

Taking the Paris Principles to Asia

A study of three human rights commissions in
Southeast Asia: Indonesia, Malaysia and
the Philippines

Hugo Stokke

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1. Introduction¹

The purpose of this study is to make an assessment of the implementation of the so-called Paris Principles in three Southeast Asian countries: Indonesia, Malaysia and the Philippines. The Principles relating to the Status of National Institutions (or the “Paris Principles” in brief) is the international standard for assessing the structure, competence, working procedure and other features of national human rights institutions. These principles provide guidelines for how institutions are to be independent from government and to reflect the pluralism of society in its membership. They address both promotional and protective aspects of the mandate of the institutions and add principles concerning the quasi-jurisdictional competence of those commissions possessing such powers.

Taking the Principles as the point of departure, this study shall make a qualitative assessment of how well the Principles have been followed in three commissions in three Southeast Asian countries. The Southeast region has been selected for being a region in rapid development with some countries graduating to a more advanced state of development. The three countries selected are all at an intermediate stage in the development process with Malaysia having come further in terms of GDP per capita than the other two larger countries.

As the Principles are quite generally formulated, the assessment is more of a qualitative than of a quantitative kind. However, selecting three commissions does allow some scope for comparison among them. Even though the comparison may not be quantitative in kind, a checklist shall be devised so as to indicate similarities and differences among the three. Following the structure of the Principles, the checklist will address competence and responsibilities, composition, independence and pluralism, methods of operation and the question and extent of quasi-jurisdictional competence. Of course, such a checklist comparison has to be based on a more descriptive account of each of the commissions, and this account precedes the checklist.

Before describing the functions of the three commissions, a historical account shall be given of the evolution of guidelines for national human rights institutions and a discussion of the actual substance of the Principles. The question may be asked why these institutions are important given an international treaty system and an extensive monitoring apparatus attached to each of the treaties. Furthermore, given a judiciary in each country, why is there a need for a commission? Given an array of non-governmental organisations (NGOs), why should there be a commission if these NGOs are capable of channeling demands and claims and complaints to different parts of the state, whether it is the government, parliament or the courts? In other words, a rationale for establishing national human rights commissions has to be made and the rationale should be found by examining the evolution towards a definitive set of principles at the international level. The key question is identifying the competence and powers of this type of institution in relation to the branches of the state on the one hand and the plurality of civil society and its organised (and less organised) interests on the other.

After looking at the evolution of principles and guidelines and their final formulation in the Paris Principles, the study goes on to assess their implementation in Indonesia, Malaysia and the Philippines. The discussion is followed by a summary checklist in order to facilitate comparisons among them. A checklist approach may also serve to identify common constraints that prevent the commissions from fully implementing the Principles, provided that such constraints do exist in

¹ This study was financed by a grant from the Norwegian Ministry of Foreign Affairs which enabled visits to the human rights commissions of Indonesia, Malaysia and the Philippines.

practice. Finally, a concluding section sums up the discussions and comparisons with a view to finding the key characteristics of the institutions enabling them to (or constraining them from) fully promoting and protecting human rights.

2. The evolution of guidelines for national human rights institutions

The initial discussions on establishing national human rights institutions go right back to the beginning of the United Nations. As early as 1946, a resolution by the United Nations Economic and Social Council (ECOSOC) invited member states to consider the desirability of establishing local information groups or human rights committees to serve as vehicles for collaboration with the United Nations Commission.² The issue of local bodies was raised again in 1960 and an ECOSOC resolution was adopted, going beyond the role of providing a contact point for the UN locally and encouraging active participation in and monitoring of the local situation.³ With expanding UN standard-setting in the 1960s and 1970s, the role of national institutions as a vehicle for promotion of standards was recognised, inter alia, by organising a seminar in Geneva in 1978 on “national and local institutions for the promotion and protection of human rights”. This seminar was significant because it opened for an active role of institutions in reviewing national policy on human rights, covering legislation as well as implementation through the administration and the courts. This development marked a step beyond the previous more limited function of information and awareness-raising. The recommendation of ensuring a representative cross-section of society in the composition of the institutions was another addition to the tasks of a national human rights institution.

General Assembly resolutions drew attention to the importance of securing the integrity and independence of the institutions⁴ and provided for a broad mandate in which the consideration of civil and political rights as well as economic, social and cultural rights should be equally important. This broad mandate was intended for the institutions to go beyond an exclusive focus on civil and political rights and judicial procedures. The potential danger of a very broad mandate, however, is that the institutions may lose focus and hence create a problem of differentiating a human rights commission from other commissions tasked with monitoring other areas of public governance. In the first reports of the Secretary General in 1981 and 1983 on National Human Rights Institutions, the range of activities are listed without specifying the legal and organisational framework of the institutions themselves. Briefly, the activities can be sorted into two classes: the functions of protection and promotion.

The function of *protection* covers a broad range of tasks, including investigating complaints, seeking settlements, referring matters to the courts or public prosecutors, providing legal counselling etc. It did not include the competence to issue final decisions or to undertake independent investigations on their own initiative. A distinction is made between judicial and non-judicial bodies, though it is not clear from the distinction whether human rights commissions are to be classified as the former or the latter. The function of *promotion* is similarly broad-ranging, from advocating appropriate legislation and participating in public awareness campaigns to working with

² See ECOSOC Resolution 2/9 of 21 June 1946. This section relies on Birgit Lindsnæs and Lone Lindholt, “National Human Rights Institutions – Standard Setting and Achievements”, in Birgit Lindsnæs, Lone Lindholt and Kristine Yigen (eds.), *National Human Rights Institutions. Articles and Working Papers* (Copenhagen, Danish Centre for Human Rights, 2001), pp. 1 – 48. Also previously published in Hugo Stokke and Arne Tostensen (eds.); *Human Rights in Development Yearbook 1998. Global Perspectives and Local Issues* (The Hague, Kluwer Law International, 1998).

³ ECOSOC Resolution 772 B (XXX) of 25 July 1960.

⁴ A/RES/36/134 of 14 December 1981.

educational and other public institutions in disseminating information about human rights and the work of the commissions and to take actions to safeguard the rights of special groups.

3. The Paris Principles

The standard-setting process did not reach fruition until the holding of the first International Workshop on National Institutions for the Promotion and Protection of Human Rights in Paris, 7–9 October 1991. The workshop resulted in a set of principles and guidelines briefly titled the *Paris Principles* which was adopted by the Human Rights Commission the following year.⁵ The Principles are divided into four main sections, dealing with

- (1) competence and responsibilities;
- (2) composition and guarantees of independence and pluralism;
- (3) methods of operation; and
- (4) additional principles concerning the status of commissions with quasi-jurisdictional competence.

Regarding the *competence and responsibilities* of national institutions, they have, as stated above, the competence to promote and protect human rights. The mandate is to be as broad as possible and to be set out in a constitutional or other legislative text, specifying composition and competence. The responsibilities are laid out in a series of paragraphs which, however, are not meant to be exhaustive. Briefly, they are as follows:

- (a) To submit to government, parliament or other competent authority opinions, recommendations, proposals, reports on any matter relating to the promotion and protection of human rights, whether on request or on own initiative. These shall be related to the following areas:
 - (i) legislative and administrative provisions of pertinence to the promotion and protection of human rights, including the amendment of such legislation and administrative provisions;
 - (ii) any violation of human rights;
 - (iii) the preparation of national reports on human rights generally and specifically;
 - (iv) drawing the attention of the government to human rights violations in any part of the country and proposing initiatives to stop such violations and monitoring government efforts towards that end;
- (b) To promote and ensure harmonisation of national legislation with international instruments ratified by the state;
- (c) To promote ratification of international instruments and to ensure implementation;
- (d) To contribute to state reporting on ratified international instruments and to the extent necessary, to comment on state reporting;
- (e) To cooperate with the UN, regional and other national institutions competent in the areas of promotion and protection of human rights;
- (f) To take part in programming for teaching and doing research on human rights in schools, universities and in the professions;
- (g) To take part in public awareness creation about human rights through information and education.

