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**The “protection” capacity of  
National human rights institutions  
in Southeast Asia**

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**THE “PROTECTION” CAPACITY OF  
NATIONAL HUMAN RIGHTS INSTITUTIONS IN SOUTHEAST ASIA:**

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## Glossary

AICHR	ASEAN Intergovernmental Commission on Human Rights
ANNI	Asian NGO Networks on National Human Rights Institutions
APF	Asia Pacific Forum
ASEAN	Association of Southeast Asian Nations
CHRP	Commission on Human Rights of the Philippines
CSOs	Civil Society Organizations
ICC	International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights
Komnas Ham	Commission on Human Rights of Indonesia
MNHRC	Myanmar National Human Rights Commission
NHRCT	National Human Rights Commission of Thailand
NHRI	National Human Rights Commission
OHCHR	Office of the High Commissioner for Human Rights (UN)
PDHJ	Ombudsman for Human Rights and Justice ( <i>Provedor</i> ) of Timor Leste
Suhakam	Commission on Human Rights of Malaysia
UN	United Nations

## Introduction

In a UN report of a 2003 meeting of NHRIs from 22 commissions, it noted the centrality and importance of the Paris Principles “and the quasi-jurisdictional powers of national institutions.” (United Nations, 2004, p.15) While safeguarding the respective roles of NHRIs and judiciaries was important, it was noted that NHRIs, through sound investigative practices, “can facilitate a greater understanding within the judiciary of international human rights norms to ensure their application in national jurisprudence.” (UN 2004, p.15) In addition, “the advantage of this quasi-judicial mode of complaints-handling is that the procedures are less time consuming, more flexible, informal, non-confrontational, in-expensive and thus more accessible to vulnerable groups, than the courts.” (Lindsnaes and Lindholt, 2000: p.26) The hallmark of a good NHRI is the effective *protection* of human rights, that is, the investigation of complaints by citizens alleging violations of human rights, the conduct of a quasi-judicial proceedings to determine the validity of the claims and the rendering of decisions or recommendations that aim at securing justice for the victims consistent with international human rights standards and through appropriate remedies.

The ASEAN Inter-Governmental Commission on Human Rights created in 2010 (AICHR), in its current form, focuses largely on the promotion of human rights. The protection function, critical to a human rights mechanism, is missing and is well documented (Forum Asia, 2015; Gomez and Ramcharan, 2014 and Yuyun 2014). In this context, National Human Rights Institutions (NHRIs) hold great promise for the advancement of the protection of human rights. Many have been established around the world and since 1987, 5 out of the 10 member states of the Association of Southeast Asian Nations have established NHRIs. Timor Leste, which has applied for ASEAN membership established an Ombudsman for Human Rights and Peace in 2004. The 2007 ASEAN Charter provides for the protection role of NHRIs. Article 16 (1) of the Charter states that its members’ “common interest” in the promotion and protection of human rights “shall be achieved through, inter alia, cooperation with one another as well as with relevant *national*, regional and international institutions/organisations, in accordance with the ASEAN Charter.”

From a review of the mandates of Southeast Asian NHRIs undertaken later in the chapter we will see broadly in each country NHRIs were established as a result of political change to a more democratic regime, international pressure and the need to ensure human rights protection in the immediate aftermath of significant abuses. Thus the laws drafted to establish the different national institutions do attempt to empower these entities to perform investigative services into human rights abuses. These enabling laws provide for varying degrees of protective capacity, from soft (Myanmar) to hard (Indonesia, Philippines, Malaysia, Thailand, Timor-Leste). The region’s NHRIs have received “A” ratings from the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) which monitors the application of the Paris Principles (de Beco and Murray 2015). They have all, except Timor Leste, been the subject of regular reviews for their conformity with the Paris Principles, established to provide a global standard to measure and enhance the effectiveness of NHRIs. However closer scrutiny of the effectiveness of their protection roles is warranted as the positive “ratings” of some commissions have been threatened. This was hinted at with the ICCs threat in 2008 to downgrade Malaysia’s Commission due to concerns over the independence of this body. A downgrade for Malaysia remained a possibility as necessary changes to increase its

investigative powers were rejected by the Government in August 2015. The rejected changes included providing that commissioners are elected by the Parliament, allowing it to appear as *amicus curiae* — “friends of the court” — in cases involving human rights, and the power to visit detention centres unannounced without first seeking authorization (Ari, 2015) In 2015, a similar concern was raised over Thailand’s National Human Rights Commission (HRW 2015). Thailand’s NHRI was eventually downgraded in 2016 due to failure to address longstanding “functional and structural problems” which are set to continue under current military rule and discussions on a new constitution. Proposed amendments had been shelved for eight years. (Ashayagachat 2016)

Table 1: Status of National Human Rights Institutions in Southeast Asia

Country	Status	Year Reviewed
Philippines	A	1999, 2007
Indonesia	A	2000 and 2007
Malaysia	A	2002, 2008, 2010
Thailand	B	2004, 2008, 2015
Myanmar	B (ICC recommendation as of 11/2015)	2015

*Source: Compiled from different sources*

While NHRIs can be key components in the region’s protection arsenal, given existing weak mechanisms and deteriorating ratings, the question remains can NHRIs in Southeast Asia fill this gap? This chapter seeks to examine the NHRIs actual record in providing such services and their capacity to do bring about redress and compensation. Promoting human rights and highlighting present and past violations may serve the cause of protection but these are not enough. Critical aspects of protection are: 1) The capacity of NHRI’s to investigate allegations of violations, to conduct credible hearings on the same and to publicize these for public consumption; and 2) To secure remedies for victims of violations. NHRIs are in principle an avenue outside of the judicial mechanisms of a State that can provide quicker access to justice, through less complicated and less expensive processes that ultimately secure remedies for violations. The ability of the NHRI to operate effectively on these two points is an indicator of the independence of the NHRI and of its capacity to hold a State accountable.

An examination of their performance from available primary sources<sup>1</sup> over the past five years undertaken in this chapter, demonstrates the following: 1) NHRIs are dependent on the political climate in each state; 2) Their quasi-judicial investigative processes are lacking in the follow-through that is necessary for the advancement of justice, not only for the parties in individual cases but more generally for the advancement of human rights consistent with international human rights standards; and 3) They do not seem to be capable of securing remedies or advancing this cause for victims of violations of rights. The review undertaken shows the actual practice of protection by the NHRI’s leaves a lot to be desired. They reveal that, just like the AICHR, the NHRIs are not able to perform the protection function effectively. This makes human rights protection overall in Southeast Asia weak and in need of improvement and enhancement.

## **I. NHRIs and the Protection of Human Rights**

The protection role of NHRIs has been widely acclaimed by practitioners and academicians. (Ramcharan, 2005) They were recognized by the Office of the High Commissioner for Human Rights (OHCHR) of the United Nations (UN) as “pillars of national human rights systems for the promotion and protection of human rights”, as playing a “crucial role” in these endeavours (United Nations, 2011, para 3), and in advancement of the rule of law. The Human Rights Council (HRC) has encouraged States “to establish effective, independent and pluralistic national institutions” and where they already exist, “to strengthen them”. The HRC encouraged national institutions to “play an active role in preventing and combatting all violations of human rights”. (UN, 2013, pp.2-3)

NHRI's, along with ombudsmen offices and other hybrids, have proliferated in the last three decades along with the inexorable march of democracy across the globe since the end of the Cold War and in particular since the World Conference on Human Rights in Vienna in 1993. There are now many such institutions around the world and they take several forms: national commission, national advisory commission, national anti-discrimination commission, an ombudsman and a ‘defender of the people’ (*defensor del pueblo*). (Cardenas 2004; De Beco, 2007) They reflect a particular stage in the evolution of the post-1945 human rights movement, which has gone from norms-creation, to norms diffusion and now to norm implementation. The first gathering to consider the protection role of NHRIs took place in 1991 resulting in the well-known Paris principles adopted by the UNGA in 1993.

