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Regional Courts and Human Rights in the Developing World

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Abstract

There are important advocacy groups that favour greater respect for human rights at the (sub) regional level in the form of courts in many parts of the developing world. Many important developments are taking place in terms of human rights at the (sub) regional level in the Southern Hemisphere that have not (yet) attracted due traction. While regional adjudication is more advanced in some regions than in others, efforts at institutionalising human rights have been pursued across all the continents. It is a welcome trend, but one which needs to be evaluated within the context of shared strengths, opportunities, weaknesses and real threats.

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Introduction: Human Rights and New Regionalism

Since the 1990s one of the highly understated trends in the evolution of new regionalism has been the increased focus placed by regional entities on human rights. This trend is driven, to a large extent, by the strong wave of social consciousness emerging across the globe. Gatherings such as the World Social Forum have sought to highlight the importance of aligning progress in growth-oriented globalization and minimum social standards. Even in the negotiation of new generation trade agreements there has been a desire from many social groups to emphasise the importance of social and economic rights as the pillars that ought to guide negotiators when engaging in trade deals. In Asian sub-regions, where there has been a strong sense of informal regionalism and where allusions to politically charged and sensitive matters such as human rights have been eschewed in the past, there is now an embryonic (albeit strong) inclination to embrace the institutionalization of human rights. Bringing human rights within a court's jurisdiction is just one of the symptoms of increased institutionalization of rights in free trade agreements. The judiciary in the traditional sense of the word evokes the presence of courts helping in discharging the task of dispute settlement. Practice on this issue varies across regions. In some of the regions studied human rights is still not regarded as part of the trade architecture. In others, the level of judicialization has been expanding. This is an important feature of new regionalism in an era marked by the increased role of the emerging actors. One of the issues that these actors would face as they develop and flourish (notably due to the trade of raw materials from the Southern Hemisphere) is that they cannot simply ride roughshod on the rights of citizens by relying on the pretext of governmental consent as they forge ahead with investment deals regardless of some of the patent risks of rights erosion. Across many countries in the South awareness amongst citizens has been accentuated and they are, thus, keen to resist races to the bottom regarding rights protection. As argued in this contribution, there is an underexplored quality of jurisprudence from the sub regional courts in the South in the area of human rights.¹

In developing these ideas, one is keenly aware of the challenges of treating very different regions in one study. Consequently, an inescapable difficulty soon becomes one of comparing entities that have been shaped by given specificities.² This is compounded by the fact that various organizations have different mandates and capacities. In 1968 Joseph Nye argued that one of the

critical challenges that one has to grapple with in studying regional integration is actually to conceptualize the object of comparison.³ In 2011 De Lombaerde would succinctly craft this as a problem of engineering the precise relevant questions in the comparative enterprise.⁴ In this article the object compared is the degree to which regional courts have been used to promote human rights in a context where enforcement at all levels remains an arduous task.⁵

Regionalism and new regionalism studies in the North (North America, Europe and South East Asia) have been on the rise.⁶ Insights from the South have largely been side lined.⁷ One of the hopes underlying the article is therefore to highlight the important jurisprudence that is being developed in many regional courts across the South in the field of human rights. While the situation is far from ideal, there are observations to be made. It is true that the role of politics and politicians remains pervasive. However, people are more conscious of the use that can be made of the (sub) regional courts to assert specific claims that can be actionable at the municipal level. This is important. In a context where very few companies and individuals exert influence on the economy or on politics, the voices of despondent individuals and groups of people, especially in poor countries, risk being completely eradicated in the (figurative) labyrinths and dark alleys controlled by those with special interests. What the despondent can claim in such circumstances are their human rights. That is why these rights are even more crucial and why efforts to consistently resist latent or patent erosion of these rights needs to be sustained.

Following this introduction the second section presents a picture of progress in human rights protection in the sub regional (trade) courts. It is correct that the European Court of Human Rights has been a trail-blazer as a regional court that has developed a robust body of principles through enforceable decisions. This is not a localized trend. Section three briefly outlines what is happening on the continental level, with landmark cases on human rights efforts by the (quasi) judicial bodies or the human rights commissions and their associated courts. The main message in this section is that in an era where new regionalism and the advent of emerging economies have been the mantras, there are still important human rights mechanisms even at the continental level, upon which people can rely if they lack recourse at the domestic level. Finally section four draws together some of the similar and contrasting features in the experiences of the courts in terms of strengths, opportunities, weaknesses and threats.

Sub Regional (Trade) Courts and Human Rights

In Africa, sub-regional courts have been active in crafting a strong body of rulings in their effort to interpret human rights provisions of the various sub-regional treaties. This stands in contrast with the continental level where the African Court of Justice and Human Rights (a very young institution) is yet to adjudicate on the merits of a major case. Across Africa, the Caribbean and South America, use is being made of sub-regional courts. Even if they are positively regarded, the involvement of regional economic community courts in human rights may be unsettling because this involvement places a negative premium on the unity of the international human rights system mindful of the economic mandate of sub regional courts. This is compounded by the fact that there is no coordination between the sub-regional courts themselves.⁸

The East African Court of Justice

In the East African Community (EAC) the sub-regional court, or the East African Court of Justice (EACJ), has been active. The most important recent cases of the court have been on the issues of legitimacy of parliamentary elections with regard to certain members of the sub-regional parliament and the legality of their assumption of office.

In 2007 the Court ruled in the *Nyong'o* verdict⁹ that citizens of Kenya could challenge the decision of the Kenyan Government to appoint its preferred individuals to the East African Legislative Assembly (EALA). The court added that there was authority for the action brought by appellants under Article 30 of the Treaty of the EAC, noting that its jurisdiction on the matter was not in dispute.¹⁰ This situation was not favourable to the EAC Council of Ministers that sought an amendment to the EAC Treaty to reduce the powers of the court to prevent it from exercising its mandate in such a manner in future. Amongst the proposals for treaty amendments were those meant to limit the powers of the court by dividing it into first and appellate chambers and also increasing the potential grounds for removing judges from their positions. In a direct attempt to target specific judges who had provoked the Council of Ministers (the initiator of the amendment), another amendment sought to preclude service on the regional bench, for judges who were previously ejected from national judicial office as a result of misconduct. This directly

targeted two Kenyan judges who had been subject to national judicial inquiries for probity lapses in 2003. The Kenyan government hoped that, through this approach, it could remove the judges from the regional bench, but the court held firm and refused to dismiss them.