These sets of responsibilities are basically *promotional*. The institutions have an assisting role by helping the government in various ways to ensure that human rights broadly and specifically are

⁵ *Principles relating to the status of national institutions*, UN Commission of Human Rights Resolution 1992/54 of 3 March 1992, annex (E/1992/22).

promoted and protected. The final section of the Principles concerns the quasi-jurisdictional status of the commissions which specifies the extent to which the commissions also have a *protective* function to directly ensure the respect of human rights. As we shall see, this function is hedged with qualifications.

Having said so far *what* national institutions shall do, *who* are the right persons to do it and under what conditions? The Paris Principles include a section on the *composition and guarantees of independence and pluralism* of the institutions. The main point regarding the composition of the institutions is “to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights”. Specifically, social forces are to be included, as members or as cooperating partners, non-governmental organisations, including trade unions and professional associations; representatives of trends in philosophical and religious thought; universities and qualified experts; parliament; and government departments (latter members only in an advisory capacity).

The institutions have to be guaranteed an adequate infrastructure, particularly adequate funding, in order to employ staff, to ensure independence from government and to be secure from financial controls.

The mandate of members shall have to be regulated by an official legal act, specifying the duration of the mandate and its renewal, provided that the independence of members are ensured.

Keywords regarding composition and operability are *pluralism* and *independence*. Institutions have to be as representative of society as possible and as free from financial and administrative controls as possible to the extent that these controls can be used to exert governmental pressure on the operations of the institutions.

The Principles go on to provide guidelines for the *methods of operation* of the institutions. These are as follows:

- (a) freely consider any question falling within its competence, whether submitted by government, petitioner or on its own accord;
- (b) hear any person or obtain any information necessary to assess the situation;
- (c) address the public directly or through the media;
- (d) meet regularly, if necessary, with all members present;
- (e) establish working groups and local/regional sections;
- (f) maintain consultations with jurisdictional and other bodies of relevance for the promotion and protection of human rights; and
- (g) develop relations to non-governmental organisations devoted to promoting and protecting human rights and the opportunities of vulnerable groups.

The guidelines on methods show that institutions need not be purely reactive; they can of their own choosing adopt a much more proactive posture and take up and pursue any question falling within their competence. As the institutions are public institutions, though not governmental, they can offer as intermediaries a channel into the government if they develop good relations with non-governmental organisations and if these NGOs see the utility of the institutions as a channel for their petitions and complaints.

Finally, the Principles offer guidelines concerning the status of commissions with *quasi-judicial competence*.⁶ Institutions may be authorised to hear and consider petitions and complaints concerning individual situations, brought before it by individuals, third parties, NGOs, trade unions and other representative organisations. In these circumstances, the commissions may be entrusted with the following principles:

- (a) Seeking an amicable settlement through conciliation or, within the limits prescribed by law, through binding decisions or, where necessary, on the basis of confidentiality;
- (b) Informing the party who filed the petition of his rights, in particular the remedies available to him, and promoting his access to them;
- (c) Hearing any complaints or petitions or transmitting them to any other competent authority within the limits prescribed by law;
- (d) Making recommendations to the competent authorities, especially by proposing amendments or reforms of the laws, regulations and administrative practices, especially if they have created the difficulties encountered by the persons filing the petitions in order to assert their rights

These additional principles are important in specifying the extent to which the institutions have *protective* powers on top of the considerable promotional powers vested in them. The principles are careful in avoiding language that may indicate that the competence of commissions overlaps with that of the courts. Commissions may assist in seeking legal remedies, transmit complaints to other competent authorities or make recommendations on law amendments or even seek binding decisions through conciliation, but outside the courts. The commissions have no powers to apply the law, not even within their fields of competence. That task rests entirely with the courts.

These are then the Principles which represent the international consensus on the framework, mandate, composition, operations and powers of the national human rights institutions. They represent the yardstick by which to assess the structure and operations of the institutions.

4. Selection of institutions and method of assessment

The first national institutions were set up in the 1970s in New Zealand and Canada (both 1978). Several countries joined in the 1980s, but it was only in the 1990s that institutions mushroomed across the world with newcomers appearing on all continents. Currently, there are, according to database information, 23 institutions in Africa, 17 in the Americas, 17 in Asia and the Pacific and 22 in Europe.⁷ Adding up, a total of 79 institutions have been established so far and most of them after the adoption of the Paris Principles.⁸

⁶ Lindsnaes and Lindholt (2000) are puzzled by the use of the term *quasi-judicial* instead of the more apposite *quasi-judicial* which has a precise meaning in legal dictionaries. The latter refers to “a function that resembles the legal function in that it involves deciding a dispute and ascertaining the facts and any relevant law, but differs in that it depends ultimately on the exercise on an executive discretion rather than in the application of the law” (quoted from the *The Concise Dictionary of Law*, Oxford University Press, 1986), whereas the former appears to have no legal reference. The former term has been retained in later UN reference works which does speak to the power of legal precedence!

⁷ Data available from National Human Rights Institutions Forum at http://www.nhri.net/pdf/List_Accredited_NIs_Nov_2006.pdf, a web site hosted by the Danish Institute of Human Rights.

⁸ It should be noted that not all are national human rights institutions in the specific sense of the Principles. Some are national ombudsman offices, others are public defenders and yet others have a narrower mandate than that recommended by the Principles, focusing specifically on ethnic discrimination and people with disabilities, to take but two examples. Different types of accreditation apply for the various institutions.

In the Asia-Pacific region, New Zealand was first to set up a national human rights institution in 1978, followed by Australia in 1981 and the Philippines in 1987. As of November 2006, 17 institutions are registered in the following countries: Australia, Fiji, Hong Kong, India, Indonesia, Islamic Republic of Iran, Jordan, Malaysia, Mongolia, Nepal, New Zealand, Palestine, Philippines, Qatar, The Republic of Korea, Sri Lanka and Thailand. As will be evident from perusing the list, a number of countries do not have a national human rights institution, notably the People's Republic of China.⁹ Yet, the idea of national institutions appears to have caught on with a clear majority of countries of the region having their own from the 1990s onwards.¹⁰

In selecting the institutions for closer scrutiny, we have selected institutions that have been accredited as being in conformity with the Paris Principles. Further, it may be an advantage to zero in on a sub-region and here the Southeast Asian (or the ASEAN) region has been selected as there may be more commonalities (in size, wealth and population) among the ASEAN countries than in other sub-regions of Asia and the Pacific. Altogether four institutions have been set up as of today, in Indonesia, Malaysia, Philippines and Thailand. No institutions are yet in place in Burma, Lao PDR, Cambodia, Vietnam and Brunei and as far as is known, no plans are afoot for their establishment. Out of the four, Thailand's commission is the most recent and its enabling act was adopted only in 1999. However, the impetus for a commission came with the promulgation of a new constitution in 1997 which provided for the full guarantee of human dignity and basic rights as well as fundamental freedoms for its people. Malaysia's commission is also fairly recent with its enabling law also dating from 1999 and its formal establishment in 2000. As there is more easily and readily available information on the Malaysian commission than for the Thai commission, it was selected for closer study. In comparison, the Philippine commission dates back to 1987 and the Indonesian commission to 1993.

