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companies can pressure governments to take more concrete steps to compensate victims, for example, through the establishment of state-sponsored trust funds. Germany established a joint US-German trust fund in 2000 to compensate victims of slave labour during the Nazi regime, under the pressure of some 55 class actions brought against German firms in US courts. In this instance, half of the US$4.8 billion fund for the compensation of some 900,000 victims was financed by some 3,000 German companies.

Whether these recent judicial developments will advance the law on non-state liability for international crimes needs to be addressed in relation to the evolution of victims' rights both internationally and domestically. Attempts to determine the international liability of non-state actors for international crimes are not new. Courts have often established that a non-state actor, such as an individual, or even a company or a corporation, can be held responsible for serious human rights violations. In March 2000, a South Korean plaintiff received ¥4.1 million in compensation from a Japanese steel company, NKK, for slave labour during the second world war.

Individuals in the United States over the past decade have begun to sue companies for human rights violations with various degrees of success invoking the Alien Tort Claims Act (ATCA). In 1996, Burmese villagers filed a lawsuit in US courts against the oil company UNOCAL for acts of torture, rape, forced labour, and forced relocation committed in Myanmar in connection with the construction of an oil pipeline. Initially, a federal district court in California rejected UNOCAL's motions to dismiss the case, ruling that the company could be held liable under the ATCA. A further judgment by the district court ultimately dismissed the case on the grounds that the government, rather than corporation agents, had committed the alleged violations. Irrespective of the final outcome, all of these attempts at establishing corporate and individual liability for serious human rights violations form part of a growing practice establishing that first, non-state actors can be sued successfully, and second, that they can be held liable and ordered to pay compensation to the victims.

A question of enforcement

As evidenced in a number of cases, there seems to be a growing recognition of victims' rights, both on the part of political players and the courts. Ironically, the real difficulties for victims often arise when they succeed in getting an award for compensation. The enforcement of compensation judgments against non-state actors, especially foreign individuals or companies, has always been a weak link in victims' access to justice. There have been countless cases where victims were awarded huge exemplary compensation awards, but could never retrieve the actual money from the tortfeasor's assets. This weakness has been especially evident in the history of serious human rights violations litigated in US courts under the ATCA. In the famous 1984 *Filártiga* v. *Peña-Irala* case, the courts awarded damages of more than US$10 million, but the complainants to date have not been successful in enforcing the judgment in Paraguay because the assets, apparently, are located abroad. Similarly, in the *Marcos Litigation* – another high-profile case before US courts – Filipino victims of human rights abuses during the Marcos regime filed a class action against the Marcos estate. In 1995, the court awarded damages for around US$2 billion, but more than ten years later the money remains in the hands of the Philippine government. Victims are currently trying to enforce the judgment in the Philippine courts.

The next step towards the effective realisation of victims' basic right to redress is the prompt enforcement of reparation orders. In the Korean case against the manufacturers of Agent Orange, neither Monsanto nor Dow Chemical seem to own registered property in Korea. Ultimately, whether victims actually receive the compensation they won in the courts will likely depend upon the responsibility of Dow Chemical, Monsanto or SNCF to honour their legal obligations. If corporations fail to pay compensation as the courts have ordered, the likelihood that victims actually get their money will depend upon the degree of inter-state co-operation in ensuring the judgments are enforced. <