*Medical Unit v AG of Kenya and Ors*¹¹ was an important human rights related matter heard by the EACJ. It pertained to inhumane treatment and torture brought as claims against the Government of Kenya in the Mount Elgon area. The matter was tabled before the EACJ by a non-governmental organisation (NGO) that had conducted extensive forensic research on the matter. The Kenyan Government's rejoinder was based on the assertion that the EACJ lacked jurisdiction on human rights issues. However, the court defended its competence based on its mandate under the EAC Treaty as an interpreter of last resort.

In the *Katabazi case*¹² the Ugandan authorities re-arrested fourteen of sixteen detainees who had been initially charged and jailed for treason. They were re-arrested based on the same facts but the second arrest related to charges of unlawful possession of firearms and terrorism. These charges were brought before a Military Court Marshall. The matter was heard by the Ugandan Constitutional Court, which ruled that based on the *non bis in idem* principle the detainees had to be released. This did not happen so the appellants sought to assert their claim before the EACJ. The respondents in the case (the EAC Secretary General and the Attorney General for Uganda) argued that the EAC Treaty gave no human rights jurisdiction to the EACJ. The court concurred that it had no such jurisdiction. However, it noted that simply because a matter related to human rights litigants could not use that as a basis to sever or clip the wings of the court in exercising its mandate in treaty interpretation under Article 27 of the EAC Treaty.

Efforts of the EACJ to assert its role in the field of human rights have been challenging and met by stiff resistance from political authorities. There have been calls to broaden the role of the Court to explicitly cover issues of human rights and gross violations such as genocide, but the political appetite for such calls has been weak. There has also been little political fervour for demands to institute a Bill of Rights for the sub-region. Yet, in spite of these challenges, there is great enthusiasm in the region about its prospects, especially in the field of human rights. This is captured by the words of one of its justices who noted that

... the peoples of East Africa should know that the integration process on which the East African Community has embarked is for them. The rights that flow from the Treaty are for them. They should enjoy them and claim them where necessary through the regional justice mechanisms put in place by the Treaty.¹³

Community Court of Justice of the Economic Community of West African States

Dispute settlement is envisaged under the Economic Community of West African States' (ECOWAS') revised Treaty of 1993. The Community Court of Justice (CCoJ) has heard several important cases with inherent ramifications for human rights. It appears to be the most activist of all the regional courts studied in its approach to defending the human rights of citizens of the sub-region. In doing so, it has also relied on its own jurisprudence as well as on cases of the European Court of Human Rights.

For instance *Manneh v The Republic of Gambia* was a case heard by the court regarding the unlawful arrest and treatment of a Gambian journalist by the Gambian authorities.¹⁴ Gambian officials were summoned before the court many times but they refused to appear without providing cause.¹⁵ Eventually the case went on appeal without the Gambian government. Counsel for the plaintiff noted inhumane and degrading conditions of detention. Counsel for the Government challenged the court's jurisdiction to hear the matter. Pursuant to Article 9(4) of the Protocol on the CCoJ and Article 10(d) of the Supplementary Protocol, the court ruled that it had jurisdiction to hear issues of violation of human rights. Relying on its decision in *Alhaji Hammani Tidjani v Nigeria and 4 Others*¹⁶ it set out the conditions under which such claims could be brought before it. Amongst these conditions is the absence of *lis pendens* hearings on the same matter in other international courts as well as the exhaustion of national remedies. It further relied on cases of the European Court of Human Rights (*Selmouni v France*¹⁷ and *Cenbauer v Croatia*¹⁸) to rule that there were violations of human rights against Manneh, which occasioned damages. It ordered the release of Manneh and a payment of 100,000 US dollars to the appellant.

The question of non-exhaustion of national remedies was also at issue in a high-profile human rights litigation. In this case the CCoJ dismissed the Government of Gambia's preliminary objection of non-exhaustion in its unlawful arrest and detention of the editor of the *Gambian Weekly* (Musa Saidu Khan).¹⁹ He was later tortured and subjected to inhumane and degrading treatment. The acts were attributed to the National Intelligence Agency. The court ruled for the appellant and ordered Gambia to pay damages to the plaintiff to the tune of US 200,000 dollars.²⁰

Another human rights case brought before the court related to slavery. In *Hadijatou Mani Koraou v Niger*²¹ the court had to examine the *wahiya* custom of Niger whereby young girls are acquired under conditions of servitude and considered as *sadaka* (fifth wife) even as they are not regarded under Sharia as legally married. In the case of Koraou, she was bought by the respondent for an equivalent of 380 euros. She later sought freedom from these customary shackles by petitioning courts in Niger. Having been turned down by the Supreme Court of Niger she filed a motion before the ECOWAS court which found for her and ordered the Government of Niger to pay the claimant an equivalent of 15,000 euros.

Unlike any of the other courts the activist approach of ECOWAS CCoJ has been demonstrated by its decision against the Government of Nigeria in a case regarding the rights of children to education. In *SERAP v Nigeria*²² the court affirmed that the Nigerian Government was accountable for ensuring the right to education for children. In this landmark decision, the court also ruled that the right to education should not be undermined by corruption. It stated that it would hold ECOWAS States accountable if they denied the right to education to their people. It rejected the government's claim that the right to education was not enforceable.

In another case that is pending before the court, SERAP has filed a motion against multinational oil firms, the state oil corporation of Nigeria and the Government of Nigeria for complicity in violating the social and economic rights of citizens. The multinational undertakings include Shell, Elf, Chevron, Agip, Total and Exxonmobile.²³ The particulars of the motion filed include, in the words of SERAP:

violations of the right to an adequate standard of living, including the right to food, to work, to health, to water, to life and human dignity, to a clean and healthy environment, and to economic and social development.²⁴

The Southern African Development Community Tribunal

In the Southern African Development Community (SADC), a human rights mandate was considered for the SADC Tribunal in the negotiations that preceded its creation. However, the proposal was rejected.²⁵ Cases heard by the SADC Tribunal have mainly revolved around issues of unlawful dismissal (labour relations) and land (mainly in Zimbabwe).

