

# National Human Rights Institutions

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## Introduction

With the 2015 deadline for the Millennium Development Goals (MDGs) rapidly approaching, the likely picture across the Asia Pacific region looks mixed, 'with some disappointing failures, some narrow misses, and some striking successes'.<sup>315</sup> As the economically fastest growing region in the world, significant progress has been made on poverty reduction, although its size means the region is still home to a significant majority of the developing world's deprived people.<sup>316</sup> In addition, the region is still lagging on other goals and challenges created by disparities of wealth,<sup>317</sup> endemic corruption, gender discrimination, natural disasters, religious conflict and resurgent nationalism all underscoring the need to strengthen the MDGs by pursuing them through a human rights framework.

The potential synergies between the MDGs and human rights are widely recognised by civil society, UN agencies and even governments, who affirmed that 'respect for and promotion and protection of human rights is an integral part of effective work towards achieving the MDGs' at the MDG Summit held in New York in September 2010.<sup>318</sup> However, translating this recognition into changes in the practice of development actors has presented challenges. Actors in the human rights field have generally advocated for a 'human rights based approach' to the MDGs,<sup>319</sup> which, broadly speaking, focuses on four key areas: (1) targeting marginalised and excluded groups; (2) facilitating community participation in decision-making; (3) prioritising human rights in policy choices and resource allocation; and (4) ensuring accountability and remedies for human rights violations.

National human rights institutions (NHRIs) are frequently cited as a key element in a human rights based approach to the MDGs.<sup>320</sup> However, the rationale for this claim is

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315 \* The author would like to thank Pip Dargan, Chris Sidoti and Victoria Wisniewski Otero for their invaluable feedback in reviewing this chapter. ESCAP, ADB & UNDP, *Paths to 2015: MDG Priorities in Asia and the Pacific*, 2011, p.3.

316 Ibid., at p.8.

317 For most countries in region the Gini coefficient, the standard measure of inequality, is not only high but has been increasing. Ibid., at p.10.

318 UNGA, 'Keeping the promise: united to achieve the Millennium Development Goals', Draft Resolution referred to the High-level Plenary Meeting of the General Assembly at its sixty-fourth session, 17 September 2010, UN Doc. A/65/L.1, at para.53.

319 See e.g., UNDP, *Human Rights and the Millennium Development Goals: making the link*, 2007; OHCHR, *Claiming the Millennium Development Goals: a human rights approach*, 2008; Amnesty International, *From Promises to Delivery: putting human rights at the heart of the Millennium Development Goals*, 2010.

320 See e.g., Alston, P, 'A Human Rights Perspective on the Millennium Development Goals', Paper for the Millennium Project Task Force on Poverty and Economic Development, 2005. See also, UNDP, above at p.27; OHCHR, above at p.15; Amnesty International, above at p.12.

rarely explained and there has been little attention given to comparative strengths and weaknesses that NHRIs might have as actors engaged in promoting a human rights based approach to the MDGs. This chapter seeks to fill this gap. To begin, it looks at the evolution of NHRIs in the Asia Pacific region. The document also examines how NHRIs in the region have exercised mandated functions on economic, social and cultural rights in ways contributing to one of the four aspects of a human rights based approach outlined above; concluding the potential added value NHRIs bring to the MDGs is the series of 'bridging' roles they play helping to strengthen mutually reinforcing aspects of the MDGs and human rights. Nevertheless, expectations on NHRIs must be realistic therefore the final section identifies challenges facing NHRIs in addressing economic, social and cultural rights, before suggesting ways UNDP can support NHRIs.

## Setting the Scene: National human rights institutions in the Asia Pacific

National human rights institutions (NHRIs) are broadly defined as quasi-governmental, administrative institutions (neither judicial nor law-making) with an 'on-going, advisory authority in respect of human rights'.<sup>321</sup> In the Asia Pacific, NHRIs remain a relatively new phenomena; a trend that began in the early 1990s. At the start of that decade, only Australia, New Zealand and the Philippines established NHRIs. By the end, Fiji, India, Indonesia, Palestine and Sri Lanka had joined them. Over the next five years, the number of NHRIs in the region grew substantially, with institutions established in Malaysia, Mongolia, Nepal, South Korea, Thailand, Jordan, Afghanistan, Qatar, the Maldives and Timor-Leste. More recently, the commission in Bangladesh commenced its work after a lengthy formation process and a commission was established in Myanmar, though it is still in the early stages of development and does not currently meet the internationally recognised criteria for NHRIs. Japan, Palau, Papua New Guinea, Samoa, Taiwan and Vanuatu are exploring steps to establish institutions and there is support for considering such an institution among various actors in China.

The growth of NHRIs in the Asia Pacific—a region whose size, diversity and political dynamics have hampered efforts to set up pan-regional human rights infrastructure—suggests that, in contrast to other regions, national leaders have preferred to respond to human rights concerns by 'alter[ing] domestic political structures'.<sup>322</sup> However, the

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321 Parlevliet, M, 'National Human Rights Institutions and Peace Agreements: establishing national institutions in divided societies', International Council on Human Rights Policy Working Paper, 2006, at p.2. Available at: <http://www.ichrp.org/en/projects/128>.

322 Cardenas, S, 'National Human Rights Commissions in Asia', in *Sovereignty under Challenge: How Governments Respond*, Montgomery J. D. & Glazer, N. eds., 2002, at p.30. See also, Muntarhorn, V, 'In Search of a Rights Track: evolving a regional framework for the promotion and protection of human rights in the Asia Pacific region', OHCHR Discussion Paper, 2005. It should also be noted that sub-regional human rights mechanisms represent another potential trend in the region. In 2009, for example, the Association of South East Asian Nations (ASEAN) established an Intergovernmental Commission on Human Rights.

motivations for and contexts in which NHRIs in the region have been established vary significantly. To begin with, a broad correlation can be seen between democratisation and the establishment of NHRIs. The establishment of a human rights commission was a major outcome of democratic reform in the Philippines and Thailand; with both commissions strongly entrenched in new constitutions.<sup>323</sup> In other cases such as Indonesia, Malaysia and Maldives, the establishment of an NHRI preceded later democratic reform; indicating NHRIs can operate relatively effectively under authoritarian or semi-authoritarian systems.<sup>324</sup> Finally, reflecting the trend internationally, countries transitioning from conflict have also established NHRIs in an effort to prevent a return to the atrocities of the past, leading some commentators to describe NHRIs as the ‘hallmark of democratic legitimacy’ for countries transitioning from conflict.<sup>325</sup> The peace agreement in Afghanistan provided for the establishment of a national human rights institution,<sup>326</sup> as did the mandate of the United Nations Transitional Administration in East Timor (UNTAET).<sup>327</sup>

Despite the vastly different political and social contexts where NHRIs in the region have been established, there is notable uniformity in their form. This may be explained by well documented influence the international community has had in promoting the establishment of NHRIs.<sup>328</sup> In the Asia Pacific, governments adopted a regional framework for technical cooperation on human rights in 1998. Known as the Tehran Framework, it was built on four ‘pillars’, namely to develop: national human rights institutions; national human rights action plans; human rights education; and the realisation of economic, social and cultural rights and the right to development.<sup>329</sup> Of the four pillars, the establishment of NHRIs in the region has been considered the greatest success.<sup>330</sup>

More significantly, perhaps, NHRIs in the region have themselves mobilised to form a robust transnational network. Established in 1996, the Asia Pacific Forum of National Human Rights Institutions (APF) is a membership organisation of NHRIs. It ‘provides a framework for national human rights institutions to work together and cooperate on a

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323 Eldridge, P, ‘Emerging Roles of National Human Rights Institutions in Southeast Asia’, *Pacific Review*, Vol.14 2002, at p.209.

