Title: A Human Rights Court for the Asia-Pacific: Contexts and Perspectives

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INTRODUCTION

With the end of World War II, the international community moved towards ideas of global governance in furtherance of greater cooperation and peace. Countries saw the proliferation of various international institutions and bodies with the aim of peacekeeping and global development. Ideas of absolute sovereignty, as propounded by Bodin and Hobbes, were diluted with the establishment of the United Nations and its various bodies which influenced and moulded governance and law-making within national boundaries through treaties and conventions.[3] The concept of absolute sovereignty was not only weakened by structures of governance, but also by various international courts and tribunals that were constituted rapidly, particularly in the aftermath of the Cold War. In examining the history of such institutions and, further, in considering the plausibility of a human rights court for the Asia-Pacific, a functional analysis would prove to be insufficient; the requirement, thus, would be of an institutional analysis.

In analyzing the evolution and functions of such courts, approaches of historical institutionalism could provide answers to the political questions that arise due to differing choices of design made by governments of various nations in light of already existing bodies of international governance

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[3] Dieter Grimm, *Post Sovereignty*, Working Paper Discussion at MPIL, Heidelberg, 28th May 2019.

and dispute settlement. These approaches and answers are crucial in envisioning a human rights court for the Asia-Pacific region, in order to address structural and functional issues that might potentially arise. This paper seeks to discuss the inception of such a court in order to address human rights violations in the region, in light of existing international courts and tribunals, their functioning, achievements and drawbacks. This analysis of international courts and tribunals will be based in theories of legitimacy, sovereignty and fragmentation of international law, which have consistently questioned the validity, binding nature of their judgments and the power politics behind the functioning of such courts.

The **first** section of this paper deals with typical characteristics that institutions called "courts" have come to demonstrate. It will provide a brief historical insight into the evolution of international courts and tribunals, elucidating certain underlying aspects that will prove to be compelling in understanding archetypal characteristics of courts and their structures. The delineation of this evolution of the nature of international courts is crucial in order to understand the functioning and structures of courts while proposing a model for a human rights court for the Asia-Pacific region. While this section will be a mere glance at the inception and progress of international courts and tribunals, the sections that follow will specifically focus on international courts of human rights, their structures and functioning in furtherance of developing a successful model for a human rights court for the Asia-Pacific region, keeping in mind the answers provided by an inquiry of historical institutionalism.

The **second** section will engage in a comparative exercise qua the structural characteristics of human rights courts in the European, American and African regions. The **third** section will focus on human rights abuses qua the freedom of speech and expression, refugee rights, women's rights, gender and sexual identities and the freedom of assembly and association in the Asia-Pacific region, which will act as a segue into the **fourth** section that will examine certain facets

that would affect the setting up a human rights court for the Asia-Pacific region. This section also contains brief suggestions for the setting up of a dedicated human rights court for the Asia-Pacific region.[4]

[4] The scope of this paper does not envisage a discussion on the laws/agreements/declarations, etc. applicable to the Asia-Pacific region. Instead, the authors have opted to discuss best practices for a potential Asia-Pacific Human Rights Court in light of the problems that such a Court would need to address (*viz.* human rights abuses in the region) and common characteristics that Courts have come to depict.

ARCHETYPAL CHARACTERISTICS OF COURTS

It would be prudent to begin with an invocation of the internal uncertainty that words like "archetypal" or "essential" suffer from. Philosophers find themselves in disagreement over whether anything can ever be said to have essential characteristics.[5] The ascribing of the words "essential" or "defining of" to anything in the law often invites raised eyebrows and sceptical inquiries.[6] Be it as complicated a question as what constitutes the essential characteristics of religion[7]- a matter of fierce constitutional debate in India- or one as mundane as to concern the essential characteristics of household chairs for sales tax purposes in Australia,[8] it is clear that any endeavour in culling out the essential characteristics of anything is not an absolute exercise, and must be adequately qualified. This may, more so, be the case with the institution of courts.

It is important to undertake a study of the structures of courts, for the structure of the courts has major implications on access to said courts, the cohesiveness of the doctrine(s) produced by said courts, inter-judge relations, and perceptions of said courts, including perceived politicization.[9]

"Court" may be used to refer to both an independent body that answers legal questions according to principles and rules of law and the physical place of occurrence of judicial

[5] Teresa Robertson, *Essentials vs Accidental Properties*, The Stanford Encyclopaedia of Philosophy (Stanford University, Fall ed, 2008), http://plato.stanford.edu/archives/fall2008/entries/essential-accidental/.

[6] Chief Justice Robert French AC, *Essential and Defining Characteristics of Courts in an Age of Institutional Change*, Supreme and Federal Court Judges Conference, Adelaide, 21 January 2013, http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj21jan13.pdf.

[7] Gilles Tarabout, *Ruling on Rituals: Courts of Law and Religious Practices in Contemporary Hinduism*, South Asia Multidisciplinary Academic Journal, https://journals.openedition.org/samaj/4451.

[8] *Diethelm Manufacturing Pty Ltd v Commissioner of Taxation* (1993) 44 FCR 450, 470.

[9] Nick Robinson, *Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts*, The American Journal of Comparative Law, Vol. 61, No. 1 (Winter 2013).

proceedings. At its very rudiments, it may be associated, physically, with high ceilings and formal décor to reflect "the majesty of the law", while judges wear robes and sit above and apart from those participating in and observing the proceedings.[10]

The principles that may be culled out from the working of domestic courts may also be applied to the working of international courts. Whilst the degree to which the decisions of international courts bind/are enforced by nation states is a factor that distinguishes them from domestic courts' diktats on those in its jurisdiction, nearly all other factors - as will be formulated towards the end of this section - that courts have come to be known for, are common for both domestic and international courts.

There are three important junctures that formed a foundational basis for the establishment of the contemporary international courts and tribunals: the role of Hague Peace Conferences in the years 1899 and 1907 along with a general appeal towards international treaties and conventions in furtherance of inter-state regulation; the proliferation of international bodies and institutions in the aftermath of World War II in the years between 1945 and 1952; and the period of post-Cold War falling between the years 1990 and 2005.[11] These historical junctures become important in understanding the underlying basis of these international courts and tribunals as they have come to be today.

