs. This also means that you cannot have a standard process whereby everything goes from the Commission to the NHRI; there is a diversity of ways in which the Charter and the Commission's work will be domesticated most effectively depending on the national circumstances.

Q: At the international level some of the most effective mechanisms are the special procedures, and I also know at the regional level some of the best work has been done by the visits of special procedures. So could you expand on how regional special procedures collaborate and work with special procedures at the international level.

- In the inter-American system the Commission has worked with UN rapporteurs on different thematic issues. The inter-American Commission's rapporteur on freedom of expression has worked with the equivalent rapporteur at the UN level and also with the rapporteur of the African Union, initialising joint communiqués on issues of common concern. We have worked with the rapporteur on the independence of the judiciary at the UN level and we also frequently cite their studies in cases before the Commission.
- In Africa, significant special rapporteur mechanisms have been established. For example, perhaps the most successful procedure of the Commission has been its special rapporteur on prison conditions. This rapporteur has conducted a number of visits and follow-up visits, made recommendations to states and been given access to the prisons. In respect to these visits, the rapporteur has collaborated with the UN special rapporteur on torture so as to ensure against duplication.

Q: If we have a weak regional human rights mechanism, is this better or worse than nothing at all, because I am still concerned that a weak mechanism will be used by authoritarian states in the region to protect themselves?

- The inter-American system was created as probably the weakest system imaginable. However, the initiative of the members of the Commission and the work of civil society formed the engine that made this choo choo train go forward and become the credible system that it is today. So yes, it is better to have a weak system than no system at all.
- The African system was weak and it has grown, so it was better to have a weak system than nothing. But it certainly places a high burden on the shoulders of civil society because if there is a weak system the danger lurks large of that being a way of legitimising oppression and many other negative forces. So it really calls one to action to ensure that one is a co-constructer and not a passive spectator.
- One does need to be aware of the risks of a backlash in relation to existing human rights standards such as the potential for the creation of bad case law which is not in agreement with international human rights law.

III.5 Panel Discussion Comparing the Roles of Civil Society/NHRIs in Africa, the Americas and Europe in Developing Credible Regional Human Rights Mechanisms

African system:

- In the African system, the granting of an official status for NGOs (Observer Status) entitles them to build up formally recognised links within the AU machinery which

assists in the flow of information (e.g. this status enables them to speak at sessions of the Commission). However, the formal linkages have not become an obstacle or constraint for other NGOs; for instance, the fact that an NGO may not have observer status has not prevented them from submitting communications.

- The formation of NGO coalitions has also been very important in the African context. For example, around the African Court's establishment there was a coalition of NGOs which pushed for its creation and now pushes for the further ratification of the Protocol on the Court and the bringing of cases.
- When one looks at the compliance of findings of the Commission by states, research has shown that when an NGO was involved in bringing the case and in following up the results of that finding there was a much greater likelihood of that finding being implemented. If it is one person bringing one case the chances of a government taking that seriously is, unfortunately, not very great; but if it becomes embedded in a social movement driven by civil society there is a much greater chance of compliance.
- NGOs should link themselves with academic institutions for strategic reasons, capacity building and training and convince them also of the importance of this endeavour. The same applies to the media, because it is all about visibility and bringing information to the common knowledge of everyone.

Inter-American system:

- NGOs can acquire status before political bodies and have the right to take the floor and make contributions both at the General Assembly and at the weekly meetings of the Permanent Council.
- They have been at the forefront of demands for new international human rights instruments.
- They have a role in promoting certain candidates for the Commission or the Court or criticising candidates who have been named by states.
- With respect to donors and money that is given to the system that is earmarked for certain specific work, this is a double-edged sword in many ways. For example, with rapporteurships that are created with this money, it is an "observer" government (not a member state) that is setting the agenda. There has been internal criticism as to how much money should be accepted and for what purposes because it does divert the attention of the Commission from what others consider it to be its primary function, which is deciding on the merits of individual cases. However, this is a very low level criticism and in general these new rapporteurships are quite welcome.
- The role of NGOs also concerns advocating for: changes in laws, truth commissions, fighting impunity and prosecutions. The specific situation in a country determines the agenda of the NGO which then, in many ways, determines the Commission's own agenda.
- The Washington College of Law of American University in Washington, D.C. has for a number of years instituted a moot court programme on the inter-American human rights system which takes place every May. This year there are about 99 teams from some 30 countries participating, including an African team, on a hypothetical question involving inter-American human rights law. This is a good training ground for young lawyers to study the inter-American system. Indeed, the best litigants are now taken on by the Commission and the Court as interns or fellows.