324 For example, following its establishment, KOMNAS-HAM issued a ‘flow of critical commentary’ on military and police actions, including a ‘hard-hitting’ report on extensive killings in East Timor prior to Indonesia’s surrender of the territory. Eldridge, above at pp.209, 218.

325 Mertus, J, *Human Rights Matters: local politics and national human rights institutions*, 2009, p.4.

326 *Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions*, at para.12. Viewed 4 November 2011 at: [http://www.usip.org/files/file/resources/collections/peace\\_agreements/pa\\_afghan\\_12052001.pdf](http://www.usip.org/files/file/resources/collections/peace_agreements/pa_afghan_12052001.pdf).

327 UNSC, *Security Council Resolution 1272 on the situation in East Timor*, UN Doc. S/RES/1272, 1999, para.8.

328 See e.g., Cardenas, C, ‘Emerging Global Actors: the United Nations and National Human Rights Institutions’, *Global Governance*, Vol.9, 2003; Pegram, T, Diffusion Across Political Systems: the global spread of national human rights institutions, *Human Rights Quarterly*, Vol.32, 2010.

329 Muntarbhorn, above note 8, at p.8.

330 Ibid.

regional basis through a wide range of services, including training, capacity building and staff-exchanges'.<sup>331</sup> It currently has 15 full members and three associate members.

Membership to the APF is based on an institution's compliance with the Paris Principles, international standards requiring an institution to be established by constitution or legislation; that it be independent and enjoy functional and structural autonomy; that its membership reflect the principle of pluralism; that it have a broad mandate to protect and promote human rights; that it receive adequate funding; that it be accessible; and that it interact with national civil society organisations, as well as regional and international bodies.<sup>332</sup> Through activities such as facilitating technical assistance, advising on compliance with the Paris Principles and promoting education and training opportunities, the APF contributes to establishing 'acceptable standards and patterns of behaviour... helping socialise states into the NHRI fold'.<sup>333</sup> The desirability of having an institution that enjoys international legitimacy has a 'flow on' effect, which can help gain 'traction' for encouraging states to amend existing or proposed legislative provisions, organisational structures and operational areas to strengthen their compliance with the Paris Principles.<sup>334</sup>

The Paris Principles also set out a number of functions that NHRIs are expected to play. These can broadly be divided into six categories: research and advice; education and promotion; monitoring; investigating; conciliating and providing remedies; cooperating with other national and international organisations; and interacting with the judiciary.<sup>335</sup> In the words of the Paris Principles, these functions either 'promote' or 'protect' human rights. Sonia Cardenas' classification of these functions provides further insight regarding how these functions make NHRIs unique institutions.

Promotional functions, which Cardenas describes as 'constitutive', aim to influence behaviour or 'transform the identity' of the state or social actors by diffusing international human rights norms at the national level.<sup>336</sup> Such functions are generally targeted at either: (1) empowering the population, particularly those who are marginalised or vulnerable, to know their rights and how to claim their rights; or (2) increasing duty bearers' awareness

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331 APF Website, 'About the APF'. Viewed 16 November 2011 at: <http://www.asiapacificforum.net/about>.

332 The Principles Related to the Status of National Institutions for the Promotion and Protection of Human Rights were adopted by the First International Workshop on National Human Rights Institutions, convened in Paris in 1991 under the auspices of the U.N. They were subsequently adopted by the U.N. General Assembly in 1993. National Institutions for the Promotion and Protection of Human Rights, G.A. Res. 48/134, Annex, U.N. Doc. A/RES/48/134 (Dec. 20, 1993).

333 Mertus, above note 11, at p.129.

334 Muntarbhorn, above note 8, at p.14.

335 Burdekin, B, 'National Human Rights Institutions in the Asia-Pacific Region', Raoul Wallenberg Institute of Human Rights and Humanitarian Law Manual, at p.17.

336 Cardenas, *Emerging Global Actors*, above note 14, at p.27.

of their obligations and their ability to respect, protect and fulfil human rights in their activities.<sup>337</sup>

Protection functions, which she describes as 'regulative', are focused on 'eliciting conformance' with international norms and rules. They relate to government, to the judiciary, or are undertaken by the institution independently. Though of course varying from institution to institution, government-related activities can include institutions advising on human rights issues; encouraging treaty ratification and assisting the state in its reporting obligations; contributing to the development of national action plans for human rights; and reviewing existing or proposed legislative or administrative provisions. In relation to the judiciary, NHRIs can assist victims to seek legal redress; refer cases to competent tribunals; or participate in legal proceedings as *amicus curiae*. Functions undertaken independently can include reporting on the national human rights situation or on specific human rights issues; conducting national inquiries; and submitting parallel reports to international human rights mechanisms.<sup>338</sup>

## National institutions and economic, social and cultural rights: An emerging focus in the Asia Pacific?

Writing in 2003, Balakrishnan Rajagopal considered the question: do NHRIs strengthen convergence between human rights and development? He concluded 'available evidence suggests extant models of national institutions narrowly focus on promoting a limited set of civil and political rights to the comparative neglect of economic, social and cultural rights'.<sup>339</sup> Even OHCHR has described the work of NHRIs in relation to economic, social and cultural rights as 'uneven and sporadic'.<sup>340</sup> Given most institutions in the region were established in a context where civil and political rights had been suppressed, sometimes violently, a bias towards these rights might not be so surprising.

Nevertheless, economic, social and cultural rights have long been on the agenda of the APF. This has provided a regional platform through which NHRIs have increasingly committed to strengthening their capacity and increasing their action and effectiveness in this area. For example, within the context of the Tehran Regional Framework, workshops on economic, social and cultural rights were held in Manila in 2000 and in Hong Kong in 2001. These workshops sought to promote a better understanding of how to interpret

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337 Corkery, A & Wilson, D, 'National Human Rights Institutions and Economic, Social and Cultural Rights', in *Contemporary Issues in the Realization of Economic, Social and Cultural Rights* (forthcoming).

338 Cardenas, *Emerging Global Actors*, above note 14, at pp.25-26.

339 Rajagopal, B, *International Law from Below: Development, Social Movements and Third World Resistance*, 2003, at p.225.

