

The Emerging Asian-Pacific Court of Human Rights in the Context of State and Non-State Liability

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Prior to embracing the international community, most Asian-Pacific states have experienced hardships in the early 20th century. The Asia-Pacific region witnessed, survived, and was reborn from the ashes left by the Russo-Japanese war and the invasion of Manchuria, World War II, the Korean division and subsequent war, the Vietnam War, and Pol Pot's regime in Cambodia, to say the least. Consequently, millions of lives were lost, and a great deal of rich cultural, philosophical, and religious achievements that were developed up until the 19th century were completely destroyed. In the 21st century, with the rapid development of international justice, the question arising is whether the atrocities of the previous centuries can be prevented through more meaningful engagement in international justice such as the creation of a regional judicial body. If such a body were to exist in the Asia-Pacific region following the examples of our brothers and sisters in Africa, Europe, and the Americas—a so-called Asian-Pacific Court of Human Rights (“APCHR”)—one may consider whether it could serve as a forum of regional justice not only for violations by states, but also non-state actors.

Since the late 20th century, many Asian-Pacific states have experienced accelerated economic development, having joined the international community. In the 21st century, greater numbers of developing Asian-Pacific states have joined in the effort to achieve such economic development. There is no doubt that Asian-Pacific states will play a great role in the economic development of the international community throughout the 21st century.

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Yet the economic development of Asian-Pacific states would become truly meaningful only if it were accompanied by the development of the rule of law and a system of national human rights protection. The disease of corruption and human rights abuses emerging in the wake of economic development can only be cured through the proper application and implementation of the rule of law. Apart from these domestic efforts, Asian-Pacific states also need to actively participate in and contribute to the international effort to enhance the rule of law and human rights protection.

The International Criminal Court functions as the center of such an effort. International crimes, the most atrocious forms of all human rights violations, often demand that the international community work together to tackle the issue given the lack of capacity in any one country to address the problem on its own. As stated in Article 1 of the Rome Statute, State Parties are allowed to try crimes of such extent if it is in their capacity to do so.¹ Thus, states becoming members of the International Criminal Court not only indicate confidence in their respective judicial systems, but also demonstrate support to those developing nations who have yet to reach such a stage.

Many cases of human rights violations that do not reach the seriousness of that of an international crime, by principle, should be managed by each nation's domestic system. In support of such efforts, however, countries have attempted to protect the human rights of their citizens through joint conventions. As a result, various European, American, and African nations were able to establish their respective human rights courts. The only region that has yet to establish such a human rights court is the Asia-Pacific. Considering its population, economic power, and dynamic political situation, there is an even greater need to institute the APCHR than ever before.

The concerns of Asian-Pacific states over possible infringements of their sovereignty vis-à-vis international justice are important, and a regional approach may be a solution that would not compromise but rather promote respect for mutual co-existence. For instance, to bring a case before the African, Inter-American or European human rights systems, all domestic remedies must have been exhausted.² Moreover, before adjudicating a case in the African and American systems, the case must be reviewed by a commission whose members are respectively appointed by the Organization of American States (OAS) and the African Union (AU) to decide, *inter alia*, whether or not cases are admissible and have sufficient merit to be taken to trial.³ Besides ensuring that every applicable and available

¹ Rome Statute of the International Criminal Court, art. 1, U.N. Doc. A/CONF.183/9, 2187 U.N.T.S. 90 (July 17, 1998) (*entered into force July 1, 2002*).

² See Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Arts. 50, 56(5), (*entered into force Oct. 21, 1986*) [hereinafter African Charter]; Organization of American States (OAS), Convention on Human Rights, art. 46(1)(a), Nov. 22, 1969, 1144 U.N.T.S. 123 (*entered into force July 18, 1978*) (reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc. 6 rev. 1 at 25 (1992)) [hereinafter American Convention]; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 35(1), Nov. 4, 1950, 213 U.N.T.S. 222, (*entered into force Sept. 3, 1953, as amended by Protocols Nos. 3, 5, 8, and 11, which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively*) [hereinafter European Convention].

³ See African Charter, *supra* note 3, arts. 30, 55(2), 56; American Convention, *supra* note 3, arts. 35, 46.

domestic remedy has been duly exhausted, the Inter-American and African Commissioners respectively may dismiss any case that does not concern an OAS or AU state's breach of their obligations under the corresponding American or African human rights instruments, which must have been consented to and ratified by the state.⁴ The same facts should not have been brought before any other international body of adjudication,⁵ and the case must have been filed within a reasonable time after the final domestic decision.⁶ The commissioners appointed by the OAS and AU members are, at the end of the day, the gatekeepers of each state's sovereignty, which is a system that ASEAN, ASEAN Plus Three, and even the East Asia Summit could consider for a regional judicial system.