Scholarly analysis of the protection roles of NHRI's has featured in many works for over a decade. (Cardenas 2003, 2004 and 2014; Brems 2013; de Beco 2015; Koo 2009; Mertus 2009; Murray 2007; and Seong 2005) Cardenas has called for the study of their creation and impact. (Cardenas 2000) A work by practitioners/CSO body, seeking to go beyond legal and institutional issues, examined ‘what made NHRIs effective’ based on studies of NHRIs in Ghana, Indonesia and Mexico. They noted in particular the issues of relations with other human rights bodies, including CSOs, and accessibility of the most vulnerable in society to the NHRI. (ICHRP 2000) They noted further, that it was important to go beyond a discussion of standards along the lines of the Paris Principles and to examine public perceptions of what an NHRI is and whether there was social legitimacy of the institution. The crucial measure of the effectiveness of NHRI's they argued was whether they were able to respond to the needs of those who were the most at risk of suffering violations. They noted that there is no single, model NHRI for the whole world. They note that the Paris Principles are a good and necessary starting point but are not sufficient for a comprehensive examination of the effectiveness of NHRIs.

Studies have been undertaken on NHRIs in different regions the African (Murray 2007), Europe (de Beco 2013; and Wouters 2013) Latin America and the Caribbean (Ayeni et. al. 2010). Of particular relevance, is the critical assessment of Mexico's NHRI was made by Human Rights Watch which noted the body's failure to live up to its promise and in particular its inability to secure remedies and promote reforms to Mexico's then dismal human rights record. (HRW 2008) Among the reasons were the failure of the body's own procedures and its alleged failure to fully use its mandate and immense resources, despite having resourceful and investigators. The most damning condemnation was the body's ‘abandonment’ of cases before



they were resolved. A study of the difficulties of implementing the Paris Principles in Hong Kong was undertaken by Peterson<sup>1</sup>. (Peterson 2004)

Analyses of NHRIs and processes in East and Southeast Asia have been featured in a few recent works. (Burdekin 2007; Cardenas 2004; and Nasu 2011; Renshaw 2011) Sonia Cardenas points to a number of NHRIs in Asia (India, Indonesia and the Philippines) that emerged due to significant international pressures as well as domestic pressures. National human rights institutions have been established in Australia, Fiji, India, Indonesia, Malaysia, Myanmar, Mongolia, Nepal, New Zealand, Philippines, Republic of Korea, Sri Lanka and Thailand and Timor Leste. Hugo Stokke has examined the experience of the NHRI's in Indonesia, Malaysia and the Philippines against the Paris Principles, with the persistent issue of the independence of the Commissioners cropping up (Stoke 2007; Whiting 2003). Eldridge has examined the role of national human rights institutions in forging linkages between governments, civil society and the United Nations human rights system. (Eldridge 2002) Another work by Evans, while noting the NHRIs inability to enforce their decisions, called attention to their constructive role in the promotion and protection of human rights. Evans has chronicled the record of human rights commissions in relation to religious conflict in the Asia-Pacific region and the possibility of NHRCs contributing to the emergence of a culture of rights. (Evans, 2004) Andrea Durbach, Catherine Renshaw and Andrew Byrnes, have attempted to identify the functions that a regional mechanism might play that are distinct from national institutions and regional networks, suggesting that while such mechanisms are important, the protection of human rights still requires the accompanying political will. (Durbach et.al., 2010)

Given the emerging works on NHRIs in Asia and in Southeast Asia in particular, this chapter seeks to contribute to the literature by specifically focusing on those ASEAN countries with NHRIs and whether they complement AICHR by filling the gap of “protection” in the regional mechanism.

## **II. The Protection Mandates of Southeast Asian NHRIs**

The establishment of NHRIs in Southeast Asia began in 1987 with the first one established in Philippines and the latest in 2011 in Myanmar (See Table 1 below). Each NHRI since established is imbued with specific mandates and emerged specifically to calls for the *protection* of fundamental human rights beyond mere oratory statements and beyond mere promotion. As this section will show their ability to provide effective protection is dependent on the political contexts in which they evolve, mostly in situations of uncertain transitions to democratic governance.

Table 2: National Human Rights Institutions in Southeast Asia

<b>Country</b>	<b>Year</b>
Philippines (NHRCP)	1987
Indonesia (Komnas Ham)	1993
Malaysia (Suhakam)	2000
Myanmar (MNHRC)	2011
Thailand (NHRCT)	2001
Timor Leste (Ombudsman)	2004

Source: ASEAN NHRI Forum (<http://www.seanf.asia/>)

The oldest commission in the **Philippines** was established in 1987 by President Cory Aquino in the wake of grave abuse of power by the late President Marcos, whose dictatorship ravaged Philippine society during his tenure. The Commission on Human Rights of the Philippines (CHRP) was established in 1986 as a Presidential Committee. It was institutionalized as an independent constitutional body in 1987 by the Philippine Constitution. Executive Order No. 163 of 1987, which serves as the Commission's Charter to today. A number of Bills were introduced in the Philippines Congress aimed at strengthening the CHRP notably through the provision of "standby" prosecutorial powers and the appointment of Human Rights Attaches to Philippine embassies and consulates to protect and promote human rights of Filipinos living abroad. Bills were not approved before the end of the 14<sup>th</sup> Congress at the end of June 2010. (ANNI Report 2011: p.216; Philippines House of Representatives) The Bills provided, *inter alia*, that the CHRP may investigate on its own or on complaint by any party in relation to all forms of human rights violations involving civil and political rights. (ANNI 2011: p.223) In carrying out its functions, it would grant immunity to a witness or to any person in possession of evidence deemed to be important. It would also be entitled to adopt its own operational guidelines and rules of procedure and may cite for contempt those who do not comply with orders pursuant to the guidelines and procedures. (ANNI 2011; p. 224) The various Bills were referred to stakeholders and given for consideration in relevant committees in Congress in 2012. As of early 2016, Bill HB02152, "An Act To Strengthen The Commission On Human Rights, And For Other Purpose," filed in July 2013, was referred to the Committee on Human Rights of the House.

In the context of a free and bolder press environment and a liberalized dialogue about around human rights, 1993 saw the establishment of a national commission in **Indonesia** (US State Department, 1993). The commission was established by the Suharto regime through a Presidential Decree of (No. 50 of 1993), shortly after United Nations Commission on Human Rights resolution 1993/97 expressed grave concern over allegations of serious human rights violations by the government of Indonesia. The Indonesian Presidential Decree No. 50 of 1993, which created the National Commission on Human Rights (NCHR or Komnas Ham), provided in its preamble that in order "to promote and protect" and to "monitor and investigate the implementation of human rights and present views, considerations and suggestions to state institutions on the implementation of human rights..". The legal status of Komnas Ham was later strengthened by Act No.39 Year 1999 on Human Rights (Act No.39/1999). Article 1, (7) of this Act stated that Komnas HAM was to be an "independent institutions, of an equal level to other state institutions and which holds the functions of carrying out research and study, education, monitoring and mediation of human rights." (ASEAN Secretariat 1999) Its protection capacity was enhanced by Act. No. 39/1999, which provided for *sub-poena* power in order to resolve cases of human rights violations. Following calls for Komnas Ham to inquire into the 1984 Tanjung Priok massacre, the Human Rights Law of 2000 (No. 26) gave it the power to investigate alleged human rights abuses, if necessary by forming ad hoc investigative teams bringing in outside expertise. Act No.26 Year 2000 of Human Rights Court appointed Komnas HAM exclusively with the mandate "to carry out inquiries of gross human rights violations, which according to the Act No.26/2000 consist of genocide and crimes against humanity." (Ibid.)

In 2008, Law No. 40 gave Komnas Ham additional responsibilities in the prevention of racial and ethnic discrimination.

In Thailand, its commission was established through a post-coup Constitution of 1997 with the commission coming into operation in 2001. Thailand's National Human Rights Commission Act [NHRCT] of 1999, provides in Section 15, that the NHRCT has the power and duty (1) to promote the respect for and the practice in compliance with human rights principles at domestic and international levels; (2) to examine and report the commission or omission of acts "which violate human rights or which do not comply with obligations under international treaties relating to human rights to which Thailand is a party" and "to propose appropriate remedial measures to the person or agency committing or omitting such acts for taking action." Failure to act by the offending party would lead to a proposal to the National Assembly regarding further action to redress. (NHRCT Act 1999) The Act provides for the duty to examine and propose remedial measures but for matters not being litigated in the Court or which has already been the subject of a court judgment; that "any person whose human rights are violated has the right to lodge a petition in writing"; the right of parties to bring lawyers or their counsel to the examination proceedings; the capacity of the Commission to carry out investigations and making factual inquiry; mediation by the Commission between persons or agencies involved "to reach an agreement for compromise and solution of the problem of human rights violation (Section 27); and post mediation for follow-up remedial action in the event that initial remedial action is not adhered to by the offending party. In performance of its duties the Commission may summon Governmental agencies and individuals to testify before its proceedings. Failure to comply with the terms of a summons by the Commission may lead to fines or imprisonment, under Sections 34 and 35.

