

Asian Human Rights: Forming a Regional Covenant

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ASIAN HUMAN RIGHTS: FORMING A REGIONAL COVENANT

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I. INTRODUCTION

The death, injuries, and detention of pro-democracy demonstrators in Tiananmen Square in 1989;¹ the estimated 9000 girls a year trafficked from Nepal to India and Bangladesh to Pakistan;² and the recent ethnically motivated killings in East Timor³ are tragic reminders of the clear need for multilateral resolutions to the myriad problems occurring across Asia.⁴ Despite

¹ See Jennifer Morris, *Human Rights Violations During the Tiananmen Square Massacre and the Precedents Obliging United States Response*, 12 CARDOZO L. REV. 1375, 1377-78 (1991).

² See *Children's Rights flouted on massive scale: Amnesty International*, AGENCE FRANCE-PRESSE, Nov. 15, 1999, available at 1999 WL 25144219.

³ See Ian Timberlake, *A blessing for the East Timor massacre dead*, AGENCE FRANCE-PRESSE, Feb. 7, 2000, available at 2000 WL 2728212. See also Tom Fawthrop, *Investigators exhume bodies from one of Timor's worst massacres*, DEUTSCHE PRESSE-AGENTUR, Feb. 5, 2000, available at LEXIS/NEXIS, Non-U.S. News; Derek Scholes, *Media coverage lacking on plight of East Timor*, THE TIMES UNION, Feb. 23, 2000, available at LEXIS, News Group File.

⁴ For the purposes of this article, Asia constitutes all states on the Asian continent, including the Middle East and Central Asia, as well as the Pacific island nations.

the popularity of codifying measures to protect human rights in the post-World War II era,⁵ nations throughout Asia have, thus far, declined to take a regional approach to human rights recognition and enforcement.⁶

In May 1998 the Asian Human Rights Commission, with support of several non-governmental organizations (“NGOs”), created the Asian Human Rights Charter Draft (“Charter”).⁷ The Charter embodies universally applicable rights that arise from an “Asian” perspective and incorporates many of the rights supported by most Asian states under various other treaties.⁸ By defining specific rights and outlining enforcement mechanisms that can be used to protect these rights, the Charter creates a strong foundation for a human rights structure.⁹

Although the Charter represents a significant step towards recognizing human rights for traditionally oppressed groups and individuals in Asia, the Charter will not be the final product

⁵ See U.N. CHARTER arts. 55, 56. See also Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) [hereinafter UDHR]; International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 999 U.N.T.S. 3 [hereinafter ICESCR].

⁶ See generally Bilhari Kausikan, *East Asian Approaches to Human Rights*, 2 BUFF. J. INT’L L. 263 (1996); Timothy Kearley, *Symposium, Structure of World Order East Asian Approaches to Human Rights*, 89 AM. SOC’Y INT’L L. PROC. 146, 153 (1995) (quoting Ali Alatas, Indonesian Minister of Foreign Affairs, and asserting that the human rights mission embodied in the U.N. Charter was created in the spirit of cooperation, not confrontation).

⁷ See Asian Human Rights Charter Draft (visited Feb. 12, 2000) <http://is7pacific.net.hk/~ahrchk/ahr_draftpart2.html> [hereinafter Charter].

⁸ See Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979 [hereinafter Women’s Convention], reprinted in 19 I.L.M. 33 (1980). Asian states that are parties to the treaty include Azerbaijan, Bhutan, Cambodia, China, India, Indonesia, Iraq, Israel, Japan, Jordan, Kazakhstan, Korea, Kuwait, Kyrgyzstan, Laos, Lebanon, Malaysia, Maldives, Myanmar, Pakistan, Philippines, Russian Federation, Samoa, Seychelles, Singapore, Sri Lanka, Tajikistan, Thailand, Turkey, Turkmenistan, Uzbekistan, Vanuatu, Vietnam, and Yemen. See INTERNATIONAL LAW: SELECTED DOCUMENTS 440 (Barry Carter & Phillip R. Trimble eds., 1999). See also Convention on the Rights of the Child, Nov. 20, 1989 [hereinafter Children’s Convention], reprinted in 28 I.L.M. 1448 (1989). Asian states that are state parties to the Children’s Convention include Afghanistan, Azerbaijan, Bahrain, Bangladesh, Bhutan, Brunei Darussalam, Cambodia, China, Indonesia, Iran, Iraq, Israel, Japan, Jordan, Kazakhstan, Korea, Kuwait, Kyrgyzstan, Laos, Lebanon, Malaysia, Maldives, Marshall Islands, Micronesia, Mongolia, Myanmar, Nauru, Nepal, New Zealand, Oman, Palau, Pakistan, Philippines, Qatar, Russian Federation, Samoa, Saudi Arabia, Seychelles, Singapore, Sri Lanka, Tajikistan, Thailand, Turkey, Turkmenistan, United Arab Emirates, Uzbekistan, Vanuatu, and Vietnam. See INTERNATIONAL LAW: SELECTED DOCUMENTS, *supra*, at 463.

⁹ See generally Charter, *supra* note 7. These provision include new or more developed internal human rights organizations, regional commissions for monitoring, regional commissions for monitoring, and international organs that permit participation by Asian scholars and peoples. See *id.*

for the protection of human rights in Asia.¹⁰ Because many Asian states are suspicious of any expansion of human rights beyond those traditionally recognized, the Charter will undoubtedly be unacceptable to them.¹¹ This does not, however, negate the Charter's value as a tool to evoke change in the position of many Asian governments that refuse to yield to "Western" principles of human rights law.¹² The primary utility of the Charter, and unofficial documents like it, exists in its strict description of rights. This definite statement of rights can be used as a lobbying point for the peoples of Asia and as a voice to espouse their needs and concerns.¹³

The true value of the Charter, however, is not to provide a workable document immediately agreeable to Asian states; rather it is to move the international community toward establishing effective recognition of more rights.¹⁴ This value extends to the proper protection of those rights that Asian states have already recognized and promised to protect under various other treaties. The Charter itself serves two functions. First, it re-emphasizes the importance of the protection of basic rights, including those of women, children, and workers.¹⁵ Second, it establishes the potential for future recognition of other rights that have not had the same level of

¹⁰ See generally Ralph Wilde, *NGO Proposals for an Asia-Pacific Human Rights System*, 1 YALE H.R. & DEV. L.J. 137, 142 (1998).