340 OHCHR, 'Economic, Social and Cultural Rights: a Handbook for National Human Rights Institutions', Professional Training Series No. 12, 2005, at p.viii.

economic, social and cultural rights standards in the Asia Pacific region and to identify practical strategies for NHRIs to address economic and social rights.<sup>341</sup>

In 2005, participants at an international roundtable on national institutions implementing economic, social and cultural rights held in New Delhi agreed to more specific actions to address economic and social rights such as establishing units or focal points; developing new and innovative strategies, including gathering information through community dialogue; developing particular strategies to address the rights of vulnerable groups; assessing the enforceability of economic and social rights, including through judicial procedures; and encouraging the development of national plans that implement economic and social rights.<sup>342</sup> Importantly, participants recognised the link between economic, social and cultural rights and the MDGs, advising NHRIs to:

*Ensure the Millennium Development Goals process is consistent with State obligations under international human rights instruments and that implementation is undertaken from a rights-based perspective.*<sup>343</sup>

A focus on economic, social and cultural rights has been observed at the sub-regional level. In South East Asia, the NHRIs of Indonesia, Malaysia, the Philippines, Thailand and Timor-Leste have established a formal cooperation framework including a joint project to promote participatory processes focusing on economic and social rights.<sup>344</sup>

In parallel, the right to development has been an emerging area of focus for NHRIs in the region. Coinciding with the 25<sup>th</sup> anniversary of the Declaration on the Right to Development, it was a thematic area addressed at the most recent Annual Meeting of the APF. The meeting's concluding statement noted:

*[T]he right to development can guide NHRIs responses to contemporary challenges. NHRIs have a unique role to play in promoting and implementing the right to development while carrying out their respective mandates.*<sup>345</sup>

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341 E.g. making use of existing mechanisms; monitoring both violations and progressive realisation; reviewing laws, policies, judicial decisions and national action plans; looking at the State's willingness versus its ability; and determining and comparing the current status of rights enjoyment with standards, benchmarks and indicators. APF Website, 'Economic, Social and Cultural Rights'. Viewed 16 November 2011 at: <http://www.asiapacificforum.net/services/training/regional-workshops/economic-social-cultural-rights> and HURIGHTS Website, 'Regional Workshop on Promoting and Protecting Economic, Social and Cultural Rights'. Viewed 16 November 2011 at: <http://www.hurights.or.jp/archives/focus/section2/2000/12/regional-workshop-on-promoting-and-protecting-economic-social-and-cultural-rights.html>.

342 *International Round Table on National Institutions Implementing Economic, Social and Cultural Rights, New Delhi, India, 29 November to 1 December 2005, the New Delhi Concluding Statement*. Viewed 20 April 2011 at [http://www.nhri.net/pdf/RT\\_New\\_Delhi\\_Conclusions\\_011205.pdf](http://www.nhri.net/pdf/RT_New_Delhi_Conclusions_011205.pdf).

343 *Ibid.*, at para. I(f)).

344 See ASEAN NHRI Forum, *Promoting ESCR and the Right to Development*, <http://www.aseannhriforum.org/en/joint-projects/escr.html> (lasted viewed May 5, 2010).

345 *Sixteenth Annual Meeting & Biennial Conference of the Asia Pacific Forum of National Human Rights Institutions, Bangkok, Thailand, 6 to 8 September 2011, Concluding Statement*, para.17. Viewed 16 November 2011 at: <http://www.asiapacificforum.net/about/annual-meetings/16th-thailand-2011>.

Growing momentum on addressing economic, social and cultural rights, especially in the context of development, can also be seen at the national level. Numerous NHRIs in the region have incorporated economic, social and cultural rights into their institutional structures by establishing focal points, committees or working groups or by dedicating staff to this area. In its General Comment No.10, the Committee on Economic, Social and Cultural Rights considered how NHRIs could carry out their mandated functions in relation to economic and social rights, advising that NHRIs should:

- promote educational and information programmes to enhance awareness and understanding of economic, social and cultural rights, for both the general public and for particular groups such as the public service, the judiciary, the private sector and the labour movement;
- scrutinise existing laws and administrative acts, as well as draft bills and other proposals to ensure they are consistent with the International Covenant on Economic, Social and Cultural Rights;
- provide technical advice, or undertake surveys in relation to economic, social and cultural rights;
- identify national-level benchmarks against which the realisation of Covenant obligations can be measured;
- conduct research and inquiries on the extent to which particular economic, social and cultural rights are being realised, either nationally or in relation to particular communities;
- monitor compliance with specific rights recognised under the Covenant; and
- examine complaints alleging infringements of applicable economic, social and cultural rights standards.<sup>346</sup>

A number of NHRIs in the Asia Pacific region have exercised these functions in innovative ways, supporting the realisation of a human rights based approach to the MDGs.

## Targeting marginalised and excluded groups

Though the MDGs contain no explicit obligation to reduce socio-economic disparities, development actors have increasingly recognised the need to tackle inequalities in order to accelerate progress towards the MDGs. Equality and non-discrimination are core principles of international human rights law and so form a key element of a human rights based approach to the MDGs. NHRIs have exercised different functions, in particular their reporting function, to highlight uneven progress on the MDGs and to uncover hidden disadvantages faced by particular groups when looking at national averages.

In Malaysia, for example, the Human Rights Commission (SUKAHAM) partnered with UNDP Malaysia and the Economics Faculty at the National University of Malaysia to disaggregate data used in the 2005 MDG Report in order to uncover 'red pockets' of poverty and shape

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<sup>346</sup> Committee on Economic, Social & Cultural Rights, *General Comment No. 10 The role of national human rights institutions in the protection of economic, social and cultural rights*, 14 December 1998, UN Doc. E/C.12/1998/25, para.3.

ethnic differentials in social, health and economic outcomes. The disaggregated data shows the geographically remote indigenous communities of Sabah, and Sarawak had internal poverty rates as high as 20%, which is disproportionate compared to the national average of 5%. Over the next 18 months, SUHAKAM and UNDP carried out advocacy activities in a variety of fora, including formal submissions to the Economic Planning Unit as it developed the Ninth Malaysian Five Year Development Plan. The plan was the first to specifically address the plight of indigenous peoples and included ‘ambitious poverty and equity targets’. As a result, novel budgetary allocations have been made to the Sarawak and Sabah regions.<sup>347</sup>

## Facilitating community participation in decision-making

A second element of a human rights based approach to the MDGs is citizens’ right to meaningfully participate in developing, implementing and monitoring the policies, programmes and strategies enacted to meet the MDGs. This, in turn, increases legitimacy of the MDG agenda at the national level. As Amnesty International stresses, States must also fulfil a number of other rights and duties for the right to participate to be meaningful. These include rights to freedom of expression and association and access to information, as well as the duty to facilitate conditions where human rights defenders can work.<sup>348</sup>

The Commonwealth Guidelines on Best Practice for National Institutions highlights facilitating citizens’ participation in public affairs as a key activity for NHRIs. Specifically, the guidelines advise that NHRIs should:

*work towards facilitating public awareness of government policies relating to economic and social rights and encourage the involvement of various sectors of society in the formulation, implementation and review of relevant policies.*<sup>349</sup>

Some NHRIs have focused on facilitating participation in development processes, in particular at the community level. For example, between 2008 and 2010 the Commission on Human Rights Commission of the Philippines (CHRP) and New Zealand Human Rights Commission (NZHRC) conducted a two-year bilateral project. The project used a community development approach to assist three indigenous communities in the Philippines to identify and prioritise human rights issues and implement plans to address them. Economic, social and cultural rights issues were raised by all three communities, including concerns such as high levels of illiteracy; loss of livelihoods; malnourishment of children; and lack of professional health workers, health centres and medicine.<sup>350</sup> At the end of the project, the Mayor of a municipality where one of the communities

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347 HuriLINK Website, ‘Malaysia—Detail’. Viewed 16 November 2011 at: [http://www.hurilink.org/malaysia\\_detail.php](http://www.hurilink.org/malaysia_detail.php)

348 Amnesty International, above note 5, at p.10.

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350 See CHRP & NZHRC, *Building Human Rights Communities: the experience of three indigenous peoples in the Philippines*, 2010.

resided observed, 'people are participating more in the council's consultative processes' and committed to adopting the human rights priorities, identified by the community, in council's annual plan and investment plan.<sup>351</sup>

## Prioritising human rights in policy choices and resource allocation

The crucial link between resources and results has been made explicit in the MDG agenda in recent years, for example in contact of the Global Strategy for Women and Children's Health. OHCHR notes that while a human rights based approach to the MDGs does not dictate what policies should be adopted or how resources should be allocated, it does provide a framework for assessing the reasonableness of such choices. In particular, by showing whether a particular policy or resource decision will:

- result in other human rights being violated;
- cause an absolute decline in the realisation of rights, contravening the principle of non-retrogression;
- be adequately directed towards realising human rights and ensuring equality, including gender equality; or
- provide adequate resources and allow sufficient policy space.<sup>352</sup>

As noted above, NHRIs perform a range of advisory functions to government. Through these functions they assess laws, policies, practices and budgets against this framework.