Malaysia also established human rights commission following political developments known as *Reformasi* in their own country a year earlier in 2000. In Malaysia, Parliamentary Act 597 of 1999, created a Commission (Suruhanjaya Hak Asasi Manusia Malaysia or Suhakam) for the "promotion and protection" of human rights, which, as per Article 2 were the "fundamental liberties as enshrined in Part II of the Federal Constitution." (Human Rights Commission of Malaysia Act 1999) In furtherance of the protection and promotion of human rights in Malaysia, Article 4, empowered the Commission to "inquire into complaints regarding infringements of human rights referred to in section."<sup>2</sup> Article 4 (2) provided for the Commission to "to study and verify any infringement of human rights"; to visit places of detention and to make necessary recommendations, to issue public statements on human rights as and when necessary and to undertake any other appropriate activities as were necessary in accordance with laws in force in relation to such activities. Article 4 (3) provided that Commission visits to any place of detention shall not be refused by the person in charge of such place of detention if the procedures provided in the laws regulating such places of detention are complied with. The investigative powers of Suhakam were outlined in Part III. Article 12 stated that the Commission may on its own motion or on a complaint "inquire into an allegation of the infringement of the human rights" of a person or group of person bringing such complaint to the Commission. Article 14 (1) provided that the Commission could procure and receive all such evidence, written oral and could examine all such persons as witnesses as necessary or desirable; require that evidence be given on oath as in a court of law; summon any person residing in Malaysia to give evidence or produce documents or other things in his possession; to admit any evidence which may be inadmissible in civil or

criminal proceedings. Article 15 provides for privileges afforded to a witness giving evidence before a court of law.

In 2011, Myanmar continued this trend of politically led developments in human rights. Myanmar's National Human Rights Commission (MNHRC) was established by presidential decree on 5 September 2011 and was announced in the state-run paper *The New Light of Myanmar*. The mandate of the MNHRC was to promote and protect the fundamental rights of citizens described in the Constitution. However, the mandate was problematic from the start given that, as the ANNI report states, "the 2008 Constitution violates the fundamental rights of the people of Burma and is an instrument used by the regime to maintain power and oppress the population." (ANNI 2012: p.47) In addition to concerns of the independence of the MNHRC as it reported directly to the President, the ANNI report for 2012 noted that there were "serious concerns" over its non-compliance with international standards – the Paris Principles – against which the credibility and effectiveness of NHRIs are judged. The ANNI report noted that Burma's 15-member body included former military regimes ambassadors, as well as retired civil servants with little knowledge of human rights. (ANNI 2012) There were no representatives of NGOs, trade unions or professional associations. Hence early reviews of MNHRC saw its establishment as an attempt "to appease the international community" a few days after the visit of the UN Special Rapporteur on the situation of human rights in Burma. (ANNI 2012: p.39) The MNHRC was placed on secure legal footing, with the passage of the enabling law in March 2014. It was tasked with promoting and protecting rights of citizens under the constitution and in international and regional instruments, with respecting the UDHR, engaging with international organizations and regional organizations, and engaging with national institutions as well as civil society and registered NGOs. (ANNI 2014: p. 17). In considering in 2015 its bid for accreditation, the Standing Committee on Accreditation of the ICC Subcommittee on Accreditation reported in 2015 that it commended the MNHRC for "its continuing efforts to promote human rights despite the challenging context in which it operates."

Timor Leste, which has applied for membership in ASEAN, has an Ombudsman for Human Rights and Justice (PDHJ), or *Provedor* in local language, which was created under section 27 of the Constitution of the Republic of Timor Leste. This law provides for an independent ombudsman with power to investigate individual complaints against public bodies made by any natural or legal person. It was established in 2004 by Law No.7./2004 which created the Office of the Ombudsman. Article 5.1 of the enabling law states that the PDHJ is empowered, *inter alia*, to investigate violations of fundamental human rights, freedoms and guarantees, abuse of power, maladministration, illegality, manifest injustice and lack of due process, nepotism, collusion, influence peddling and corruptions. Interestingly, the PDHJ cannot be suspended during states of emergency or other exceptional circumstances. (ANNI 2012: p.35) A complaint may be made orally and transcribed in writing later. The complainant was to be notified within 10 days of lodgment of complaint and within 30 days the PDHJ was to make a preliminary assessment as to what action to take. The complainant was to be notified within 45 days of lodging the complaint whether it would be investigated or not. If investigated, recommendations about these complaints were to be forwarded to competent bodies. Article 28(e) of the enabling law The PDHJ provides that the *Provedor* may order a person to appear before him or her and has the power to "have access to any facilities, premises, documents, equipment, goods or information for inspection and interrogate any person to whom the

complaint relates somehow.” (ANNI 2010: p. 294) Article 48 prescribes fines for non-compliance, Article 49 provides for offences such as hindering the Office and threatening, intimidating or improperly influencing involved parties and provides for fines up to US\$3000 and imprisonment for one year. The PDHJ can use formal notification procedures to summon State officials who must comply. It can investigate the exercise of judicial functions, challenge decisions issued by the Court or investigate a matter already before the court which has not yet been decided. The enabling law of 2004 provided that the Courts shall not arbitrarily interfere with, nor delay an investigation unless *prima facie* evidence places the investigation outside of the PDHJ’s jurisdiction or if there is *mala fide* or conflict of interest. (ANNI, 2010: p.291)

From the review above it is clear the political contexts from which Southeast Asian NHRIs have emerged allowed them to be set up with legal mandates to perform investigative services into human rights abuses. However, the actual implementation and the changing political context which the NHRIs operated have a bearing on their actual protection capacities.

### **III. The Protection Capacity of Southeast Asian NHRIs**

Most NHRIs in Southeast Asia were established with legal mandates to receive complaints. These were actively utilized but effective investigation and resolution of disputes was weak.

The CHR of the **Philippines** has recorded its fair share of complaints. The ANNI 2011 report noted of the 2792 complaints recorded, that none of the cases had reached the Commission *en banc* for resolution. A majority were remained in the investigation stage. Indeed, at the 16<sup>th</sup> Annual APF meeting in 2011, the Philippines Commission reported that “Unresolved cases of violations of civil and political rights, particularly enforced disappearances, extra judicial killings, and arbitrary deprivation of life and liberty contribute to a growing perception of state impunity.” The non resolution of human rights violation was mostly attributed to “lack of witnesses and insufficiency of evidences.” Moreover, domestic laws to penalize enforced disappearances and extra judicial killings had yet to be enacted by Congress. A critical concern of the Commission was how to address “justiciability” of violations of economic, social and cultural rights, in such issues as homelessness, hunger, social security, and other human rights degradation attributable to the poverty and hunger suffered by the poor and vulnerable sectors in many parts of the country. (Commission on Human Rights Philippines 2010: p.16)

In seeking to remedy this situation through action in the 15th Philippine Congress, Representative Salvador H. Escudero III provided a poignant indictment of the “toothless” nature of the Commission. (Philippines House of Representatives). He noted that: [I]t is neither a judicial nor a quasi-judicial body. It can only extend preventive measures, such as initiating applications in court for judicial writs and order, conduct investigation and receive evidence of violations of human rights, among others. The Bill sought to equip the CHRP with prosecutorial powers over delineated forms of human rights violations.<sup>3</sup> At the time of writing, the Bill was under review by stakeholders since May 2012.