In *Mtingwi v SADC Secretariat*²⁶ the Tribunal refused to grant application for costs of damages for breach of an employment contract by SADC's Secretariat based on the fact that the applicant did not turn up for work on the due date as a result of pending criminal charges against him in Malawi. In the *Kanyama Case* the Tribunal used the notion of 'justice' in ruling for the applicant who was technically demoted from a high post of responsibility in SADC's Secretariat and demanded to leave even though he had the lawful option for his contract to be extended by four years. The Tribunal ordered SADC Secretariat to make good costs determinable by the registrar.²⁷

The main land-related case was the *Campbell Case* where the Tribunal ruled that the actions of the Government of Zimbabwe in taking landed property from the applicants was inconsistent with the Treaty of SADC.²⁸ The facts of the case are worth revisiting. In 2004 the Government issued notice to usurp Campbell's land (Mount Carmel) purchased in 1974. On 14 September 2005 President Robert Mugabe's government adopted Amendment 17 that vested certain categories of land to the government, excluding the possibility of recourse to a court for those affected. Following a seizure of Campbell's property the issue was taken to courts in Zimbabwe. Dissatisfied with the verdicts of national courts, the plaintiff, alongside 77 others filed the complaint with the SADC Tribunal. The SADC Tribunal ruled that the Government of Zimbabwe had violated Articles 4 and 6 of the SADC Treaty by restricting access to justice for the plaintiffs through excluding their recourse to courts and also by engaging in blatant racial

discrimination against white farmers whose lands were confiscated without compensation under Zimbabwe's land reform program. It concluded that the plaintiffs were entitled to compensation. Zimbabwe failed to comply with the judgment. The Tribunal then referred the matter to the Summit, which did not make any pronouncements on the merits of the issue. However, in August 2009, the Government of Zimbabwe reacted to the decision by announcing that it will withdraw its membership from the Tribunal.

The *Campbell Case* is one of the landmark judgments, which exposes the complex interplay between politics and law at the sub-regional level, in terms of adjudication. It appears to indicate that politics begins where the law ends. This is all the more so because Zimbabwean courts and leaders (especially President Mugabe) persistently dismissed the validity of the rulings of the Tribunal.²⁹ At the moment of writing, SADC leaders have imposed a moratorium on the functioning of the Tribunal pending a re-negotiation of the Tribunal's protocol. Yet, one cannot comprehend the approach that was adopted by the Tribunal without scrutinising SADC's treaty framework.

The fight against poverty and respect for human rights are presented by SADC States as major goals in the Treaty of SADC. SADC NGOs even sought to take the human rights dimension of the treaty to another level by codifying it into a protocol, in a manner reflecting similar calls for a sub-regional Bill of Rights in the EAC. This was resisted by some Member States.³⁰ According to authors like Ruppel, all SADC goals that relate to poverty reduction that are contained in the SADC Treaty have a direct link to human rights.³¹ He has also argued that the Campbell case 'became a benchmark of the SADC Tribunal's key role in the integration of legal and institutional systems in its region of jurisdiction.'³²

Other matters heard by the SADC Tribunal have been on the electoral process in Zimbabwe and an action against the government of the Democratic Republic of Congo (DRC) on irregularities in customs administration. In *The United Peoples' Party of Zimbabwe (UPPZ) v SADC, Mbeki and Movement for Democratic Change (MDC)*, the applicant sought to dismiss the validity of the power-sharing memorandum reached by the respondents in July 2008 since the petitioner was not included in the negotiations on the sharing or transfer of power.³³ According to the applicant SADC's move to exclude it

from the talks was *ultra vires*. SADC claimed that the applicant had not exhausted national remedies and the Government of Zimbabwe argued that the Tribunal had no competence to hear the matter. But the Tribunal justified its jurisdiction on the basis, particularly, of the inclusion of the Republic of Zimbabwe as one of the parties. It ruled that as the UPPZ had won no seats it was rightly excluded from the talks of power sharing and so duly dismissed the application.

The case against the DRC was momentous in its involvement of the rights of private sector actors and its implication for trans-boundary, *ipso facto*, regional commerce within SADC. The issue was that the applicant's truck was held in the DRC by Control Officers without cause and so he appealed to the Tribunal claiming damages of 2 million US dollars. He also contended that he could not exhaust national remedies, given that his refusal to pay bribes to judges in the DRC meant his case could not be justly heard at the municipal level. In deciding the matter the Tribunal indicated its preference to lean on its own precedents thereby developing its own jurisprudence on some of the issues that were examined including exhaustion of national remedies. It ruled that

In *Mike Campbell (PVT) Ltd v The Republic of Zimbabwe* SADC (T) 2/2007, the Tribunal observed: ... where the municipal law does not offer any remedy or the remedy that is offered is ineffective, the individual is not required to exhaust the local remedies. . . These are circumstances that make the requirement of exhaustion of local remedies meaningless, in which case the individual can lodge a case with the international tribunal.³⁴

On the damages requested, the Tribunal noted that these were premised in fact and in law, mindful that the truck was later auctioned by the Control Officers in Lubumbashi. Respondents claimed that the true value of damages was 25000 dollars without giving evidence to justify this figure. The Tribunal ruled for the applicant and ordered the registrar to determine costs.

Caribbean Court of Justice (CCJ)

The CCJ hears matters that arise from the interpretation of the Treaty of Chaguaramas, but for individuals to avail themselves of the services of the court, they need to refer back to their

national constitutions and exhaust national remedies. The CCJ was created with the hope of relieving the Privy Council of its erstwhile final appellate jurisdiction in the Caribbean. The Treaty of Chaguaramas does not explicitly mention human rights and the CCJ has also inherited this omission.³⁵

Important issues such as the right to legal representation,³⁶ unlawful dismissal³⁷ and transfer of real estate title³⁸ have come before the CCJ. The CCJ also had the opportunity to hear a matter on human rights pertaining to the death penalty, originating in Barbados. The Appeals Court of Barbados ordered commutation of a sentence of death to that of life imprisonment for the respondents who had been charged with beating and killing an individual. The Crown appealed the decision. But the CCJ dismissed the appeal partly because the respondents had presented the issue before the Inter-American Commission on Human Rights and so had a legitimate expectation that the Commission would decide before any death sentence took effect.³⁹