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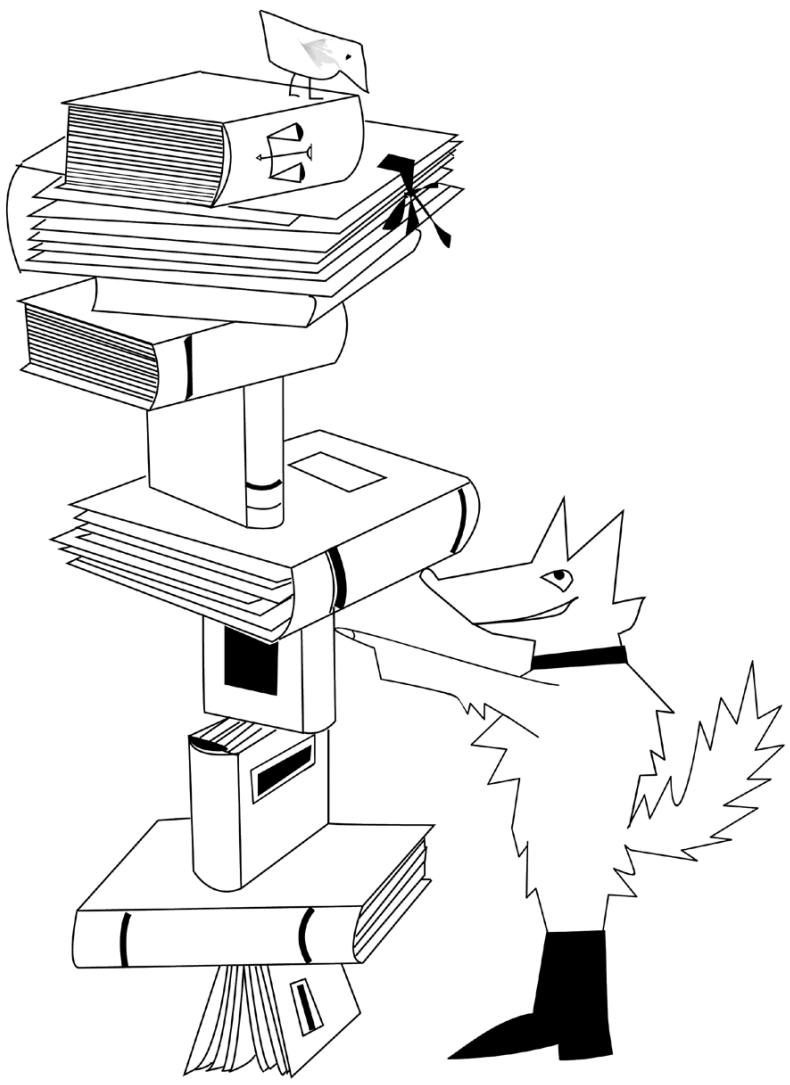
Human rights between Europe and Southeast Asia

Human rights are a source of friction between Southeast Asian and European governments. Southeast Asian politicians generally emphasise principles of sovereignty and non-interference in internal matters, while their European counterparts tend to champion democracy, human rights and good governance beyond their borders. The differences in approach, however, do not seem as daunting today as they once did.



Simone Eysink

Relations between Europe and East Asia have been institutionalised since 1996 in the Asia-Europe Meeting (ASEM), a forum for dialogue between heads of state established by the then 15 member states of the European Union, the seven member states of the Association of South East Asian Nations (ASEAN), China, Japan and the Republic of Korea. ASEM is informal, without official institutions or a secretariat; its main aim is to build trust among its members and to create a framework for future co-operation.

The first ASEM summit in 1996 addressed general aspirations, trade and investment; it was considered a success as it avoided controversial issues. The second summit in 1998 was more problematic – ASEAN had expanded the previous year and now included Vietnam, Cambodia and Myanmar; human rights violations by Myanmar's military government became a particular source of friction between the European and Asian sides. EU member states, consistent with their policy of an arms embargo and economic sanctions against Myanmar, were unwilling to accept it as a participant. In contrast, most Asian states considered Myanmar's political instability and human rights record an internal matter that should not interfere with its participation in multi-lateral meetings or its membership of ASEAN: silent diplomacy and 'constructive engagement' were the way forward. This difference in approach almost derailed the ASEM project: meetings between senior officials and ministers were cancelled, and the summit only went ahead at the last moment due to Thai mediation.

Only seven of the ten ASEAN countries attended the second, third and fourth summits in 1998, 2000 and 2002. Myanmar's participation became an issue again before the fifth ASEM summit in 2004 as the ten new states of the enlarged European Union were automatically accepted. A compromise was reached where Myanmar could attend, but not at the presidential level. This solution, considered far from ideal by many, is again causing trouble in the run up to the sixth summit in Helsinki this November.

EU, ASEAN and the 'Asian way'

The controversy over Myanmar's participation within ASEM points to deeper differences in opinion regarding state sovereignty, regional co-operation and the realization of national society between – generally speaking – ASEM's European and Asian member states. The historical context is crucial. The European states, after a 20th century of unprecedented carnage and human rights abuses, have transferred some of their law-making powers to a supra-national organization that legislates on human rights standards. ASEAN, in contrast, was set up in 1967 by states varying enormously in politics, economy and culture. What they shared was their recently won post-colonial status and the priority of nation-building. ASEAN, far from being an ambitious project for regional co-operation, was a cautious attempt to maintain friendly relations between states. The association was based on the non-binding Bangkok Declaration, where the principle of non-interference in internal matters, or state sovereignty, was considered the cornerstone for co-operation.