**Indonesia's** Komnas Ham has received many complains, recording some 6,358 in 2011 alone, the plurality of them involving land rights and the main alleged perpetrators of rights abuse being police, corporations and provincial governments. Complaints about torture were also received. The Institute for Policy Research and Advocacy (ELAM) noted that in relation to some 19 reported cases of torture committed by State agencies such as the Indonesia Military, Police and Prison Officers, Komnas Ham “carried out monitoring and investigations to further provide recommendations to the relevant parties in an effort to resolve the cases.” (ANNI 2012, p.103) It noted that “procedurally” the commission “follows up on the complaints by meeting with the parties to clarify the details of the case, providing recommendations, and assisting with mediation. It also participates in investigations and monitoring and in certain cases, carries out fact-finding missions (especially for national-scale cases). Following these it issues recommendations to the government and other parties. However, ELAM has noted that “the most frequent challenge is when the recommendation is not acted upon. It is apparent that KOMNAs HAM’s recommendations have largely not been implemented. One plausible explanation is that there is no relevant mechanism to ensure the implementation of KOMNAs HAM’s recommendations.” (ANNI 2012: p. 106) With regard to agrarian conflicts, the Commission “has largely failed to prevent the escalation of violence and has not been successful at pushing for the protection of the perpetrators of violence.” (Ibid: p.107) In relation to human rights violations in Papua, a lack of funding and personnel led to a situation in which the Commission “often responds slowly to the violations of human rights occurring in Papua.” Overall, it appeared that Komnas Ham’s role in resolving conflicts and mitigating the effects of human rights violations “has not improved or changed significantly from the previous year” and it appeared as if “there has been no extra effort by Komnas Ham to improve its performance in promoting and protecting human rights in Indonesia.” (ANNI 2012: p.114) for the period 2012 to 2011 ANNI reports indicated that “there were problems in maintaining cases and reports which indicate a weak leadership and coordination among commissioners.” (ANNI 2011: p.78) Moreover, there were divergent comments by different commissioners on individual cases. Some commissioners expressed opinions contrary to the principle of universal human rights. (Ibid.: p.80)

The effectiveness of Komnas Ham’s investigative capacity faced continued questioning as ANNI’s 2014 report related problems in its ability to summon alleged perpetrators of violations and in its “poor ability in handling cases”. (ANNI 2014: p.30) Many cases handled by the Commission “received less than satisfactory responses from NHRI”, even the most serious violations. Commissioners themselves, through ill-advised statements, raised doubts about the effectiveness of their own institution. Local NGOs complained of little follow-up by the NHRI, notably due to internal conflicts. The appearance of ineffectiveness was compounded by ongoing political interference in the selection of commissioners. (Ibid.; pp. 28-30) As Indonesia consolidates its democracy, its leaders appear to still be concerned with limiting Komnas Ham’s capacity to conduct its work. The Commission has come under criticism due to alleged political interference in the Chairmanship of the institution. Komnas Ham’s independence is compromised by a selection process that is dominated political interests and most candidates do not have adequate knowledge and expertise of human rights. [ANNI 2015]. One commissioner, Hafid Abbas, was reported as stating in 2014, that human rights violations may be resolved “from inside the new regime”, that is under recently elected President Jokowi. (ANNI, 2015,

p.29). the Attorney General's office is accused of delay tactics on administrative grounds in relation to investigations of the 1965 massacre.

**Thailand's** NHRCT reported receiving some 666 complaints in 2012. It also reported examination of a total of "1,014 complaints in which 873 complaints are pending before 2011." (NHRCT, 2012: p. 22). For 2014, it reported receiving some 689 complaints. (ANNI 2015, Chapter on Thailand, section 3.1) The investigative capacity of the NHRCT appeared to be under serious threat when the then new Chairwoman, Amara Pongsapich, assumed office in 2009. The Hong-Kong based Asian Human Rights Commission (AHRC) noted at the time that she "has effectively promised to make the national rights institution meaningless and irrelevant, other than as an obstacle to human rights." (Asian Human Rights Commission 2009) The AHRC expressed concern over the Chairwoman's statement that "The commission will not be acting as a law office, filing individual cases, but will create an environment for concerned agencies to work together. " For AHRC, while the NHRCT was supposed to have the power to file cases in court (section 257, para. 4 of the constitution), the new chairperson seemed to be indicating "That she has no interest to exercise this power. Instead her commission will just "create an environment"." (Ibid.) A vigorous protective role for the NHRCT is not apparent from its actions, despite the Constitutional Court's ruling (No. 31/2548) of 2005, affirming that under Section 2005, of the Constitution of Thailand NHRCT had "the powers and duties to inspect and prepare reports on acts or omissions which constituted violations of human rights or which were not in accordance with international obligations with respect to human rights to which Thailand was a party. The NHRCT claimed in its report to the UPR in 2011, that the government was slow in enacting the law that would allow the National Human Rights Commission of Thailand (NHRCT) to discharge its additional functions prescribed by the 2007 Constitution. It argued that the draft law on NHRCT did not permit the NHRCT to disclose any information obtained during the carrying out of its functions and imposes a penalty for such disclosure. This restriction would severely affect the NHRC's function as a monitoring body. (NHRCT Submission to UPR Process 2012) It noted further, that Thailand was not adequately living up to its commitments under international core human rights and that there was a real lack of remedies to victims of human rights violations and a failure to bring perpetrators to justice. The NHRCT's credibility as protective entity appeared to be seriously compromised as it had taken "no concrete action...in the cases of many victims of human rights violations" to citizens and non-citizens. (ANNI 2014; p. 39) Human rights defenders have criticized the NHRCT and essentially do not trust it.

To the extent that Thailand's NHRCT's was 'proactive', this was linked to the political climate amidst ongoing tensions between rival political parties. (ANNI, 2014, p.39) Statements, policy recommendations and legal recommendations emerged but "few actions were taken by the NHRCT during a time when there was no political movement." (Ibid.) Moreover, the legal and policy recommendations "lack proper analysis and focus only on changing the wording of the law." (Ibid.) A merger of its National Human Rights Commission with the Ombudsman's office was on the table amidst failed draft constitutional talks in 2015, a move which was duly criticized by stakeholders. The proposed merger into one body to be called the Office of the Ombudsman and Human Rights Protection, however, ran counter to the Government's pledges, during its campaign for a seat on the Human Rights Council (2010-2013) to strengthen the protection of human rights by "supporting" the work of the NHRC. The Government then promoted the NHRC as "fully exercising its power vested by the Constitution to advance the

cause of human rights in the country, while fully respecting its independent character.” (Abhisit, 2009, p.2) The merger was sharply criticized by Human Rights Watch on several counts related to the proposed new rules: the lack of independence of 11 Commissioners to be selected “in closed an unaccountable vetting system by the Thai senate”; the requirement of “apparent knowledge and experiences in the protection of rights and liberties” and “having regard” only to the participation of civil society, which was not consulted; failure to recognize the different mandates of the NHRC and the Ombudsman; and failure to heed past criticisms of lack of transparency and inclusiveness”. (Human Rights Watch, 2015) With the constitutional crisis in Thailand, currently under military rule, the International Coordinating Committee, monitoring the application of the Paris Principles by NHRIs, downgraded the NHRC from A to B status and the NHRCT’s future protection role is uncertain. This situation epitomizes the situation of NHRIs in the region that are subject to the vicissitudes of national politics.

**Malaysia’s** Commission, Suhakam, has been active in receiving complaints and investigating the same. In its report for 2014, Sukaham noted that it received complaints as follows: 911 in 2012, 624 in 2013 and received 717 in 2014. In the latter year, it decided that 269 were outside its jurisdiction. (Suhakam, 2014) Issues related to, inter alia, arrest and detention, indigenous peoples, workers and refugees and asylum seekers. Earlier, in its 2010 report, Suhakam had received 1,005 complaints (Figure 1) at its Kuala Lumpur, Kota Kinabalu and Kuching offices during the year, of which 42 were in the form of memoranda. Of the 572 complaints were accepted. (Suhakam 2010: p.42) In its 2011 report Suhakam noted that it had received some 1232 cases of which 825 were accepted involving alleged violations by the police force, excessive use of force, Prison Department, Immigration Department and so on. While progress was made on investigating these by the time of the ANNI report of 2011, some 215 cases had been dealt with, a slow pace of investigation was noted by the ANNI report for Malaysia written by ERA Consumer Malaysia. (ANNI 2012: p.130) In 2011, the Commission exercised its powers to issue subpoena on both the government and general public during a national inquiry on *Bersih* 2.0. It appeared that no one broke the subpoena. (Ibid.: p.131) In 2011 report, in keeping with its functions, the Complaints and Inquiries Working Group (CIWG) investigated cases referred to the Commission and visited places of detention including prisons, police lock-ups, detention centres and a rehabilitation centre under the jurisdiction of the National Anti-Drugs Agency. The Commission received 1,232 complaints<sup>1</sup> at its Kuala Lumpur, Kota Kinabalu and Kuching offices during the year, of which 51 were in the form of memoranda. After careful deliberation, the Commission found that 407 complaints fell outside its jurisdiction. These included. Of the Of the 825 complaints accepted, the Commission has completed investigations into 215 cases, while the rest are still being investigated. (p. 40) The nature of complaints varied at each location related to matters involving indigenous peoples (156 cases) and alleged police inaction (66 cases); land matters (153 cases) and alleged infringement of Native Customary Rights to land (48 cases).