¹¹ See Kausikan, *supra* note 6, at 263. See Vitit Muntarbhorn, *Asia, Human Rights and the New Millennium: Time for a Regional Human Rights Charter?*, 8 TRANSN'T'L L. & CONTEMP. PROBS. 407, 414 (1998).

¹² See generally Wilde, *supra* note 10.

¹³ See Charter, *supra* note 7, at Explanatory Note.

¹⁴ See also Kearley, *supra* note 6, at 156-57; Muntarbhorn, *supra* note 11.

First, there is a general paradoxical human rights situation . . . which acts as a disincentive to a regional human rights mechanism. Second, Asia is probably too vast and heterogeneous for a single regional inter-governmental human rights mechanism. Third, there is a hesitation among Asian governments regarding the monitoring role that such a mechanism would imply. Fourth, these governments claim to prefer a non-confrontational approach.

Id. at 414. See generally Wilde, *supra* note 10.

¹⁵ See generally ALLAHAD KITAB MAHAL, IMPLEMENTATION OF HUMAN RIGHTS COVENANTS 23-24 (1983); Charter, *supra* note 7.

universal acknowledgement in the Asia-Pacific region.¹⁶ Under international law, the creation of rights often demands a process of customary recognition and codification.¹⁷ The Charter adds additional weight to the conventions and custom currently protecting basic, widely recognized human rights. Asian states have only recently recognized the possibility for multilateral action on issues of international human rights.¹⁸ The Charter's lobbying potential can be used to hasten recognition of rights for the Asia-Pacific region.¹⁹

This paper discusses how the expansion of human rights has altered the human rights framework in the international community and how the Charter's identification of human rights might alter the framework accepted by Asian states. Part II briefly describes the history of human rights documents and several significant rights protected by the Charter. Part III explains the tension between universal human rights and cultural relativism. Additionally, Part III analyzes the tension between Asian values and universal human rights, and the effect this Charter may have on Asian states because of this conflict. Part IV predicts alterations that an Asian regional human rights structure will undergo before becoming an actuality. Finally, this paper concludes that although an Asian human rights covenant is still in the early stages of development, the Charter and similar documents give a unified voice to oppressed and disenfranchised groups. This voice elevates the priority of human rights and encourages states to take practical steps in considering various means to protect the rights concretely laid out in the Charter. To provide a workable covenant agreeable to Asian states, however, NGOs and the international community as a whole must find a balance in the tension between protecting individual and group rights and state sovereignty.

¹⁶ See MARK VILLIGER, *CUSTOMARY INTERNATIONAL LAW AND TREATIES* 15 (1997); See generally Charter, *supra* note 7.

¹⁷ See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 7-11 (5th ed. 1998). See also MALCOLM SHAW, *INTERNATIONAL LAW* 76-78 (3d ed. 1991); VILLIGER, *supra* note 16, at 15.

¹⁸ See Li-Ann Thio, *Implementing Human Rights in ASEAN Countries: "Promises to keep and miles to go before I sleep,"* 2 *YALE HUMAN RIGHTS & DEV. L.J.* 1, ¶ 18 (1999).

¹⁹ See VILLIGER, *supra* note 16, at 15.

II. PROVISIONS EXPAND THE REALM OF SUBSTANTIVE HUMAN RIGHTS IN ASIA

A. *Brief History of Human Rights*

The history of human rights covenants began during the post-World War II period with the adoption of the Universal Declaration of Human Rights (UDHR) by the United Nations General Assembly.²⁰ During the Cold War period, the General Assembly followed the UDHR by partitioning human rights into two distinct categories: civil and political rights, enumerated in the International Covenant on Civil and Political Rights (ICCPR);²¹ and economic and cultural rights, outlined in the International Covenant on Economic, Social and Cultural Rights (ICESCR).²² Three regions (the Americas, Europe, and Africa) have established regional covenants for the protection of human rights with supporting machinery in the form of multilateral Commissions and/or Courts.²³ Asia is the last major region to remain without an international human rights enforcement mechanism.²⁴ The Charter, therefore, is a significant step towards moving Asia into step with the international community.

The Charter proposes rights that fall into two general categories. The first group consists of rights recognized universally as meriting state protection.²⁵ The second group consists of

²⁰ See UDHR, *supra* note 5. See also BROWNLIE, *supra* note 17, at 576. The UDHR specified the rights protected under Articles 55 and 56 of the U.N. Charter. See U.N. CHARTER arts. 55 and 56.

²¹ See generally ICCPR, *supra* note 5; ICESCR, *supra* note 5.

²² See generally ICESCR., *supra* note 5. See also BROWNLIE, *supra* note 17, at 576; Joy Gordon, *The Concept of Human Rights: The History and Meaning of its Politicization*, 23 BROOKLYN J. INT'L L. 689, 706 (1998).

²³ See European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention]; Inter-American Convention on Human Rights, Nov. 22, 1969, O.A.S. Doc. OEA/Ser. L/V/II.23 doc.rev.2 [hereinafter Inter-American Convention]; The African Charter on Human and Peoples' Rights, June 7, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev.5 [hereinafter African Charter].

²⁴ See generally Kelly Dawn Askin, *Issues Surrounding The Creation of a Regional Human Rights System for the Asia-Pacific*, 4 ILSA J. INT'L & COMP. L. 599 (1998); Bina D'Costa, *Challenges For An Independent Asian Human Rights Commission*, 4 ILSA J. INT'L & COMP. L. 615 (1998); Muntarhorn, *supra* note 11, at 413; Wilde, *supra* note 10.

²⁵ See generally Women's Convention. The rights of women and children are nominally agreed upon by almost all Asian states. See *id.* See generally also Children's Convention, *supra* note 8.

rights not readily recognized by most Asian states.²⁶ The following sections provide examples of these rights.