All four Southeast Asian institutions are members of the Asia Pacific Forum for National Human Rights Institutions which serves as a regional forum as well as a provider of support and services for the national institutions throughout the region. More specifically for the Southeast Asian region, the national human rights institutions may have an additional role to play alongside activists and lobbyists for an ASEAN Human Rights Mechanism, an initiative that was initially conceived at an ASEAN Ministerial Meeting in 1993, after the adoption of the Vienna Declaration and Programme of Action on 25 June that year. A Working Group on an ASEAN Human Rights Mechanism was set up to liaise and lobby at the ASEAN Ministerial Meetings and to meet regularly in between these official meetings. The working group drafted in 2000 an outline of an ASEAN human rights commission.¹¹ These activities at both the regional and sub-regional levels make Southeast Asia an interesting region for testing the application of the Paris Principles.

How to assess the application of the Principles? An assessment will have to encompass the legal framework, the mandate, the composition, the independence, the operations and to the extent possible, some estimate of the effectiveness of the commissions in changing the human rights situation for the better. The assessment of performance and impact is strictly speaking beyond the scope of the Paris Principles which speak to the structural and formal requirements of national human rights institutions. Nonetheless, all three commissions are subject to running assessments of

⁹ Most of the institutions have been given an A accreditation with the Palestinian given an A(R), Qatar and Jordan a B and the Iranian commission a C. Only those with an A accreditation are regarded as being in conformity with the Principles. The A (R) category indicates that the information provided is insufficient for assessment; B denotes not fully conformant or lack of information and C is non-conformant.

¹⁰ The database provides useful contact information for the national institutions, but not their year of establishment or the year of the enabling law.

¹¹ See *ASEAN and Human Rights. A Compilation of ASEAN Statements on Human Rights*. Manila, the Philippines, Working Group for an ASEAN Human Rights Mechanism, Ateneo Human Rights Center, Ateneo de Manila University, 2003). For updated information, check <http://www.aseanhrmech.org/>.

their performance, either informally by concerned members of the public or more formally by evaluations and performance assessments. The latter exercises may give rise to organisational restructuring in order to better achieve the objectives of the Paris Principles and heighten effectiveness and impact.

In brief, the assessment by this study will examine the following points:

- (a) legal basis;
- (b) composition, including the pluralistic representation of society;
- (c) independence, financial and operational;
- (d) mandate, including quasi-judicial, if applicable;
- (e) operational priorities: which (categories of) human rights are given priority and why;
- (f) assessment of effectiveness based on performance;
- (g) assessment of impact, to the extent possible.

The latter two points are from the point of view of the Principles of less importance than the others, yet considered essential for evaluations, so they have been included here as add-ons. In the following, each of the commissions will be treated separately, but in a concluding section, some key points will be singled out so as to make comparisons between them. The purpose of the comparisons is not to establish any ranking order, but to see if there are elements, common or disparate, which may be susceptible to broader generalisation.

5. Three Southeast Asian human rights commissions

5.1 Commission on Human Rights – the Philippines

5.1.1 Legal foundation

The creation of a Commission on Human Rights in the Philippines was provided for in Article XIII, sections 17 – 19 of the 1987 Constitution of the Republic of the Philippines. This was followed up by Executive Order no. 163 which specified the mandate of the Commission. Until the Commission was formally set up, the Presidential Committee of Human Rights exercised the functions and powers of the Commission and Section 4 of the Executive Order dealt with the transfer of functions, powers and resources from the Committee to the Commission.

The 1987 Constitution was a turning point in the history of the Philippines as it marked the end of the Marcos dictatorship and signalled the beginning of the new democratic era. Despite instability, democracy has survived in the ensuing twenty-year period. It was part of the new era to include a constitutional provision for a Commission, in the hope that this type of institution may prevent relapses into authoritarianism in the future.

A constitutional foundation does not ipso facto guarantee a better functioning Commission, though it may be argued that a constitutional foundation does provide a more secure basis than a Presidential decree or an executive order. The implicit assumption is that a constitution may be harder to change than a decree from the executive.

5.1.2 Composition

Section 2 of the Executive Order provides that the Commission is to consist of a Chairman and four members, all natural-born Filipinos above 35 years of age. None of the members must have stood for an elective position in any election immediately prior to their appointment. During their term of appointment, members can not hold any other office or employment. Members can not engage in any profession or take part in the management of any business that may be affected by the functions of their office or in any way have a financial interest in any franchise or privilege granted by the government or any of its branches, agencies and subdivisions.

These restrictions are of importance as the Chairman and the Commissioners are full-time positions. These are not part-time engagements as is the case for some of the other Commissions in the region and hence any division of loyalty should not apply.

The Chairman and Members are appointed by the President for a period of seven years, which can not be extended. Generally, a longer period of tenure is better for guaranteeing independence than short-term tenure which will allow the government better opportunities for removing activist commissioners. However, all members are appointed for the same period, leading to a complete change of membership every seventh year.

As the Commission members are appointed by the President, there is the possibility that political considerations of loyalty enter into the selection process. Potential candidates are screened by the Presidential Office staff, but the President is basically free to select candidates not on the short list. There are no indications that there is a process of wider consultation involved in the selection of Commission members.

There are five members of the Commission and they share a common background in law, with one specialising in labour arbitration. The Chair, Purification C. Valera Quisumbing, is a lawyer by profession and has an extensive experience abroad, particularly related to the UN. All five have worked for the government of the Philippines, partly or fully. As the Commission only counts five members with a predominant legal and government background, it is doubtful whether it can be said to represent the pluralism of society in total. But all have extensive legal experience, including handling human rights cases in their capacities as lawyers (and for one member, looking after the interests of Philippine migrant workers).

5.1.3 Financial and operational independence

Section 6 of the EO provides that the approved annual appropriations of the Commission shall be automatically and regularly released. But in practice, there is no automatic release of government funds. Budget items are subject to scrutiny and approval by the Department of Budget and Management and there are restrictions on transfers of funds from one budget item to the other and from one programme to the next. Staff reported that it has happened on occasion that parts of the budget have not been released or even reduced. The US State Department report on human rights practices for 2005 reports that “approximately one-third of the country's 42 thousand barangays had Human Rights Action Centers, which coordinated with CHR regional offices; however, the CHR's regional and subregional offices remained understaffed and underfunded. The CHR budget for the year was \$3.59 million (P197.38 million), down 6 percent in peso value from 2004.”¹²

Operational independence may be affected by the Commission assisting the Government in its performance of functions related to human rights protection and promotion. While there is nothing

¹² See the Philippines report at www.state.gov/g/drl/rls/hrrpt/2005/61624.htm.

inherently wrong in such assistance, the Commission may risk being too closely identified with the government and possibly having to share the blame if government service is not up to expectations. Its role as a government monitor may also be affected in the process if the Commission actively contributes to government reports under international human rights treaty obligations. According to an official at the Ministry of Foreign Affairs, there was co-operation on the ICCPR report, but in general the Ministry chose to work with the relevant Congress committee.

5.1.4 Mandate

Section 3, the longest in the Executive Order, deals with the *mandate, functions and powers* of the Commission and consists of 11 points as follows:

- (1) Investigate on its own or on complaint by any party, all forms of human rights violations involving civil and political rights;
- (2) Adopt its operational guidelines and rules of procedure, and cite for contempt for violations thereof in accordance with the Rules of Court;
- (3) Provide appropriate legal measures for the protection of human rights of all persons within the Philippines, as well as Filipinos residing abroad, and provide for preventive measures and legal aid services to the under-privileged whose human rights have been violated or need protection;
- (4) Exercise visitorial powers over jails, prisons or detention facilities;
- (5) Establish a continuing program of research, education and information to enhance respect for the primacy of human rights;
- (6) Recommend to the Congress effective measures to promote human rights and to provide for compensation to victims of violations of human rights, or their families;
- (7) Monitor the Philippine Government's compliance with international treaty obligations on human rights;
- (8) Grant immunity from prosecution to any person whose testimony or whose possession of documents or other evidence is necessary or convenient to determine the truth in any investigation conducted by it or under its authority;
- (9) Request the assistance of any department, bureau, office or agency in the performance of its functions;
- (10) Appoint its officers and employees in accordance with law; and
- (11) Perform such other duties and functions as may be provided by law.