In Suhakam’s report to the UPR process in 2008, in addition to making submissions to various international treaty bodies it noted that Malaysia’s commitment to fundamental liberties in the UDHR, was with “only to the extent it is not inconsistent with the Federal Constitution” under Act 597.(Suhakam UPR Report 2008: para. 3) It noted, inter alia, specific challenges such as Delays in court proceedings and availability of written judgments. With regard to its own ability to protect human rights, it noted that a Minister in the Prime Minister’s Department



publicly said that Suhakam would not be given “teeth”. “The credibility and effectiveness of Suhakam may now be greatly damaged.” (Ibid.) Suhakam’s performance in relation to Malaysia’s infamous Internal Security Act (ISA), a litmus test for its ability to provide protection was in doubt by 2008. By then, Renshaw noted, NGOs had realized that Suhakam was not “the mighty champion that was going to sweep down from the mountains and resolve their problems for them” but “merely one cog in the wheel of human rights activism”. (Sharom, quoted in Renshaw, 2011: p. 192) Major weaknesses with Suhakam’s ability to deal properly with complaints were highlighted in the ANNI 2011 report. There was no provision which set out how complaints should be made. They could be made in the form of a referendum or via the site’s official portal. Upon receipt of a complaint, an officer carried out the official written order by the Commission or the Commissioner in charge, in order of precedence. Upon receipt of a complaint, it is filed and given a file number. Notification was given to the complainant within three working days. A first evaluation was conducted and recommendations and plans made by the officer receiving the complaint in consultation with the Assistant Chief Secretary of the Complaints and Inquiries Working Group. If the complaint was received through e-mails or letters, the supervisor was responsible for evaluating the complaint. Decisions on case classifications were to be made by the Commissioner or Supervisor responsible, based on past precedent. Complaints outside the Commission’s jurisdiction were sent to the complainant describing that decision. Cases comprising human rights violations were then passed on to the relevant officers and investigation was carried out. The content of all correspondence was to be acknowledged, approved and signed by the commissioners only. Visits by officers for fact-finding were to be approved by the Commissioners. The final process in the case evaluation involving SHAKAM was the taking note of the accusation and the reply by the alleged perpetrator. Evaluations were based on physical evidence not perception. The officer in charge then informed and discussed the development of the case with the Supervisor and Commissioner until the case is solved. Finally, a notification letter signed by the Commissioner was to be sent to the complainant. (ANNI 2011: p. 142)

The protection role of **Myanmar**’s NHRC appeared to be “severely limited” from its inception even if one of its core functions was to receive complaints of human rights violations. The complaints handling process required that each complaint was accompanied by a copy of the complainant’s national registration card. According to ANNI, “this effectively excludes a significant number of victims of human rights violations, especially, those from ethnic and religious minority groups.” (ANNI 2011, p.14) In addition, further restrictions were noted as the Chairperson U Win Mra stated that the MNHRC would not investigate abuses in ethnic conflict areas.(Ibid.: p.15) Reluctant and selective engagement with NGOs was also noted. The capacity to handle complaints faces continued criticism. The ANNI report for 2015, noted that “The complaint handling process, which is not sufficiently explored in the MNHRC Enabling Law, must be amended to protect the confidentiality of complainants...” (ANNI 2015, Burma Chapter, section 5) ANNI recommended the NHRC “Improve the complaint-handling process and ensure that complainants are protected from reprisals. This should include acting in a confidential manner with regards to information sharing between the Executive, Parliament, the Burma Army, and other branches of the law enforcement agencies/departments.” (Ibid.) Even under the 2014 enabling law, its credibility as an investigative body was seriously compromised by its

inaction in relation to anti-Rohingya violence. There are no investigations to date and the MNHRC has claimed that it did not happen. (ANNI 2014: p. 17) A fact-finding report found no evidence of massacre against “Bengalis”, a derogatory term used by the authorities to who view them as illegal immigrants. Its inability to engage seriously with civil society was also noted.

In **Timor Leste**, the public may complaints online, by phone call, mobile service, or directly visiting, the central office in Dili and regional offices. The complaints procedure of the Office of the Ombudsman (*Provedoria* for Human Rights and Justice or PDHJ)) under Law No. 7/2004 provides that the Ombudsman must determine within 45 days whether a complaint will be investigated or dismiss it for a reason. Once completed the Ombudsman is required to provide a draft report to the parties on his or her key findings. A 15 day period is allowed for consideration. Any entity subject to a recommendation arising out of the investigation must comply and must inform the Ombudsman within 60 days on the status of implementation. The ANNI report for 2012 has noted, however, that “in reality, the ombudsman has noted poor compliance with this requirement.” (ANNI 2012: p.241) In 2011, some 55 cases of human rights violations were investigated though only 3 were closed. In 2014, some 97 complaints were filed, of which 57 were investigated and the rest declared outside of PDHJ’s mandate. (ANNI 2014: p. 60) An analysis of investigations by the PDHJ over six years (2007-2013), concluded that it only concluded 44 investigations of at total of 344. (ANNI 2014, p.60) A low conclusion rate stems partly from lack of professional and qualified human resources in the department of investigation. (Ibid., p. 65) By the end of 2015, the ANNI Report noted that the number of human rights cases investigated by the PDHJ has remained fairly static”. (ANNI 2015, Timor leste chapter, second 2) While the Ombudsman has been positive in terms of the PDHJ’s working relationship with public authorities the *Provedor* is on record as having stated that “sometimes we face problems regarding our investigation when we want to get documents or information – sometimes they don’t provide us with it.”(ANNI 2010: p.293) In joint police and military operations in 2014 and 2015 in the eastern part of the country, for example, monitoring and reporting by PDHJ on the same was diminished by the fact that they rarely entered the areas most affected by the joint operation. (ANNI 2015, Ibid.) The PDHJ’s has only legal power to recommend or propose remedies and reparations to victims of human rights violations to the Public Prosecutor. There is little by way of information on follow-up: The PDHJ has never produced any reports on the results of the follow-up of the recommendations to outline how many institutions have taken measure to implement the recommendations, and how many of them have refused to comply.” (ANNI 2015, Section 5)

The available evidence on Southeast Asian NHRI’s investigative capacities and their ability to secure justice reveals a weak mechanism for the protection of human rights. A tougher review of the regional NHRIs seems warranted.

#### **IV. Assessing the Protection Role of Southeast Asian NHRIs**

The NHRIs reviewed above operate in the context of democratic transitions, some fragile and some more confident. However, their capacity to provide “hard” protection, beyond monitoring, advising, educating and coaching governments is not in evidence. In terms of executing the duties enshrined in the mandates of the different NHRIs, responses to violations vary and range from public awareness, to mediation, to investigation, to visiting detainees, to involvement in court cases, and in very rare instances to reports to national assemblies for follow up. In this analysis, our focus has been to evaluate the challenges related to investigating complaints and the eventual resolution of the human rights violation. In this regard our review has revealed so far that: there is a need for credible and transparent quasi-judicial investigation of allegations of violations; there is no follow up to NHRI reports and recommendations; and there is no evidence of NHRIs contributing to redress and remedies.

While all NHRI’s have documented receipt of complaints and have undertaken investigations and issued recommendations, full protection requires stronger action of a quasi-judicial nature. Judging from reports to date, few if any, undertake the latter, which requires actions akin to those normally undertaken by a court of law or a prosecutor. Generally, from the brief factual account emanating from primary sources there is no evidence of the full exercise of such capacity by the NHRIs. Across the region, NHRI’s responses to violations are generally of a soft nature, varying from public awareness, to mediation, to investigation, to visiting detainees, to involvement in court cases, and to reports to national assemblies for follow up.