Alter argues that while rationalist scholars have brought out the functional benefits that accrue from empowering international courts in terms of power disparities, treaty compliance and cross-jurisdictional disputes, there is a need for a historical institutional inquiry in order to

[10] Dinah Shelton, *Form, Function, and the Powers of International Courts*, Chicago Journal of International Law: Vol. 9, No. 2 (2009), http://chicagounbound.uchicago.edu/cjil/vol9/iss2/8.

[11] Alter K.J. (2016), The Evolution of International Law and Courts, In Oxford Handbook of Historical Institutionalism, OUP 590-610.

understand why certain courts were constituted when they were and the reasons for an overall acceptance of their establishment by governments.[12]

Most of the international courts established in the early twentieth century provided for a flexible jurisdiction with an opt-out mechanism and a significant majority of the nations did not fall within the ambit of the compulsory jurisdiction of any one court.[13] The Hague Peace Conferences saw the establishment of the first bodies of international dispute settlement as a result of progressive ideologies of the then diplomats who foresaw international coordination and politics replacing inter-state war. These Conferences resulted in the establishment of the Permanent Court of Arbitration, Central American Court of Justice and the Permanent Court of Justice. These were what scholars termed the "old-style" international courts which were devoid of compulsory jurisdiction, initiation of litigation proceedings was limited to states and the greater aim of a comprehensive structure of international courts failed.[14]

This changed with the international courts that were subsequently established following the junctures of the end of World War II (International Court of Justice (ICJ), European Court of Human Rights (ECtHR), Inter-American Court of Human Rights (IACtHR) etc.) and Cold War (International Criminal Court (ICC), African Court on Human Rights and People's Rights (AfCHPR) etc.) in the latter half of the twentieth century. The post-Cold War era saw the creation of more international courts, which seem to have adopted the structural framework of international courts in Europe.[15] All member states are within the compulsory jurisdiction of these courts, which now allow for the initiation of litigation by non-state actors for cases involving states, thus portraying an evolution

[12] *Id.*

[13] Alter K.J. (2014), The New Terrain of International Law: Courts, Politics, Rights.

[14] Mary Ellen O' Connell and Lenore Vander Zee, *The History of International Adjudication*, Oxford Handbook on International Adjudication, Oxford University Press (2014).

[15] *Supra (n.12)*

in design and structure since the Hague Peace Conferences. The points of change in the form and structure of international courts depict prima facie reasons for such evolution and modifications accepted by governments of different nations, with the post-war periods creating a necessity for greater accountability, justice and peaceful international coordination.

An important function of courts has interestingly been characterized by Martin Shapiro as a "triad",[16] which cuts across cultural lines and involves the calling upon a third person to assist in the achieving of the resolution of an impasse between two parties. In short, for the purposes of conflict resolution the triad is the basic social logic of courts, a logic so compelling that courts have become a universal political phenomenon.[17] However, the triad involves a basic instability that accounts for a large proportion of the scholarly quarrels over the nature of courts - when the third party in the triad decides in favour of one of the two disputants, a shift occurs from the triad to a structure that is perceived by the loser as two against one. A substantial portion of the total behaviour of courts in all societies can be analyzed in terms of attempts to prevent the triad from breaking down into two against one.[18]

In looking at courts as social institutions, it may be said that they are self-contained social phenomena, physically isolated and systematically distinct from other institutions.[19] Additionally, each stakeholder in the system plays fixed roles, *viz.*, the judges, litigants and

[16] Martin Shapiro, Courts: *A Comparative and Political Analysis*, University of Chicago Press (1986).

[17] G. Aubert, *Competition and Dissensus: Two Types of Conflict Resolutions*, Journal of Conflict Resolution (1963).

[18] Thus, courts may be seen as a special case of the dyadic-triadic relationships of Simmel [G. Simmel, *The Sociology of Georg Simmel*, New York: Free Press (1950)].

[19] Philip Allott, *The International Court and the Voice of Justice*, Fifty Years of the International Court of Justice, Cambridge (1996).

witnesses, which culminate in a proceeding(s) that produces a decision on the rights and responsibilities of parties.[20]

It is clear that courts must not be seen as providers of a spectrum of consensual and non-consensual dispute resolution services. In fact, there are those who assert that it is not the job of courts to be providing social services, and the more courts foray into these directions, the greater is the risk of them being regarded, in particular by the executive, as simply another administrative agency.[21] Professor Owen Fiss explains the motivation behind this sentiment thus:

> *Their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and Statutes: to interpret those values and to bring reality into accord with them.*[22]

Thus, an important feature of a court is its adherence to the paraphernalia that lends it its legitimacy and grants it its powers. Seldom does a court transgress the bounds of its constituting document, and when it does, the powers that be find ways to qualify the transgression, or justify it. For instance, in India, an example of a transgression from the literal text of the Indian Constitution is that of the basic structure doctrine, which is a creature of the Indian Supreme Court, and which posits that constitutional amendments that do not fall within the four corners of the "basic structure" cannot survive.[23]

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[20] Jacob Katz Cogan, *Competition and Control in International Adjudication*, 48 Va J Intl L 411, 416 (2008).

[21] Chief Justice Robert French AC, *Essential and Defining Characteristics of Courts in an Age of Institutional Change*, Supreme and Federal Court Judges Conference, Adelaide, 21 January 2013, http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj21jan13.pdf.

[22] Owen Fiss, *Against Settlement*, 93 Yale Law Journal (1983-83).

[23] A.G. Noorani, *Behind the 'basic structure' doctrine*, Frontline, Vol. 18, Issue 09, April 28- May 11 (2011), https://frontline.thehindu.com/static/html/fl1809/18090950.htm.