In another human rights related matter, the court adopted a more conservative and constructionist approach when it ruled that a claimant sentenced to death could not rely on the state to provide him with an expert DNA witness, whose services the claimant regarded as part of ‘facilities’ to which claimants may be entitled to under section 18(2) of the Barbadian Constitution. The court rejected the reading of such an entitlement under the provisions of the Barbadian fundamental law. Instead the CCJ rested its *dictum* on precedents set by the European Court of Human Rights (*Jespers v Belgium; Mayzit v Russia; Natunen v Finland*) and on the International Covenant on Civil and Political Rights. It ruled that ‘facilities’ could not be taken to include the services of expert witnesses.⁴⁰

Tribunal of Justice of the Andean Community

Apart from the Court of Justice of the European Union and the European Court of Human Rights, the only institution that comes close in terms of case load and an overcrowded docket is the Tribunal of Justice of the Andean Community (TJAC).⁴¹ It has heard numerous contentious issues, actions for non-compliance, labour matters as well as cases involving annulment actions. Many litigious actions have been heard before the TJAC and on many occasions it has been used as a

successful medium for such disputes, especially in the area of international trade.⁴² The TJAC has had the opportunity to issue over 1500 rulings and the solid majority of these have been in the realm of intellectual property rights. This can be largely explained by the fact that matters that impinge on intellectual property in the region are mainly addressed through regional rather than national disciplines.⁴³

The Andean leaders adopted the Charter of the Promotion and Protection of Human Rights in 2002. Since this happened, there has been a remarkable increase in the frequency with which human rights provisions are invoked by the TJAC, through solid arguments to resolve differences and by using a constructive interpretation.⁴⁴ There are many cases relating to intellectual property and human rights that it has heard. For instance in *The Vintix Coated Tablet Case* heard in 2003 (preliminary ruling request from Colombia) the TJAC ruled that holders of test data and trade secrets must not act in a manner that infringes human rights in terms of accessing affordable medication.⁴⁵ In another landmark decision that also related to intellectual property the TJAC ruled that:

the granting of exclusive rights for certain periods of time, may conflict with fundamental human rights such as health and life, since the consumption of drugs is related to its price and the monopoly price may make it impossible to access the drug, which can lead to disease and death to their potential customers.⁴⁶

As such it indicated that intellectual property rights cannot be used to supersede the rights of citizens to access affordable drugs.

The TJAC has equally had the opportunity to provide a preliminary ruling (also requested by Colombia) on trademark registration standards for products that could be harmful to plants and animals if improperly or unclearly labelled. It ruled that national authorities have to assess the risks entailed in the use of such products, especially for plants and animals.⁴⁷

Finally, in another health related preliminary ruling (this time from Peru), it found that in deciding on the location of slaughterhouses, governments have to place greater priority and emphasis on the health and lives of human beings. It expounded the view that in its (the government's) pursuit of

goals that are pro-agribusiness, any efforts related to this goal must be evaluated against more important factors such as human health and a safe environment.⁴⁸

MERCOSUR's ad hoc Arbitration Court

The Common Market of the South (MERCOSUR) has been developing a growing body of regional human rights norms. It has several human rights instruments, such as the Protocol of Asuncion on the Commitment to the Promotion and Protection of Human Rights in MERCOSUR; the Social-Labour Declaration of MERCOSUR; the Agreement on the Regularisation of Internal Migration in MERCOSUR; the Agreement Against Illicit Traffic of Migrants; the Agreement on Regional Cooperation for the Protection of Children in Situations of Vulnerability and the Agreement on the Implementation of Shared Databases of Children in Situations of Vulnerability in MERCOSUR and Associated States.

In the *Bridges case*, the MERCOSUR *ad hoc* arbitration court held that, in the dispute between Argentina and Uruguay, the question of a public protest was an issue that Argentina had to deal with through its criminal rules. The court upheld the claim by Uruguay that the failure of the Argentine Government to deal with the environmental protest violated the agreement on free movement of goods and persons within MERCOSUR. In effect, the court appeared to take a counter intuitive approach that seems to be inconsistent with the human rights of freedom to demonstrate and freedom of assembly. Yet, it held that this was not the case. From a broader perspective, and given the context of the case, it is clear that Argentina did not want to bear the cost of pulp mills along the Uruguay River and thus, that the freedom of expression argument was largely artificial. Consequently, the court rejected Argentina's desire to lean on the Court of Justice of the European Union's cases in *Commission v France* and in *Schmidberger* to uphold the right to protest, noting that the decisions on both cases had been contingent on different facts which could not be applied to the current issue.⁴⁹ Essentially, the court in this case, upheld the rights of people to free movement, as it believed that finding for Argentina would greatly jeopardize protection of these rights. The ruling, regarded by Lixinski as narrow, can be explained by the embryonic nature of the economic integration process in MERCOSUR and the

desire of the *ad hoc* arbitration court to focus on the goal of attaining economic integration in contrast to protecting the rights to freedom of expression and protest.⁵⁰

Continental (Semi) Adjudicative Systems: Human Rights Commissions and Courts

The relations between the United Nations and regional entities are sanctioned by Chapter VIII of the UN Charter. In the area of human rights this chapter is silent. This was partly due to the tensions and dichotomies that existed between the more socialist understandings of what constituted rights and the perceptions of the Western nations. In any event, in 1977, the UN General Assembly appealed to states for regional human rights systems. Communist and Asia-Pacific states resisted such requests.⁵¹ However, in 1995 the Commonwealth of Independent States adopted the Minsk Convention on Human Rights, which amounted to little in practice. Nevertheless, some of the traditional regional organizations that were initially created to foster regional economic development have embraced the human rights mantle and have in certain cases, enshrined the pursuit of human rights as core components of their goals.

The Americas

The main texts in the human rights system of the Americas are the 1948 American Declaration on the Rights and Duties of Man and the 1969 American Convention on Human Rights. However, the real institutional genesis of the system was the creation of the Organisation of American States (OAS) through its 1948 Charter (which came into force in 1951). The Charter has been revised over the years by various protocols.