As can be seen from the list, the mandate and powers cover both protective (1 – 4) as well as promotional functions (5 – 7) as per the Principles. The main accent, as far as the main human treaties are concerned, is on the civil and political rights and these are the primary concerns of the investigative work of the Commission which also includes forensic services. Legal services comprise aid and counselling, conciliation and mediation. Assistance, including financial assistance, is provided to victims of violations. Visitorial services also come under the protective function, in particular to prisons and other places of detention.

The promotional programme of the Commission comprises first of all educational services. One element is the development of modules for teaching at elementary and secondary school levels. These were tested out over a number of years and revised following changes in the basic school curriculum. Another is the development of a Human Rights Education Facilitators Manual for teachers as the general knowledge of human rights among teachers is poor. This manual gives a general introduction to human rights and teaching human rights as well as more detailed information on child rights. A third component is the introduction of a teaching module to be

integrated into the curriculum of police and military education and training centres. Fourthly, training of trainers and teachers is an ongoing activity of the education services.

Another promotional function is the monitoring of legal treaties ratified by the Government of the Philippines (see 7 above). The Instruments Monitoring Office carries out this function through its Treaties and Monitoring Programme. This programme provides advice to the government on its international obligations as well as in setting up national action plans. However, the Commission should not advise on how to comply with international standards, but rather independently monitor government reporting and prepare alternative reports if needed (as we shall see below).

The Indicator Setting Programme is an initiative to monitor government performance in selected rights areas. A pilot study is being conducted on Rights Based Indicators on Selected ESC Rights with a focus on the right to food and health. This study involves looking at government performance based on government development plans and the MDGs, including the role of government departments and civil society organisations in the exercise. Data are drawn from both government sources and from outside NGOs with an expertise in health issues. Data collection is supplemented by interviews with informants and by dialogue with affected agencies along the way.

Another module of the promotional functions is to inform the public about what the Commission does and accomplishes. This module is thought implemented in five parts: developing a Commission web site; a bulletin board system; a facility for on-line training; on-line documentation and a general web portal. The web site is up and running, though none of the other components are in place yet. The Commission is well aware of what remains to be done and says that in about 6 – 8 months time the rest should be in operation.¹³ While setting up an online presence is a sign of progress, a major weakness is that the Commission has yet to publish an annual report, on paper or electronically on the Web. Statistical compilations of activities are published annually, but not generally circulated. While they may be handy for providing an inventory of activities, they are no substitute for an annual report which has to have at least a qualitative assessment of what has been done and what are the challenges and targets ahead.

Yet another part of the promotional tasks is to develop linkages, both to the government sector and to civil society. The first linkage, to the government sector, is oriented towards operating an oversight function with reference to pending legislation and administrative orders and directions regarding compliance with international human rights standards. It has so far meant taking a CHR position on pending legislation, but as Commission staff admit on its web site, the resources for performing this task remain an issue: A major plan is “(t)o request the CHRP management for additional warm bodies to complement the unrealistically small composition of the Division otherwise, the functions and mandates of the LPD should be transferred to the Legal Office; where they properly belong”.

Linkages are also to be forged with NGOs, civil society and media. This need has emerged as a result of a wide-spread perception that the CHRP did not have a highly visible public image and that potential users of its services were more likely to go to NGOs than to the Commission. Hence, the need to develop linkages in order to make CHRP services better known not only in society at large, but also within government.

Finally, the Commission operates a number of special programmes, including a Right to Development programme, a Barangay Human Rights Action Center, a Child Rights Center, a Women Rights Action Center and an Asia – Pacific Institute of Human Rights, comprising

¹³ See the web site at <http://www.chr.gov.ph/index.htm>. As the page has not been updated, it is hard to say whether the Commission has fulfilled these objectives.

information, training and research centres and a publication unit. Again, info on activities and accomplishments are scarce.

Does the Commission have any quasi-judicial powers? The question was put during the visit to CHRP main office in Quezon City, and according to information received, CHRP officials may be asked to deputise as prosecutors in child right cases following a Memorandum of Agreement with the Ministry of Justice. Whether this extends further is unclear as there is a need to distinguish human rights cases from those that do not fall under this rubric. What is clear is that the Commission has the mandate to provide legal assistance in the preparation of legal documents and to undertake visitations to centres of detention and to extend legal and other financial, medical assistance to inmates. The Commission has intervened in cases where the death penalty may be imposed and in cases of individuals imprisoned under the previous Marcos regime.¹⁴ Nonetheless, the brunt of protective functions concerns investigation and case management.

5.1.5 Operational priorities

As the former section on the mandate showed, the Commission is active within the entire spectrum of functions identified by the Paris Principles. The accent has been on the protective functions, specifically related to investigation, legal and other assistance and visitations. However, following a review of performance in 2002, priorities changed.¹⁵

The review, undertaken by the Center for Public Resource Management, criticised the Commission for its “transactional” approach and advocated an “environmental” approach to supplement the transactional. This latter approach would have the purpose of investigating the structural causes of human rights violations. It is argued that “promotion and consequential protection must be deepened, widened and given more attention than what it is currently getting in as much as this intervention has deeper and longer-term impact on human rights awareness, societal capacity to assert and protect individual rights, and capacity to seek redress under the law”.¹⁶ Instead of a reactive stance, the HRCMP should shift to a more proactive one. That would mean that instead of waiting for complaints to be received, the Commission should on its own initiative launch investigations and undertake visitations.¹⁷ It would also mean more attention to economic, social and cultural rights with a view to ensuring equity, equal opportunity, provision of resources and prevention of discrimination.

Of the cases investigated, the review found that 40 per cent was filed with the courts or administrative agencies and only 10 per cent made it as far as a court judgement. There was no information as to whether these cases were appealed, or about the amount of time, resources and assistance rendered to get as far as a court judgement. However, the fact that only one out of ten complainants received judicial redress indicates that there is scope for improvement. Furthermore, the review criticised the HRCMP for being too close to the government in a number of instances and for its inability to undertake independent monitoring functions, in particular of government obligations and functions, but also to effectively liaise with Congress on legislative matters.

¹⁴ Refer to the Supreme Court petition filed by the Chair and Commissioners of the HRCMP for habeas corpus of Leonardo Pacquinto and Jesus Cabangunay, G.R. No. 115575, 4 August 1994. On file with the author. These two had been incarcerated for 20 years at the time of the petition, sentenced by a military tribunal in the Marcos era.

¹⁵ See Center for Public Resource Management, *Institutional Review of the Commission on Human Rights*, January 2003, Pasig City, the Philippines.

¹⁶ *Institutional Review, ibid.*, p.2-23.

¹⁷ The review found that the average workload for investigators in the regional offices in 2001 was one case per month, quite a pleasant workload, but obviously with scope for more to do!

In conclusion, the review recommended the following broad reform measures:

- Shift from transactional protection activities (investigation of human rights cases, provision of legal services and referrals to other agencies, forensic services, jail monitoring and financial assistance) to independent investigation and case monitoring;
- Conduct of monitoring of the consequential aspects of human rights violations;¹⁸
- Strengthening of research functions to provide analytic and experiential inputs for continuing improvement in the role, programs and interventions of the CHR and its linkages; and
- Reengineering of the human rights programme towards strengthening public education and broad-based advocacy.

In brief, the Commission was recommended to be less of a service provider and more of an independent monitoring agency. Resources freed up by this change of orientation could be fruitfully directed to monitoring. However, a change in orientation would also require a change in competence, which may not be available, in particular analytical skills.