An important qualifier to be kept in mind is that, consequentially, the effects of courts' structures should not be over-stated. Nick Robinson argues that the structural characteristics of courts are rarely determinative in their impact; they shape possible outcomes, but do not guarantee them and thus, given this contextual specificity, a comparative analysis of court structures should not try to create a new science, but rather a better language to articulate the impact of said structures.[24]

The preceding discussion makes it plain that there are numerous variables that are integral characteristics of courts, both domestic and international. However, a perusal of literature on the subject reveals certain fixed characteristics that nearly all international courts demonstrate:

- **PROMOTION OF COMPLIANCE WITH GOVERNING INTERNATIONAL NORMS**

  Most international courts have been constituted through interstate treaties, whose norms the courts are required to interpret and apply. These courts attempt to achieve compliance by, first, augmenting the credibility of member states' treaty undertakings and second, by monitoring the compliance of the norms in question, while adapting existing norms to changing circumstances.[25] Compliance courts also express concerns for consistency, owing to the fact that they are pronouncing general rules for all state parties. For instance, the ECtHR has said: "*while the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability, and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases*".[26]

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[24] Nick Robinson, *Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts*, The American Journal of Comparative Law, Vol. 61, No. 1 (Winter 2013)

[25] Thomas M. Franck , *The Power of Legitimacy Among Nations* (1990).

[26] *Goodwin v United Kingdom*, 35 Eur Ct HR 18 (2002).

➢ DISPUTE RESOLUTION

International courts, at least notionally, shoulder the burden of being expected to aid the resolution of disputes whose protraction may pose harm to international relations, co-operative structures and peace. This is more the case when the mandate statements of the Courts envisage such notions.[27] The settlement of disputes has historically been an unstated goal of international courts, and has reflected in their mandates.[28] The purpose of the dispute resolution function is to cause the resolution of issues between parties and bring an end to the dispute. The resolution of conflicts is further important because it helps avoid the parties being compelled to act on their own accord, and thus helps avoid the escalation of conflicts between the contesting parties by referring the dispute to a third, neutral decision maker. This function assumes greater importance in international relations than in domestic relations because of the lack of international peacekeepers to discourage recourse to violence and because the consequences of an inter-state conflict are bound to be on a much larger scale than disputes between companies or individuals.[29] While the resolution of conflicts and their neutralization invariably involves two or more states pitted against one another, the majority of cases before human rights courts are instituted by individuals against states-parties to the human rights convention(s).[30] Thus, it would be safe to conclude that the dispute resolution role qua a human rights court for the Asia-Pacific would, too, involve the hearing of cases instituted by individuals.

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[27] High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration, Feb. 19 2010, Action Plan, sec. A1.

[28] James Brown Scott, *The Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists : Report and Commentary* 49 (1920).

[29] Dinah Shelton, *Form, Function, and the Powers of International Courts*, Chicago Journal of International Law: Vol. 9, No. 2 (2009), http://chicagounbound.uchicago.edu/cjil/vol9/iss2/8.

[30] Rhona K.M. Smith & Christien van der Anker, *The essentials of Human Rights* (2005), p. 115, Hodder Arnold.

- **ENFORCEMENT**

Enforcement courts are empowered to determine the guilt or innocence of individuals accused of international crimes. Usually, this jurisdiction is qualified and narrow. For instance, the drafting of the Rome Statute of the ICC, and of the elements of crimes triable by it, demonstrates clearly the intent of the parties to the Statute to "maintain control over the making of international law and to keep a tight leash on the ability of international judges to go beyond what they have agreed to".[31]

- **ADVISORY ROLE**

Most international courts are empowered to issue advisory opinions; the extent of this ranges from narrow[32] to broad.[33] The IACtHR describes its advisory jurisdiction as permissive; similarly, the ICJ's advisory jurisdiction extends to responding to "any legal question" at the request of an authorized body. As a general principle, it is suggested that courts issuing advisory opinions ought to be particularly circumspect in indulging in a fact-finding exercise, because all parties with the relevant information to aid an informed issuance of an advisory opinion may not be present before the Court. If a successful quelling of the issue necessitating the advisory opinion requires the establishment of facts, the court should, it is suggested, be in a position to appoint its own experts to carry out the role of an independent fact-finding commission.[34]

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[31] For instance, the draftspersons categorically withheld jurisdiction over the crime of aggression until the state parties defined the elements of the crime; see Article 4 of the Rome Statute.

[32] Protocol No.2, European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), https://www.echr.coe.int/Documents/Convention_ENG.pdf.

[33] Article 64, American Convention on Human Rights, https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm.

[34] Dinah Shelton, *Form, Function, and the Powers of International Courts*, Chicago Journal of International Law: Vol. 9, No. 2 (2009), http://chicagounbound.uchicago.edu/cjil/vol9/iss2/8.

COMPARING STRUCTURES: THE ECTHR, IACTHR & AFCHPR

Before embarking on a discussion of a human rights court for the Asia-Pacific region, it would be pertinent to take note of certain salient characteristics of already established counterparts from Europe, the Americas and Africa. In envisioning an Asia-Pacific court for human rights, this paper attempts to draw parallels with existing human rights courts, such as the ECtHR (Europe), AfCHPR (Africa) and the IACtHR (the Americas). While several international courts have come about over the past years, this section shall limit its focus to the three human rights courts already in existence. This is primarily because of the fact that most International courts, such as the ICJ and the International Tribunal for the Law of the Sea, primarily settle disputes that arise between state parties, and do not entertain individual complaints.[35] [36]. In contrast, human rights courts entertain most of their matters from individuals.[37] Further, courts like the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), as also the International Military Tribunals for the Nuremberg (IMT) and Tokyo (IMTFE) trials, were set up with specific mandates, *viz.*, trying war crimes committed in the region, after which they were dissolved.[38] Owing, thus, to the fact that the structures, mandates and workings of the aforementioned international courts and tribunals are not in alignment with the purposes of a regional human rights court - which is, in principle, designed to be of a permanent character, whilst predominantly seeking to address individual complaints of human rights violations - this section limits its comparative exposition to the ECtHR, the IACtHR, and the AfCHPR.