European system:

- The role of civil society in the continuous development of human rights standards has been crucial. Currently there are many avenues that NGOs can use to influence the human rights agenda and act as an essential source of information for the various human rights mechanisms within the European system.

Questions from the participants:

Q: Are targets set for governments in the respective regions to spend a certain percentage of its budget on particular human rights groups or themes?

- The inter-American Commission does not set any guidelines for targeting budgetary allocation.
- In Africa, in the Protocol on the Rights of Women, there is one provision which says that states should revise their budgetary allocations to reduce military spending and increase social spending involving, particularly, women and children, though it does not specify figures. One will have to see whether this can ever be invoked in a judicial setting to challenge a budget. Nevertheless, there is a very clear provision in a legal text that sets some kind of progressive realisation target for diminishing military spending and increasing spending on social aspects, including women's affairs.
- The European Social Charter has defined a framework for what progressive realisation of economic and social rights means, and it includes a condition that states have an obligation to demonstrate progress in relation to the implementation of, for example, the right to housing and the corresponding resources that have been spent. However, the European Court has not become involved in indicating to member states how to spend their money.

Q: How should the involvement of civil society be institutionalised in areas such as the selection and election of Commissioners, especially given the reluctance of ASEAN to engage with civil society?

- In the inter-American system it is exclusively the prerogative of the member states to nominate candidates. Civil society plays an active role in lobbying for or against the candidates that they would like to see win; frequently before the candidates are nominated they might suggest names of individuals that they think would make good commissioners or judges. However, they do not have an official role in that selection process.
- It would be interesting to have some kind of institutional mechanism at the regional level. This does not exist in the African system. The emphasis is more on the national level to ensure that the individual state's nomination is as good as it can get. Civil society should work to get the state to accept some form of transparent mechanism whereby there is an open debate and some form of entry point for civil society to interface with the process of national nominations.
- The appointment process of judges to the European Court of Human Rights is not without problems. States have been known to appoint candidates who lack the requisites of independence and necessary qualifications, so there has been pressure on states to be more transparent in the process of identifying the list of 3 applicants which is then submitted to the Parliamentary Assembly from which the judges are ultimately chosen.

Q: Can complaints be filed against member states for violations committed outside of the region? Can human rights cases be brought against private companies owned by nationals operating in other regions of the world?

- In the inter-American system, anybody can file a complaint, though you still have to comply with the requisites for admissibility, the most important being the exhaustion of domestic remedies. You do not have to be a national from any of the countries of the member states; you only have to allege that the OAS member state has committed a violation of your human rights as set forth either in the American Declaration or the American Convention.
- The inter-American Court has found that a non-state actor can be responsible for human rights violations. In a landmark case (*Pueblo Bello v Colombia*), which involved human rights violations committed by paramilitaries, the Court found that the paramilitaries were

created by the state and that the state could have dissolved them; in not doing so it was subsequently responsible for the violations committed by them. With regard to extra-territoriality, the Commission has received cases involving human rights violations in Iraq, for example. The test in cases dealing with extra-territoriality is whether the respondent state has effective control over the alleged victims. If it does, then the system will generally take jurisdiction.

Q: In the three continents does the common person actually know about these human rights mechanisms or is it just the domain of academics and NGOs?

- One of the biggest problems of the European Court of Human Rights is that they have too many applicants/cases. Nevertheless, often the people whose human rights have been violated rely upon NGOs to provide assistance and expertise in pursuing their case with the European mechanisms. The Court is better known than other mechanisms such as those provided under the European Social Charter.
- In Peru and Argentina the common person does know about the regional human rights mechanisms, and whenever somebody feels that they have been wronged by their Supreme Court they look to the Inter-American Commission. In the US and Canada, the inter-American Human Rights system is pretty much unknown. Even in Europe, with its 50,000 plus cases per year and the inter-American Commission's 1,500 cases per year, in regions of 800 and 900 million people respectively this is just a tiny drop in the bucket.
- Africa is certainly the region with the lowest level of awareness. This is why the African Commission is including promotion as a principal part of its mandate, and seeks to work in collaboration with NGOs, the media etc. Currently, the focus should lie with NGOs positioning themselves to work in the region, and with lawyers. At the very least, one should create a generation of lawyers who would recognise a case to bring to the Commission if it is appropriate.