The future APCHR would, at its early stages, focus mainly on state liability, but may also consider the question of corporate accountability at the behest of its members. To this extent it is important to take note of the emerging trend of corporate accountability. As recently held by the Special Tribunal for Lebanon, "in a majority of the legal systems in the world, corporations are not immune from accountability merely because they are a legal—and not a natural—person."⁷ For the sake of academic discussion, let us briefly review the regional human rights systems' take on corporate accountability in order to provide some ideas that the APCHR could take into account once it is settled.

When it comes to this topic, there is no doubt that the African human rights system has a progressive body of jurisprudence and statutes. In *SERAC et al v. Nigeria*, the African Commission on Human and Peoples' Rights found that "[g]overnments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties."⁸ In fact, the Commission held that such an obligation was breached in the case at hand as "the Nigerian Government [gave] the green light to private actors, and the oil companies in particular, to devastatingly affect the well-being of the Ogonis."⁹

Further, the AU has recently issued a Protocol merging the African Court on Human and Peoples' Rights along with the Court of Justice of the AU.¹⁰ This Court "shall have jurisdiction over legal persons"¹¹ for genocide, crimes against humanity, war crimes,

⁴ *Id.*

⁵ See African Charter, *supra* note 3, art. 56(7); *American Convention*, *supra* note 3, art. 46(c).

⁶ See African Charter, *supra* note 3, art. 56(6); *American Convention*, *supra* note 3, art. 46(b).

⁷ Prosecutor v. New TV S.A.L. & Karma Mohamed Tahsin al Khayat, Case No. STL-14-05/PT/AP/AR126.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, ¶ 58 (Special Tribunal for Lebanon, Appeals Panel, Oct. 2, 2014) (holding a corporation can be held liable for contempt), <https://www.stl-tsl.org/en/decision-on-interlocutory-appeal-concerning-personal-jurisdiction-in-contempt-proceedings>.

⁸ *SERAC et al v. Nigeria*, African Comm'n on Human and Peoples' Rights, Comm. No. 155/96, ¶ 57 (Oct. 27, 2001), <http://www.achpr.org/communications/decision/155.96/>.

⁹ *Id.*, ¶ 58.

¹⁰ African Union (AU), Protocol on the Statute of the African Court of Justice and Human Rights, art. 2 (July 1, 2008), http://www.au.int/en/sites/default/files/treaties/7792-file-protocol_statute_african_court_justice_and_human_rights.pdf.

¹¹ African Union (AU), Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, art. 22, (27 June, 2014) (inserting art. 46C(1)), <http://lawyersofafrica.org/wp-content/uploads/2014/10/PROTOCOL-ON-AMENDMENTS-TO-THE-PROTOCOL-ON-THE-STATUTE-OF-THE-AFRICAN-COURT-OF-JUSTICE-AND-HUMAN-RIGHTS-EN.pdf>.

unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources, and aggression.¹² The amendment further explains that “[c]orporate intention to commit an offence may be established by proof that it was the policy of the corporation to do the act which constituted the offence.”¹³ Similarly, “[c]orporate knowledge of the commission of an offence may be established by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation.”¹⁴

While it is not yet possible to bring cases entailing corporate liability at the Inter-American and European human rights systems, the Inter-American Commission on Human Rights has issued precautionary measures in cases where state liability is sought for human rights abuses allegedly caused by state and corporate actors in infrastructure projects.¹⁵

Given this state of affairs, there is no doubt that the APCHR would allow Asian jurists to contribute to the national, regional, and international pursuit of justice. For instance, the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) has shown vast potential for development in the areas of the rule of law and human rights throughout the Asia-Pacific region. Through the participation of the Cambodian judiciary in the ECCC proceedings, the ECCC has enhanced the sense of involvement of the Cambodian people in the court cases. By collecting and exchanging information on capacity-needs, the ECCC has positioned itself to strengthen the Cambodian national justice system and its functioning. Furthermore, the ECCC has demonstrated a number of jurisprudential and structural innovations, being the first international court to allow victims to participate as full parties in the proceedings, and has demonstrated that victims’ full participation can be successfully balanced with the rights of other parties. The legacy of the ECCC may enable the integrated and well-balanced development of the rule of law and human rights in this region, and could be extended throughout Asia by establishing the APCHR.

In the 21st century, I hope that every Asian-Pacific country will be able to develop its own judicial system for the protection human rights, while taking an equally active role in the International Criminal Court. Those participating nations would certainly receive international recognition and acknowledgement that would boost confidence for further contribution to the international community. And finally, I hope to see greater attention devoted towards the establishment of the APCHR through the options elaborated above.

¹² *Id.* art. 14 (inserting art. 28A).

¹³ *Id.* art. 22 (inserting art. 46C(2)).

¹⁴ *Id.* art. 22 (inserting art. 46C(4)).

¹⁵ *Indigenous Communities of the Xingu River Basin, Pará v. Brazil*, Inter-Am. Ct. H.R., Precautionary Measure 382/10 (July 29, 2011), <http://www.oas.org/en/iachr/indigenous/protection/precautionary.asp>.