In the face of inaction by the authorities what have the NHRI’s done to provide remedies as defined above? One is hard pressed to find evidence of a substantial record on securing remedies. The Philippine Commission noted in its UPR submission in 2012 that it participated in distribution of compensation checks to victims who had filed and won a civil case against Marcos in Hawaii, USA, which it hailed as “a milestone in human rights.” The CHRP, on request of the lawyers representing the victims, allowed the distribution in the CHR regional offices. (CHRP, 2012: p. 5) The NHRCT reported in 2012 that it had sent eight cases to the Prime Minister’s Office after no remedial action was taken by referral agencies and likewise, 15 to the Constitutional Court (compared with 27 previously), 11 to the Administrative Court (18 previously) and 5 (85 previously) to the Court of Justice. (NHRCT 2012, p. 35) Aside from having no details about these, the outcome is uncertain in the context of political turmoil and military rule at present. The Constitutional Court had affirmed in 2005 (Case No. 31/2548), that where there was a violation of human rights, the NHRCT “should propose suitable remedial measures to the persons or agencies responsible for such acts or omissions for further action.”

The NHRCT noted to the 15<sup>th</sup> APF meeting that it sought to improve the system of handling cases in order to give remedies to the affected parties as soon as possible. For the NHRCT this meant, as per a memorandum of co-operation with various agencies such as the local Prince Songkhla University, to receive complaints occurring in the South and conduct preliminary fact-findings. It also had agreements with the Law Society to file cases for people to the Court of Justice. The NHRCT also signed memoranda with the Office of Attorney-General and the Ombudsperson on the cooperation in litigation on behalf of the injured persons whose rights are violated. This has all been thrown into doubt under military rule.

The Asia Pacific Forum of National Human Rights Institutions has issued guidelines on best practices for NHRI's, including on remedies. It recommended that an NHRI "should be empowered to refer matters for prosecution" and that it "should have the power to seek effective remedies including, where appropriate, through the courts." (Ibid.) The APF noted that NHRIs "must be able to provide effective remedies for violations of human rights". It continued:

The means that are available to NHRIs to resolve complaints will affect both public perception and the ability of an NHRI to successfully foster a culture of respect for human rights. Human rights breaches may be resolved in various ways ranging from alternative dispute resolution to action in the courts. The power to conciliate and mediate between disputants is important as a means of resolving complaints expeditiously. Delays in the provision of remedies will diminish public confidence in the NHRI and deter victims from looking to the NHRI for redress. NHRI decisions should, where appropriate, be enforceable through the courts. In addition, complainants should have access to the courts should they be dissatisfied with the findings of an NHRI.

Perhaps not always seen as a remedy but of major importance in the armoury of an NHRI is work aimed at prevention of abuses. It is therefore important that national human rights institutions should have powers to issue guidelines to encourage the protection of human rights. (Ibid.)

The inability to provide remedies is a result of the general non-responsiveness of national authorities to NHRI recommendations. For example, KOMNAS Ham had difficulty in communicating with the Attorney General on finding solutions to differences in interpretation of a 2000 law mandating it to investigate a series of killings in Trisakti (1998), Semanggi (1998, 1999), May 1998, Wsior 2001, Wamena (2003), disappearances (1997-1998), Talangsari Lampung (1989), the genocide of 1965-1966 and the "Mysterious shootings" (1982-1985). These were still "dragging in the Attorney-General's Office". (ANNI, 2015: p.30)

All regional NHRI's faced difficulties in getting parliaments to even discuss the reports of the commissions. Suhakam of Malaysia has noted that since its establishment, the Commission has been submitting its Annual Report to Parliament at the first sitting for the year, as required by Section 21(1) of the Human Rights Commission of Malaysia Act 1999. Unfortunately, none of the Reports has ever been debated. Suhakam urged the Government to consider setting up a Parliamentary Select Committee to look into human rights matters, as an additional measure in upholding the rights of the people and reinforcing parliamentary democracy. The NHRCT, in addition to submitting annual reports to the national assembly, in case of failure of a party to follow-up on recommendations of the NHRCT the latter may submit a report to the National Assembly, the Prime Minister's office and other bodies for follow up action. Evidence of follow-up, if indeed there has been, is not easily available and details are lacking.

The PDHJ in Timor Leste does not appear to have regular consultation sessions with the National Parliament. It was invited once in 2010 to discuss a draft law, but it has no explicit power to intervene during deliberations in Parliament. The ANNI 2010 recommended that all organs of the state must "make every effort to better follow up PDHJ recommendations and

communicate this to the public and specifically to the PDHJ. (ANNI 2010, p. 303) The 2015 ANNI Report recalled that “The law obliges engagement of the PDHJ with the National Parliament. When the PDHJ wishes to provide a legal opinion or testimony before court, it must first request permission from the Parliament. The PDHJ also should inform the Parliament of the findings of its investigations and recommendations.” (ANNI 2015, Timor Leste Chapter, Section 4)

The protection role of NHRI’s is ill served by the lack of information, on the websites of NHRI’s or otherwise, regarding the cases that are investigated by the Commission and in particular by the lack of information on the basis on which *decisions* are reached following an investigation. Publicising the *ratio-decidenti* in each case decided upon will serve not only a promotional role but also will also indicate the degree of conformity of national human rights law and practice with international standards. This is where the NHRI’s can help to bridge any gaps between the national / regional norms and the international norms governing the protection of human rights.

Mohamedou has noted, however, that globally “A number of commissions demonstrate a tendency to regard complaints as discrete matters to be settled to the satisfaction of the individual complainant.”(Mohamedou 2000: p. 51) This perception, he continued, “prevented the staff from understanding the cases before them as symptomatic of more systemic human rights problems.” Instead, he suggested that an individual complaint ought to be resolved “in a manner that has an educational and preventive function as well as simply resolving the complainant’s problem.” (Ibid.: p.51) He noted a trend towards enactment by NHRIs of measures in that direction. It was important that the methods and style a commission adopted in settling cases serve as “an important marker of its identity”. While for many NHRIs, conciliation and mediation were the preferred methods of settlement, friendly settlement, though a constructive problem-solving approach, “should not be implemented systematically and, more importantly, to the detriment of the claim’s merits per se. Legitimacy depends finally on an institution’s ability to focus its activities on the areas of greatest need, and on vulnerable groups. Ultimately, for the complainant, a satisfactory resolution of his case is the most important measure of effectiveness.” (Ibid: p.51)

Ultimate satisfaction is the securing of remedies to victims, which is a fundamental aspect of international human rights law. (See Antkowiak, 2008; Shelton 2009; Ramcharan 2011; and Van Boven, 1993;) The duty to provide redress has been widely expounded upon by the Inter-American Court of Human Rights, the Human Rights Committee (HRCt) and many other treaty bodies. General Comment 31 of the HRCt noted that individuals must have access to remedies to vindicate their rights and that NHRIs “endowed with appropriate powers, can contribute to this end.” (Ramcharan, 2011: p. 192) the UN Basic Principles and Guidelines adopted by the General Assembly in 2006, provide an authoritative statement of this duty. Victims of violations must have access to an effective judicial remedy and that adequate and prompt reparation is necessary to promote justice. Forms of reparations include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. (Ramcharan, 2011, pp. 144-145; UN 2005)



There may be some scope for hope as some NHRI's undertake to produce thematic investigative reports on contemporary and historic wrongs. Moreover, it is fair to note that the following play a role on the protection spectrum, though in the 'soft' protection category: public enquiries on allegations of mass violations; public awareness campaigns; observation of court cases, peaceful assembly, negotiations and establishment of a local presence outside the national capital. However, regional NHRIs cannot impose penalties or punish government officials who commit abuses. Instead, they have to call other institutions to do the sanctioning, either through criminal prosecution or administrative procedures, or both. Failure by those other institutions to do so results in the failure to achieve a most important objective of guaranteeing a remedy to the victims of abuse. The track record of Southeast Asian NHRIs is poor in this realm. The reasons are varied and maybe summarized as follows: reluctance by the authorities to act on investigations; failure by parliament to discuss reports; failure by the Attorney General to follow up on some cases; and Failure by NHRI's to secure changes to, and challenge, policies or laws of state.

## **Conclusion**

Establishment of NHRIs has become one of the indicia of a progressive democratic liberal state. (Renshaw, 2011: p.4.) However, Sonia Cardenas has warned that many NHRIs are established mainly to appease the international community - "state adaptation" - which has a "paradoxical effect", namely, "most NHRIs remain too weak to protect society from human rights violations at the same time that they create an unprecedented demand for such protection". (Cardenas, 2003: p. 3) At the present time, this appears to be the case with the NHRIs in Southeast Asia, which all are operating in the context of democratic transitions, some less certain than others.