The 1969 Human Rights Convention entered into force in 1978. Of the 35 OAS members, 24 have ratified the Convention. The human rights system is overseen by a Commission and a court. The Commission plays an important quasi-judicial role of monitoring; promotion; investigation and litigation activities. It is composed of 7 members, who meet several times annually for periods of two weeks, at the headquarters in Washington DC. The major challenge faced by the Commission in discharging its tasks is money, a great part of which comes from European

donors. Another difficult aspect of its work has been stances of some leaders like former Venezuelan President Hugo Chavez who threatened to withdraw from the system in April 2012 because the Commission accused the Venezuelan government in 2011 of expropriating private property to expand the availability of public housing. Chavez accused the Commission and the Court of being tools of US imperialism.⁵²

The Commission has been involved in a series of high profile cases. For example, it issued a precautionary measure against Brazil's Belo Monte Hydro power-plant that would have affected the indigenous communities of the Xingu River Basin. Brazil retaliated by withdrawing its OAS ambassador and refusing the annual contribution of 800,000 dollars to the Commission.⁵³ The majority of cases brought before the Commission are individual petitions. Inter-state cases are rare but in 2007 Nicaragua brought a case against Costa Rica on grounds of discriminatory treatment of Nicaraguans in Costa Rica. Ecuador also brought a case against Colombia expressing its displeasure at a Colombian army incursion into Ecuador on the grounds of pursuing Colombian rebels, which resulted in 25 deaths including that of an Ecuadorian.

Aside from the Commission, the court is also very active. It came into being in 1979 and has 7 judges. It meets for 1-2 weeks several times per year at its headquarters in San José, Costa Rica, as well as in other countries that offer to host its sessions. It is a judicial body with a contentious jurisdiction recognized by a majority of member states and hears about 4 cases per year.⁵⁴ It issues decisions on violations cases submitted by the Commission. It can equally provide advisory opinions and provisional measures for the protection of individuals in imminent danger of rights violations. Like the Commission, the Court also faces financial problems and low levels of compliance by member states. An example of a landmark case heard by the court was the *Sawhoyamaxa Indigenous Community v. Paraguay*.⁵⁵ In this case the Paraguayan government was held responsible for the purchase of a huge expanse of land by British businessmen towards the end of the 19th century in Paraguayan Chacos, that belonged to the Sawhoyamaxa community, without the knowledge of the local Indians. It found the state to be in violation and ordered payment of one million US dollars into a fund to finance educational, housing and agricultural projects for the community.

Africa

The African human rights system cannot be understood independently of continental integration efforts that took an important formal turn in 1963 with the creation of the Organization of African Unity (OAU). The OAU was founded upon several bases, amongst which were the importance of sovereignty and non-interference in the internal matters of states. However, the crass actions of certain regimes in Africa attracted many criticisms, both from within and beyond Africa. The atrocities perpetrated by the likes of Idi Amin of Uganda and Bedel Bokassa of Central Africa were so heinous that even some of their peers resolved to forge a human rights system. This led to the adoption of a decision to create an African Charter on Human and Peoples' Rights in 1981, which came into force in 1986.

At the core of the task of implementation of the charter has been the African Commission based in Banjul, the Gambia. The main task of the Commission is promotion, ensuring protection and interpretation of the Charter. It also makes recommendations after on-site visits. It can issue resolutions, constitute working groups or committees and also appoint special rapporteurs on specific issues as and when needed. It meets every two years and receives biennial reports from states. Both individuals and states can bring complaints. There has been a lack of inter-state complaints, with an exception being that brought by the Democratic Republic of Congo against some of its neighbouring states. For individual petitions, important cases have been heard. In *The Social and Economic Rights Action Centre and Another v Nigeria*, the Commission made clear that economic and social rights are perfectly justiciable.⁵⁶

Given the relative youth of the system, it is limited by many constraints. Alston and Goodman⁵⁷ contend that the system is not robust enough and that there is a need to raise the cost for violations familiar to other systems. This problem is associated with other challenges, such as low levels of awareness, timid use of the system and weak levels of compliance.

The system now includes a court. The protocol creating the court was signed in 1998 and came into force 2004. Known as the African Court of Justice and Human Rights (following a merger), it is based in Arusha in Tanzania.⁵⁸ There are eleven judges but only the president is sitting. The

court has the mandate to provide advisory opinions and also to hear cases submitted by the Commission, states and inter-governmental organizations. Individual complaints can also be entertained by the court. However, this is contingent on a special declaration by the states as well as the discretion of the court. This double hurdle system is a unique trait of the African system.⁵⁹ Judges of the court were elected in 2006 and the first judgment was issued in 2009.⁶⁰ The second case, brought in the context of the Libyan revolution, was considered in 2011.⁶¹

Asia

Asia is the region with the lowest level of institutionalisation of regional human rights mechanisms. Asian NGOs met in 1993 and issued the Bangkok Declaration containing some of the goals of the NGOs, which included the creation of a commission; a reporting system and adherence to international human rights conventions. In countries such as Indonesia, Malaysia and Singapore, the protection of state sovereignty has been seen as too important to allow for regional human rights institutions such as a court. Only the Philippines has been consistently inclined to having a more robust form of institutionalized human rights mechanism in the region.⁶² An initial idea of a regional human rights clearing house was proposed by the Philippine Government under Corazon Aquino, but the proposal was not accepted.⁶³

Within the Association of Southeast Asian Nations (ASEAN), institutes for strategic studies started to make calls for regional approaches to civil and political rights, with the Centre for Strategic and International Studies (CSIS) in Jakarta pushing for this regional approach. These institutes were doing so with the understanding that human rights had implications for US/EU and ASEAN strategic relations.⁶⁴ In December 1983, the Regional Council on Human Rights (an NGO) in Asia, was formed which mainly had the task of promoting the human rights agenda. There were hopes that this NGO would grow to do what commissions would normally do, but its effects on the governments proved to be negligible. In the 1980s and 1990s the Asian Human Rights Commission and Asian Legal Resource Centre developed and circulated the Charter of Asian Human Rights. However, the Charter was perceived, at the time, as a pedantic document rather than a legal text.⁶⁵

Many reasons explain why it has been hard to institutionalize human rights in Asia. These reasons include a strong perception that human rights are a Western concept;⁶⁶ the vastness and diversity of Asia; inadequate ratifications (most states tend to be reticent towards civil and political rights, asserting that these hamper development); the Asian values debate (opposing viewpoints between South Korea's Kim Dae Jung and Singapore's Lee Kuan Yew) and the persistent problem of adversity toward erosion of state sovereignty.⁶⁷

Following the demands included in ASEAN's Charter in 2007 for the creation of a human rights body, in 2008, the human rights commissioners for Indonesia, Malaysia, the Philippines and Thailand met to discuss the option of such a body being a commission, with the possibility of it evolving into a court. Whilst noting that such a body could potentially raise ASEAN's international standing, Singaporean officials were nonetheless cautious about the advent of such a body noting that it had to reflect the history and culture of the region.⁶⁸ In their report on the ASEAN Charter, the Group of Eminent persons selected by ASEAN concluded that having an ASEAN human rights body was a positive development for the citizens of the region.⁶⁹ There is now an ASEAN Inter-governmental Commission on Human Rights that was put in place in 2009. This body is a consultative organ for ASEAN that engages in promotional and capacity-building activities.