Q: How do you view the two parallel processes in ASEAN regarding the establishment of an ASEAN human rights body and an ASEAN Commission on Women and Children?

- *Prof Cerna:* I find it curious in ASEAN that you are thinking of creating a Women and Children Commission at the same time that you are considering the creation of an ASEAN human rights body. In a way you are fractionalising out a segment of the larger picture of human rights protection to a separate body, and I do not understand why you would want to do that.
- In the African system, there is a general African Commission and also a Committee on the Rights and Welfare of the Child. I would argue that it is an historical anomaly and that if we had the luxury of sitting back and devising the system now, we would integrate it all into one and make one strong institution. With the Protocol on the Rights of Women, there was an opportunity to create a new body again, but it was agreed that the new substantive scope should fall within the existing African Commission and that this institution should be strengthened. The creation of two separate bodies has been counter-productive, maybe because of the specific situation (e.g. the two bodies were placed under two different political entities within the African Union - one under social affairs, the other under political affairs, limited resources were available). So, there were many reasons within the particular African context why this was not an ideal solution. I am not saying that this is true for all systems, but that is certainly how it played out in Africa.
- In the inter-American system, whenever a donor country or a foundation gives money to the Commission it will frequently be earmarked for specific themes such as freedom of expression and the creation of a rapporteurship. When the issue came up for the first time in 1998, the inter-American Commission was very zealous in making sure that this rapporteurship would be somehow affiliated with the Commission and would not be autonomous. So there has been a strong interest in keeping all of these promotional mechanisms under the umbrella of the inter-American Commission.

- *Mr. Alizadeh*: If you create another institution, rather than having sub-committees, you have to spend money and energy. The key issue is whether it will be able to do protection work in accordance with international standards.
- *Prof Maloney*: Strategically, there are some reasons to have the ASEAN Commission on Women and Children. We know that the ASEAN human rights body is going to be extremely weak, so there is a possibility that the ASEAN Commission on Women and Children could be much stronger because it is not quite as threatening to ASEAN members. It seems that, if they are both created, at some point they will come together. If one of the bodies has more protection powers, then this could help to strengthen the mandate of the weaker body.

Day Two:

The second and final day of the meeting featured three workshop sessions, whereby participants broke out into groups to discuss specific issues.

III.6 Workshop 1: Facing Off the Return of the “Asian Values” Thesis

Main points from the working groups:

- For some Asian politicians, Asian values challenge the “Western” concept of human rights in the sense that human rights are individualistic rather collectivist.
- The “Asian values” thesis fails to recognise the link between individual and collective rights.
- There is no clear definition of what Asian values are; the concept is left very vague.
- The idea of “Asian values” can be used to justify cultural relativist positions on issues such as sexual orientation, where it can be used to claim that Asian countries and Asian communities cannot accept homosexuality or same sex marriage.
- Asian values, as interpreted by states, are archaic e.g. heads of state must be obeyed by their citizens; the youth must obey their elders; patriarch relations etc.
- Self-interest lies at the core of the Asian values thesis; people in power want to stay in power, and this thesis helps them to do so. Politicians can ignore the views of the people with individual human rights being dismissed as “Western”.
- “Asian values” enables politicians to derogate from the human rights principle of universality.
- We need to learn from Africa’s experience; Africans do not define what peoples’ rights are, hence there is no need to seek a definition of Asian values.
- We do have Asian values, but the notion has been abused by some Asian leaders. It is important for CSOs to develop the concept in a way which respects the diversity of the people of Asia.
- We are all equal human beings, with equal rights. Promoting so-called Asian values will only create divisions. Emphasis should be placed on equality among people regardless of national or geographic boundaries.
- The Asian values thesis is linked with religious values, which gives it an unquestionable nature.
- Religion, coupled with poverty helps people to buy into Asian values.
- There are question marks over whether Asian states are really secular. For example, Mahathir declared Malaysia to be an Islamic state; Islam is allowed to evangelize in Malaysia while other religions are not. In Thailand, to be Thai is to be Buddhist; others, such as southern Malay Muslims both feel and are perceived to be outsiders.
- In many European countries, religion is at the core of national identity. It is important how courts at the national and international level manoeuvre amongst different claims in giving weight to morality and national security vis-à-vis individual rights.
- CSOs need to position themselves to influence governments in the drafting of the ASEAN human rights declaration.