To begin with, NHRIs have exercised their advisory role to ensure the national legal framework provides clear, legally binding, standards on economic, social and cultural rights. At a fundamental level, this includes advocating constitutional protections for these rights. For example, in Nepal, economic, social and cultural rights are protected in the Interim Constitution and the National Human Rights Commission advocates for their continued protection, as the process of agreeing on a final constitution progresses.<sup>353</sup> More broadly, NHRIs review proposed laws and policies in development-related areas, such as social protection, livelihood security and poverty reduction to determine compliance with human rights principles and standards. For example, in 2010 the Afghan Independent Human Rights Commission (AIHRC) reviewed a draft bill on the protection of destitute persons and families. AIHRC provided comments and recommendations aimed at improving legislation in accordance with international human rights standards. These recommendations were largely accepted and incorporated into the final law.<sup>354</sup>

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351 Ibid., at p.13.

352 OHCHR, *Claiming the MDGs*, above note 5, at p.12.

353 Interview with Commissioner Gauri Prahm, Geneva, Switzerland, 18 May 2011.

354 AIHRC, (2010/2011) *First Quarterly Report*, p.7. Viewed 14 November 2011 at: [www.aihrc.org.af/2010\\_eng/Eng\\_pages/Reports/First%201389%20Quarterly%20Report%20\(English\).pdf](http://www.aihrc.org.af/2010_eng/Eng_pages/Reports/First%201389%20Quarterly%20Report%20(English).pdf)

Second, it has been suggested that recommendations from NHRIs can help governments strategize the prioritisation of development objectives to meet the MDGs.<sup>355</sup> In some cases, an institution will be given an explicit mandate to do this. In the Philippines, for example, CHRP is the convener of committee on implementing the country's development plan.<sup>356</sup> In other cases, policy guidance can come from a country's human rights action plan. Several countries in the region have adopted such plans, with NHRIs playing a key role in their development.<sup>357</sup> Recommendations made in the context of specific investigations can also guide policy. In India, for example, the National Human Rights Commission (NHRC) developed a 'National Action Plan to Operationalise the Right to Health Care' in 2004. The plan contained extensive recommendations for reforming the health sector, such as enacting a public health services act; defining a list of essential services to be offered at each tier of the health system; increasing the central government's budgetary provisions for public health to 3% of GDP; and setting up a health services regulatory authority.<sup>358</sup>

Specifically, NHRIs can identify and encourage states to adopt national targets and indicators for framing development policies reflecting their obligations to progressively realise economic, social and cultural rights. Recognising concerns raised by human rights actors about global targets set by the MDGs,<sup>359</sup> OHCHR suggests States:

- adapt current indicators to human rights: e.g. disaggregate data to show marginalisation;
- add complementary indicators to measure existing MDG targets: i.e. include indicators measuring the efforts a state has taken as well as outcomes it has achieved; or
- identify additional indicators for new targets.<sup>360</sup>

In this light, the National Human Rights Commission of Nepal convened a working group on economic, social and cultural rights in 2009 made up of representatives from the various national commissions, government, civil society and OHCHR. Through consultations with local, national and international stakeholders, the working group identified indicators for the rights to food, housing, health, education and work that would be applicable to the national context.<sup>361</sup> A user guide for the indicators was released in September 2011 and the commission expects the indicators to 'actively assist policy makers in the formulation of improved plans, programmes and policies to improve the enjoyment of these fundamental human rights in Nepal'.<sup>362</sup>

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355 UNDP, *Making the Link*, above note 5, at p.26.

356 Interview with Loretta Rosales, Chairperson, Geneva, Switzerland, 19 May 2011.

357 Burdekin, above note 21, at p.91.

358 See NHRC Website, 'Recommendations of National Action Plan to Operationalise the Right to Health Care. Viewed 14 November 2011 at: <http://www.nhrc.nic.in/dispatchArchive.asp?fno=874>.

359 See Amnesty International, above note 5, at pp.8-10.

360 OHCHR, *Claiming the MDGs*, above note 5, at p.10.

361 NHCR, *Indicators for Monitoring Economic, Social and Cultural Rights in Nepal*, 2011, p.3.

362 NHRC, Human Rights Newsletter, Vol.7 , Issue 3/4, Sept – Oct 2011, p.3.

Finally, NHRIs can also evaluate whether resources allocated to sectors relevant to the MDGs, such as agriculture, education, health, water and sanitation, the environment, land and housing, employment and infrastructure reflect the government's obligation to allocate maximum available resources to economic, social and cultural rights. For example, in Jordan the National Centre for Human Rights conducted an initial study reviewing the budgetary allocations for health, education and employment between 2000 – 2010. The study raised issues about downward trends in spending, which the Centre recommended be the subject of further research.<sup>363</sup> To date, budget analysis has been an underutilised tool by NHRIs. However, it is encouraging that other institutions in the region, such as the Human Rights Commission of the Maldives and the Mongolian Human Rights Commission, have expressed interest in conducting this kind of work in the future.<sup>364</sup>

## Ensuring accountability and remedies for human rights violations

At the international level, monitoring states' efforts to meet the MDGs is generally limited to voluntary reports submitted by states themselves for a largely external audience, which, Amnesty International notes, 'lack an in depth assessment of progress' and are not updated with sufficient frequency.<sup>365</sup> As a consequence, the concept of accountability 'often equated with monitoring and evaluation', is not always particularly strong.<sup>366</sup> For this reason, accountability mechanisms built into the human rights system can provide important oversight of activities undertaken to meet the MDGs.

In terms of national accountability, NHRIs' quasi-judicial function has been frequently highlighted as a key redress mechanism in the context of a human rights based approach to the MDGs.<sup>367</sup> Indeed, a significant number of complaints received by NHRIs concern development-related rights violations. In India, for example, NHRC reported that in 2010 it investigated complaints on environmental pollution, facilities in hospitals, development-related displacement, and the denial of education.<sup>368</sup> Beyond individual complaints, NHRIs' investigatory function make them uniquely placed to look into systemic or structural dysfunctions that create, perpetuate or exacerbate rights violations and inhibit progress towards the MDGs. Some institutions have exercised this function by conducting national

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363 NCHR & UNDP, *The actual Expenditure of the Jordanian Government Budgets on Education, health and Employment, an evaluative study: 2000-2010*, 2011, Executive Summary, pp.7-8.

364 Email correspondence dated 31 October 2011 and 4 November 2011, respectively.

365 Amnesty International, above note 5, at p.11.

366 OHCHR, UNICEF & Norwegian Centre for Human Rights, *Human Rights and MDGs in Practice: A review of country strategies and reporting*, 2010, p.29.