B. *Provisions in the Charter Protecting Widely-Recognized Rights*

Some Asian states have already assumed obligations to uphold some provisions contained in the Charter,²⁷ although in some cases the protection is only nominal. Of the 140 parties to the ICCPR and the 137 parties to the ICESCR, only nine members of each treaty are Asian States.²⁸ In contrast, dozens of Asian states are parties to the Convention on the Elimination of All Forms of Discrimination against Women (“Women’s Convention”), and the Convention on the Rights of the Child (“Children’s Convention”).²⁹

By instituting remedial programs, states have strengthened the protection of the rights of these two groups required under both the Women’s and Children’s Conventions. Many Asian states submitted themselves to the jurisdiction of the Women’s Convention monitoring body, which recently evaluated the progress of treaty compliance of several States Parties, including Nepal and Kyrgyzstan.³⁰ Additionally, the Asia Pacific Economic Cooperation Forum has begun to include specific women’s leadership councils to address women’s role in business and the

²⁶ See Charter, *supra* note 7, at Indigenous/Tribal/Peoples’ Rights, Rights of Minorities, Rights of Refugees and Internally-Displaced Communities, Rights of Older Persons, Rights of Disabled Persons, Rights of Peasants and Fisherfolk, Rights of Persons with HIV/AIDS, Rights of Prisoners and Political Prisoners, Rights of Human Rights Defenders, and Our Common Humanity. Rights of groups protected in these sections have been traditionally denied by Asian states.

²⁷ See generally Women’s Convention, *supra* note 8; Children’s Convention, *supra* note 8.

²⁸ See generally ICCPR, *supra* note 5; ICESCR, *supra* note 5. “The [ICCPR], for example, has 140 parties, of which only Cambodia, the two Koreas, Japan, the Philippines, Thailand, Australia, New Zealand, and Viet Nam are from this region. With the exception of Thailand, and the addition of the Solomon Islands, these same states are some of the 137 parties to the [ICESCR].” Gillian Triggs, *Confucius and Consensus: International Law in the Asian Pacific*, 21 MEL. U.L. REV. 650, 670 (1997).

²⁹ See Women’s Convention, *supra* note 8; Children’s Convention, *supra* note 8.

³⁰ See UN: Committee on Elimination of Discrimination against Women to Hold 21st Session at Headquarters, M2 PRESSWIRE, June 7, 1999, available in 1999 WL 19096417. See also UN: Kyrgyzstan committed to integrating women into national programmes of action, committee told, M2 PRESSWIRE, Jan. 26, 1999, available in 1999 WL 7550891.

economy.³¹ Children's rights have also received higher priority in many Asian nations. Similarly, several states have created plans to foster greater protection and education for children.³²

Asian states have already acceded to these basic rights, at least in principle. These rights represent a starting point from which a regional human rights regime can be developed.

C. Provisions Inconsistent with Widely-Recognized Rights

The current Charter extends beyond the principles recognized in other Conventions in an attempt to raise international standards.³³ Rights for oppressed groups such as the elderly,³⁴ the disabled,³⁵ peasants and working-class groups,³⁶ indigenous peoples and minorities,³⁷ prisoners,³⁸ individuals suffering from HIV/AIDS,³⁹ as well as the right to democratic government⁴⁰ constitute rights not traditionally recognized by most Asian governments. Asian

³¹ See Marta Steeman & Andrea Fox, *Shipley hopes to push Apec women's agenda*, THE DOMINION, June 23, 1999, available in 1999 WL 19480350. See also *APEC forerunner for women*, THE DOMINION, June 18, 1999, available in 1999 WL 19479852.

³² See *Lebanon to Rehabilitate Street Children*, XINHUA, Oct. 9, 1999, available in 1999 WL 28967792. See also *ID card for hill tribes*, NATION, Jan. 4, 2000, available in 2000 WL 6313126 (reporting that Thailand established a new mobile unit to maintain records of members of its hill tribes to ensure citizenship to children born in their territory).

³³ See generally Charter, *supra* note 7. See generally also Thio, *supra* note 18; Kausikan, *supra* note 6.

³⁴ See Charter, *supra* note 7, at Rights of Older Persons.

³⁵ See Charter, *supra* note 7, at Rights of Disabled Persons.

³⁶ See Charter, *supra* note 7, at Rights of Peasants and Fisherfolks at Worker's Rights.

³⁷ See Charter, *supra* note 7, at Indigenous/Tribal/Peoples' Rights. See also Thio, *supra* note 18, ¶ 4.

³⁸ See Charter, *supra* note 7, at Rights of Prisoners and Political Prisoners. See generally ANDREW HARDING & JOHN HATCHARD, *PREVENTATIVE DETENTION AND SECURITY LAW: A COMPARITIVE STUDY* (1993); STANISLAW FRANKOWSKI & DINAH SHELTON, *PREVENTATIVE DETENTION* (1992).

³⁹ See Charter, *supra* note 7, at Rights of Persons with HIV/AIDS. See also Marc Lim, *The First Step Forward--The AIDS Dismissal Case and the Protection Against AIDS-Based Employment Discrimination in Japan*, 7 PAC. RIM L. & POL'Y J. 451, 453 (1998); FREDERIC G. REAMER, *AIDS AND ETHICS* 227-28 (1991).

⁴⁰ See Charter, *supra* note 7, at Our Common Humanity, We Agree, ¶ 4.

states view this expansion of human rights as a threat to state self-interest and sovereignty.⁴¹ Accordingly, this perceived threat creates an obstacle to human rights recognition in Asia. The following section presents two examples of rights that Asian states perceive as threats to state sovereignty.

One of the significant innovations of the Charter is its inclusion of a right to democracy, which is “a first for a regional human rights treaty.”⁴² Yet, inclusion of such a right hinders Asian states’ acceptance of the Charter. Because of the diversity of national governments across Asia,⁴³ many Asian states regard democratic rule as inappropriate and inapplicable when used outside the structure of Western democracies.⁴⁴ Although some states have adopted constitutions and even parliamentary democracies,⁴⁵ many non-democratic Asian states, including Bhutan, China, Burma, and some Middle Eastern States, show disdain towards attempts at democratization outside government-initiated methods of liberalization.⁴⁶

Similarly, the Charter’s inclusion of rights for indigenous peoples also hinders its acceptance, because the concept is imprecise and inapplicable to post-colonial Asian populations.⁴⁷ Although 1993 witnessed the emergence of a draft declaration on the rights of

⁴¹ See D’Costa, *supra* note 24, at 616. See also Askins, *supra* note 24, at 601.