The non-availability of a competent staff profile is apparent from another exercise following from the performance assessment. The same company that did the assessment was tasked by UNDP to introduce the HRCP to the Rights-Based Approach (RBA) to Development.¹⁹ The purpose of the RBA is to mainstream human rights in development planning and to make sure that development and governance activities across the board are informed by human rights considerations such as equity, non-discrimination, participation, empowerment and so on. The Strategic Development and Planning Office of the HRCP is to be entrusted with the oversight functions, accompanied by both linkages offices, the Government Cooperation Office and the Civil Society Cooperation Office. The report goes on to describe the RBA in an elaborate 120-page document, with an abundance of flow charts throughout.

Whether the HRCP is in the position to fulfil these new oversight functions will depend not only on resources, but of analytical skills considerably beyond the predominant legal skills among the current roster of commissioners.

5.1.6 Effectiveness and impact

It is beyond the Paris Principles to enquire into effectiveness and impact as the Principles are primarily concerned with the structural factors that will have to be in place for a commission or institution to function independently and properly. But as the review so far has indicated, effectiveness and impact have been limited. As the Asia-Pacific Human Rights Network concluded in a regional review: “the Philippine Commission looks spectacular on paper: it is supported by the Constitution, detailed and varied legislation, and has numerous publications. However, its execution is poor. NGOs have little faith in the organization, perceiving it as the lackey of the government.”²⁰ This was the perception prior to the “reengineering” project and whether the reorientation has resulted in altering the public perception of the Commission is uncertain. However, there is reason to doubt it. To judge from the information provided by its web site, there are scanty indications as to whether the Commission has improved its outreach and accessibility. There are no indications

¹⁸ This is presumably to be understood as not looking at the consequences of human rights violations, but at structural factors that cause the violation of human rights.

¹⁹ See *CHR Reengineering Project. Rights-Based Approach (RBA) to Development*. Center for Public Resource Management. Design Report. October 2003.

²⁰ See “An Assessment of the Philippine Commission on Human Rights,” in *National Human Rights Institutions in the Region. Report of the Alternate NGO Consultation on the Seventh Asia-Pacific Regional Workshop on National Human Rights Institutions*. Delhi, Asia Pacific Human Rights Network, 2002, pp. 109-118.

whatsoever whether the Commission has been able to accomplish its objectives after the reengineering job; the available information speaks of objectives and not of accomplishments or benchmarks or progress rates. As a review concludes: “it is due to these factors that the CHRP is unable to reach its full potential. Its character precluded the possibility of success.”²¹

5.2 SUHAKAM – The Malaysian Human Rights Commission

5.2.1 Legal foundation

SUHAKAM is founded on the Human Rights Commission Act 1999 which sets out the functions of the Commission as follows:

- (a) to promote awareness of and provide education in relation to human rights;
- (b) to advise and assist the Government in formulating legislation in relation to human rights;
- (c) to recommend to the Government with regard to the subscription or accession of treaties and other international instruments in the field of human rights; and
- (d) to inquire into complaints regarding infringements of human rights referred to in section 12.²²

In contrast to the Philippine and Thai commissions, the Malaysian commission does not have a constitutional anchoring.

5.2.2 Composition

The members of the Commission shall not exceed 20 in number. They are appointed by the Yang-di-Pertuan Agong (the titular head of state) on the recommendation of the Prime Minister. The members are appointed on the basis of prominence and from a variety of religious and racial backgrounds.²³ The duration of tenure is two years, but with eligibility for reappointment.

As with the Philippine commission, members are appointed by the executive branch giving the Prime Minister considerable influence (and the President in the Philippines) on who are to be appointed. Pluralism appears to be guaranteed, but there is no clause requiring that the members should have any prior familiarity with human rights or experience from working on human rights issues. The tenure of commissioners is only two years, thus giving the executive a high degree of control over who are reappointed. There are no criteria for reappointment, thus giving the executive wide discretion in deciding on reappointments, including failure to reappoint “troublesome” members.²⁴

When perusing the list of current commissioners, it is apparent that most have a government background, though some are academics at state universities or civil service unionists. It is dominated by Malays who comprise about two-thirds of Commission members. None of the

²¹ “Philippines Commission. Stymied by its character”, *Human Rights Features*, August-September 2005, p. 6 (published by the South Asia Human Rights Documentation Centre, New Delhi).

²² See *Laws of Malaysia. Act 597. Human Rights Commission Act 1999*. Malaysia, Govt. Printing Office.

²³ It may be surprising that the word “racial” figures in official Malaysian discourse. It shall be taken to mean basically the Bhumiputras (or sons of the soil, comprising the Malays and other indigenous groups) and the Chinese and Indian populations.

²⁴ See the decision by several NGOs to boycott SUHAKAM for 100 days in 2002, partly due to the non-extension of commission members: “it is the perception of civil society that the Commissioners who have been dropped are among those who have actually discharged their statutory duties in the protection and promotion of human rights, without fear or favour,” at <http://www.aliran.com/oldsite/monthly/2002/4j.html>. It was also noted that the new Commission Chair was Attorney General at the time of wide-spread arrests in 1987 – 88 under the Internal Security Act. However, in his new capacity, he has taken a public stand against ISA.

members has a specific human rights background, and none of the human rights NGOs is represented on the Commission.

The commissioners are only part-time and numerous in contrast to the Philippines commission that is small, but full-time. Arguably full-time commissioners would ensure a higher commitment to the Commission, though not necessarily a more efficient one. Conflict of interest issues may arise, and with only part-time commissioners, decision-making is going to be slower and more cumbersome. There are apparently no requirements for commissioners to meet more than once a month.

5.2.3 Financial and operational independence

According to Art 19 of the Human Rights Commission Act, the Government shall provide the Commission with adequate funds to enable the Commission to discharge its functions. The Commission can not receive any foreign funds, but funding can be from private or organisational sources provided it's for promotional, educational purposes.²⁵

Funding does not come from parliament, as might be expected, but from the Ministry of Foreign Affairs. Initially, expenditure had to be approved by the Treasury, but as from 2001 the Commission has been able to manage its own funds independently. Whether the funding received is "adequate" is not known.

Art. 22 of the Human Rights Commission Act provides that "(t)he Minister may make regulations for the purpose of carrying out or giving effect to the provisions of this Act, including for prescribing the procedure to be followed in the conduct of inquiries under this Act". This can easily be interpreted to the effect that the Commission is not free to determine its own inquiry procedure, but in actual practice the Commission has been able to set its own procedures, though submitted to the Ministry for approval.

The proof of independence is the ability to criticise the government when there are clear grounds for doing so. The inquiry into the Kesas Highway Incident in 2000, wherein the police broke up a meeting of an oppositional political group, produced a report that was critical towards the police. An inquiry was launched into the Kampung Medan Incident in 2001, wherein a private dispute turned into a communal riot, but it was, however, never published. Another case, the Damansara School case in 2001, concerning expropriation, was not taken up by the Commission. The general viewpoint of human rights activists has been that SUHAKAM could have been more vigilant and forceful and that it is too reactive and not proactive enough.

5.2.4 Mandate

The mandate, as we saw under section 2.2.1, covers both promotional functions (a,b) as well as protective functions (c,d).

It is further specified under Art. 4(2) of the Human Rights Commission Act as follows:

- (a) to promote awareness of human rights and to undertake research by conducting programmes, seminars and workshops and distribute the results of such research;
- (b) to advise the Government and/or the relevant authorities of complaints against such authorities and recommend to the Government and/or such authorities appropriate measures to be taken;

²⁵ It is not known whether funding can be channeled through sister human rights commissions in other countries as is the case for Komnas HAM in Indonesia.