367 See note 6 above.

368 NHRC, *Activities of the National Human Rights Commission of India for the year 2010-2011*, 2011, para.13. Viewed 16 November 2011 at: <http://www.asiapacificforum.net/about/annual-meetings/16th-thailand-2011>

inquiries.<sup>369</sup> Again, the Indian commission provides an example of this kind. In 2004, NHRC conducted a series of public hearings around the country on access to health care. At the hearings, individuals and groups who had suffered denials of the right to health care—in particular denials resulting from structural deficiencies—could present their cases before a panel made up of a commissioner and state level public health officials.<sup>370</sup> The hearings informed the commission's action plan on the right to health, discussed above. In Malaysia, SUHAKAM currently has an inquiry underway on land rights of indigenous peoples. In the Maldives, the Commission is committed to commencing an inquiry on education for children with disabilities next year and the Palestinian Commission is also looking at carrying out an inquiry next year on employment for people with disabilities.

In addition to being accountability mechanisms in their own right, NHRIs are able to strengthen other national mechanisms. For example, they may advise regulatory bodies in sectors relevant to the MDGs on how to integrate human rights standards into their reviews or they may make amicus interventions to guide courts on how to interpret and appropriately apply international human rights instruments. Where the legal system allows, NHRIs may pursue public interest litigation themselves. In Mongolia, for example, the commission took a case to the Supreme Court in 2002 involving thousands of rural and nomadic citizens who had migrated to Ulaanbaatar and a number of other provincial capitals. The migrants were charged a substantial 'resettlement fee' to register for basic services, which the majority were unable to pay.<sup>371</sup> The commission argued the fee was unconstitutional, as it infringed migrants' rights to freedom of movement, residence within the country and access to social welfare. The Court agreed, annulling the resolution of Ulaanbaatar City Council who imposed the fee. Following the decision, other provincial councils voluntarily annulled similar resolutions and migrants have since been able to register for services.<sup>372</sup>

NHRIs also play a key role in terms of international accountability. Independent information provided by an NHRI can carry considerable authority either to corroborate or challenge the state's interpretation of its performance. At the same time, states should, theoretically, be more receptive to international critique if it is underpinned by information gathered by an official process at the national level. Further, as international mechanisms lack comprehensive follow up procedures at the national level, NHRIs are also an important part of promoting implementation of their recommendations.

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369 See Burdekin, above note 21, at pp.87-90. The Australian Human Rights Commission pioneered this methodology and has conducted many national inquiries over the past 30 years, most of them on economic, social and cultural rights issues (e.g. on child homelessness, mental illness, rural and remote education).

370 NHRC Website, 'Public Hearings on Access to Health Care Delivery System'. Viewed 16 November 2011 at: <http://www.nhrc.nic.in/disparhive.asp?fno=796>

371 The case was brought following an 'extensive investigation' by the commission, which documented how the inability to pay the resettlement fees impacted access to basic services such as education, health, employment and social security. Burdekin, above note 21, at p.82.

372 Email correspondence, dated 9 November 2011.

In practice, international human rights mechanisms have not to date played a prominent role systemically monitoring states' efforts to meet the MDGs,<sup>373</sup> and NHRIs' interaction with the UN human rights system in relation to economic, social and cultural rights is still maturing. Nevertheless, some institutions in the region, including New Zealand, Afghanistan, Australia, Korea, and the Philippines, have submitted information to the Committee on Economic, Social and Cultural Rights in recent years and the Committee has increasingly included references to NHRIs in its concluding observations. Likewise, a number of special procedure mandate holders have noted positive engagement with NHRIs on economic, social and cultural rights, particularly in the context of country visits.

A particular mechanism NHRIs have actively engaged in at the international level is the universal periodic review (UPR) process. In 2010 and 2011 the institutions of Australia, the Maldives, Mongolia, Nepal, Thailand and Timor-Leste made submissions on their country's human rights record. These reports generally did not comment on the country's MDG performance explicitly. However, economic, social and cultural rights issues featured prominently. As well as reporting on the level of enjoyment of particular rights (e.g. literacy and school enrolment rates for marginalised groups<sup>374</sup>), the reports frequently commented on gaps or weaknesses in laws, policies and programmes (e.g. the lack of inter-ministerial cooperation to control the quality of supplies for school feeding programs<sup>375</sup>) and made recommendations for addressing these.

A number of economic, social and cultural rights issues raised by NHRIs in their reports were taken up by members of the Human Rights Council in their interventions during debate on the country's report and were subsequently reflected in recommendations to the government; which were frequently accepted by the government. To ensure the accepted recommendations are actually implemented, a number of NHRIs in the region have convened committees to monitor progress. For example, SUHAKAM reported on the implementation of Malaysia's UPR recommendations to the Human Rights Council in September 2011. The report acknowledged progress on a number of economic, social and cultural rights issues, while also highlighting areas that require further attention.<sup>376</sup>

## The institutional significance of national institutions

NHRIs in the Asia Pacific have been subtly 'redefining the state's agenda' in relation to economic, social and cultural rights; creating 'new rules' for state agencies to follow; holding governments to account for their actions, and 'shifting social expectations' about

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373 Amnesty International, above note 5, at p.14.

374 National Human Rights Commission of Nepal, National Women Commission of Nepal & National Dalit Commission of Nepal, *The Report of the NHRI of Nepal on the UPR Processes*, 2010, para.31.

375 PHRJ, *Joint submission of the Office of the Provedor for Human Rights and Justice and civil society organisations in Timor-Leste*, 2011, para.9.

376 SUHAKAM, *Information presented by the Human Rights Commission of Malaysia to the Eighteenth Session of the Human Rights Council*, 6 September 2011, UN Doc. A/HRC/18/NI/1.

what is appropriate and acceptable governmental behaviour.<sup>377</sup> In this way, NHRIs fulfil what can be described as a series of ‘bridging’ roles.<sup>378</sup> Taken together, these bridging roles uniquely place NHRIs to advance economic, social and cultural rights, with a view towards strengthening synergies between human rights and the MDGs.

First, NHRIs bridge the divide between the national, regional and international human rights systems, having formal recognition in all arenas. Their national legislative basis provides a legally defined relationship with the state—one which gives them specific duties and powers in relation to international human rights law. Because NHRIs take UN human rights instruments as their core frame of reference, a ‘triangular’ relationship exists between international human rights systems, the state and the NHRI, with information flowing to and from each point.<sup>379</sup> NHRIs could help increase the prominence of the MDGs on the international human rights agenda by encouraging states to address the MDGs in reports to the UN human rights instruments, as well as by explicitly linking activities to the realisation of specific MDGs in their own reports to these instruments.

Second, NHRIs bridge the divide between government and civil society.<sup>380</sup> Thus, as Okafor and Agbakwa argue, the value of an NHRI comes not just from ‘what it does’, but also from ‘what other agents are able to do with it.’<sup>381</sup> Again, the fact that NHRIs take human rights treaties as their core mandate is ‘strategically vital’ in this respect. On the one hand it bolsters them against attempts to co-opt human rights by the state. On the other hand, it limits ‘extreme definitions of human rights’ by civil society groups that risk provoking conservative reactions.<sup>382</sup> In this light, NHRIs in the region have convened effective interactions between duty bearers, civil society and rights holders about the MDGs. SUHAKAM, for example, co-organized a High-Level Policy Dialogue on ‘A Human Rights Perspective on MDGs and Beyond’ with UNDP in 2005, creating space for different actors to voice their concerns about issues and challenges as well as brainstorming recommendations related to the MDGs in Malaysia.<sup>383</sup> This ‘convening’ role will again be crucial ensuring genuine local participation for defining a human rights based development agenda post-2015.