⁴² See Wilde, *supra* note 10, at 140.

⁴³ See Michael C. Davis, *Human Rights in Asia: China and the Bangkok Declaration*, 2 BUFF. J. INT’L L. 215, 220 (1995-1996). “[B]ecause of differences in social systems, culture, traditions and economic development, there should be different measures to protect human rights and various forms of democracy.” *China: Nation Values Human Rights*, CHINA DAILY, Nov. 17, 1999, available in 1999 WL 17783570 (quoting Jiang Zemin).

⁴⁴ See, e.g., Davis, *supra* note 43, at 220.

⁴⁵ See, e.g., *First Presidential Election in Yemen on Thursday*, BERNAMA, Sept. 17, 1999, available in 1999 WL 27613471.

⁴⁶ See, e.g., *Rule of Law Should Not be Used to Create Chaos*, BERNAMA, Sept. 16, 1999, available in 1999 WL 27613292. “Malaysia believes that concepts such as human rights, democracy and the freedom of the individual should not be used as tools to create chaos within society.” *Id.* (quoting Malaysia’s Deputy Prime Minister Datuk Seri Abdullah Ahmad Badawi); *China: Interests for All Guaranteed*, CHINA DAILY, Nov. 13, 1999, available in 1999 WL 30608172; *Anwar Ibrahim Did Not Declare His Assets, Says Dr. Mahathir*, BERNAMA, Oct. 2, 1999. See generally Davis, *supra* note 43.

⁴⁷ See Benedict Kingsbury, *Indigenous Peoples in International Law: A Constructivist Approach To the Asian Controversy*, 92 A.J.I.L. 414, 417 (1998). See also Russel Lawrence Barsh, *Indigenous Peoples: An Emerging Object of international Law*, 80 A.J.I.L. 369, 374 (1986).

indigenous peoples, several Asian governments continue to be reticent in recognizing a concept created by Western colonization and perceived as a Western concept.⁴⁸ Because of their varied histories and cultures, Asian states argue that the generalization classifying all ethnic groups native to a territory as indigenous is ill fit to Asia and that generalizations regarding indigenous peoples in the region are difficult to clearly define.⁴⁹

Accordingly, many Asian states have protested the application of the term “indigenous peoples.”⁵⁰ Although many indigenous groups and a few Western states prefer a self-definition by the indigenous group, many Asian states insist that historical coexistence and political integration of several groups make it unnecessary to classify many of the groups in the region as indigenous peoples.⁵¹ No agreement currently exists on the definition of the term indigenous peoples, even from the U.N.⁵² Without a widely recognized definition, creating an enforceable standard in international law remains impossible.⁵³

The problematic application of democratic rule and indigenous rights to Asia epitomizes the difficulties presented by Asian values. Despite regional and international attempts to expand the realm of human rights, the reticence of Asian states in accepting the universality of those rights hinders the evolution of human rights in the region.

⁴⁸ See Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660, 672 (1990). The term “indigenous” has been attributed to Western colonization and the doctrine of discovery. Because of Asia’s colonial history, generalizations regarding indigenous peoples in the region are colored by Western perceptions and do not necessarily reflect the perceptions of indigenous groups or of Asian states. See *id.* Several Asian states argue that the term “indigenous” is inapplicable to states that never experienced colonialization or whose multi-ethnic populations have co-existed for centuries. See Kingsbury, *supra* note 47, at 416.

⁴⁹ See also Kingsbury, *supra* note 47, at 416. Emphasizing the difficulty of generalized concepts, Kingsbury states that “[e]ven with much of western and central Asia omitted, [Asia] is so diverse as to issues pertaining to ‘indigenous peoples’ that generalizations must be treated with the utmost caution.” *Id.* See generally Yash Ghai, *Human Rights and Governance: The Asia Debate*, 14 AUSTL. Y.B. INT’L L. 1 (1994).

⁵⁰ See generally Barsh, *supra* note 47. See generally Kingsbury, *supra* note 47.

⁵¹ See Kingsbury, *supra* note 47, at 420. See generally Barsh, *supra* note 47.

⁵² See Kingsbury, *supra* note 47, at 419. See generally Barsh, *supra* note 47.

⁵³ See Kingsbury, *supra* note 47, at 419.

III. ADDITION OF SPECIAL PROVISIONS COULD ASSIST IN OBTAINING STATE PARTICIPATION

The atrocities⁵⁴ that have occurred over the past fifty years have caused states and scholars to rethink the concept of state sovereignty.⁵⁵ Despite this re-evaluation, recognition and enforcement of rights remain dependent on acceptance by sovereign states.⁵⁶ States perceive any covenant that affords individuals rights, such as those encompassed by the Charter, as an encroachment upon the sovereign right of the state.⁵⁷ Therefore, state sovereignty represents one of the main barriers to recognition of rights for individuals and groups.⁵⁸ Asian states attempt to elude the growing international consensus through various defenses using the buzzword “Asian values.” China, for example, uses the overarching theme that a state is best able to determine those values for its nationals and the values protected by the government are the only legitimate societal values.⁵⁹ Some states, such as Indonesia, nominally accept universality of rights but claim that economic pressures to develop force the government to put rights of individuals and disenfranchised groups after economic development.⁶⁰ Developed states, such as Singapore, justify their denial of some basic “Western” rights on the ground that they are model Asian societies and can develop without these rights.⁶¹ Further, these developed states espouse the

⁵⁴ See Charter, *supra* note 7, at Introduction.

⁵⁵ See Louis Henkin, *Sibley Lecture, March 1994, Human Rights And State “Sovereignty,”* 25 GA. J. INT’L & COMP. L 31, 32-33 (1994). See also Jiangming Shen, *The Basis of International Law: Why Nations Observe*, 17 DICK. J. INT’L L. 287, 311 (1999).

⁵⁶ See Henkin, *supra* note 55, at 33.