[35] https://www.icj-cij.org/en/how-the-court-works.

[36] https://www.itlos.org/the-tribunal/

[37] Rhona K.M. Smith & Christien van der Anker, *The essentials of Human Rights* (2005), p. 115, Hodder Arnold.

[38] The ICTY was dissolved in 2017; the ICTR was dissolved in 2015; the IMT was dissolved in 1946, and the IMTFE was dissolved in 1948.

THE EUROPEAN COURT OF HUMAN RIGHTS (ECtHR)

➢ REGIONAL ORGANIZATION

The Regional Organization of which the ECtHR forms a part is the Council of Europe (CoE), which was launched in 1949. The CoE consists of 47 member states.[39] It is associated with numerous monitoring bodies, such as the Group of States against Corruption,[40] European Committee of Social Rights,[41] European Commission for the Efficiency of Justice,[42] European Commission against Racism and Intolerance,[43] and the Group of Experts on Action against Trafficking in Human Beings,[44] among others.

➢ TREATY FORMING BASE OF THE COURT

Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.[45]

➢ LOCATION

Strasbourg, France

➢ DISPUTE RESOLUTION/ADVISORY POWERS

The ECtHR possesses dispute resolution powers, and, as of August 2018, also has an advisory role.[46]

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[39] https://www.coe.int/en/web/about-us/who-we-are.

[40] http://www.coe.int/t/dghl/monitoring/greco/default_en.asp?.

[41] http://www.coe.int/t/dghl/monitoring/socialcharter/ECSR/ECSRdefault_en.asp.

[42] http://www.coe.int/t/dghl/cooperation/cepej/default_en.asp.

[43] http://www.coe.int/t/dghl/monitoring/ecri/default_en.asp.

[44] http://www.coe.int/t/dghl/monitoring/trafficking/default_en.asp.

[45] https://rm.coe.int/1680063765.

[46] https://ijrcenter.org/european-court-of-human-rights/.

- **NUMBER OF JUDGES**

The ECtHR has 47 judges, one from each member state of the Council of Europe.[47]

- **APPOINTMENT OF JUDGES**

Each government proposes 3 candidates, and the final decision on the appointment of judges from among the pool of candidates proposed rests with the Parliamentary Assembly of the CoE. There is no restriction on the number of judges from a given nationality.[48]

- **TERMS OF APPOINTMENT**

Judges are appointed for nine-year terms, to work full-time; their appointments are not renewable.[49]

- **APPOINTMENT OF PRESIDENT**

The President is elected by the Plenary Court, for a three-year term.[50]

- **MEETINGS OF THE COURT**

The ECtHR is a permanent body.

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47 https://www.echr.coe.int/Documents/50Questions_ENG.pdf.

48 https://www.echr.coe.int/Documents/50Questions_ENG.pdf.

49 https://www.echr.coe.int/Documents/50Questions_ENG.pdf.

50 Rule 8, Rules of Court, European Court of Human Rights, https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf.

THE INTER-AMERICAN COURT OF HUMAN RIGHTS (IACtHR)

➢ REGIONAL ORGANIZATION

The regional organization that the IACtHR is associated with is the Organization of American States (OAS),[51] which was established in 1948. The OAS has 35 member states at present.[52] It was initially governed by the Charter of the OAS,[53] which was amended by the Protocol of Buenos Aires (1967),[54] the Protocol of Cartagena de Indias (1985),[55] the Protocol of Managua (1993),[56] and by the Protocol of Washington (1992).[57]

➢ TREATIES FORMING BEDROCK OF THE COURT

Charter of the Organization of American States (1948)[58] & American Convention on Human Rights (1969).[59]

➢ LOCATION

The Court is located in San Jose, Costa Rica.[60]

➢ DISPUTE RESOLUTION/ADVISORY POWERS

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[51] http://www.oas.org/en/

[52] http://www.oas.org/en/about/who_we_are.asp.

[53] http://www.oas.org/juridico/english/charter.html.

[54] http://www.oas.org/juridico/english/sigs/b-31.html.

[55] http://www.oas.org/juridico/english/sigs/a-50.html.

[56] http://www.oas.org/juridico/english/sigs/a-58.html.

[57] http://www.oas.org/juridico/english/sigs/a-56.html.

[58] http://www.oas.org/en/sla/dil/docs/inter_american_treaties_A-41_charter_OAS.pdf.

[59] https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm.

[60] Article 3, Statute of the Inter-American Court of Human Rights, https://www.oas.org/xxxivga/english/reference_docs/Estatuto_CorteIDH.pdf.

The IACtHR possesses both dispute resolution powers and broad advisory powers.[61]

- **NUMBER OF COURT MEMBERS**

The IACtHR has 7 judges.[62]

- **APPOINTMENT OF JUDGES**

The judges of the Court, as well as the Commission, are appointed by the General Assembly of the OAS.[63]

- **TERMS OF APPOINTMENT**

Judges of the IACtHR are appointed for six-year terms, to work on a part-time basis. Their terms are renewable only once.[64]

- **APPPOINTMENT OF PRESIDENT**

The President is elected by the Court, and serves a two-year term.[65]

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[61] Article 2, Statute of the Inter-American Court of Human Rights, https://www.oas.org/xxxivga/english/reference_docs/Estatuto_CorteIDH.pdf.

[62] Article 4, Statute of the Inter-American Court of Human Rights, https://www.oas.org/xxxivga/english/reference_docs/Estatuto_CorteIDH.pdf.

[63] Article 7, Statute of the Inter-American Court of Human Rights, https://www.oas.org/xxxivga/english/reference_docs/Estatuto_CorteIDH.pdf.

[64] Article 5, Statute of the Inter-American Court of Human Rights, https://www.oas.org/xxxivga/english/reference_docs/Estatuto_CorteIDH.pdf.

[65] Article 12, Statute of the Inter-American Court of Human Rights, https://www.oas.org/xxxivga/english/reference_docs/Estatuto_CorteIDH.pdf.