Third, NHRIs bridge the artificial divide between civil, political, economic and social rights; both in the NHRI mandate and in practice. NHRIs are regularly required to deal with issues

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377 Cardenas, above note 8, at p.31.

378 See Corkery and Wilson, above note 23.

379 Carver, R, ‘A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law’, *Human Rights Law Review*, Vol.10, 2010, p.20.

380 See Smith, A, ‘The Unique Position of National Human Rights Institutions: A Mixed Blessing?’, *Human Rights Quarterly*, Vol.28, 2006.

381 Okafor, O. C. & Agbakwa, S, ‘On Legalism, Popular Agency and “Voices of Suffering”: the Nigerian National Human Rights Commission in context’, *Human Rights Quarterly*, Vol.24, 2002, pp.688-689.

382 Eldridge, above note 9, at p.210.

383 SUHAKAM & UNDP, *High Level Policy Dialogue “A Human Rights Perspective on MDGs and Beyond”: new development targets, Manila, Malaysia, 26 July 2005, Proceedings*. Viewed 16 November 2011 at: [http://www.undp.org.my/uploads/Human\\_Rights\\_Perspective\\_on\\_MDGs.pdf](http://www.undp.org.my/uploads/Human_Rights_Perspective_on_MDGs.pdf)

that 'defy conventional divisions' between civil and political and economic and social rights.<sup>384</sup> This makes NHRIs well placed to uncover and respond to barriers that may limit citizens' enjoyment of their economic, social and cultural rights or their participation in development processes. For example, in the Philippines community development project, one community reported fear of harassment and extra-legal and unresolved killings by armed groups and state agents at checkpoints hindered their ability to transport products,<sup>385</sup> affecting their livelihoods. Similarly, in its UPR submission, the Human Rights Commission of Thailand raised concerns about the fact that community leaders rallying against industrial projects were facing threats.<sup>386</sup>

Finally, NHRIs bridge what might be seen as the 'tactical divide' in human rights between 'naming and shaming', reactive, violations based or oppositional approaches, and proactive monitoring and advisory approaches. As seen in the above discussion, NHRIs generally work with a broader set of 'tools' than the judiciary or civil society groups. In India, for example, the commission was able to uncover dysfunctions in the health sector through public hearings, and make concrete recommendations for addressing those shortcomings. In this way, NHRIs can offer states both incentives for and disincentives against adopting a human rights based approach to the MDGs.

## Engaging national institutions on economic, social and cultural rights: Challenges and opportunities

High expectations have been placed on NHRIs to overcome governments' resistance to the international human rights system in the Asia Pacific. Nevertheless, ensuring states meet their obligations to recognise and implement economic, social and social rights remains 'one of the greatest challenges confronting NHRIs in the Asia Pacific region.'<sup>387</sup> The degree of success an institution will achieve depends on a number of legal, political, financial and social factors affecting the institution both internally and externally.

To begin with, an institution should have a clear mandate and defined powers to address economic, social and cultural rights. However, despite the strong focus on economic and social rights in the 'Asian values' discourse, few states in the region have enacted strong, legally enforceable, constitutional provisions on economic and social rights, instead defining them as directive principles guiding government policy.<sup>388</sup> This has a flow on effect for the work of the country's institution. The Committee on Economic, Social and Cultural Rights has noted while the establishment of an NHRI is one step a state can take

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384 Ibid, at 76.

385 CHRP & NZHRC, above note 36, at p.15.

386 NHRC, *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*, para.16

387 Burdekin, above note 21, at p.84.

388 E.g. in Thailand, economic and social rights are covered under 'Directive Principles of Fundamental State Policies', which are not justiciable.

to progressively realise the Covenant's rights, this role 'has too often either not been accorded to the institution or has been neglected or given a low priority by it'.<sup>389</sup> The Commonwealth Secretariat nevertheless counsels NHRIs to:

*employ all available means to respond to inquiries related to the advancement of economic, social and cultural rights, whether or not [their] enabling statute or national constitutions recognise [such] rights as justiciable.*<sup>390</sup>

NHRIs in the region have indeed done this. In India for example, the commission is mandated to address rights 'embodied in the International Covenants *and enforceable by courts in India*'.<sup>391</sup> Although the only rights enforceable in Indian courts are 'fundamental rights' enshrined in the Constitution, the commission has followed the Supreme Court's interpretation of the right to life as encompassing a broader range of economic and social rights. In the Philippines, the CHRP only has powers to investigate human rights violations 'involving *civil and political rights*.' The Supreme Court ruled this to be an exclusion of economic, social and cultural rights.<sup>392</sup> However, the CHRP has adopted a system of 'investigative monitoring', enabling it to respond to a large number of complaints concerning economic and social rights by drawing on its other powers.<sup>393</sup>

Secondly, an institution requires organisational capacity to deal with economic, social and cultural rights. According to OHCHR, many NHRIs lack an 'understanding of the legal nature and content of economic, social and cultural rights'.<sup>394</sup> Staff may recognise the importance of indivisibility and interdependence of rights. However, they may be insufficiently trained to deal with economic, social and cultural rights issues. On top of this, building institutional capacity on development-related issues may be given a lower to priority compared to building capacity on more urgent 'core' protection issues, such as torture, summary executions, arbitrary detention and disappearances.<sup>395</sup>

Accordingly, while many NHRIs have successfully influenced public policy in the political sphere, their voices have been less prominent in the socio-economic sphere. Engaging in debates affecting employment, health, housing, social security, and education requires knowledge of how these issues manifest. However, complex social arrangements, legal systems, and economic structures give rise to violations in the context of economic and

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389 CESCR, above note 32.

390 Commonwealth Secretariat, *National Human Rights Institutions: Best Practice*, 2001, p.33.

391 Section 2(d) of the *Protection of Human Rights Act 1993* (emphasis added).

392 Quisumbig, P, 'The Protection Role of the Philippines Human Rights Commission', in Ramcharan, B ed. *The Protection Role of National Human Rights Institutions*, 2005, p.161.

393 *Ibid.* Section 18 of the Constitution also grants the CHRP a number of other powers relating to human rights more broadly, including 'to monitor the Philippine government's compliance with the international treaty obligations on human rights', which does include the Covenant on Economic, Social and Cultural Rights.

394 OHCHR, *Handbook*, above note 26, at viii.

395 See UNDP & OHCHR, *Toolkit for Collaboration with National Human Rights Institutions*, 2010, p.86. Viewed 14 November 2011 at: <http://www.ohchr.org/Documents/Countries/NHRI/1950-UNDP-UHCHR-Toolkit-LR.pdf>.

social rights. These are often not easily attributed to one-off incidents or particular duty bearers. For example, the Commonwealth Secretariat counsels NHRIs to:

*advise the government on the development and implementation of economic policies to ensure economic and social rights of people are not adversely affected (e.g. structural adjustment programmes and other aspects of economic management).*

In practice, knowledge regarding the impact of economic and fiscal policies on rights—beyond a basic understanding of how the economy works and how public finance is organised—varies significantly from institution to institution, depending on availability of resources and staff expertise. While NHRIs in the region have sought to contrast governments' corporatist, state-capitalist or neoliberal development models with a more egalitarian vision, their recommendations have not always been in tune with the country's economic realities. For example, in a background paper on the role of NHRIs on the Asian economic crisis of the late 1990s, the APF quoted an analysis concluding:

*It is clearly premature to analyse the impact of the crisis on poverty or on the distribution of income and wealth in any of the severely affected ASEAN economies.... While few serious commentators doubt there will be a sharp fall in household incomes... it is far from clear how the decline will affect different regions, and different socio-economic groups.<sup>396</sup>*

The discussion paper asked, in these circumstances, how well equipped are NHRIs to contribute to the formulation of responses to these claims? What do NHRIs' own statistics, experience and contacts have to say about actual impacts of a crisis or some systemic problem underlying violations of economic and social rights? Do NHRIs have data that can be used to quantify the consequences and identify the groups particularly affected? The paper concluded it was unclear whether or not NHRIs would be sufficiently equipped to formulate a response to this complexity; an issue of equal relevance in the context of the MDGs.