The existing mandates do provide, for the most part, reasonable protection powers on which the NHRI's could build and, if they are willing and enterprising, could expand on. Beyond the mandate to investigate, enabling rules and procedures are in place – such as the ability call state officials and other types of witnesses to give evidence, immunity and related protections for witnesses, the provision of sanctions for non-compliance, the issuing of recommendations for follow up action by appropriate authorities – and could easily provide the foundation for more vigorous protection role. A major problem, however, is the inability and perhaps unwillingness to follow-through. The record on follow-through is not stellar as they are simply ignored. Their contribution to providing redress and remedies remains at best aspirational. Effective protection of human rights may serve to advance the rule of law and, in so doing, consolidate young democracies. Moreover, they thrive best in democratic contexts, which have appropriate checks and balances upon governmental authority. The NHRI's in Southeast Asia are products of their individual country's political contexts. As elsewhere, these NHRIs in Southeast Asia generally mirror domestic political developments and the demands from the international arena. The record of NHRIs in these areas, in the context of their dependence on the general political climate, must be improved.

## Bibliography

Abhisit, V. Prime Minister of Thailand (2009), “Thailand’s Commitments, Voluntary Pledges and Contributions to the Promotion and Protection of Human Rights: Election to the Human Rights Council for the term 2010-2013,” Department of International Organizations, Ministry of Foreign Affairs, October 2009. (copy with authors)

Ashayagachat, Achara (2016) “Thai rights agency downgraded by international body,” *Bangkok Post* 28 January. Accessed on 2 February 2016.  
<http://www.bangkokpost.com/news/general/843412/thai-rights-agency-downgraded-by-international-body>.

ANNI (2012) *ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia*. Bangkok: Forum Asia

ANNI Report (2010) *ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia*. Bangkok: Forum Asia

ANNI Report (2011) *ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia*. Bangkok: Forum Asia

ANNI Report (2013) *ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia*. Bangkok: Forum Asia

ANNI Report (2014). *ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia*. Bangkok: Forum Asia

ANNI Report (2015), *ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia*. Bangkok: Forum Asia

Antkowiak, T. (2008) “Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond. *Columbia Journal of Transnational Law* . Vol. 46: 2, pp. 351-409

Ar, Zurairi (2015). “Suhakam says risks downgrade over Putrajaya’s reluctance to empower body,” August 24, 2015. Accessed on 2 February 2016.  
<http://www.themalaymailonline.com/malaysia/article/suhakam-says-risks-downgrade-over-putrajayas-reluctance-to-empower-body>

AYENI, Victor, REIF, Linda, and THOMAS, Hayden (eds.). (2000) *Strengthening Ombudsman and Human Rights Institutions in Commonwealth Small and Island States: The Caribbean Experience* (London: Commonwealth Secretariat with The International Ombudsman Institute, Canada)

ASEAN Secretariat (1999), Act No.39 Year 1999 on Human Rights (Act No.39/1999)

Asian Human Rights Commission, “Thailand: New NHRC chief promises to ensure that human rights body is meaningless and irrelevant,” August 20, 2009. AHRC-STM-174-2009.

Brems, E., de Beco, G. and Vandenhole, W. (eds) *National human rights institutions and economic, social and cultural rights* Cambridge : Intersentia, 2013

Burdekin, B. (2007) *National Human Rights Institutions in the Asia Pacific Region* Volume 27 of Raoul Wallenberg Institute Human Rights Library, Martinus Nijhoff Publishers.

Cardenas, S. (2004) *Adaptive states: the proliferation of National Human Rights institutions*. Carr Center for Human Rights Policy Working Paper T-01-04.  
<http://content.knowledgeplex.org/kp2/cache/kp/24.pdf>; Accessed on 18 February 2015

Cardenas, S. (2014) *Chains of justice : the global rise of state institutions for human rights*. Philadelphia : University of Pennsylvania Press, c2014

Cardenas, S. (2003) “Emerging Global Actors: the United Nations and National Human Rights Institutions,” *Global Governance*, Vol. 9, No. 1, Jan.–Mar. 2003

Chachavalpongpun, P. (2012) “Toothless Thai Human Rights Commission,” *Prachathai*, 17 December 2012, available at: <http://www.prachatai.com/english/node/3458>

Commission of Human Rights of the Philippines (CHRP), Annual Report for 2010

CHRP (2012), *Submission to the Universal Periodic Review*. Philippines, June 2012

D. Shelton (2009), “The Jurisprudence of Human Rights Tribunals on Remedies for Human Rights Violations, in *International Protection of Human Rights and Victims’ Rights*, J.-F. Flauss. Paris: Bruylant. pp.67-75

De Beco, G. (2007) *National Human Rights Institutions in Europe, Cellule de recherche interdisciplinaire en droits de l’homme*, Université catholique de Louvain, Faculté de droit, CRIDHO Working Paper 1

De Beco, G and Murray, R. (2015). *A commentary on the Paris Principles on national human rights institutions* / Cambridge : Cambridge University Press.

Durbach, A., Renshaw, C. and Byrnes, A. (2010) ‘A tongue but no teeth?': The emergence of a regional human rights mechanism in the Asia Pacific region,” *Sydney Law Review*. VOL 31:211-238. Vol. 81, No. 1

Eldridge, P. (2002) “Emerging Roles of National Human Rights Institutions in Southeast Asia,” *Pacific Review: Peace, Security & Global Change*, Volume 14, Issue 3.



Evans, C. "Human Rights Commissions and Religious Conflict in the Asia-Pacific Region," *International and Comparative Law Quarterly*, v. 53, July 2004, pp.713-729.

Forum Asia (2015) *The Future of Human Rights in ASEAN Public Call for Independence and Protection Mandates*, A Report on the Performance of the ASEAN Human Rights Mechanism in 2014. Bangkok: Forum Asia.

Gomez, G. and Ramcharan, R. (2012) "The Protection of Human Rights in Southeast Asia: Improving the Effectiveness of Civil Society Advocacy," in *Asia-Pacific Journal on Human Rights and the Law*, Vol. 2, pp.27-43.

Goodman, R. [et al.] (2012) ed.: *Human rights, state compliance, and social change: assessing national human rights institutions* Cambridge : Cambridge University Press

Government Gazette (Thailand) (2005). *Summary of the Constitutional Court Ruling No. 31/2548* Dated 8th February B.E. 2548, Vol. 122, Part 104a, dated 8th November B.E. 2548

Hossain, K. (2000) *Human Rights Commissions and Ombudsman Offices: National Experiences Throughout the World*. Martinus Nijhoff.

Human Rights Commission of Malaysia Act. (1999)

Human Rights Watch (HRW) (2008). *Mexico's National Human Rights Commission*, February. Vol. 20, No. 1B

HRW (2015), "Thailand: Keep Independent Rights Commission," 3 February 2015.

<http://www.hrw.org/news/2015/02/03/thailand-keep-independent-rights-commission>

International Council on Human Rights Policy (2000). *Les institutions nationales des droits de l'homme, performance et légitimité : résumé [sic] des conclusions*. Versoix : International Council on Human Rights Policy

International Coordination Committee, (ICC) (2015). ICC Sub-Committee on Accreditation Report – November 2015. Accessed on 2 February 2016.

<http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20FINAL%20REPORT%20-%20NOVEMBER%202015-English.pdf>

International Council on Human Rights Policy (ICHRP) (2000), *Performance & Legitimacy: National Human Rights Institutions*. ICHRP

Koo, J.-W. and Ramirez, F. (2009). *National Incorporation of Global Human Rights: Worldwide Expansion of National Human Rights Institutions, 1966-2004*, Social Forces, Volume 87, Number 3, March 2009 pp. 1321-1354

Komnas Ham (2007), *Submission to the Universal Periodic Review of the Human Rights Council*.

Lindsnaes, B. and Lindholt, L. (2000) "National Human Rights Institutions - Standard setting and achievements," in Lindsnaes, et.al., *National Human Rights Institutions, Articles and Papers*. Ed. Birgit Lindsnaes, et.al., Copenhagen, Danish Human Rights Center.