- **MEETINGS OF THE COURT**

  The Court determines the number of sessions it must have, in deciding on the next meeting during an ongoing session. There are also provisions for extraordinary sessions.[66]

[66] Articles 11 and 12, Rules of Procedure of the Inter American Court of Human Rights, https://www.cidh.oas.org/Basicos/English/Basic20.Rules%20of%20Procedure%20of%20the%20Court.htm.

THE AFRICAN COURT ON HUMAN AND PEOPLE'S RIGHTS (AfCHPR)

- **REGIONAL ORGANIZATION**

  The AfCHPR was established by the African Union (AU), which replaced the Organization of African Unity (OAU) in 2002.[67] The aims of the AU are laid out by the Constitutive Act of the AU[68] and the Protocol on Amendments to the Constitutive Act of the AU.[69] There are 55 members of the AU at present.[70] Within the AU, there are various bodies that handle social, political, technical, judicial and legal matters; the latter of these include (aside from the AfCHPR) the African Commission on Human and People's Rights, AU Advisory Board on Corruption, AU Commission on International Law.

- **TREATIES FORMING BEDROCK OF THE COURT**

  African Charter on Human and Peoples' Rights (1981)[71] & Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (1998).[72]

- **LOCATION**

  The Court is located in Arusha, Tanzania. The Commission on Human Rights is located in Banjul, Gambia.[73]

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[67] http://en.african-court.org/index.php/31-frequently-asked-questions.

[68] https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf.

[69] https://au.int/treaties/protocol-amendments-constitutive-act-african-union.

[70] https://au.int/memberstates.

[71] http://www.african-court.org/en/images/Basic%20Documents/charteang.pdf

[72] http://www.african-court.org/en/images/Basic%20Documents/africancourt-humanrights.pdf.

- **DISPUTE RESOLUTION/ADVISORY POWERS**

The AfCHPR possesses both dispute resolution powers and broad advisory powers.[74]

- **NUMBER OF COURT MEMBERS**

The Court has 11 members, and the Commission has 11 members.[75]

- **APPOINTMENT OF JUDGES**

Judges and Commissioners are appointed by the AU Assembly of Heads of State and Government.[76]

- **TERMS OF APPOINTMENT**

Judges are appointed for six years, with only the President working full time. The judges' terms are renewable only once.[77]

- **APPOINTMENT OF PRESIDENT**

The President is elected by the Court for a two-year term.[78]

- **MEETINGS OF THE COURT**

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[73] http://en.african-court.org/index.php/31-frequently-asked-questions

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] Rules 10 and 11, Rules of Court, African Court on Human and Peoples' Rights, http://www.african-court.org/en/images/Basic%20Documents/Final_Rules_of_Court_for_Publication_after_Harmonization_-_Final__English_7_sept_1_.pdf.

The AfCHPR holds four ordinary sessions per year, with each session lasting about fifteen days.[79]

[79] Rule 14(1), Rules of Court, African Court on Human and Peoples' Rights, http://www.african-court.org/en/images/Basic%20Documents/Final_Rules_of_Court_for_Publication_after_Harmonization_-_Final__English_7_sept_1_.pdf.

The central theme of this paper, which is the requirement of a human rights court for the Asia-Pacific region, needs to be substantiated on grounds which necessitate its establishment. This section of the paper seeks to outline a few of the major human rights issues in the region that call for immediate attention and redressal.

Freedom of Speech and Expression

The right to freedom of speech and expression is guaranteed under Article 19 of the International Covenant on Civil and Political Rights (ICCPR)[80] and the Universal Declaration of Human Rights (UDHR).[81] Furthermore, the same is also protected under the European Convention on Human Rights (ECHR), the American Convention on Human Rights and the African Convention on Human Rights.

It has been observed that there is a widespread infringement of the right to freedom of speech and expression in the Asia-Pacific region, with governments curbing free speech and imposing internet bans.[82] In the context of India, defamation remains both criminal and civil offence. The judgment by the Supreme Court of India in the *Subramanian Swamy* upheld the criminal defamation as a reasonable restriction on free speech and expression which have been guaranteed under Article 19 of the Constitution of India.[83] Singapore has passed laws to prevent "online falsehoods", which have proven to be extremely vague and broad in nature, thus

[80] https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

[81] https://www.un.org/en/universal-declaration-human-rights/.

[82] https://www.article19.org/regional-office/asia-pacific/.

[83] *Subramaniam Swamy v. Union of India* [(2016) 7 SCC 221], https://www.livelaw.in/breaking-law-criminal-defamation-not-unconstitutional-sc/.

threatening the freedom of speech and expression guaranteed under international human rights law.[84] In Pakistan, journalists have been increasingly self-censoring their speech and expression due to threats and attacks from Taliban and militant groups in response to their criticising articles.[85] The Human Rights Watch has reported that in Vietnam, laws curbing free speech have been broadly and vaguely worded to impose restrictions on dissent in the country.[86] Freedom of speech and expression in China has been termed as a "privilege" and not a right, where the authorities believe that limitations on free speech will facilitate the government to track and handle social problems in a more efficient fashion.[87]

The above mentioned are a few of the many examples of the violation of the right to freedom of speech and expression in the region. This calls for the need of an overarching judicial organ that adjudicates and enforces international human rights laws, thus creating an environment of accountability for state and non-state actors.

Refugees

The current refugee crisis in Myanmar is a significant example of the dearth of non-refoulement policies and refugee laws in the Asia-Pacific region. While these issues are directly addressed under instruments of international human rights law, countries have turned a blind eye towards the immediate need for comprehensive policy changes and humanitarian aid.

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84 https://www.article19.org/resources/singapore-new-law-on-online-falsehoods-a-grave-threat-to-freedom-of-expression/

85 https://www.hrw.org/world-report/2018/country-chapters/pakistan.

86 https://www.hrw.org/world-report/2018/country-chapters/vietnam.

87 https://www.cecc.gov/freedom-of-expression-in-china-a-privilege-not-a-right.