- Civil society perceptions and how to counter state's perceptions:
 - Human rights are not foreign; they are natural, inherent, intrinsically good and embedded within Asian society.
 - Asian values are also human rights values, and vice versa.
 - We can provide arguments that Asian values actually include more human rights inspired by elements – more egalitarian, inclusive, universal – than politicians allow for. For instance, in the pre-colonial society, homosexuality was accepted.
 - We can say that values are learned and not static.
 - Asian values should not go lower than human rights standards or be used to suppress the establishment of an ASEAN human rights mechanism.
 - Civil society can invoke Asian values to hold leaders to account for human rights violations and as a means of asserting the human rights of people.
 - The Asian values stigma that is derived from Mahathir Mohamad and Lee Kwan Yew will make it difficult to promote Asian values in a human rights friendly way.

III.7 Workshop 2: Considering the “evolutionary approach” to the development of human rights norms and standards in ASEAN

Main points from the working groups:

- The “evolutionary approach” suggests starting small and developing towards something more significant. It suggests the progressive realisation of something over a period of time.
- The term means different things to different governments; for example, the Philippines, Indonesia and Thailand use the term in a more constructive way than other governments in the region who use it to stifle the process.
- Some form of evolution has taken place with the regional human rights systems in Africa, the Americas and Europe.
- CSOs need to gain ownership of this term “evolutionary approach”. If conservatives are in charge, evolution will go in a negative direction.
- The term provides space for governments to negotiate on more controversial aspects of the ASEAN human rights body (AHRB); for example, on the protection mandate.
- It can also be a way of limiting the mandate while achieving consensus. The term is premised on the notion of consensus.
- What is the political agenda behind the evolutionary approach? It is saying that the process towards the protection and fulfilment of human rights needs to be slowed down. The term is also used by governments to pacify civil society. It can also be used to justify the establishment of a very weak mechanism (promotion with no protection mandate) with weak instruments.
- It could be good to have elements of the AHRB that are optional to enable the more progressive states to move forward. Alternatively, it could be problematic having different standards for different states.
- The timeframe or roadmap for this evolutionary approach has not been made clear by ASEAN governments.
- Civil society has to have a clear idea in terms of the substance of what it wants (e.g. rapporteurs) and of the timeframe.
- Should civil society take an ideal position or an “evolving” position?
- The “evolutionary approach” is a term of the state. Civil society should be pushing for the strongest possible mechanism (protection mandate, investigatory powers, individual complaints mechanism, rapporteurs, even the establishment of a court). There are certain basic principles and concepts which should not be subject to “evolution”.

- The AHRB must start from the Universal Declaration and other core international human rights treaties. The “Paris Principles” also establish basic standards and principles for human rights mechanisms.
- What should civil society do if the AHRB falls down on even the basic principles? Issue a statement condemning it and then develop strategies to engage with it to make it stronger.
- The vagueness of the TOR can be used to the advantage of CSOs. Making it too specific may be restrictive in terms of the AHRB’s future development.
- The best approach for civil society advocacy will vary from country to country.
- CSOs must work together and through networks, join together to lobby governments and submit checklists to governments.
- The concept of non-interference needs to be evolved to bring it in line with human rights standards.
- Independent commissioners are needed on the AHRB to enable the evolutionary approach to be a positive and constructive process.
- With human rights mechanisms in Africa, Europe and the Americas, the principle of appointing independent commissioners who are experts acting in their individual capacity has been there from the **very beginning**. Civil society should make clear that this is non-negotiable.
- It is difficult to see how the members of the AHRB can be independent when their loyalty and accountability belong to the appointing governments.
- What is being proposed in the terms of reference looks more like the UN Human Rights Council than a Regional Human Rights Commission.