In terms of dispute settlement proper and potential incidence on human rights in ASEAN, the High Council of Foreign Ministers was created to settle disputes between the members. However the effectiveness of this body has been questioned, given that ASEAN states have sought recourse to the International Court of Justice rather than to the Council in settling certain matters.⁷⁰ ASEAN has no court or tribunal in the sense of the courts established in ECOWAS, the EAC or CARICOM. However, there are specific institutions that have been created to deal with problems that may arise in the implementation of the ASEAN Charter. They include the ASEAN Consultation Commission to Solve Trade and Investment Issues and to resolve complaints on ASEAN Economic Community-related operational problems within 30 days; the ASEAN Compliance Body to provide mediation services for resolving disputes (modelled on the World Trade Organisation and the EU); and an appellate body that would hear appeals of decisions.⁷¹

In South Asia, in the South Asian Association for Regional Cooperation (SAARC), the institutionalization of dispute settlement is not adjudicative, but based more on arbitration. SAARC, which lacks a human rights mandate, has established an Arbitration Council that is supposed to settle issues between members.⁷² The Council is new and still to develop its own body of precedents. Dispute settlement in the area of trade in SAARC under the South Asian Free Trade Agreement (SAFTA) is specifically deferred to a Committee of Experts selected for this purpose.⁷³

Concluding Comparative Traits

The courts and institutions discussed above share common traits in terms of strengths, opportunities, weaknesses and threats. In considering their strengths, there is no question that the majority of the judges in the regional (trade) courts and commissions have been keen to exercise their tasks with a strong sense of probity and independence, in spite of the pressures that may emanate from political and economic actors. Secondly, it is useful that the regional courts (even when they are within trade-based communities) have demonstrated a willingness to take on human rights concerns, especially as the regional level often serves as a necessary link between domestic legal matters and universal concepts. Regional courts have the advantage of being attuned to the realities of specific regions and countries in a manner that eludes universal institutions. Thirdly, it is in some ways advantageous that the regional trade courts are grappling with human rights matters, such as the courts of the EAC and ECOWAS, because the types of challenges that municipal and regional actors have to deal with are usually comprehensive rather than restricted only to trade issues.

These strengths inevitably open up many opportunities for these courts. In many parts of the developing world there is an expansion of the middle class that is conscious of rights and remedies. The existence of cross-country markets will likely lead to greater demands on trans-boundary dispute settlement needs, especially in individual petitions both against private and public entities. Secondly, these courts are in a unique position to initiate proceedings *suo motu*, especially in those cases where governments may be unwilling to take on international corporate giants. In such cases, the courts (independent of any particular state), can use their discretion proactively to institute public interests claims. Thirdly, in certain regions, especially in Africa,

there is now an irreversible trend toward legal harmonization, especially through initiatives such as the Organization for the Harmonisation of Business Laws in Africa (OHADA). This spike in the affinity for legal convergence allows greater flexibility for judges in regional courts to cooperate with arbitrators of institutions such as OHADA's court of arbitration in a sustainable endeavour of judicial comity that can be extended to courts in other continents.

Regardless of these strengths and opportunities there are real weaknesses faced by all the courts. The first is money. The majority of the courts, even those that focus mainly on human rights are constrained by the issue of lack of funding. Lack of funding often equates to untrained court officials; decrepit work conditions; inability to hire clerks; pre-modern archiving and lack of basic facilities such as decent court registries and libraries. This is a problem reported in the majority of the courts and it beseeches a solution, showing better ways in which funds can be made more sustainable for the courts. An exit strategy from this problem could well be to deliberately communicate the importance of the use of these courts to the public as well as lawyers so that more cases could be brought before the court and this in turn would generate case fees for the institutions. The current trend of donor reliance is unsustainable. The experiences of the Tribunal of Justice of the Andean Community can be very instructive. A more acute challenge for these institutions is the lack of ample and clear relay between the regional courts and the municipal ones. Better communications systems are needed to ease the manner in which national courts can request preliminary rulings and also enforce regional court decisions.

Besides these weaknesses there are real threats that affect these courts. First is the issue of obstinacy of some political leaders who refuse to adhere to the verdicts of the courts in brazen acts of non-compliance, as has been the case of Zimbabwe in SADC's Tribunal or Venezuela in the Inter-American Commission. The second threat is the weak mandate that is often accorded the courts. This is in no small measure compounded by the demands on exhausting national remedies (often used as pretext by governments to abstain from deferring to regional courts) as well as from committing full enforcement of court decisions to politicians. Finally, the lack of broad awareness of the existence of the courts by their respective publics is a real existential concern for the courts. This is not made easier by the cost of accessing such institutions, even when there is awareness.

¹ See J Gathii, 'The under-appreciated jurisprudence of Africa's regional trade judiciaries' (2010) 12 *Oregon Review of International Law* 246.

² M Bøås, M Marchand and T Shaw, 'The weave-world: The regional interweaving of economies, ideas and identities' in *Theories of New Regionalism* (Frederik Söderbaum and Timothy Shaw eds., 2003), 204.

³ J Nye, 'Comparative regional integration: Concept and measurement' (1968) 22 *International Organization* 855. See also Ph De Lombaerde, F Söderbaum, L Van Langenhove and F Baert, 'The problem of comparison in comparative regionalism' (2010) 36 *Review of International Studies* 731-753.

⁴ Philippe De Lombaerde, 'Comparing regionalisms: Methodological aspects and consideration' in *The Ashgate Research Companion to Regionalisms* (Shaw, Grant and Cornelisse eds., Ashgate, Surrey, 2011), 33.

⁵ J Sarkin, 'The role of regional systems in enforcing state human rights compliance: Evaluating the African Commission on Human and Peoples' Rights and the new African Court of Justice and Human Rights with comparative lessons from the Council of Europe and the Organization of American States' (2008) 1 *Inter-American and European Human Rights Law Journal* 201.