In the northern Rakhine state, the community of Rohingyas have witnessed ethnic cleansing, rapes and killings at the hands of security forces in the country.[88] These acts have forced the Rohingya to flee the state, thus creating a large-scale refugee crisis in the neighbouring states. Countries where they have sought refuge (India, Malaysia and Bangladesh), have proven to be ill equipped to deal with refugees due to a lack of refugee laws and adherence to international human rights laws. While this has attracted the attention of the global human rights community, a large number of refugee issues also go unnoticed. Afghan refugees in Pakistan are facing harassment at the hands of the police authorities due to their uncertain status and lack of documentation, thus leading to their deportation.[89] Australia failed to comply with its international obligations by confining a large number of asylum seekers to the islands of Nauru and Papua New Guinea where their processing centres are located.[90]

With the increasing acts of armed conflict and war, the refugee crisis will continue to be on the rise in countries surrounding areas of conflict. There is an impending necessity for comprehensive policies for refugees in alignment with international instruments of human rights. The same requires enforcement beyond national borders by an overarching judicial authority since the issue of refugees becomes an international concern and not something that is limited to state boundaries and functioning.

Women's Rights, Gender and Sexual Identities

Significant parts of the Asia-Pacific region continue to be extremely backward looking in their conceptions of gender and sex. National mechanisms of justice have proven to be insufficient in protecting basic human rights of women and the LGBTQI community.

[88] https://www.amnesty.org/download/Documents/POL1067002018ENGLISH.PDF.

[89] https://www.hrw.org/world-report/2018/country-chapters/pakistan.

[90] *Supra (n. 68)*

It has been noted that Pakistan witnesses around one thousand honour killings every year, with women being murdered by family members for bringing shame to the family.[91] Furthermore, the country remains violently hostile towards people of intersex and transgender people. Homosexuality or same-sex acts continue to be criminalised in Pakistan. Bangladesh has the highest rates of child marriage across the globe and the government has declared it will completely abolish the same over the coming years. However, the state passed laws in the year 2017 allowing child marriage under "special circumstances". The situation with respect to sexual harassment also appears to be dismal.[92] The Chinese government has shown extremely low tolerance towards women's rights activism, and sexual harassment, domestic violence and abuse are largely prevalent across the country.[93] India continues to witness brutal acts of rape and sexual harassment in spite of a series of amendments made to rape laws in the Indian Penal Code. There also appears to be a lack of victim support systems that provide rehabilitation and access to justice.[94]

The prevailing condition of women's rights and rights of the LGBTQI community shows a clear failure of national systems of adjudication and law making in rendering justice and complying with international human rights instruments. With no supra-national body to raise questions of accountability, the victims are often left with no choice after exhausting national remedies, which are in serious violation of basic human rights.

[91] *Id.*

[92] https://www.hrw.org/world-report/2018/country-chapters/bangladesh.

[93] https://www.hrw.org/world-report/2018/country-chapters/china-and-tibet.

[94] https://www.hrw.org/world-report/2018/country-chapters/india.

Freedom of Assembly and Association

The right to freedom of assembly and association is guaranteed under Articles 21 and 22 of the ICCPR. Similarly, it is protected under Article 11 of the ECHR and Articles 15 and 16 of the American Convention on Human Rights.

Serious restrictions on the freedom of assembly and association have been observed in Afghanistan with security forces attacking civil society groups and dispersing protesters with the use of water cannons. The government has put forth the Law on Gatherings, Demonstrations and Strikes which reduced the number of places allowed for protests and restricted the objective of the protests to ones with ideas of reform and prohibited the criticism of government policies.[95] It has been noted that Malaysia has constantly prosecuted individuals for their involvement in peaceful assemblies which did not give a prior notice. Freedom of association is restricted in the country through legislations such as the Societies Act which requires the registration of organisations with seven or more members with the registrar, who holds complete discretion in rendering an organisation illegal.[96] In Indonesia, amendments were made to laws regulating non-government organisations through a decree issued by the President, which allowed the government to accelerate the process of banning groups which advocated communism or separatism.[97]

These examples of human rights violations in the Asia-Pacific region strengthen the need for a supra-national adjudicating authority that can regulate and maintain checks on states and non-state actors for violation of international human rights laws. While these international courts, as

[95] https://www.hrw.org/world-report/2018/country-chapters/afghanistan.

[96] https://www.hrw.org/world-report/2018/country-chapters/malaysia.

[97] https://www.hrw.org/world-report/2018/country-chapters/indonesia.

will be elucidated in the following section, are flawed in certain ways and face issues of compliance and legitimacy, they are nonetheless organs promoting and safeguarding human rights in instances where national authorities have failed to do so. The lack of such a structure in the Asia-Pacific region, particularly in light of the extent of human rights violations in the region, creates an atmosphere of impunity for perpetrators and state governments that fail to comply with their international obligations under human rights laws. The following section of the paper will outline issues faced by international courts which ought to be kept in mind while envisioning a human rights court for the Asia-Pacific region.

As the preceding section demonstrated, there is an ubiquitous violation of basic human rights by states and non-state actors in the Asia-Pacific region. These violations are acts of non- compliance with the provisions of the ICCPR and the UDHR, which a majority of the states in the Asia-Pacific region have signed and ratified. In the absence of a supra-national court, similar to the IACtHR, AfCHPR and the ECtHR, there is no mechanism of appeal to a higher, international, adjudicatory body available to the victims after the exhaustion of domestic remedies.

This calls for the need to establish a human rights court for the Asia-Pacific region, in furtherance of creating an environment of accountability for states and non-state actors in the international arena to ensure that people are not deprived of their basic fundamental rights guaranteed under international charters of human rights. In envisioning the establishment of such a body, this section of the paper will focus on issues pertaining to certain characteristics that would be pivotal to such a court, *viz.* the binding nature of its judgments, along with compliance and enforceability of the same in light of theories of sovereignty and how they have played out in other regions with an overarching court of human rights, particularly with the ECtHR, IACtHR and the AfCHPR.