- (c) to study and verify any infringement of human rights in accordance with the provisions of this Act;
- (d) to visit places of detention in accordance with the procedures as prescribed by the laws relating to places of detention and to make necessary recommendations;
- (e) to issue public statements on human rights as and when necessary; and
- (f) to undertake any other appropriate activities as are necessary in accordance with the written laws in force, if any, in relation to such activities.

Art. 4.2 (a,b,e) addresses promotional functions and Art. 4.2(c,d) protective functions, thus fulfilling both parts of the mandate of a commission as per the Principles.

With reference to 4.2(d), there is a drawback in that the Commission is expected to announce its visits well in advance, giving prison authority sufficient time to present a better picture of conditions than if visits were unannounced. Hence the Commission has been considering announcing the visit on the same day of the actual visit, thus keeping an element of surprise. But these rules do not apply to the secret places of detention of those detained under the Internal Security Act where the government may choose to delay requests for visit and to insist on officials being present under inquiries.

However, as Article 4(4) provides, “regard shall be had to be the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with the Federal Constitution.” Malaysia has not ratified any of the two main human rights conventions and is thus not bound by its provisions. The Declaration is technically speaking a non-binding instrument, though it has come to be regarded as an integral part of customary international law. There is no presumption on the part of Malaysia that it takes precedence over domestic law and as such Malaysia practices a *dualistic* system of legal administration.

The protective function under (d) is further specified under Art. 12 regarding the powers of inquiry of the Commission:

- 12(1) The Commission may, on its own motion or on a complaint made to it by an aggrieved person or group of persons or a person acting on behalf of an aggrieved person or a group of persons, inquire into an allegation of the infringement of the human rights of such person or group of persons.
- 12(2) The Commission shall not inquire into any complaint relating to any allegation of the infringement of any human rights which (a) is the subject matter of any proceedings pending in any court, including any appeals; or (b) has been finally determined by any court.
- 12(3) If the Commission inquires into any allegation under subsection 12(1) and during the pendency of such inquiry the allegation becomes the subject matter of any proceedings in any court, the Commission shall immediately cease to do the inquiry.

The law is quite specific in denying any quasi-judicial function to the Commission; the task of the Commission is purely to investigate and refer conclusions and recommendations to the relevant authority, usually the Home Ministry or the Prime Minister’s Office. This limitation of mandate deprives the Commission of any direct interaction with the judicial system. However, the Commission does have subpoena powers during investigations and inquiries and can hear evidence that may be inadmissible in civil or criminal courts and grant immunity to witnesses in cases under investigation, provided that information given is truthful and not deliberately fabricated.

5.2.5 Operational priorities

The Commission has organised the commissioners into five separate working groups; the Human Rights Education and Promotion Working Group, the Complaints and Inquiries Working Group, the Economic, Social and Cultural Rights Working Group, the Law Reform and International Treaties Working Group (and the Management and Finance Committee). This structure is replicated in the divisions of the regular staff which adds a Legal Division, a Public Affairs Division, a Policy and Research Division (and a Management and Finance Division).

It is a sensible move to focus the work of the Commission on a limited set of subjects and to work systematically to come up with recommendations. Each working group has been studying topics relevant to their brief. The Law Reform group has focused their attention on the Convention on the Rights of the Child (CRC) and Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) particularly as well as on a fair and expeditious trial. The Economic and Social Rights working group has looked into the Millennium Development Goals focusing on extreme poverty and hunger, universal primary education and gender equality. The Education group has looked at CRC and made the Universal Declaration available in Bahasa Malaysia.

5.2.6 Effectiveness and impact

The disadvantage of being an advisory body is that it is only advisory. The Commission has no way of enforcing its recommendations. The first Chair of the Commission said in 2000: "As far as SUHAKAM is concerned, we are not an enforcement institution. We are more an institution that is advisory and gives a power of moral persuasion not only to government but to all".²⁶ The government may choose not to listen to any of the advice given and Parliament may not be given the opportunity to debate the conclusions and recommendations given. The Commission is required to produce an annual report to be tabled in Parliament by the Government. However, the report is submitted indirectly; it is sent to the Ministry of Foreign Affairs which forwards it to parliament after vetting its contents. The majority government party has prevented discussions of the report despite motions by opposition party MPs.

SUHAKAM is not receiving a lot of mainstream media attention. Media associated with the governing coalition are less likely to provide regular coverage than oppositional media such as the online Malaysiakini "newspaper" which, according to the editor, covers SUHAKAM closely.

SUHAKAM has unfortunately not been successful in persuading the government to ratify the two main human rights conventions or to repeal the Internal Security Act which opens for long-term detention without trial. However, the annual reports now contain a section of government response to the recommendations and the Commission's comments to the response. As a review of SUHAKAM concludes, "Malaysia is still in the early stages of transition towards being a nation built solidly on the principles of democracy, accountability and transparency."²⁷ It's not SUHAKAM's fault that it has to deal with a political environment that is slow to change in the direction of more democratic space. In a system in which the government always knows best, it requires a long haul for alternative voices to be heard and seriously considered.

²⁶ See "SUHAKAM – Yet to Earn its Spurs," in *National Human Rights Institutions in the Asia Pacific Region*, p. 85.

²⁷ *Ibid.*, p. 90

5.3 Komnas HAM – The Indonesian Human Rights Commission

5.3.1 Legal foundation

The Indonesian Commission was set up by Presidential Decree No. 50 in 1993 which was later modified in the Human Rights Act no. 39 of 1999.²⁸ The Act laid down the objectives of the Commission as follows in Chapter 7, Art. 75:

- (a) to develop conditions conducive to the execution of human rights in accordance with Pancasila, the 1945 Constitution, the United Nations Charter, and the Universal Declaration of Human Rights; and
- (b) to improve the protection and upholding of human rights in the interests of the personal development of Indonesian people as a whole and their ability to participate in several aspects.

In order to achieve these aims, “the National Commission functions to study, research, disseminate, monitor and mediate human rights issues (Art. 76(1)).

The timing of the establishment of the Commission, just prior to the World Conference on Human Rights in 1993, was by many observers seen as a move to deflect criticism of the Suharto regime at the time, responsible for serious human rights violations in East Timor, Aceh and Papua (formerly Irian Jaya). The imprint of the Suharto era is also evident in the reference to Pancasila, the official State philosophy at the time, with its belief in the five principles of God, humanity, nationalism, representative government and social justice.

With the adoption of the Act in 1999, the Commission was given a statutory foundation, but not a constitutional one as those of Thailand and the Philippines.

5.3.2 Composition

Initially in 1993, the membership of the Commission was appointed by the President and their actual names were listed in Presidential Decree No. 455 of that year (followed by Decree No. 476 concerning the Commission’s election of Chair and Vice Chairs).

The only criterion for the selection of members in the 1993 Decree was that the membership should consist of “national prominent figures” (Art 7). There was no trace of the Paris Principles’ criterion of pluralism. Members sit for a period of five years, but can be extended for another five years, making ten years the maximum duration of service for any member.

The brunt of the “nationally prominent” membership consisted initially of elite figures close to the Suharto government. One worrying factor was that former military officials were represented on the Sub-commission for monitoring the execution of human rights, the entity most directly engaged with protective functions. However, with the renewal of the Commission in 1998, the Commission decided the new composition of the Commission on its own accord.

²⁸ Presidential Decree No. 50 of 1993, and Decrees 455 and 476 can be found in *National Human Rights Institutions in the Asia-Pacific: A Source Book*, published by the Human Rights Center, Ateneo de Real University, Manila, the Philippines. The House of Representatives of the Republic of Indonesia. *Republic of Indonesia Legislation Number 39 of 1999 concerning Human Rights*, on file with the author.

The selection procedure was modified by the 1999 Act in the sense that the 35 members are now selected by the House of Representatives, but on the recommendation of the plenary of the Commission. While it does allow for more autonomy on the part of the Commission, it does entail the danger that current members will have a larger degree of control over membership, thus making it difficult to bring in new and outside members. As the selection procedure is closed and not in any way open to public intervention, the likelihood of any radical changes in membership is low.