⁵⁷ See Xin Chunying, *Can the Pluralistic World Have a Unified Concept of Human Rights*, in HUMAN RIGHTS: CHINESE AND DUTCH PERSPECTIVES 43, 54-56 (Peter R. Baehr et al. eds., 1996) [hereinafter HUMAN RIGHTS].

⁵⁸ See OPPENHEIM’S INTERNATIONAL LAW 457, 457 (1992). See generally Henkin, *supra* note 55.

⁵⁹ See Fried Van Hoof, *Asian Challenges to the Concept of Universality: Afterthought on the Vienna Conference on Human Rights*, in HUMAN RIGHTS, *supra* note 57, at 1, 4-5.

⁶⁰ See *id.* at 5-7.

⁶¹ See *id.* at 7.

notion that they can continue to do so, because international law lacks any truly universal rights.⁶²

Despite some Asian states' refusal to be bound by the Charter, the Charter's provisions may nevertheless bind the states to the extent that those provisions reflect customary international law. The Charter itself adds to the development of customary international law by evidencing what NGOs and, to a lesser extent, the international community recognizes as inherent universal rights.

A. *Traditional State Sovereignty*

More states joined the consensus to promote the protection of human rights in the latter half of the twentieth century. Most Asian states, however, have steadfastly refused to join in this part of the international regime despite having joined a number of regional and global organizations for economic and military purposes.⁶³ These Asian states reason that Asian communities recognize only the rights of the community and not of the individual, and under the concept of state sovereignty, the only legitimate rights are those recognized by the state.⁶⁴

The concept of state sovereignty is traditionally described as the legitimate authority of the supreme power within a territory to command.⁶⁵ Originally arising from the sovereign right of kings⁶⁶ and developing into an assertion of royal or central authority over the different

⁶² See *id.* at 8.

⁶³ See MAHAL, *supra* note 15, at 84.

⁶⁴ See generally Kausikan, *supra* note 6. Asian states that distinguish between individual and group rights describe individual rights as a Western concept that is not necessary to employ in states with considerably different cultural traditions. See *id.* See also Van Hoof, *supra* note 59, at 6-8.

⁶⁵ See Daniel Philpott, *Ideas and the Evolution of Sovereignty*, in STATE SOVEREIGNTY, CHANGE AND PERSISTENCE IN INTERNATIONAL RELATIONS 15, 17 (Sohail Hashmi ed., 1997) [hereinafter CHANGE AND PERSISTENCE]. See also GIDON GOTLIEB, NATION AGAINST STATE, A NEW APPROACH TO ETHNIC CONFLICTS AND THE DECLINE OF SOVEREIGNTY 15 (1993); GENE LYONS & MICHAEL MASTANDUNO, BEYOND WESTPHALIA? STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTION 1, 7 (1995).

⁶⁶ See Philpott, *supra* note 65, at 18-19; see also GOTLIEB, *supra* note 65, at 15; LYONS & MASTANDUNO, *supra* note 65, at 7.

factions in constructing territorial states,⁶⁷ the present principle of state sovereignty permits a ruling government to exercise power over both people and territory.⁶⁸

Two schools of thought conceptualize state sovereignty differently: the naturalist theory focuses on inherent rights endowed to all individuals; and the positivist theory emphasizes the element of human discretion.⁶⁹ The naturalist theory of international law propounds that, “the rules and principles governing human behavior and social order exist independently of any formal, enacted laws or systems governing any nation.”⁷⁰ Under this theory, neither the state nor the individuals in power have the ability to limit individual rights, because certain rights are innate to all individuals.⁷¹ Though the naturalist school of thought has gained ground, the positivist theory has held the most effective sway over international law.⁷²

Under the positivist theory of state sovereignty, it is “man’s discretion and express direction” that govern the legal order on the international level.⁷³ “The proponents of the positivist doctrines maintain that the will of the State is absolutely sovereign and that it is the source of the validity of all law.”⁷⁴ This notion of state control over the rights of the individual and the state creates a jurisprudence that recognizes the state as the primary organ of

⁶⁷ See Sohail Hashmi, *Introduction*, in CHANGE AND PERSISTENCE, *supra* note 65, at 10.

⁶⁸ See GOTLIEB, *supra* note 65, at 15.

⁶⁹ See Alfred P. Rubin, *Ethics and Authority in International Law*, 22 SUFFOLK TRANSAT’L L. REV. 335, 37 (1998). See also Shen, *supra* note 55, at 291-92.

⁷⁰ Rubin, *supra* note 69, at 336. See also Shen, *supra* note 55, at 292-93.

⁷¹ See Rubin, *supra* note 69, at 336. See also Shen, *supra* note 55, at 295-96.

⁷² See Henkin, *supra* note 55, at 33. “Until the Second World War, the systems of states was a ‘liberal’ system of independent, ‘impermeable,’ ‘monolithic,’ states. Its cardinal principle, and its principle value, was that states should leave each other alone.” *Id.* See also Shen, *supra* note 55, at 311.

⁷³ Rubin, *supra* note 69, at 336. See also Shen, *supra* note 55, at 309.

⁷⁴ Shen, *supra* note 55, at 309.

international law, because it is sovereign will that creates the law.⁷⁵ Accordingly, “rights” are reserved to those recognized by the sovereign.⁷⁶

The governing documents of the international community illustrate the dominance of positivist theory. Article 2(7) of the U.N. Charter immunizes state action relating to “matters which are essentially within the domestic jurisdiction of any state.”⁷⁷ The dominance of the positivist model of sovereignty permits Asian states to maintain their claims of cultural relativism. Because no law can be applied to a state without the state’s consent, opposition to adoption of Western rights can be feasibly sustained as a domestic policy concern.

B. *Asian Opposition to the Adoption of “Western” Rights*

Generally, Asian states invoke the traditional concept of positivist state sovereignty to protect what they claim as rights unique to the region or state.⁷⁸ Three examples of state invocation of sovereignty emphasize the schism between “Western” and “non-Western” values.⁷⁹ Position statements enunciated by China, Indonesia, and Singapore typify each of the three views opposing the universality of human rights.⁸⁰

First, China argues that social stability is a state’s pre-eminent concern and that states have differing levels of social stability. Therefore, no standard for human rights can be

⁷⁵ See Anthony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT’L L.J. 1, 2, 10 (1999). See also Shen, *supra* note 55, at 309-310.