These courts primarily deal with instances of human rights violations committed in their respective regions, over which they have jurisdiction. Each court evaluates the claims of the victims based on the interpretation of the human rights conventions that guide them (European

Convention on Human Rights, Inter-American Convention on Human Rights, African Convention on Human Rights). While these institutions have significantly evolved and upheld values of human rights at the supra-national level, they are often faced with issues that question the fundamental nature of judicial institutions.

In the recent past, both the ECtHR and the IACtHR have been faced with issues of compliance and enforceability of their judgments, thus challenging their binding nature. Existing data recorded by the Council of Europe (CoE) depicts that, since the inception of the ECtHR in 1959, around 7500 judgments have simply failed to be complied with![98] Similarly, research scholars have documented that the IACtHR has seen a mere compliance rate of 28 per cent.[99] The rate of compliance was inversely proportional to the invasive nature of the court's judgments. It has been noted that the compliance rate was higher, at 31 per cent, when the states were ordered to apologise, and said rate dropped to 13-19 per cent when the court ordered the states to reinstate the rights of the people who had been deprived of their rights, or by penalizing the perpetrators.[100] In instances where the court directed the state to undertake an amendment, repeal or adaption of national laws to be in congruence with international human rights conventions, the court witnessed a compliance rate of 5 per cent.[101] However, the compliance rate in cases of payment of damages has been much higher as compared to the above mentioned instances. As noted by the President of the ECtHR, the court has been far more reserved in meting out non-monetary punishments when compared to its Inter-American

[98] Council of Europe, Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights 2017: 11th Annual Report of the Committee of Ministers, March 2018, at 7.

[99] Darren Hawkins and Wade Jacoby, *Partial Compliance: A Comparison of the Europe and Inter-American Court for Human Rights*, Paper prepared for delivery at the 2008 Annual Meeting of the American Political Science Association, Boston, MA, August 28-31, 2008.

[100] Fikfak V. (2018), *Changing State Behaviour: Damages before the European Court of Human Rights*, European Journal of International Law Vol. 29(4), 1091-1125.

[101] *Id.*

counterpart.[102] Such non-compliance has given rise to the issue of repetition of matters before the court due to the lack of enforcement of the pilot judgments which decreed measures that did not impose the payment of monetary fines or damages.[103]

The concept of sovereignty has long tussled with the idea and functioning of international courts. While sovereignty in international law is qualified, states nonetheless tend to avoid an overarching authority beyond national borders imposing measures that would compromise, in the eyes of their citizens, the extent of their respect, standing and power. In the context of the European Union, it is often argued that there has been a dilution of the concept of absolute sovereignty with international human rights instruments dictating the laws and legislations of member countries.[104] This argument merits appreciation, owing simply to the truth of the statements being made. Member countries are expected to mould their national laws to be in compliance with the ECHR and the judgments delivered by the ECtHR. In furtherance of the need to strike a balance with the concept of sovereignty, the ECHR provides for what is termed as the *margin of appreciation*, which seeks to respect national laws and values while also safeguarding rights and interests of aggrieved parties.[105] This provides the states with certain leeway to address issues of human rights within their national borders if the court deems the situation to be peculiar to that particular state, thus placing the national government in a better position to deal with it. Scholars have advocated for the exporting of this concept to other international human rights courts in order to respect democratic processes and ensure greater

[102] Sicilianos, *The Involvement of the European Court of Human Rights in the Implementation of Its Judgments: Recent Developments under Article 46 ECHR*, 32(3) *Netherlands Quarterly of Human Rights* (2014) 235.

[103] Council of Europe, Copenhagen Declaration, April 2018, para 50.

[104] *Supra (n. 3).*

[105] Article 5, ECHR.

legitimacy towards their institutions.[106] This, however, is a tool of power and one must exercise due care and caution before transplanting the concept as it is into other structures of international human rights courts.

Although the court of each region is in the process of constantly assessing measures to prompt states to comply with its judgments and to ensure greater legitimacy, the scope and success of such measures are beyond the scope of this paper, which simply seeks to lay out potential roadblocks that might arise in the setting up of an Asia-Pacific human rights court, for the only difference that an Asia-Pacific human right court's structure vis-à-vis its counterparts from other regions must have should be an attempt towards quelling problems that the functioning of said counterparts have thrown up. Further, the remedies used by each court often vary, depending on the countries party to it, the nature of the human rights violations and various other factors that tend to affect the rate of compliance. Therefore, analyzing and prescribing a blanket solution for all supra-national courts would prove to be an exercise in futility, without taking into consideration the contexts and issues faced by each body on a subjective basis. The need is to keep in mind the peculiarities of the Asian-Pacific region, an important one being the diversity of languages employed for communication in the region.

While this section has attempted to outline some issues that tend to arise in the structures and functioning of international human rights courts, it is also crucial to raise concerns qua the multiplicity of international institutions. This multiplicity, and establishment of various bodies in international law, has been categorized as a phenomenon known as the *fragmentation of*

[106] Follesdal A. (2017), *Exporting the Margin of Appreciation: Lesson for the Inter-American Court of Human Rights*, International Journal of Constitutional Law Vol. 15(2), 359-371.

international law.[107] The debate surrounding the fragmentation of international law has taken various strands, with liberal scholars arguing that the phenomena is a result of a gradual process where specialized bodies have mushroomed and will work in harmony for the promotion of international law.[108] Critical scholars, however, have argued that the fragmentation of international law was a politically-motivated, intentional process that was brought about to maintain existing power structures and dynamics.[109] These arguments become relevant in light of the focus of this paper, which looks at the modalities of establishing an Asia-Pacific human rights court, thus increasing the number of existing international institutions. While this requires a deeper engagement with the concept of fragmentation, it is important to outline such theoretical criticisms that might potentially be associated with proposals for the setting up of a new supra-national human rights court.

The preceding discussion notwithstanding, the authors' brief suggestions towards the setting up an Asia-Pacific human right court may be summarized thus:

- The establishment of such a court would necessarily require the backing of a regional organization along the lines of the Council of Europe, the Organization of American States and the AU, along with a human rights convention tailored to the needs of the Asia-Pacific region.