III.8 Workshop 3: Working with Different Regional Human Rights Mechanisms to Create an Effective System

Main points from the working groups:

- The TOR of the AHRB does not mention about the establishment of sub-commissions.
- An ASEAN Commission on Women and Children can be used as an entry point for other human rights issues.
- In Africa, the establishment of a separate human rights body for children (the Committee of Experts on the Rights of the African Child) has not been successful. The body has not been given the resources required, is placed under a separate political body and has not taken up issues in an effective way. With the Protocol on the Rights of Women, there was an opportunity to create a new body again, but it was agreed that the new substantive scope should fall within the existing African Commission and that this institution should be strengthened.
- There is a concern that an ACWC separate from the AHRB may become marginalized. One integrated human rights body is what should be aimed for, with sub-commissions on specific themes/groups established under the AHRB. If separate bodies are created they should be integrated in the future.
- The creation of separate bodies, independent from one another, could create problems in terms of securing funding.
- The ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers has already been established, consisting of staff from the member countries’ Department of Labour.
- The proposals for the establishment of an ASEAN commission on the promotion and protection of the rights of women and children (ACWC) and the elaboration of an ASEAN instrument on the protection and promotion of the rights of migrant workers are derived from a policy document (the Vientiane Action Programme) whereas the ASEAN human rights body is derived from a stronger legal basis (the ASEAN Charter).
- Additional mechanisms to make up the ASEAN human rights system could include sub-commissions on specific themes/groups, special procedures, individual complaints mechanisms, preventative mechanisms (early warning system; something similar to the

European Committee on the Prevention of Torture), inquiry procedures, reporting procedures, a regional human rights court, a mechanism to examine and review domestic laws to ensure compliance.

- National human rights mechanisms should also be established which, in turn, link up with regional human rights mechanisms.
- An individual complaints mechanism and a human rights court are central to human rights protection.
- Different mechanisms should be utilised by civil society for maximum effect. This includes coordinating/collaborating with UN human rights mechanisms.
- The TOR of the ACWC could be based on the TOR for the AHRB, but also strengthened, which could in turn act as an incentive to strengthen the AHRB's TOR.

III.9 Panel Discussion²: Thoughts on Civil Society and NHRIs Strategy for the Months and Years Ahead to Help Develop Credible and Effective Regional Human Rights Mechanisms

Main points from Ms. Atty. Leila De Lima (Chairperson, Commission on Human Rights of the Philippines)

- The ASEAN NHRI Forum has submitted its recommendations to the HLP on how to improve the TOR. These recommendations include the following:
 - Would like the AHRB to be called a “Commission”.
 - That it be effective, credible and accessible.
 - That it be an independent **deliberative** inter-governmental body with emphasis on the promotion and protection of human rights. Recognise that it is an inter-governmental body, but that it should be more than simply a consultative body (as it is currently referred to in the TOR).
 - Elaborate on the AHRB's functions and give it more independence.
 - The formation of the Commission should take place through a transparent, participatory and inclusive process of consultation with all stakeholders, including NHRIs.
 - Note the total absence of any language with respect to NHRIs in both the ASEAN Charter and in the TOR.
 - In the mandate, push for the maximum, which includes protection. Implicitly, the ASEAN NHRI Forum adheres to the “evolutionary process” in that we are proposing a mandate to receive, analyse, investigate and take action on complaints on alleged violations of human rights for any person or group of persons or on its own initiative, but that no reference is made to a court.
 - The Commission shall only deal with the matter after all domestic remedies have been exhausted according to the generally recognised rules of international law.
- Initiatives/action that may be taken:
 - Need more dialogue, forums to maximise lobby efforts with governments. NHRIs are in a good position to add extra pressure to governments. Are closer to government than civil society and also closer to civil society than governments, so can act as a bridge between the two.
 - Sustained advocacy against cultural relativism.
 - Utilise to better effect the various mechanisms within the UN human rights system.
- Between now and July it should be non-stop advocacy work directed towards governments to develop a substantive protection mandate for the AHRB.
- The focus of the ASEAN NHRI Forum is also to be able to assist in the establishment of NHRIs in other ASEAN member states.

² Sitting on this panel were Mr. Yap Swee Seng, Executive Director of Forum Asia; Ms. Atty. Leila De Lima, Chairperson, Commission on Human Rights of the Philippines; and Mr. Rafendi Djamin, Convenor of the SAPA Task Force on ASEAN and Human Rights.