⁷⁶ See Anghie, *supra* note 75, at 13.

This sovereign [was] the highest authority and could only be bound by that to which it had agreed to be bound. Thus, for positivists, the rules of international law were to be discovered, not by speculative inquiries into the nature of justice or teleology, but by careful study of the actual behavior of states and the institutions and laws that those states created.

Id. See also Shen, *supra* note 55, at 310.

⁷⁷ U.N. CHARTER art. 2, para. 7.

⁷⁸ See generally Van Hoof, *supra* note 59; Han Yanlong, *Legal Protection of Human Rights in China*, in HUMAN RIGHTS, *supra* note 57, at 1, 4-5; Xin, *supra* note 57, at 54-56.

⁷⁹ See generally Van Hoof, *supra* note 59, at 6-8.

generically applied to all states.⁸¹ Accordingly, if a state lacks the economic and social structure to create internal stability through a strong system of order, it cannot grant rights that would conflict with the more basic right of survival and safety.⁸² Thus, a state must place its sovereignty before any lesser rights that benefit individuals to the detriment of social stability.⁸³

Indonesia, on the other hand, nominally concurs with the concept of universality of human rights but prioritizes the economic rights of society over the rights of individuals and disenfranchised groups.⁸⁴ Instead of predicating its actions on the need for internal stability, Indonesia points to the fact that, “the wide diversity in history, culture, value systems, geography[,] and phases of developments among nations of the world calls for greater recognition of the immense complexity of the issues of human rights.”⁸⁵ Like other developing countries, Indonesia espouses balancing the rights of the individual and the individual’s responsibility to society.⁸⁶

A third example, Singapore, expressly rejects the recognition of more human rights without offering any excuses. Singapore, a country with far more economic success over the last twenty years than China or Indonesia, lacks an economic excuse for its failure to ensure more human rights and justifies its action by its own success.⁸⁷ Because Singapore succeeded in creating what it views as a clean, healthy, and successful society for its citizens without providing some Western rights, it sees nothing wrong with continuing without these rights.

⁸⁰ See *id.* at 5.

⁸¹ See generally Han, *supra* note 78, at 91. See also Van Hoof, *supra* note 59, at 5.

⁸² See Van Hoof, *supra* note 59, at 6-8.

⁸³ See generally Xin, *supra* note 57, at 55-56.

⁸⁴ See Van Hoof, *supra* note 59, at 5.

⁸⁵ *Id.* at 6 (citing statement by Mr. Ali Alatas, Minister of Foreign Affairs and Head of the Delegation of the Republic of Indonesia, before the World Conference on Human Rights, Vienna, June 14, 1993).

⁸⁶ See Xin, *supra* note 57, at 51-52. The North-South dichotomy plagues developing states around the world, and Indonesia uses the concept of imposition of Western values to defend their actions. See also Peter Baehr, *The Universality of Human Rights*, in HUMAN RIGHTS, *supra* note 577, at 25, 36-37; Van Hoof, *supra* note 59, at 5.

⁸⁷ See Van Hoof, *supra* note 59, at 7.

Singapore also considers the law on many of the rights in the UDHR and its successor documents to be ambiguous, general principles that each state must interpret for its own best use.⁸⁸

The values mentioned above differ from each other slightly: Indonesia prioritizes economic development; China espouses a social isolationist policy; and Singapore emphasizes present success as the hallmark of sufficient rights provisions. These three cases, however, are similar in one important respect. In each case, the state has used its sovereignty to protect values that it believes necessary to protect the interests of society. Essentially, each state uses its own governmental priorities as the justification for its invocation of state sovereignty to deny rights it might otherwise afford individuals.

C. *International Consensus Established by Custom*

The diversity of values advocated by China, Indonesia, and Singapore are important, because they are what must be overcome for rights espoused in the Charter to be binding on otherwise reticent states. One means to overcome the diversity of values is through the creation of customary international law, which can be binding on a state even absent that state's consent to be bound.⁸⁹

International custom is generally defined as a continuous or repetitive practice by a number of states over a period of time (state practice) combined with the notion that the practice is required by international law (*opinio juris*).⁹⁰ A treaty exerts its binding power upon ratification by a required number of states;⁹¹ customary international law, however, requires no such express ratification.⁹²

⁸⁸ See *id.* at 8.

⁸⁹ See generally *Paramilitary and Military Activities in and Around Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27); *Diplomatic and Consular Relation in Tehran* (U.S. v. Iran), 1980 I.C.J. 3 (May 24).

⁹⁰ See *Barcelona Traction, Light, and Power (Barcelona Traction)* (Belg. v. Spain), 1970 I.C.J. 3, ¶¶ 33-34 (Feb. 5). See also BROWNLIE, *supra* note 17, at 7-11; SHAW *supra* note 177, at 76-78; VILLIGER, *supra* note 16, at 15.

⁹¹ See SHAW, *supra* note 17, at 42-43.

⁹² See *id.*; BROWNLIE, *supra* note 17, at 82.

Although positivists contend that only a state's express consent can give rise to a binding obligation, other scholars assert that a state's action in compliance with these unstated rules has a binding character as evidenced by state adherence. Both national and international courts have been willing to look to evidence of custom to determine the international nature of particular actions.⁹³ In fact, international law-making bodies, including regional commissions and courts, the U.N., and the International Court of Justice, have utilized custom to create universally binding law.⁹⁴ Moreover, the establishment of international custom has often preceded and formed the basis for many international covenants.⁹⁵ These covenants, in turn, evidence the existence of international custom.⁹⁶

Consequently, Asian states that refuse to adopt the Charter may nevertheless be bound to the extent that the Charter reflects customary international law. Even if the Charter is not yet binding as custom, however, its provisions may develop into custom. The Charter aids this development by providing a definite statement of rights that the peoples of Asia can use as a lobbying point.

D. *Logical Fallacies in the Arguments against Universal Human Rights*

Of the three examples of values utilized to justify rejection of the Charter, perhaps the most entrenched is the one espoused by China, because this value is almost entirely based on state sovereignty.⁹⁷ As long as China stands behind its claim of state sovereignty and other states are willing to allow it, China will continue to be the most reticent of Asian states and the least

⁹³ See generally ROBERT WOETZEL, *THE NUREMBERG TRIALS IN INTERNATIONAL LAW* (1962).