- Such a court must have multiple benches, and should not limit itself to one bench, owing to the massive geo-social breadth of the Asia-Pacific region. Access to courts as a

[107] Study Group of the Int'l Law Commission, Rep. on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, finalized by Martti Koskenniemi, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006).

[108] Peters A. (2017), *The Refinement of International Law: From fragmentation to regime interaction and politicization*, International Journal of Constitutional Law Vol. 15(3), 671-704.

[109] Benvenisti E. & Downs G.W. (2007), *The Empire's New Clothes: Political Economy and the Fragmentation of International Law* Vol. 60(2), 595.

pre-adjudicatory necessity is as important as passing a reasoned and fair judgment and ensuring its compliance.

- Unlike the ECtHR, such a court should, mandatorily, ensure the representation of judges from each country of the Asia-Pacific. This would help in garnering the legitimacy that would be a pivotal factor of the success/failure of such a court. Such representation should be proportionate to the population of each country in the region.

- Like the ECtHR, such a court must ensure long terms for its judges, to ensure stability and continuity in the quest of access to justice.

- Such a court must ensure adequate safeguards and concessions, arrived at from negotiations with the Asia-Pacific member states, to ensure that the countries are not left feeling the need to cede their sovereignty to an external actor.

- Such a court must also ensure adequate, if not equal, representation to all genders as judges. The movement towards a new world order demands that equality be intersectional.

- Such a court must make the exhaustion of domestic remedies a pre-cursor for invoking its jurisdiction. In exceptional cases, the skirting of such a requirement may be made permissible.

- Such a court can make valuable takeaways from the working of smaller-level courts such as the Extraordinary Chambers in the Courts of Cambodia (ECCC), which has shown incredible potential for development in the areas of the rule of law and human

rights across the spectrum of the Asia-Pacific region. An important feature of the ECCC has been its involvement of the Cambodian people in the judicial process, thus making it an essentially bottom-up approach, thus leading to greater legitimacy for the system[110].

- Such a court could also follow in the footsteps of the AfCHPR, which has been merged with the Court of Justice of the AU and, as a consequence, has additional jurisdiction over legal persons for genocide, crimes against humanity, war crimes, 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.[111] While it is true that this would cause a significant overlap with the jurisdiction of the ICC, depending on how one looks at the concept of fragmentation, it may either be a welcome or groan-inducing move. What is certain is that the overlap notwithstanding, such a move would certainly improve access to a court dealing with the same crimes as the ICC, with the added geographical and lingual advantages that an Asia-Pacific Court would undoubtedly offer.

- Another interesting path that such a court could take would be to follow the IACtHR's lead in entertaining cases concerning corporate liability, wherein the IACtHR has issued precautionary measure in cases involving allegations of human rights abuses by both, state and corporate actors.[112]

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[110] Chang-ho Chung, *The Emerging Asian-Pacific Court of Human Rights in the Context of State and Non-State Liability*, Harvard International Law Journal (2016), https://harvardilj.org/2016/07/the-emerging-asian-pacific-court-of-human-rights-in-the-context-of-state-and-non-state-liability/ .

[111] *Id.*

[112] *Indigenous Communities of the Xingu River Basin, Pará v. Brazil*, IACtHR., Precautionary Measure 382/10 (July 29, 2011), http://www.oas.org/en/iachr/indigenous/protection/precautionary.asp.

CONCLUSION

The benefits of a dedicated court for the Asia-Pacific region are numerous. Benefits include, but are not necessarily limited to, the possibility of an impartial resolution of inter-state disputes, for state parties (thus minimizing the potential for the escalation of tensions taking the shape of armed conflicts) and the establishment of a more uniform basic standard of treatment qua persons of the region, based on certain agreed upon minimum standards inter-se the constituent members of the Asia-Pacific. The setting up of a dedicated Asia-Pacific human rights court could also contribute to the fostering of goodwill, both internationally and domestically, owing to neutral third-party investigations into the ubiquitous and diverse human rights crises that are bounden in the region today. A regional court for the Asia-Pacific would also serve to educate citizens, states, corporation and organizations on the multi-faceted nature and importance of notions like human dignity and autonomy, which are among the chief solutions for a predominant number of human rights crises that the Asia-Pacific region faces today. If structured well, an Asia-Pacific Court of Human Rights could also serve to, through its orders, be a source of deterrence for the perpetrators of human rights abuses.[113]

However, the path to the setting up of such a court is far from being a walk in the park. Not least of the impediments would include the marshaling and usage of financial resources and language, owing to the thousands of languages and their dialects that are spoken across the Asia-Pacific region, which is hub of diversity. While these are more practical problems, there remain greater concerns of legitimacy and sovereignty that[114] are bound to cloud the setting up of a regional human rights court, for history is replete with instances to show that states are not

[113] Kelly Dawn Askin, *Issues Surrounding the Creation of a Regional Human Rights System for the Asia-Pacific*, ILSA Journal of Int'l & Comparative Law, https://core.ac.uk/download/pdf/51089424.pdf

[114] *Id.*

amenable to cede their sovereignty and become subject to the diktat of an external authority at the drop of a hat. The road to a dedicated court for the Asia-Pacific region must, ultimately, be the product of a measured compromise, which itself would be the culmination of several concessions and negotiations.

The future looks promising, with the Association of Southeast Asian Nations (ASEAN) having come up with the ASEAN Intergovernmental Commission on Human Rights (AICHR).[115] While there is a case to be made for major improvements in the functioning of the AICHR, it is undeniable that steps like the setting up of the AICHR are, in principle, the need of the hour for the Asia-Pacific region. It would, undoubtedly, take some doing, but a careful study of the already existing regional human rights courts, and a cogent plan to build on its successes and avoid its pitfalls would stand us in good stead. The need, thus, is to learn from the past, use the present, and develop in the future. We can get there: slowly, perhaps, but surely.

[115] https://www.aseanhrmech.org/aboutus.html.