⁶ YJ Choi and JA Caporaso, 'Comparative regional integration' in *Handbook of International Relations* (W Carlsnaes, T Risse and BA Simmons eds., London: Sage Publications, 2003), 480-499.

⁷ M Bøås, 'Regions and regionalisation: A heretic's view' in *Regionalism and Regional Integration in Africa: A Debate of Current Aspects and Issues* (2001), 27-39, 35.

⁸ LN Murungi and J Gallinetti, 'The role of sub-regional courts in the African human rights system' (2010) 7 *Sur International Journal on Human Rights* 120-121.

⁹ *Prof. Peter Anyang' Nyong'o and Others v. Attorney General of Kenya and Others*, Reference N° 1 of 2006 (EACJ Mar. 2007).

¹⁰ *East African Law Society and Others v. Attorney General of the Republic of Kenya and Others*, Ref. No. 3 of 2007, at 2-3 (EACJ Sep. 2008).

¹¹ *Medical Unit v Attorney General of Kenya and others*, reference N° 3 (2010).

¹² *James Katabazi and 21 Others v. Secretary General of the East African Community and Another*, Reference N° 1 of 2007 (EACJ November 2007).

¹³ Hon Mr Justice HR Nsekela, 'The Role of the East African Court of Justice in the Integration Process,' Paper Presentation, 3rd EAC Media Summit, Kampala, Uganda, 21-22 August 2009, 14.

¹⁴ *Chief Ebrimah Manneh v The Republic of The Gambia*, suit ECW/CCJ/APP/04/07, judgment ECW/CCJ/JUD/03/08, 5 June 2008.

¹⁵ *Manneh v Gambia*, at paragraph 4.

¹⁶ ECW/CCJ/APP/01/06, 28 June 2007.

¹⁷ [2005] CHR 237.

¹⁸ [2005] CHR 429.

¹⁹ ECOWAS Court dismisses government objections over jurisdiction in the case of tortured journalist, available at http://www.ifex.org/the_gambia/2009/07/08/gouvernement_objection_dismissed/ 29 June 2009.

²⁰ ECOWAS Court orders Gambia to pay Musa Saikyhan \$200,000 in landmark case, available at <http://www.jollofnews.com/ecowas-court-orders-gambia-to-pay-musa-saidykhan-200000-in-landmark-case.html>

²¹ *Hadijatou Mani Koraou v The Republic of Niger* ECW/CCJ/APP/0808, judgment ECW/CCJ/JUD/06/08, 27 October 2008.

²² *Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria and Universal Basic Education Commission*, ECW/CCJ/APP/0808.

²³ ECOWAS Court adjourns case against Shell, ELF and Others, No ECW/CCJ/APP/08/09 available at <http://thewillnigeria.com/general/5937-Pollution-ECOWAS-Court-Adjourns-Case-Against-Shell-ELF-Others.html> , 20 September 2010.

²⁴ ECW/CCJ/APP/08/09.

²⁵ ST Ebobrah, 'Litigating human rights before sub-regional courts in Africa: Prospects and challenges' 17 (2009) *African Journal of International and Comparative Law* 84.

²⁶ *Ernest Mtingwi v SADC Secretariat*, SADC (T) CASE No.1/2007, at 15.

²⁷ *Clement Kanyama v SADC Secretariat*, CASE NO. SADC (T) 05/2009. See also *Angelo Mondlane v Secretariat of the Southern African Development Community*, CASE NO SADC (T) 07/2009 and *Bookie Monica Kethusegile-Juru v SADC Parliamentary Forum*, CASE NO. SADC (T) 02/2009, at 2 and 6.

²⁸ *Mike Campbell and 78 Ors. v Government of Zimbabwe*, SADC (T) Case No. 2/2007, at 57-58. Other land cases pitting the Government of Zimbabwe against farmers and in which the Government has been ordered to refrain from evicting title holders from their landed property include: *Gideon Stephanos Theron v The Republic of Zimbabwe and Ors.*, CASE NO SADC (T) 2/08, *Douglas Stuart and Ors., v The Republic of Zimbabwe and Ors.*, *Andrew Paul Rosalyn Stidolph v The Republic of Zimbabwe and Ors.*, CASE NO SADC (T) 04/08, *Anglesea Farm Ltd., and Ors v The Republic of Zimbabwe and Ors.*, CASE NO SADC (T) 06/08; *Luke Munyando Tembani v Republic of Zimbabwe*, SADC (T) Case No. 7/2008; *Luke Munyando Tembani v Republic of Zimbabwe*, CASE NO. SADC (T) 07/2008.

²⁹ *Louis Karel Fick and Ors. v Republic of Zimbabwe*, CASE NO. SADC (T) 01/2010, at 3; *William Michael Campbell and Richard Thomas Etheridge v The Republic of Zimbabwe*, CASE NO SADC (T) 03/2009.

³⁰ O Ruppel, 'Land issues before the Southern African Development Community Tribunal' in *Southern African Development Community Land Issues: Towards a New Sustainable Land Relations Policy* (Ben Chigara ed., London: Routledge, 2012), 89-120.

³¹ *Ibidem*.

³² *Ibidem*.

³³ *United Peoples' Party of Zimbabwe v SADC, Thabo Mbeki, ZANU-PF, MDC Tsvangirai and MDC Matambara and the Republic of Zimbabwe*, CASE NO. SADC (T) 12/2008, at 3.

³⁴ *Bach's Transport Ltd., v The Democratic Republic of Congo*, CASE NO. SADC (T) 14/2008, at 4-7.

³⁵ D Bascombe, 'The introduction of the Caribbean Court of Justice and the likely impact on human rights standards in the Caribbean Commonwealth' (2005) 31 *Commonwealth Law Bulletin* 119-121.

³⁶ *Gladston Watson v Rosedale Fernandez*, GY Civil Appeal No. 42 of 2004, CCJ Appeal No CV 2 of 2006.

³⁷ *Euland Hendy v Commissioner of Police and Att. Gen. of Guyana*, GY Civil Appeal No 99 of 2004, CCJ Appeal No CV 6 of 2007; *Mohammed Yasseen v Att. Gen. of Guyana*, GY Civil Appeal No 97 of 2004, CCJ Appeal No CV 10 of 2007; *Stephen Edwards v Att. Gen. of Guyana and The Public Service Commission*, GY Civil Appeal No. 77 of 2003, CCJ Appeal No. CV 3 of 2007.