⁹⁴ See Shen, *supra* note 55, at 316-17 (citing CHARLES FENWICK, *INTERNATIONAL LAW* 35-36 (1965)); J.L. BRIERLY, *THE LAW OF NATIONS* 51-52 (1963).

⁹⁵ See Henkin, *supra* note 55, at 35-36.

⁹⁶ See Karol Wolfke, *Treaties and Custom: Aspects of Interrelation*, in *ESSAYS ON THE LAW OF TREATIES* 31, 32 (Jan Klabbbers & Rene Lefeber eds., 1998).

⁹⁷ See Van Hoof, *supra* note 59, at 8.

likely to be held accountable for any human rights violation.⁹⁸ China's argument, however, fails in situations where the international system provides a truly universal, independent, and impartial supervision of the state compliance.⁹⁹ Although the U.N. and its constituent parts are not unbiased,¹⁰⁰ some independent bodies exist that can carry out this task. The Human Rights Committee under the ICCPR is neutral because of its representative distribution between member states.¹⁰¹ Additionally, because a regional (or sub-regional) organization unites states with common histories, values, and interests, such an organization is perhaps the most appropriate body to judge the states of that region or sub-region.

Similarly, Indonesia's argument that economic development must supersede individual human rights fails for a number of reasons. First, Indonesia ignores its own history of recognizing the universality of such rights.¹⁰² Further, Indonesia cannot argue that economic concerns or the lack of financial resources render it unable to comply with its international obligations, because some human rights treaties¹⁰³ do take into account the economic

⁹⁸ See Xin, *supra* note 57, at 44-49. China's position is the least focused on a difference in rights of the three presented. The Chinese focus is on the right of each state to determine its own values. China, therefore, opposes universality of rights to protect its ability to control its state. See *id.*

⁹⁹ See Pieter Van Dijk, *A Common Standard of Achievement*, in HUMAN RIGHTS, *supra* note 57, at 57, 74-75.

¹⁰⁰ See *id.* at 75.

¹⁰¹ See *id.*

¹⁰² See Baehr, *supra* note 86, at 36. For example, in the late 1950s, the democratically-elected *Konstituante* of Indonesia freely adhered to the universality of human rights, as evidenced by the following passage:

[T]he *Konstituante* unanimously appreciated the universal validity of human rights as inherent in human nature and existing in every human civilization. It was generally believed that if human rights were negated then man would lose his humanity. Human rights were considered to be the objective of the state: the state was considered to exist for man and not man for the state.

Id. (citing Adnan Buyung Nasutin, *The Aspiration for Constitutional Government in Indonesia: A Socio-Legal Study of the Indonesian Konstituante 1956-1959* (1992) (unpublished Ph.D. Dissertation, Utrecht University)).

¹⁰³ See Van Dijk, *supra* note 99, at 71. In contrast, the UDHR possess several propositions that are still interpreted differently by a number of states. See *id.*

development of member states and grant states a longer period to comply.¹⁰⁴ Also, Indonesia's claim fails, because customary international law on human rights includes traditional rights, such as those accepted by African and Islamic states.¹⁰⁵ Inclusion of traditional rights reduces the inequity in application between more and less developed states.¹⁰⁶

Singapore's logic that no international consensus has yet formed is also untenable, because there is significant evidence of custom supporting the universality of some rights of the Charter.¹⁰⁷ These rights represent core values¹⁰⁸ that are virtually unopposed by state official doctrine.¹⁰⁹

Each of these arguments put forward under the aegis of Asian values has flaws that belie the truly relative nature of rights they describe.¹¹⁰ The growing evidence of custom and international pressures of documents like the Charter show the flaws in these legal defenses and demand states accept more of the denied rights.

IV. THE POSSIBLE SHAPE OF A HUMAN RIGHTS COVENANT IN ASIA

As the possibility for a human rights instrument in Asia becomes more of a reality, any instrument adopted will be somewhat different from current regional conventions.¹¹¹ In contemplating a human rights convention, the Asian Human Rights Committee and scholars have considered sub-regional measures as more appropriate methods of reporting on and

¹⁰⁴ See *id.*

¹⁰⁵ See Baehr, *supra* note 86, at 37. "Further evidence for [an emerging consensus] may be found in the fact . . . that newly adopted 'non-Western' human rights documents, such as the African Charter of human and Peoples' Rights and the two Islamic Declaration on Human Rights, all reaffirm traditional human rights values." *Id.*

¹⁰⁶ See *id.*

¹⁰⁷ See Van Dijk, *supra* note 99, at 58-59.

¹⁰⁸ See Van Hoof, *supra* note 59, at 12.

¹⁰⁹ See *id.* at 13.

¹¹⁰ These states and most others around the world follow the notion that human rights are increasing in their importance.

¹¹¹ See Baehr, *supra* note 86, at 26.

enforcing rights.¹¹² The Charter hedges in its discussion of enforcement through intervention, which indicates state intervention will be minimal, at best, during the early period of an Asian human rights convention.

A. *Additional Means of Support for the Convention*

The Charter mentions the use of sub-regional mechanisms to expand protection of human rights in the Asian region.¹¹³ The number of cultures co-existing in Asia lends itself to creating several smaller bodies, allowing multinational organs to operate with maximum participation and efficiency.¹¹⁴ Other regions, such as the Americas, Africa, and Europe, only require one regional entity,¹¹⁵ because their similar cultural histories bind their memberships.¹¹⁶ Some of the elements that facilitate the creation of regional charters include the increase of consensus on the rights that require protection, utilization of similar systems of government and culture to facilitate communication, and an increasing capacity to apply various forms of sanctions through the interdependence of local nations.¹¹⁷ Thus, even though Asia lacks a cohesive force to bind the nations in the region as a whole, Asian states can use sub-regional organizations to group themselves according to homogeneous interests.