In the context of the MDGs, conceptual challenges in operationalising a human rights based approach go beyond NHRIs. As Philip Alston emphasises, hesitating to use a human rights framework is 'deeply entrenched' and development actors resisting change towards a human rights based approach is based on more than ignorance.<sup>397</sup> The reason for this stems, in part, from the fact that a human rights based approach is not prescriptive. It does not provide clear answers. This is especially true in debates about macro-economic policy.

In Asia, 'more conventional economic policies for promoting growth in the short-to-medium term are still often centre-stage', with an emphasis on macroeconomic stability, trade liberalisation, foreign investment, infrastructure, privatisation and commercialisation; the

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396 APF, *Theme Paper: National Human Rights Institutions and Economic, Social and Cultural Rights*, presented to the Fourth Annual Meeting of the APF, 1999, p.9. Viewed 14 November 2011 at: [http://www.asiapacificforum.net/about/annual-meetings/4th-philippines-1999/downloads/thematic-issues/esc\\_rights.pdf](http://www.asiapacificforum.net/about/annual-meetings/4th-philippines-1999/downloads/thematic-issues/esc_rights.pdf).

397 Alston, above note 6, at p.47.

assumption being benefits will 'trickle down'.<sup>398</sup> The challenge for advocates of a human rights based approach to the MDGs is to articulate, with a reasonable degree of certainty, an alternative macro-economic framework allowing for more resources to be allocated to the social sector. However, as NHRIs' advisory functions are generally spelt out in very broad terms, most have not developed the 'skill set' required to engage in this area.

An institution's ability to engage with key stakeholders on complex debates will also depend on the dynamic of its external relationships. Anne Smith describes these relationships as moving 'downwards' to partners, beneficiaries and supporters and 'upwards to government', parliament and funders.<sup>399</sup> By virtue of their 'unique' place between government and civil society, the central challenge for NHRIs, as Smith articulates, is to guard their independence, but at the same time maintain constructive relationships with both.

To begin with, it is important to remember NHRIs generally lack powers to enforce recommendations. This means when the interest of a government department is not to implement recommendations, they simply won't. For this reason, it is necessary for NHRIs to foster 'government goodwill' to facilitate their work.<sup>400</sup> As discussed above, entrenched resistance to a human rights based approach to the MDGs can make calling for such a paradigm shift difficult to complete.

Further, the fact that (for the most part) NHRIs are government funded creates an ongoing tension maintaining the conceptual space from which to critique 'the hand that feeds you'.<sup>401</sup> Managing this dynamic is complex and underfunding is persistent.<sup>402</sup> In some cases, institutions have faced budget cuts after criticizing the government and the current global financial crisis has provided a convenient veil for such action.<sup>403</sup>

For institutions receiving support from international agencies or bilateral donors, there is risk that the institution's planning may be driven by external priorities. The experience of the PHRJ in Timor-Leste illustrates such challenges. The Provedor's office has received assistance from the World Bank, the United Nations Integrated Mission in Timor-Leste, UNHCR, OHCHR, USAID and others. However, the fact that donors differ in their priorities has reportedly fragmented the Provedor's activities.<sup>404</sup> More broadly, the international community, especially OHCHR, has tended to prioritise support to NHRIs to address 'core'

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398 OHCHR et al, *Human Rights and MDGs in Practice*, above note 52, at p.26.

399 Smith, above note 66, at p.906.

400 Eldridge, above note 9, at p.222.

401 Smith, above note 66, at p.920.

402 OHCHR, *Survey on National Human Rights Institutions: report of the findings and recommendations of a questionnaire addressed to NHRIs worldwide*, 2009, p.15. Nearly half of the survey respondents in all regions (and slightly higher in Africa) indicated that their budget is insufficient.

403 Asian NGO Network on National Human Rights Institutions (ANNI), *Report on the Performance and Establishment of National Human Rights Institutions in Asia*, 2011, p.181.

404 HURIGHTS Website, 'Ombudsman for Human Rights: The Case of Timor-Leste', Viewed 16 November 2011 at: <http://www.hurights.or.jp/asia-pacific/047/02.html>.

protection issues.<sup>405</sup> This has arguably perpetuated a bias towards civil and political rights, compared to economic, social and cultural rights.

It is important external support to NHRIs not 'reorient accountability upward, away from the grassroots, supporters and staff'.<sup>406</sup> Cooperative relationships with civil society groups, recognised in the Paris Principles as integral to NHRIs' legitimacy, are essential if NHRIs are to effectively promote a participatory approach to the MDGs. Nevertheless, such relationships can be quite complex in practice. On one hand, NHRIs depend on civil society to build pressure for the implementation of recommendations. At the same time, NHRIs must remain independent from NGOs if they are to be an effective channel through which the community's grievances can be brought to the attention of the government. As a result of this duality, it is not uncommon for NHRIs and NGOs to differ in their opinions about the appropriate role for the NHRI.

Philip Alston rightly raises the concern that calls for participation in the MDG process risk becoming hollow and tokenistic if they do not spell out what this means in practice.<sup>407</sup> In the Asia Pacific region, NHRIs and civil society sought to articulate practical channels for participation in the Kandy Programme of Action, adopted in 1999. The Declaration calls for the adoption of processes and mechanisms ensuring NHRIs engagement in transparent, inclusive and substantive consultation with NGOs.<sup>408</sup> While a number of NHRIs have established such mechanisms and processes,<sup>409</sup> NGOs in the region have expressed concern that NHRIs sometimes remain 'cosmetic' and have urged serious consideration be given to how such mechanisms and processes (which should themselves be established in a participatory manner) can be real and relevant.<sup>410</sup>

More and more, UNDP has provided crucial support to NHRIs. In January 2008, 94 UNDP country offices reported active working relationships with NHRIs, providing resources, capacity, and expertise—including legal and management expertise. In many cases, this occurred in partnership with OHCHR in conglomeration with an international or relevant

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405 OHCHR Website, 'OHCHR and NHRIs'. Viewed 16 November 2011 at: <http://www.ohchr.org/en/countries/nhri/pages/nhrimain.aspx>.

406 Smith, above note 66, at 922.

407 Alston, above note 6, at pp.50-51.

408 *Workshop on National Institutions and Non-Governmental Organisations: Working in Partnership, Kandy, Sri Lanka, 26 to 28 July 1999, Kandy Programme of Action*, para.2.1.

409 Respondents to the OHCHR Survey indicated that they had undertaken activities to improve or enhance relationships with civil society such as meetings, forums and roundtables with civil society, as well as joint projects undertaken by the institution with NGOs and civil society groups. Above note 88, at p.36.