Mertus, J. (2009). *Human rights matters : local politics and national human rights institutions* Stanford, Calif. : Stanford University Press

Mohamedou, M.-M. (2000) "The Effectiveness of National Human Rights Institutions," *National Human Rights Institutions, Articles and Papers*. Ed. Birgit Lindsnaes, et.al., Copenhagen, Danish Human Rights Center, 2000, p. 50. Accessed online on January 20, 2013p. 51

Murray, r. (2007) "The role of National Human Rights Institutions at the international and regional levels: the experience of Africa," in [\*Human rights law in perspective\*](#). Volume 11. Hart, 2007

Murray, R. (2007) *The role of national human rights institutions at the international and regional levels : the experience of Africa / Place* London : Hart, 2007

Nasu, H. and Saul, B. (eds.) (2011) *Human rights in the Asia-Pacific region : towards institution building*. London : Routledge

National Human Rights Commission ACT, B.E. 2542 (1999), Thailand

National Human Rights Commission of Thailand (NHRCT) (2011). Human Rights Situation in Thailand, "Paper by the National Human Rights Commission of Thailand Submitted to the UN Human Rights Council under the UPR Process, This report is submitted to the UN Human Rights Council Working Group for its review of human rights situation in Thailand under the Universal Periodic Review process to be held in October 2011. The National Human Rights Commission of Thailand.

NHRCT (2012), *Summary of the Human Rights Situations and Performance Report of the Year 2012*, Submitted to the Submitted to the Sub-Committee on Accreditation, International

Peterson, C.J. (2004) "The Paris Principles and Human Rights Institutions: Is Hong Kong Slipping Further Away From the Mark?," *Hong Kong Law Journal*, v. 33 n. 3, p. 513-522

Philippine House of Representatives (2010), House Bill 55, "an Act Strengthening the Commission on Human Rights and Other Purposes," 15<sup>th</sup> Congress, Philippines House of Representatives, 5<sup>th</sup> Session. Available at [http://www.congress.gov.ph/download/basic\\_15/HB00055.pdf](http://www.congress.gov.ph/download/basic_15/HB00055.pdf) ; and

Philippines House of Representatives (2010), House Bill 1141, 15<sup>th</sup> Congress, Philippines House of Representatives, 5<sup>th</sup> Session. Available at [http://www.congress.gov.ph/download/basic\\_15/HB01141.pdf](http://www.congress.gov.ph/download/basic_15/HB01141.pdf)

Philippine House of Representatives (2010). House Bill 2974, An Act Strengthening The Functional And Structural Organization Of The Commission On Human Rights, And For Other Purpose, First Regular Session, 15th congress, House of Representatives of the Philippines. Available at [http://www.congress.gov.ph/download/basic\\_15/HB02974.pdf](http://www.congress.gov.ph/download/basic_15/HB02974.pdf)

Philippine House of Representatives (2013). House Bill 2152, An Act to Strengthen the Commission of Human Rights, and for Other Purposes. First Regular Session, 16th congress, House of Representatives of the Philippines. Available at: [http://www.congress.gov.ph/download/basic\\_16/HB02152.pdf](http://www.congress.gov.ph/download/basic_16/HB02152.pdf)

Ramcharan, B. (2011). *The Fundamentals of International Human Rights Treaty Law*. Leiden, Boston: Martinus Nijhoffs Publishers.

Ramcharan, B. Ed. (2005), *The Protection Roles of National Human Rights Institutions*. The Hague, Martinus Nijhoff, 2005.

Reif, L. (2000) "Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection," *The Harvard Human Rights Journal* Spring, Vol. 13, No. 1., pp.1-72

Renshaw, C. (2011) "Testing the Mettle of National Human Rights Institutions: A Case Study of the Human Rights Commission of Malaysia," *Asian Journal of International Law*, 1, pp. 165-198

Seong, H. (Marcellino) (2005) *National human rights institutions in East Asia : impact of international cooperation on the effectiveness of national human rights institutions*. Genève : Institut universitaire de hautes études internationales, 2005 Diplôme d'études approfondies en relations internationales / IUHEI [265]. Mention Science politique

Seong, H. (2012) Delegation to independent regulatory agencies: comparative study of 12 national human rights institutions. Graduate Institute of International and Development Studies, 2012 Material: 1 vol. (pagination multiple)

Sharom, A. "High Hopes on Suhakam Which Has Little Power" *The Star* (5 March 2009), quoted in Renshaw 2011.

Stokke, H. (2007) *Taking the Paris Principles to Asia: A Study of Three Human Rights Commissions in Southeast Asia: Indonesia, Malaysia and the Philippines*. Chr. Michelsen Institute, 2007.

SUHAKAM (2008) Report to the Universal Periodic Review.

SUKAHAM (2011), Report to The 16<sup>th</sup> Annual Meeting Of The Asia Pacific Forum of National Human Rights Institutions Bangkok, Thailand, 6-8 September 2011, p8.

SUHAKAM (2014), Annual Report. Kuala Lumpur, Human Rights Commission of Malaysia.

United Nations (UN) (2004), *Effective Functioning of Human Rights Mechanisms: National Institutions and Regional Arrangements. National Institutions for the Promotion and Protection of Human Rights*. Report of the Secretary General. 28 January. E/CN.4/2004/101

UN (2005) Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005

UN (2011) *National Institutions for the Promotion and Protection of Human Rights: Report of the Secretary General*. A/HRC/16/76,

UN (2013). *National Institutions for the Promotion and Protection of Human Rights*, Human Rights Council. A/HRC23/L.15. 7 June 2013.

United States Department of State (1993), Indonesian Human Rights Practices, 1993. [http://dosfan.lib.uic.edu/ERC/democracy/1993\\_hrp\\_report/93hrp\\_report\\_eap/Indonesia.html](http://dosfan.lib.uic.edu/ERC/democracy/1993_hrp_report/93hrp_report_eap/Indonesia.html)

Van Boven, T. (1993) *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and fundamental Freedoms*, Final Report of the Special Rapporteur, 2 July 1993, E/CN.4/Sub.2/1993/8.

Whiting, A. (2003) "Situating Suhakam: Human Rights Debates and Malaysia's National Human Rights Commission," 39 Stan. J. Int'l L. 59 (2003)

Wouters, J. (2013) *National human rights institutions in Europe* / [et al.] (eds.) Cambridge: Intersentia.

Yuyun Wahyuningrum (2014), *The ASEAN Intergovernmental Commission on Human Rights: Origins, Evolution and the Way Forward*, Stockholm : International Institute for Democracy and Electoral Assistance, 2014

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<sup>1</sup> In assessing the protection capacity of regional NHRIs, this study reviewed several sets of primary documents over the past five years: Annual reports by NHRI's, submissions of NHRIs under the UN Human Rights Council's

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Universal Periodic Review over two rounds of submissions, and independent commentators contained in annual publications of Asian NGOs in the annual publication of the Asian NGO Networks on National Human Rights Institutions (ANNI). Note: Annual Reports of some of the NHRI's provide adequate or insufficient national assessments of the human rights situation. Further, the Thai Commission's reports are not published in English nor on time. The reports of the Indonesian and the Philippines Commissions are not readily available online. To supplement these reports, we also review a second set of reports which are the NHRIs countries' submissions to the Universal Periodic Review (UPR) of the UN Human Rights Council. The different national situations have been assessed largely via annual reports of the NHRIs to their respective governing authorities or reports to the Universal Periodic Review process of the UN Human Rights Council. A number of them have provided useful assessments to the UN Human Rights Council under the Universal Periodic Review (UPR). The Commissions of Indonesia, Malaysia and Thailand and the Ombudsman of Timor-Leste have made submissions to the UPR process.

<sup>2</sup> Article 4(4) provides that "For the purpose of this Act, regard shall be had to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with the Federal Constitution."

<sup>3</sup> In the event of failure by the Department of Justice or Office of the Ombudsman to initiate a preliminary investigation within 20 days from its receipt of the case recommended for prosecution by the Commission, such inaction was to be considered as an automatic endorsement of the matter to the Commission without any further act or notice by the Department of Justice or Office of the Ombudsman for the purposes of preliminary investigation; the Commission was to have the power to deputize government prosecutors or private lawyers to prosecute the criminal offence(s) that were the subject of its preliminary investigation. In such circumstance, the prosecution was to remain under the Commission's direct control and supervision. This would apply where the offender is a public officer as defined under the Penal Code and where the offence constituted a criminal offense under the Penal Code. The concurrent prosecutorial powers would apply to non-state actors and to prosecution of crimes against vulnerable persons, including children, infants, women and indigenous peoples.