³⁸ *Toolsie Persaud Ltd. v Andrew James Investments Ltd., Shivlochnie Singh (By order of the Court) and Att. Gen. of Guyana*, GY Civil Appeal No. 72 of 2004, CCJ Appeal No CV 1 of 2007.

³⁹ *The Att. Gen., Superintendent of Prisons and Chief Marshal v Jeffrey Joseph and Lennox Ricardo Boyce*, BB Civil Appeal No 29 of 2004, CCJ Appeal No CV 2 of 2005, at 2.

⁴⁰ *Frank Errol Gibson v Att. Gen.*, BB Civil Appeal No 8 of 2007, CCJ Appeal No CV 1 of 2010, at paragraph 28 and 29.

⁴¹ See GM Cruz and S Kingah, 'Addressing human rights in the Court of Justice of the Andean Community and Tribunal of the Southern African Development Community' (forthcoming 2013) *Colombia Internacional*.

⁴² A Fuentes and A Allegret, 'Comunidad Andina: bases jurídico-institucionales y funcionamiento de su sistema de cumplimiento' in A Von Bogdandy, L Arroyo and MM Antoniazzi, *¿Integración suramericana a través del derecho? Un análisis interdisciplinario y multifocal*, Madrid: Max Planck Institute and Center for Political and Constitutional Studies (2009).

⁴³ K Alter, L Helfer and F Guerzovich, 'Islands of effective international adjudication: Constructing an intellectual property rule of law in the Andean Community' 103 (2009), *American Journal of International Law* 1-47.

⁴⁴ M Vargas Mendoza, 'El Tribunal de Justicia de la Comunidad Andina y la defensa de los derechos humanos' in Escobar Garcia Claudia (Ed.), *Teoría y Práctica de la Justicia Constitucional* (Quito, Ministerio de Justicia y Derechos Humanos del Ecuador, 2010), 469-502.

⁴⁵ Proceso 37-IP-2003, *Gaceta Oficial del Acuerdo de Cartagena*, N° 960, Lima 1 de Agosto de 2003, 16-26. Available, only in Spanish, on the Web site of CAN: www.comunidadandina.org

⁴⁶ *Colombian Association of Pharmaceutical Industries (Asinfar) v Colombian state*, Proceso 114-AI-2004, *Gaceta Oficial del Acuerdo de Cartagena*, N° 1295, Lima 9 de Febrero de 2006, 36.40. available at www.tribunalandino.org.ec; See also GM Cruz and S Kingah, 'Addressing human rights.'

⁴⁷ Proceso 45-IP-2008, *Gaceta Oficial del Acuerdo de Cartagena*, N° 1641, Lima 31 de julio de 2008, 32.56 available at www.tribunalandino.org.ec

⁴⁸ Proceso 90-IP-2008, *Gaceta Oficial del Acuerdo de Cartagena*, N° 1662, Lima 9 de octubre de 2008, 16.48, available at www.tribunalandino.org.ec

⁴⁹ L Lixinski, 'Human rights in MERCOSUR' in *The Law of MERCOSUR* (Marcilio Toscano Franca Filho, Lucas Lixinski and Maria Belen Olmos Giupponi eds., Oxford: Hart Publishing, 2010), 351-364, at 357-362.

⁵⁰ *Ibidem*, at 363.

⁵¹ Ph Alston and R Goodman, *International Human Rights: Texts and Materials, The successor to International Human Rights in Context, Law Politics and Morals* (Oxford, Oxford University Press, 2013), 890.

⁵² *Ibidem*, 998-999.

⁵³ *Ibidem*, 995.

⁵⁴ *Ibidem*, 984.

⁵⁵ *Sawhoyamaya Indigenous Community v. Paraguay*, Inter-American Court of Human Rights, Judgment of 29 March 2006.

⁵⁶ AHRJ, 'Statement on social and economic rights in Africa' (2005) 5 African Human Rights Law Journal 182-193.

⁵⁷ Ph Alston and R Goodman, *International Human Rights*, 1028.

⁵⁸ See K Kindiki, 'The proposed integration of the African Court of Justice and the African Court of Human Rights and Peoples' Rights: Legal difficulties and merits,' 15 (2007) *African Journal of International and Comparative Law* 138-146.

⁵⁹ Ph Alston and R Goodman, *International Human Rights*, 1043.

⁶⁰ *Yogogombaye v. Republic of Senegal* application n°001/2008 (2009).

⁶¹ *African Commission on Human and People's Rights v Great Socialist People's Jamahiriya* application n°004/2011 (2011).

⁶² S Jones, "Regional institutions for protecting human rights in Asia," *American Society of International Law Proceedings* (1995), 475-479, at 476.

⁶³ S Jones, 'Regional institutions for protecting human rights in Asia' 477.

⁶⁴ *Ibidem*, 478.

⁶⁵ *Ibidem*, 479.

⁶⁶ VA Leary, 'Human Rights in the Asian context: Prospects for regional human rights instruments' (1987) 2 *Connecticut Journal of International Law* 319, 333-334.

⁶⁷ S Chiam, 'Asia's experience in the quest for a regional human rights mechanism' (2009) 40 *Victoria University Wellington Law Review* 146.

⁶⁸ A Durbach, C Renshaw and A Byrnes, "'A tongue but no teeth?'" The emergence of a regional human rights mechanism in the Asia Pacific Region' (2009) 31 *Sydney Law Review* 213-214.

⁶⁹ *Ibidem*, 223.

⁷⁰ A Acharya, 'ASEAN at 40: Mid Life Rejuvenation?' (Council on Foreign Relations, 15 August 2007), at <http://www.foreignaffairs.com/articles/64249/ amitav-acharya/asean-at-40-mid-life-rejuvenation>.

⁷¹ Vientiane Action Plan, pp. 2 and 15. See also YF Khong and HES Nesadurai, 'Hanging together, institutional design, and cooperation in Southeast Asia: AFTA and the ARF' in *Crafting Cooperation: Regional International*

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⁷² Article 1 and 2, SAARC Agreement for the establishment of the SAARC Arbitration Council, 13 November 2005.

⁷³ Article 10, Agreement on South Asian Free Trade Agreement (SAFTA), Islamabad, Pakistan, 6 January 2004.