Southeast Asian states' greater emphasis on national sovereignty is reflected in their approach to conceptualising and implementing human rights. The focus has been on protection by the states themselves, according to their own 'cultural' norms. Critics of this approach have accused certain Southeast Asian leaders of misusing the argument of cultural differences and sovereignty to hide rights-violating behaviour. Former Malaysian Prime Minister Mahathir Mohamad, a prominent advocate of 'Asian values', proclaimed that human rights privileged 'western values' – most notably individual freedom – and was not suitable for Asia where commu-

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sidering survivors' long-term needs, and may encourage the ICC Victim's Trust Fund to think carefully and creatively about the types of services that need to be supported and nurtured. It also may persuade the Fund to assist research partnerships between NGOs and academics focusing on the efficacy of particular services and the manner in which the long-term needs of survivors can be addressed.

A broader justice

The efforts of international civil society in organising and bringing the Tokyo Women's Tribunal to fruition challenges the adequacy of the international community's response to the needs and rights of victims and survivors following mass atrocities. The tribunal poses a heretofore unasked but important question: what should the international community do to acknowledge the suffering of victims and survivors of war crimes and crimes against humanity in cases where the perpetrators will never be brought to trial? The inevitable limitation of resources will mean that not all crimes within the jurisdiction of the International Criminal Court will in fact be brought to trial. Many countries lack the resources to conduct either trials or truth commissions.

The evidence placed before the tribunal demonstrated that the years of silence that surrounded the issue of the 'comfort system' left the women affected by that system wondering about their value as human beings. They had to live with the physical and psychological damage, while knowing that no one had ever been held accountable for what had happened to them. Whatever dignity has now been restored cannot take away from the years of shame, fear and regret that they have had to endure alone.

We cannot assume that the 'comfort women' will be the last group of survivors to feel this way. This leads to two fundamental questions. What obligation does the international community have to those without access to mechanisms that will provide them with 'justice'? And, if we continue to do nothing, are we complicit in the continuing harm that will be experienced by the survivors? Perhaps it is time to look beyond official state and international organs for means of achieving justice, particularly in the documentation of events and the acknowledgement of victims and survivors. It may be that the significance of the Tokyo Women's Tribunal will be the message it sends to others that something can be done by ordinary people to encourage the healing of victims and to create lasting historical records of previously overlooked history. Having the entire set of documents placed before the tribunal digitized will allow scholars and other interested individuals to study, not only the comfort women system, but the birth and work of an international movement to further women's rights.

'Justice means constant revision of justice, expectation of a better justice.'[3] Through the efforts of civil society, surviving comfort women have been accorded a form of justice. They have been empowered by their participation in the tribunal, and this in turn has enabled them to regain a sense of their dignity and worth. Civil society has ensured that the experiences of victims and survivors will not be forgotten; our understanding of the experiences of women during armed conflict has been enriched by their courage in coming forward to tell their stories. <

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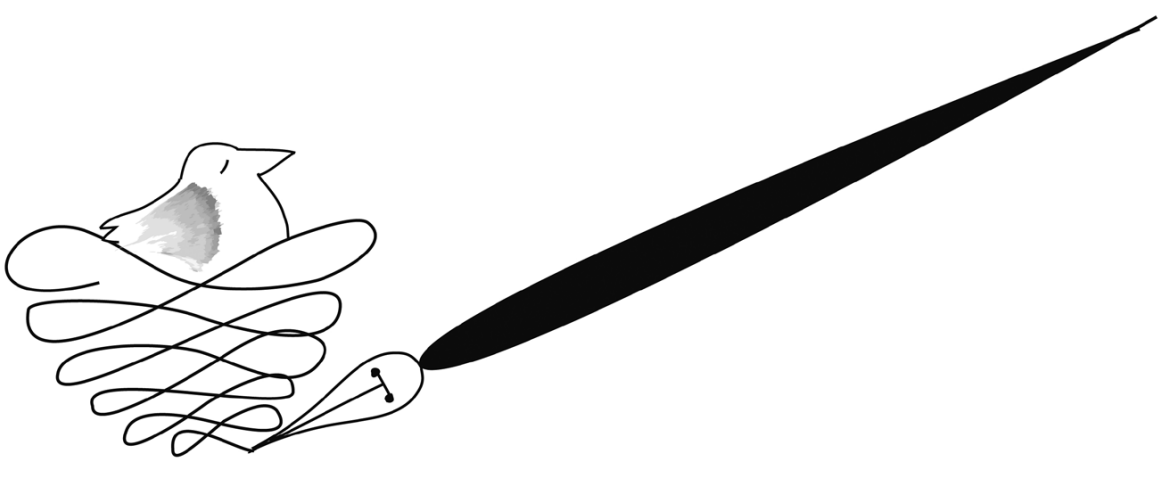
Notes

1. Treaties bind those countries that have ratified them. Customary norms are formed when states act out of a belief that they are required to undertake a particular course of action by their international legal obligations. Treaty and customary law obligations can co-exist. For further information see *The International Court of Justice* (IC) The Hague 2004).
2. See Judgement of the Women's International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery delivered in The Hague, December 2001, paragraphs 81-83. A copy of the judgement can be obtained from the website of the Violence Against Women in War Network - Japan website: www1.jca.apc.org/vaww-net-japan/english/womenstribunal2000/judgement.html
3. Emmanuel Levinas as quoted in Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishing 2000) pp.352-353.