The current Commission comprises 23 members composed of lawyers, ex-judges, ex-military officers, Muslim organisations, minority religions, human rights NGOs and women and children NGOs. Nine members of the current membership have an NGO background.

The commissioners are only engaged part-time in commission work, and approximately half of the commissioners attend the Commission on a daily basis. Plenary meetings are twice a month.

The Commission has its nation-wide network through a combination of branch offices and local commissions with about 70 staff employed. There has been a frequent complaint from out-lying parts of the country that the Commission is too Java-based with inadequate presence outside.

5.3.3 Financial and operational independence

The funding for the Commission comes from the Government. In its annual report for 2001, the Commission reports that the state funding only covers the running costs of the Commission. Special top-up funding had to be sought for financing the investigatory work related to large-scale human rights violations. In addition to government funding, the Commission receives funding from donor sources, some of it directly from the Norwegian²⁹ and Dutch governments and some channelled through sister commissions in Australia and Canada.³⁰ As special funding has to be sought for investigative work, the dependence on the government is deepened.

As for operational independence, observers have noted the practice of clearing commission statements with military officials before releasing them to the public at large. Further reports of non-transparent decision-making threaten the integrity of the Commission.³¹ These reports refer to practices in and around 2000. It is not known whether matters have improved in the changed political environment of present-day Indonesia.

5.3.4 Mandate³²

The mandate of the Commission is as follows, as stated in the 1999 Act, Art. 89, is as follows:

- (a) to study and examine international human rights instruments with the aim of providing recommendations concerning their possible accession and ratification;
- (b) to study and examine legislation in order to provide recommendations concerning drawing up, amending and revoking of legislation concerning human rights;
- (c) to publish study and examination reports;
- (d) to carry out literature studies, field studies, and comparative studies with other countries;

²⁹ The Norwegian government has for a number of years operated a Human Rights Dialogue with Indonesia, particularly focused on the courts and the judicial system.

³⁰ See National Commission on Human Rights Indonesia, *Annual Report 2001*, ch. 9, financial report, pp. 213-6.

³¹ See *Komnas Ham – The Indonesian National Human Rights Commission: The Formative Years*, Human Rights Documentation Center, Asia Pacific Human Rights Network, New Delhi, 2000, p. 11.

³² From 1999, there is also the Minister of State for Human Rights and the divisions of powers and responsibilities between the Minister and the Commission is not clear. The Minister can also receive complaints from individuals and groups.

- (e) to discuss issues related to protecting, upholding and promoting human rights; and,
- (f) to conduct cooperative research and examination into human rights with organizations, institutions and parties, at regional, national and international levels.

The above list refers to general promotional functions and does not mention the protective functions at all. These functions are given in a separate sub-paragraph in which monitoring includes investigating and examining incidents likely to constitute violations of human rights; call on complainants, witnesses and accused to hear their statements and to give written statements and submit necessary documents³³; and to survey places of incidents.

Finally, and of particular interest, the Commission can, on approval of the Head of Court, provide input to cases currently undergoing judicial process if the case involves violations of human rights of public issue and court investigation. This provision is significant as it opens for Commission intervention in court cases involving human rights violations.³⁴

Complaints can come from individuals or from groups, provided that the complainant can be seen as a representative of the group in question. Complaints can be oral, but the finalised complaint must be in written form.

The Commission can decide to set up ad hoc teams to look at cases of gross and wide-spread human rights violations, including looking into the 1965 – 66 events, drawing upon complaints from victims' families and relatives. Estimates of people disappeared and believed killed, range from 300,000 up to several million. At the time of visiting the Commission, commissioners were in disagreement about the conclusions and the report remained unpublished. The Commission decided to set up a review team to investigate into the disappeared, but had not decided to go ahead with an

In general, court admissibility is contingent on the case being a human rights case, the complaint being in good faith and the case not being resolved by an appropriate agency.

The 1999 Act also provides for Human Rights Tribunals to be set up within the ambit of District Courts, but this opportunity has been little used, with the exception of incidents related to East Timor.

An alternative method of responding to complaints has been to offer mediation and conciliation services, but there have been discussions within the Commission whether this represents the best use of limited resources as many of the cases, typically involving land and labour issues, fall outside the human rights rubric.

On the promotional side, there are a number of tasks the Commission has attended to. The Commission has tried to convince the Government to ratify the main human rights conventions. There are a number of discriminatory laws regarding passports, ID cards and birth certificates. As there are only five recognised religions, and the religious denomination has to be entered, this leaves the residents of Chinese extraction in a quandary as the Chinese cannot be subsumed under any of the five and hence cannot be issued ID cards and other papers of documentation of personal identity.

³³ The Commission does have subpoena powers, but it's hardly invoked.

³⁴ The possibility of *amicus curiae* briefs, which this paragraph opens up for, has reportedly not been utilised.

There are plans for training in *Pro Justitia*, i.e. how to conduct fact-finding inquiries into gross human rights violations³⁵ and to better co-ordinate human rights monitoring among NGOs with a particular focus on Aceh and Makassar in Sulawesi. Co-operation with foreign sister commissions will continue.³⁶

5.3.5 Operational priorities

As from 2004, the sub-commissions will be divided into separate entities for civil and political rights, economic, social and cultural rights and vulnerable groups.

There does not appear to be any major change in organisational priorities. Komnas HAM identifies the following priorities for its work plan up to 2008:

- Improving the performance of Komnas HAM to achieve its legislative mandate, including under decentralisation;
- Protecting Human Rights Principles, preventing potential violations and investigating and acting on violations that have already occurred;
- Building the networks between Komnas HAM and human rights stakeholders;
- Promoting national and regional governments to adopt human rights principles in the implementation of development programs;
- Empowering society to be actively engaged in upholding, promoting and protecting human rights; and
- Encouraging the ratification of international human rights instruments.³⁷

The plan specifies a number of steps to take with regard to internal management, decentralisation and the relationship to other institutions, both domestically and abroad.

Perhaps the most significant change would be to establish a much stronger local presence in line with overall decentralisation of the governance system in Indonesia and to correct the perception of the Commission being too Java-centric. The importance of outreach and accessibility is also one to consider for Komnas HAM.

5.3.6 Effectiveness and impact

The overall verdict on the Commission is not unexpectedly mixed. The Commission has been making strong statements about military and police transgressions in a number of instances. Yet there are structural deficits to attend to: lack of pluralism in membership (though improving), oversized commission with not enough regular staff, inadequate outreach and accessibility, lack of enforcement power (and low utilisation of mandate opportunities), lack of transparency due to confidentiality and off- the-record procedures of persuasion.

Co-operation from the Government is not exactly forthcoming as this story brings out: “in 2003, Komnas HAM's efforts to expose human rights violations and bring perpetrators to account were undermined by a number of court decisions regarding its jurisdiction or authority. For example, in June 2003 a Jakarta court refused to subpoena former and active military officers who had ignored Komnas HAM summonses to face questioning about the 1998 riots, which claimed more than 1,200

³⁵ This is part of the Indonesia programme at the Norwegian Centre for Human Rights. Komnas HAM staff was provided training in *Pro Justitia* procedures this year.

³⁶ The Raoul Wallenberg has been donating human rights literature to the Komnas HAM library, with SIDA funding.