An example of one successful regional organization is the Association of Southeast Asian Nations (ASEAN). Founded in 1967 with the primary goal of economic development, it recently broke down its long-standing separation of trade and human rights issues.¹¹⁸ ASEAN's narrow recognition of human rights, however, is not consistent with the broader spectrum of human

¹¹² See Charter, *supra* note 7, at Regional Institutions for the Protection of Rights.

¹¹³ See *id.*

¹¹⁴ See Muntarhorn, *supra* note 11, at 415, 416.

¹¹⁵ See generally European Convention, *supra* note 8; Inter-American Convention, *supra* note 8; African Charter, *supra* note 8.

¹¹⁶ See THOMAS BUERGENTHAL ET AL., PROTECTING HUMAN RIGHTS IN THE AMERICAS (2d ed. 1986). See also A.H. ROBERTSON, EUROPEAN INSTITUTIONS 51 (3d ed. 1973).

¹¹⁷ See A. LEROY BENNETT, INTERNATIONAL ORGANIZATIONS 348-349 (1984).

rights recognized by the Charter. The Charter would be more consistent with ASEAN's policy if the Charter, too, recognized only a core group of universal rights and focused on economic development for regional cultures.¹¹⁹

B. *Strict Circumstances for Humanitarian Intervention*

Ideally, "[s]ince the inception of the U.N. Charter, humanitarian intervention has been considered illegal, although the Charter does not explicitly ban it."¹²⁰ Nevertheless, humanitarian intervention has been used several times since World War II in attempts to prevent grave atrocities from occurring.¹²¹ The humanitarian intervention by ASEAN in Vietnam's involvement in Cambodia presents a clear example of necessary intervention in Asia.¹²² Because of concerns for their own sovereignty, Asian states have refrained from intervening when other states oppress human rights.¹²³ As a result, the Charter's provisions for humanitarian intervention will be limited. This does not, however, obviate the need for a legitimate ground to conduct multilateral action to prevent egregious violations of human rights.

Asian states have had an aversion to dealing with problems on a multinational level and prefer bilateral solutions;¹²⁴ however, actions in Cambodia create some precedent for multilateral

¹¹⁸ See David K. Malcolm, *Human Rights and Asian Values: Developments in Southeast Asia*, L. ASIA J. 57 (1999). See also Thio, *supra* note 18, ¶¶ 1, 9.

¹¹⁹ See Muntarbhorn, *supra* note 11, at 29, 30. See also Thio, *supra* note 18, ¶ 9.

¹²⁰ Barry Benjamin, Note, *Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities*, 16 FORDHAM INT'L L.J. 120, 120 (1992). See also Bruce Pruitt-Hamm, Comment, *Humanitarian Intervention in Southeast Asia in the Post-Cold War World: Dilemmas in the Definition and Design of International Law*, 3 PAC. RIM L. & POL'Y J. 183, 198 (1994).

¹²¹ See Benjamin, *supra* note 120, at 122. See also Pruitt-Hamm, *supra* note 120, at 205, 206; Captain Davis Brown, *The Role of Regional Organizations in Stopping Civil Wars*, 41 A.F.L. REV. 255, 247 (1997).

¹²² See Pruitt-Hamm, *supra* note 120, at 188-19. See also Steven Ratner, *The Cambodia Settlement Agreements*, 87 A.J.I.L. 1, 1, 2 (1993).

¹²³ See Thio, *supra* note 18, ¶ 22. Although the Vietnam invasion remains on ASEAN's agenda, they refuse to deal firmly with the civil war in East Timor. See *id.* See also Triggs, *supra* note 28, at 670.

¹²⁴ See, e.g., Paul Martin, Note, *Regional Efforts At Preventive Measures: Four Case Studies On The Development Of Conflict-Prevention Capabilities*, 30 N.Y.U. J. INT'L & POL. 881, 923 (1998) (stating that "Asia...has never developed a regional security system to address these concerns, relying instead on an inter-linked series of bilateral defense treaties").

protection. A regional organization through which multilateral regional action could be taken would allow early intervention, stemming atrocities that might otherwise have occurred if left unhindered. Despite these positive aspects, such united action will probably not be seen in the first stages of an Asian human rights covenant, because the potential for infringement of sovereign rights may dissuade state participation.

V. CONCLUSION

Although Asian human rights have developed significantly in some respects, Asian states have failed to enforce all the rights supported by the international community. The failure, thus far, to create a regional human rights covenant that protects rights in Asia or its sub-regions has brought international criticism.¹²⁵ Because the Asian community has the opportunity to create a multilateral organization for the benefit of peoples in Asia, all groups must be careful in how they approach the situation, or risk wasting the opportunity of establishing a meaningful human rights structure.

Utilizing their sovereignty as a shield from international interference, Asian states have refused to recognize the universality of human rights, preferring instead to enforce higher priority policies, such as economic development, social stability, and financial success.¹²⁶ Human rights in Asia are difficult concepts to define because of the changing nature of international law and the wariness of Asian states of encroachments on their sovereignty.¹²⁷ Despite this difficulty, the increasing pressure of international custom through documents such as the recent NGO-proposed Charter is moving Asian states toward creating an organization to define and protect human rights. NGOs and states must therefore accommodate each other to some extent, if such an organization is to come into existence.

¹²⁵ See, e.g., Dinah PoKempner, Symposium, *Human Rights On The Eve Of The Next Century: Human Rights & Non-Governmental Organizations: Asia's Activists And The Future Of Human Rights*, 66 FORDHAM L. REV. 677, (stating that "Asia is unlikely to see the development of regional or sub-regional inter-governmental human rights institutions in the near future, so [independent activist] groups will bear much of the burden of responding to transnational abuses that are the trend of the future"); Pruit-Hamm, *supra* note 120, at 183.

¹²⁶ See *supra* Part III.B.

¹²⁷ See *supra* Parts III.A. and III.B.

To effect such a compromise, proponents of human rights must utilize the progressive nature of custom in international law to establish a covenant and must develop machinery to enforce the rights stated in the Charter. Such a covenant will have to conform to the human rights needs of Asian states, just as ASEAN has met the economic needs of its members. The final hurdle will, of course, be obtaining the consent from Asian states. In the interim, the Charter serves as a starting point for a dialogue on establishing a permanent human rights structure in Asia.

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