Illustrated by Chiara Dissette



nity, order and harmony were more important. Individual rights should thus be sacrificed to serve wider community interests and national economic development. Such statements, and the fact that until two years ago only five out of ten ASEAN member states had ratified both Covenants on Civil and Political Rights (ICCPR) and Economic, Social and Cultural Rights (ICESCR), led observers to doubt the seriousness of Southeast Asian governments' commitment to human rights in any form.

While the argument of 'Asian values' has been misused by political leaders to serve political interests, it remains plausible that Asian governments have different priorities from western ones – on individual versus community rights, and civil versus social rights. This is born out by the ratification pattern of human rights treaties by European and Asian states. The former favour agreements that apply to individuals based on the Universal Declaration on Human Rights and both Covenants; many Asian states, on the other hand, show a priority for first protecting vulnerable groups such as women and children. All ASEAN member states, with the exception of Brunei Darussalam, are party to the UN Convention for Women (CEDAW) and the UN Convention on the Rights of the Child (CRC).

Recent developments

Southeast Asia over the past five-six years has witnessed a deepening transition towards democratic practices and respect for citizens' rights. Leaders today are less inclined to invoke cultural relativism when discussing issues around human rights and their implementation. In the wake of the 1997-98 financial crisis, Malaysia, Thailand and Indonesia (re-)established national human rights commissions. In 2005 and 2006, Indonesia ratified both Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, while Thailand signed the two Protocols of the Rights of the Child.[1]

Civil society in Southeast Asia is active in promoting human rights. The Asian Commission on Human Rights, which drafted the 'Asian Human Rights Charter – a Peoples' Charter' in the 1990s, is one important initiative. ForumAsia, a network of Asian human rights organisations that promotes, protects, educates and monitors all categories of human rights, is another. Also of note is the Asia-Europe Peoples' Forum, which takes place within the ASEM context. This platform for over 400 Asian and European NGOs is campaigning for inclusion in the ASEM Dialogue, where it wants to see discussion of democratisation. The existence of these groups points to a cautious but discernible trend towards more open discussion of state affairs by NGOs, academics and business communities.

The greater institutionalisation of regional co-operation will likely further the protection of human rights in Southeast Asia. An 'Eminent Persons Group' is currently drafting recommendations for a legally binding ASEAN Charter. The Charter – which will endorse democratic institutions, human rights, transparency and good governance[2] – has yet to be finalised, but it could be a significant step towards the regional human rights treaty that ASEAN member states have been working on for some time.[3] An analogy is the inter-American system of human rights protection, where the Charter of the Organisation of American States became the basis for the American Convention on Human Rights of 1969.

Future challenges

Human rights remain controversial in relations between Europe and Southeast Asia; fundamental differences of opinion remain on implementing 'universal' human rights within specific national contexts. How to deal with human rights violating states such as Myanmar remains a challenge for Southeast Asian governments. Should Myanmar's military government remain included in the system of regional co-operation, or should it be more openly criticised? Although ASEAN states still officially maintain that the situation in Myanmar is an internal matter, under the surface there is growing impatience and more direct criticism; some argue that Myanmar has become a threat to regional stability.

The road ahead will be gradual and delicate. European partners need to acknowledge recent developments in Southeast Asia, and to encourage them rather than trying to speed things up through criticism and pressure. Europe needs to realize that its particular practice of democracy cannot be transplanted root and branch to Southeast Asia. The European states are now more homogenous in political stability and economic development than their Southeast Asian counterparts; the large and politically empowered middle class in Europe did not emerge overnight.

Improvement in the protection of human rights in Southeast Asia will result from dynamics within the region itself, which will lead to a more sustainable and effective result than when lectured to by foreign (former colonial) powers. Respecting the Southeast Asian states and their way of dealing with issues is the right thing to do – without trying to control everything, the way we are used to. <

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1. Office of the United Nations High Commissioner for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties. 10 April 2006. www.ohchr.org/english/bodies/docs/RatificationStatus.pdf
2. Kuala Lumpur Declaration on the Establishment of the ASEAN Charter. Kuala Lumpur, 12 December 2005, paragraph 4.
3. Conclusions and Recommendations of the Workshop for the Establishment of an ASEAN Human Rights Mechanism: Kuala Lumpur, 20-22 June 1997.