- Certain NHRIs may not respond adequately to human rights concerns and issues in their respective countries. So the AHRB has a role to play in this instance, in accordance with the principle of the exhaustion of domestic remedies.
- A representative from Komnas Perempuan, National Commission on Violence Against Women in Indonesia, added that i) Their position is to have one unified human rights body; ii) Coordination between ASEAN and NHRIs needs to improve; iii) The TOR should refer to the need for consultation with NHRIs from the region.

Main points from Mr. Rafendi Djamin (Convenor of the SAPA Task Force on ASEAN and Human Rights):

- Focusing on the possible joint initiatives between civil society and NHRIs in terms of engagement with the AHRB, it was recommended to:
 - Collaborate on public awareness campaigns regarding ASEAN human rights mechanisms.
 - Collaborate on the selection of the commissioners, especially where member states' internal processes provide more space for this.
 - Hold regular consultations on advocacy and trans-boundary human rights issues in relation to the AHRB.
- There is possibly going to be another discussion with the HLP before they decide on the final draft of the TOR in July. The best practices we have learned from other regions can inform advocacy and lobbying to help persuade governments to fill the gaps in the current TOR.
- The AHRB is likely to have serious gaps in terms of its protection mandate. One way to fill this gap is to encourage states to implement recommendations from UN human rights mechanisms, such as the treaty bodies, special procedures and the UPR.

Questions/comments from the participants:

Q: Do NHRIs also have some strategies to respond to the emerging mechanisms such as the ASEAN Committee on Migrant Workers (ACMW) and the ASEAN Commission on Women and Children (ACWC)?

- *Ms. Atty. Leila De Lima:* There is some recognition that the ACWC might go ahead of the AHRB but the position of the NHRIs is that, as much as possible, they should be integrated with the AHRB instead of separate commissions.

Comment: The ACMW is not structured to deal with human rights; they are mid-level officers appointed to ensure the implementation of article 22 of the ASEAN Declaration on Migrant Workers (develop an ASEAN instrument on the protection and promotion of the rights of migrant workers) and then to ensure that it is implemented at the national level (the ACMW met in Bangkok in April). The Task Force on Migrant Workers, consisting of civil society and trade union representatives, will finalise a framework instrument by the end of next week. This framework instrument will be passed to the Senior Labour Officers Meeting (SLOM) in Vientiane who will then hand it over to the ACMW to continue the drafting process. The ACMW does not have a role to play in terms of a complaints mechanism, which is why the Task Force is calling for a sub-committee of the AHRB to deal with migrant workers issues.

Q: Regarding CSO collaboration with the NHRIs on the selection process for the Commissioners of the AHRB, are you referring to the selection process or suggesting someone that can come from civil society or from the NHRIs to sit on the AHRB?

- *Mr. Rafendi Djamin:* I am proposing for a discussion to take place, otherwise the Commissioners will simply be appointed by national governments without consultation. It is important to engage with governments on what kind of process they will have to select the commissioners; the TOR leaves it open to governments to decide on their internal

process of consultation. CSOs can say to their governments, for example, “In Indonesia it is possible to have an internal process of consultation, why not us?” Governments are worried about their image within ASEAN and this can give civil society leverage.

Comment: Regarding Child Rights CSOs, the challenge for us is to engage with the children and young people who are supposed to benefit from this AHRB and whatever mechanism will be working to protect their rights. What is imperative now is for us to translate many of these messages into something that children and young people can truly relate to and which will allow them to provide inputs into the process.

- *Mr. Yap Swee Seng:* What are the issues to focus on during the period May-July 2009 in terms of improving the text of the TOR? Things to highlight include the independence of the persons sitting in the AHRB, which is crucial if we want to ensure that the mandate of the AHRB will evolve in a positive direction. Also, what is our non-negotiable bottom line? An investigation mechanism as one of the key protection elements should be pushed to be included in the final text. These two points are crucial to ensure the effectiveness of the body and its future development.

Comment: In Uruguay at the moment there is a petition process going on where they are trying to get 250,000 signatures to repeal the amnesty law in Uruguay. I am not optimistic about the idea of talking to the HLP and getting them to include protection at the last minute; it just does not sound like that is in the cards. What you can do is try to hand a kind of fait accompli or some kind of public manifestation through a petition campaign to this new human rights commission that is being created under the ASEAN Charter. If you send them complaints about human rights violations then at some point somebody is going to ask what are you going to do with these complaints and they are going to have to answer something. So if you present them with the facts of human rights violations in this region that forces them to take some kind of action.