410 ANNI, *Review of Kandy Program of Action 1999: Towards a Kandy Plus Program 2011, statement to the 1<sup>st</sup> Biennial Conference of the Asia Pacific Forum of National Human Rights Institutions, Bangkok, Thailand, 7 to 8 September 2011*, paras. 6 (vii) and 7(i).

regional network of NHRIs.<sup>411</sup> This engagement is expected to increase with the launch of a toolkit for UN country teams on collaborating with NHRIs in December 2010. Greater engagement by UNDP is a significant opportunity and has the potential to strengthen NHRIs' capacity to engage in governments' development agendas and poverty reduction strategies, including in relation to infusing the MDGs with a human rights based approach. Importantly, UNDP support can help build NHRIs' internal capacity and strengthen external relationships with stakeholders.

In relation to an institution's internal capacity, UNDP can engage with countries taking steps to establish an institution, in collaboration with its partners, to ensure it is given a strong and specific mandate to both promote and protect economic, social and cultural rights. It can also play a key role by strengthening the internal capacity of existing institutions. This might include encouraging NHRIs to more explicitly focus on the MDGs, for example when reporting to international human rights mechanisms. UNDP may also train NHRIs to use supplementary methodologies and working methods—including building competency in fact-finding; community consultation; collecting and analysing primary and secondary data; and analysing economic, including budgetary, information—to monitor economic, social and cultural rights and evaluate MDG related initiatives.<sup>412</sup>

Importantly, UNDP can help NHRIs identify how to holistically integrate economic, social and cultural rights issues, including the MDGs, into their strategies and work plans. This could include assisting NHRIs when carrying out capacity needs assessments, which UNDP, OHCHR and APF have been doing in the Asia Pacific since 2008. Such assessments support APF member institutions to identify current capacities with room for growth, in order to fulfil the NHRI mandate by promoting and protecting human rights at the national level. To date, these assessments have been conducted with the NHRIs of Afghanistan, Jordan, Malaysia, Maldives, Mongolia, Palestine and Thailand.<sup>413</sup> It might also include assisting an institution to seek greater harmonisation among its donors. In Palestine, for example, bilateral donors to the Independent Commission for Human Rights have signed a Joint Financial Agreement, enabling the commission to align activities and projects over the

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411 Helen Clark, UNDP Administrator, *Address to the 23rd Session of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, Geneva, Switzerland, 23 March 2010*. Viewed 14 November 2011 at: [http://content.undp.org/go/newsroom/2010/march/helen-clark-address-to-the-committee-for-the-protection-and-promotion-of-human-rights.en?sessionid=a\\_uQBb7raV47](http://content.undp.org/go/newsroom/2010/march/helen-clark-address-to-the-committee-for-the-protection-and-promotion-of-human-rights.en?sessionid=a_uQBb7raV47).

412 See Corkery, A, 'National Human Rights Institutions as Monitors of Economic, Social and Cultural Rights', Center for Economic and Social Rights Working Paper, 2010. Viewed 17 November 2011 at: <http://www.cesr.org/downloads/NHRIs%20as%20Monitors%20of%20ESC%20Rights.pdf>

413 See APF Website, 'Capacity Assessments – Asia Pacific Forum'. Viewed 17 November 2011 at: <http://www.asiapacificforum.net/support/capacityassessment>.

next three years to its strategic plan.<sup>414</sup> This is a commendable initiative that should be replicated in the region.

In relation to an institution's external relationships, UNDP is uniquely placed to help coordinate an 'inter-institutional' approach to strengthening a country's democratic institutions. As noted above, NHRIs are but one of a number of national accountability mechanisms. Parliament, the courts, the media, and civil society must also be functioning. However, international assistance tends to focus on a particular mechanism, without focusing on improving the relational dynamics between them.

Most importantly, by virtue of UNDP's mandate to mainstream human rights into development activities, UNDP is in a strong position to support NHRIs build relationships outside the human rights and good governance fields. At the national level, entry points for UNDP might include building relationships with government ministries in finance, planning or infrastructure so NHRIs are a recognised stakeholder involved in the planning cycle for development plans or poverty reduction cycles. At the international level, one entry point might be to support NHRIs meaningful participation in the development of a country's United Nations Development Assistance Framework (UNDAF), as suggested by the toolkit.<sup>415</sup> Another entry point might be to promote linkages between NHRIs' reporting functions and MDG-related reporting, such as proposed 'compacts' between country governments and all major development partners recommended by the Commission on Information and Accountability for Women's and Children's Health.<sup>416</sup>

## Conclusion

Despite being relative newcomers in the field, NHRIs in the Asia Pacific have established themselves as unique actors within the human rights system. The position of NHRIs between the state and civil society has enabled them to subtly redefine the government's agenda; shift expectations about government behaviour; domesticate international standards; and hold governments to account for their actions. The ability of NHRIs to 'bridge' gaps between national and international human rights systems, between government and civil society, between civil and political and economic, social and cultural rights, and between reactive and proactive approaches to economic, social and cultural rights means NHRIs have a key role to play strengthening synergies between human rights and the MDGs.

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414 ICHR Website, 'ICHR Signs Joint Financial Agreement'. Viewed 17 November 2011 at: <http://home.ichr.ps/en/2/20/619/The-Independent-Commission-for-Human-Rights-Signs-Joint-Financial-Agreement-with-Donors%E2%80%99-Consortium-for-future-Cooperation-towards-the-Prote-The-Independent-Commission-for-Human-Rights-Signs-Joint-Financial-Agreement-with-Donors%E2%80%99-Consortium-for-future-Cooperation-towards-the-Protection-and-Promotion-of-Human-Rights-in-Palestine.htm>.

415 UNDP & OHCHR, *Toolkit*, above note 81, at p.83

416 Commission on Information and Accountability for Women's and Children's Health, *Keeping Promises: Measuring Results*, 2011, p.14. Viewed 17 November 2011 at: [http://www.who.int/topics/millennium\\_development\\_goals/accountability\\_commission/Commission\\_Report\\_advance\\_copy.pdf](http://www.who.int/topics/millennium_development_goals/accountability_commission/Commission_Report_advance_copy.pdf)

As the discussion in this chapter showed, NHRIs in the region have carried out mandated functions advancing each of the key elements of a human rights based approach to the MDGs. They have highlighted the situation of marginalised and excluded groups in their reports. They have facilitated community participation in decision-making. They have advised government by prioritising human rights in policy choices and resource allocation, including setting targets to measure progress. They have ensured accountability and remedies for rights violations, as a redress mechanism in their own right and through other mechanisms such as the courts.

Nevertheless, NHRI activity in the area is still emerging. NHRIs have not always met high expectations placed on them to guide governments towards a human rights based approach to development. However, this has not generally been because of any fundamental weakness in NHRIs' mandates. More often, it is because of institutional weakness, competing priorities, limited resources or a lack of expertise and effective working methods. While NHRIs can build on the analytical capacity developed in relation to civil and political rights and to some extent, overcome institutional weaknesses, identifying appropriate supplementary methodologies and approaches for addressing economic, social and cultural rights and allocating priority to their implementation is crucial. UNDP has a key role to play in this respect. Alongside supporting NHRIs in the development of their internal capacity to holistically address the full spectrum of rights, UNDP can aid NHRIs by strengthening relationships with national and international development partners.