³⁷ See The Indonesian National Commission on Human Rights (Komnas HAM), *Co-operation Plan 2003 to 2008*. May 2003.

lives. In June the armed forces stated it could not cooperate with attempts by Komnas HAM to summon retired and active-duty generals to answer questions about the abduction of pro-democracy activists between 1997 and 1998. The armed forces insisted that Komnas HAM must first obtain permission from the House of Representatives before it could summon retired and active-duty generals for questioning. By law severe human rights violations that occurred before 2000 could be investigated only by an ad hoc human rights court, not Komnas HAM. Such a court could be formed only at the suggestion of the House, but for the House to know enough about an incident to approve the formation of a court, a thorough investigation was necessary.”³⁸ A classic case of catch 22 if there ever was one!

Similar to the Philippine Commission, outreach via online sources appears to be quite limited. The site is only in Bahasa Indonesia, and no annual reports or other summaries of activities appear to be available online. Hence it is extremely difficult to make any assessment about recent events and developments.

Indonesia is still at an early stage in the transition towards democracy and there is a need for institutions to hold Government accountable. If Komnas HAM were to address its structural deficits, it could be a force in that process.

6. Concluding observations

Summing up, we may set out some of the structural features in tabular form.

Table 1. Structural Features of three Southeast Asian commissions

Features/Commission	Indonesia	Malaysia	Philippines
Legal basis	Decree, Act	Act	Constitution, Executive Order
Size of commission	Large	Large	Small
Tenure	Long, part-time	Short, part-time	Long, full-time
Mandate	Broad: protective, promotional	Broad: protective, promotional	Broad: protective, promotional
Quasi-judicial functions	Investigations into past HR violations	None	Limited
Financial independence	Govt. funding, extra funding for investigations, foreign funding	Govt. funding, own management of budget	Govt. funding, at times inadequate
Operational independence	Occasional clearing of statements	Vetting by Foreign Ministry	No known interference
Outreach	Some branch offices, local commissions	Some branch offices	Many branch offices
Effectiveness and impact	Mixed	Mixed	Mixed

As can be seen from the table, all three are based on law, but only the Philippine has a constitutional underpinning. The size of the commission varies, with the Philippine opting for a small commission which has the further distinction of being full-time. A small commission would under normal assumptions be a more efficient decision-making body. A large one may better ensure pluralism in

³⁸ See the report on Indonesia at www.state.gov/g/drl/rls/hrrpt/2005/61609.htm, the US State Department’s annual review of human rights practices throughout the world.

its membership. The Malaysian commission is the odd one out in having a very short tenure for commissioners which gives the appointing authority more powers of control over membership.

All three commissions have a broad mandate, covering both protective and promotional functions, but there are distinctions between them as regards quasi-judicial functions. The Indonesian commission does have the opportunity to investigate past human rights abuses, but this opportunity is, as we saw, hedged with constraints.

Regarding independence, only the Philippine commission appeared to be financially constrained whereas other constraints concerned the operational independence of the others.

The Philippine commission has a better outreach than the others, but this advantage did not appear to be efficiently exploited. Finally, as regards output factors, the picture is mixed and none of them can be said to be particularly successful in achieving their objectives. This may be due to structural features or due to constraints in the political environment.

However, we may also make some qualitative concluding observations, drawing on another checklist compiled by the International Human Rights Council.

The International Council has set up a set a list of criteria for what distinguishes an effective national human rights institution.³⁹ These criteria may also serve as benchmarks against which to assess the three institutions under review.

First, an institution should *enjoy public legitimacy*. All three commissions are often perceived as being an extension of the Government. Even though a commission cannot be an NGO, independence from government is guaranteed to enhance public legitimacy.

Second, institutions should be *accessible*. We have seen that all three institutions tend to be reactive rather than proactive, to wait for complaints instead of making independent investigations based on news reports and other sources. We did also see that the quality of online information differed greatly, with an obvious effect on accessibility. Accessibility also has to do with local presence and here the Philippine commission had a wider network, although by and large underutilised.⁴⁰

Institutions should have an *open organisational culture*. As we have seen, most of the commissions are dominated by former government officials and given the elite composition of most of the commissions, it is doubtful whether a culture of openness will develop.

Institutions should ensure the *integrity and quality of their members*. As we saw, two of the commissions have only part-time members and are at the same time quite oversized. A smaller, full-time membership with members familiar with human rights will ensure both higher integrity and loyalty.

Institutions should have *diverse membership and staff*. As we noted above, a preponderance of ex-public officials is not the best way to guarantee that pluralism is reflected in the membership. Civil society organisations are as a rule underrepresented even though Indonesia appear to have more diversity, however, at the price of an oversized commission.

Institutions should *consult with civil society*. Networking with civil society has been identified, as we saw, as a primary task for both the Philippine and Indonesian commissions. The Malaysian

³⁹ International Human Rights Council, *Assessing the Effectiveness of National Human Rights Institutions*. Versoix, Switzerland, 2005.

⁴⁰ Komnas HAM was quite accessible in a specific sense as one of their buildings provided temporary housing for about 100 displaced people.

commission has instituted a series of dialogues across government – civil society boundaries, but relations with the NGOs were at one time so strained that a 100 day symbolic boycott was instituted.

Institutions should have a *broad mandate*. All three have a broad mandate, covering both promotional and protective functions.

Institutions should have an *all-encompassing jurisdiction*. All three have a wide, though not all-encompassing jurisdiction. Military and special forces are not off limit to the commissions, and the Indonesian commission has kept a higher profile on these issues, basically due to their powers to set up ad hoc teams to investigate cases of gross human rights violations. However, there are contentions regarding the functioning of human rights tribunals for past violations.

Institutions should have *power to monitor their recommendations*. This power is largely absent, although the changed role for the Philippine commission would give it considerable monitoring powers of government performance, though it is far from certain whether it is in a position to exercise it.

Institutions should *treat human rights issues systematically*. All three deal systematically with human rights issues, basically through a system of working groups and sub-commissions. However, there is always the danger that it may be difficult to demarcate human rights issues from those that are not. All three also push for ratifications of main treaties and in some cases aid the government in its reporting obligations to the treaty bodies.

Institutions should *have adequate resources*. As we saw, the Philippine commission complained about resource inadequacy and irregularity while the Malaysian appeared to be most in control over its own budget. Some commissions accept foreign funding, others do not.

Institutions *should develop effective international links*. This question is slightly outside the scope of the review, but suffice it to say that all three participate in both regional and global forums. The Indonesian Commission has a close relationship with other sister institutions abroad, though this does not seem to be case for the other two.

Institutions should *handle complaints speedily and effectively*. As we saw above, this question touches on accessibility as well as the powers to monitor the implementation of its own recommendations. This ability differs across the three commissions, particularly with regard to the judicial system.

All in all, the benchmarks of effectiveness indicate that there is considerable scope for improvement of all three. However, it should be considered that the commissions operate in difficult political environments with countries in a slow transition to a democratic dispensation and with a considerable legacy of authoritarianism and a strong government to contend with.

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SUMMARY

The report studies three human rights commissions in Southeast Asia in light of the so-called Paris Principles. These principles are the authoritative guidelines for directing the work of national human rights institutions. Designed as agencies for both the promotion and protection of human rights, these entities occupy an important intermediate position between the state and civil society. They are to serve as public watchdogs over the state and to be accessible to the public at large as agencies investigating complaints about state wrongdoing and as sources of education and training for raising human rights awareness.

The report makes an assessment of the legal mandate, composition, independence, operational priorities and to the extent possible, the effectiveness and impact of the three commissions in Indonesia, Malaysia and the Philippines. Although the assessment finds that the three fulfil the requirements of the Paris Principles, there is still considerable room for improvement for all three. All three commissions are also found to vary in significant respects and this variation is sought summarised in a concluding table. Finally, some recommendations are made as to how the performance of the commissions can be bettered.

The general weakness of the commissions is that their mandates are not as encompassing as they should be and that they have few powers to make sure that their recommendations are followed once they are submitted to the relevant government authority. The strict separation between the commissions and the courts also derives the commissions of any judicial function.

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