Looking at the Sabato Commission in Argentina, Ernesto Sabato was one of the most prestigious novel writers in Argentina and he was named by the Government to head a truth commission. Now, you would not expect a novelist to be heading a truth commission, but he was a man with an important reputation and was widely loved in the country. It is then important to think outside of the box for the people with the great reputations in the region who would be credible members of the Commission that you could promote.

Comment: Civil society should argue for the whole range of human rights, including sexual orientation and gender identity, right to safe and legal abortion etc. We feel that our role is to maintain our convictions.

- *Mr. Yap Swee Seng:* Issues for civil society to focus on after the body is set up will include the drafting of the rules of procedure of the body and the drafting of the ASEAN human rights declaration.

Q: What are we going to do on July 13-14 at the ASEAN Ministerial Meeting (AMM) when the TOR will be finalised? Do we have any chance to go inside the meeting, because I do not know what the previous experience of dealing with the AMM is? Is there anything that we can do prior to that date?

- *Mr. Rafendi Djamin:* From now until July we are still trying to request one more interface with the HLP, as occurred in Manila and Kuala Lumpur. However, we can also approach the MFA and the HLP members at the national level to ask for developments regarding the filling of the protection gap for the AHRB. They received instructions from their own ministers during the meeting in Hua Hin to really strike a balance between protection and promotion. In our consultations with our own governments, we can ask for the results of the deliberations after these instructions.

- As far as the AMM is concerned, it has always been a closed meeting. However, we can try to change this. The SAPA Task Force on ASEAN and Human Rights (TF-AHR) has won space and recognition and secured interactions with the HLP on the discussion of the TOR. The next step is to secure consultations at the AMM.
- CSOs have to consider the possibility of having a media blitz of advocacy in June and July, prior to the AMM.
- Following the AMM, CSOs need to develop a position on the finalised TOR, and whether to initiate a wide public campaign denouncing it?
- CSOs will also have to focus on the proposed modality of consultation with civil society by the AHRB and the drafting of the ASEAN Declaration on Human Rights.
- The TF-AHR will have its regional consultation in August 2009 at which point we can identify what the priority issues are to bring to the attention of the AHRB in performing their mandate.

Comment: The AMM will be closed to civil society, but not to journalists. So maybe we should identify journalists that will be invited to the AMM and have a meeting with them. We need the country focal points to help identify who these journalists are.

Comment: In the Kuala Lumpur meeting we decided that we should do some analysis to compare CSO submissions with the TOR. I think this is very important for us to show the gap between these two documents and to use it as a lobby tool. This should be prepared before July.

Comment: It is important for the different sectors of civil society to come together and agree on a common core message. When we approach our governments we need to have a common stance.

- *Mr. Yap Swee Seng:* The secretariat of Forum-Asia will put together the points and ideas that have been discussed here and will then circulate to everyone. The secretariat will also continue liaising with the HLP and continue with the public advocacy campaign that started two months ago.

III.10 Closing remarks

Ms. Atty. Leila De Lima, on behalf of the ASEAN NHRI Forum, expressed appreciation for the two day dialogue and the suggestions that resulted, including the need for closer collaboration between CSOs and NHRIs. Mr. Yap Swee Seng thanked the participants and organisers along with the three experts for travelling from so far afield and providing valuable experiences and suggestions. Mr. Rafendi Djamin, on behalf of the TF-AHR, expressed his sincere gratitude and thanks to the experts for helping the participants better understand the workings of regional mechanisms and the role of civil society and NHRIs in other regions of the world. He thanked OHCHR Regional Office, Bangkok and SEARCH for the close collaboration and cooperation since the beginning of the planning for this expert dialogue. And he expressed appreciation for the contributions from all national and thematic focal points of the SAPA Task Force on ASEAN and Human Rights, including Lao and Viet Nam, and looked forward to elaborating further cooperation and engagement with the wider civil society networks in the countries of ASEAN. He also gave thanks to Ms. Atty. Leila De Lima for representing the ASEAN NHRI Forum, and to Komnas Perempuan for participating.

IV. FOLLOW UP TO THE MEETING

- This report will be circulated to all participants of the meeting as a resource to help link their work in South-East Asia with experiences from Africa, the Americas and Europe.

Prepared by Mr. Daniel Collinge, ROB