Comparative regional human rights regimes: Defining a research agenda

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This article introduces the Comparative Regional Human Rights Regimes Symposium which marks a first attempt at a regime-level comparative analysis of the three main regional human rights courts and commissions. It does so with the aim of laying out why regime level comparative analysis matters and why access, interpretation and remedies offer core markers of a comparative research agenda. The article identifies three distinct contributions that regional comparison makes to comparative international human rights law. First, it allows us to go beyond the binary form that is prevalent in comparative human rights law scholarship that most often juxtaposes (selected elements of) the European and Inter-American human rights regimes, and less frequently the African-Inter-American, or African-European human rights regimes. Second, a comparative research agenda goes beyond existing scholarship on regional comparison that has been largely descriptive in character. Taking a holistic approach to regional human rights regimes, comparisons can be made over time and dynamics of divergences and convergences can be identified and explained. Third, a comparative research agenda allows us to locate regional human rights regimes as part of a more general global evolution of law and institutions. That is, through comparison, we are better placed to evaluate how regional human rights courts and commissions are inscribed in a broader development of regional and international law since the aftermath of World War II.

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1. Introduction

This symposium marks a first attempt at a regime-level comparative analysis of the three main regional human rights courts and commissions (the European, Inter-American Court, and the African Courts and Commissions). It does so with the aim of identifying and explaining the convergences and divergences of human rights institutionalization in different regions. The symposium fits within the wider research agenda of "comparative international law"[1] and aims to contribute, particularly, to the comparative study of international human rights law and its institutions.

The symposium offers a distinct contribution to comparative international human rights law in three different ways. First, it goes beyond the binary form that is prevalent in comparative human rights law scholarship that most often juxtaposes (selected elements of) the European and Inter-American human rights regimes,[2] and less frequently the African-Inter-American,[3] or African-European human rights regimes.[4] It broadens the inquiry into a triangular analysis, while not foreclosing further future broadening, notably with regard to emerging regional or subregional human rights regimes in Asia and the Middle East.[5] Second, the symposium goes beyond existing scholarship on regional comparison that has been largely descriptive in character, often focusing on identifying either formal textual similarities and differences or similarities or differences with respect to the interpretation of a particular right.[6] The authors in this symposium all take a holistic focus to regional human rights regimes. They offer comparisons over time that go both beyond formalist or single-issue analysis, using both legal and extralegal sources. They further seek to not only identify but also explain the divergences and convergences among regional regimes. Third, while many scholars have addressed the related and larger question of the international protection of human rights and included regional regimes in this analysis,[7] such studies have not aimed to offer a theory-building agenda for how to study regional human rights regimes comparatively. In this symposium, we collectively theorize

1 Anthea Roberts, Paul B. Stephan, Pierre-Hugues Verdier, & Mila Versteeg, *Comparative International Law: Framing the Field*, 109 Am. J. Int'l L. 467 (2016).

2 *See, e.g.*, Darren Hawkins & Wade Jacoby, *Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights*, 6 J. Int'l L. & Int'l Rel. 35 (2010–2011). For an example of earlier scholarship engaged in "comparative regional human rights," *see* Thomas Buergenthal, *The American and European Conventions on Human Rights: Similarities and Differences*, 30 Am. U. L. Rev. 155 (1981).

3 *See, e.g.*, Clara Burbano Herrera & Frans Viljoen, *Danger and Fear in Prison: Protecting the Most Vulnerable Persons in Africa and the Americas by Regional Human Rights Bodies Through Interim Measures*, 33 Netherlands Q. Hum. Rts 163 (2016); for an earlier exploration along this comparative axis, *see* Frans Viljoen, *The Relevance of the Inter-American Human Rights System for Africa*, 11 Afr. J. Int'l & Comp. L. 659 (1999).

4 *See, e.g.*, Paul Johnson, *Homosexuality and the African Charter on Human and Peoples' Rights: What Can Be Learned from the History of the European Court of Human Rights*, 40 J. L. & Soc'y 249 (2013).

5 Christof Heyns & Magnus Killander, *Towards Minimum Standards for Regional Human Rights Systems*, *in* Looking to the Future: Essays on International Law in Honour of W Michael Reisman 527 (Cogan et al. eds., 2010).

6 *See, e.g.*, Christof Heyns, David Padilla, & Leo Zwaak, *A Schematic Comparison of Regional Human Rights Systems: An Update*, 15 Afr. Hum. Rts. L.J. 308 (2005).

7 The closest to our inquiry is the work of Dinah Shelton and Paolo G. Carozza on the regional protection of human rights. Dinah Shelton & Paolo G. Carozza, Regional Protection of Human Rights (2d ed. 2013).

regional human rights regimes as part of a more general global evolution of law and institutions. That is, the symposium is not only interested in the usual markers of comparative law, those of textual and case law analysis, but also how the three key regional human rights courts and commissions are inscribed in a broader development of regional and international law since the aftermath of the World War II.

In what follows, we first justify regional human rights regimes as an appropriate unit for comparative analysis. Next we turn to the promises of approaching regional human rights regimes as units of comparative analysis for the broader field of comparative international law, and particularly comparative international human rights law. In the third section, we outline some of the symposium's central findings as a whole with respect to how regional human rights courts and commissions constitute semi-autonomous human rights legal orders, and how they negotiate their role as a conduit between global and constitutional human rights dynamics.

2. Regions as units for comparative human rights law

In this symposium, we employ regional human rights regimes as our units of comparative analysis. We theorize regional human rights regimes as manifestations of a global phenomenon: international human rights law. We also hold that these regimes have semi-autonomous properties that make them neither a mere extension of a global human rights regime nor an amalgamation of regional constitutional cultures. The very rationale for regional regimes (in addition to, or alongside the UN system and constitutional systems) lies in their ability to articulate and institutionalize human rights in ways that are more responsive to and legitimate in a certain region and its particular cultural, legal, and political contexts. The making of regional human rights is a dynamic process, which defines the central characteristics of a "region" along the way. The three established human rights regimes —the European, Inter-American, and African—therefore, are "imagined communities" delineated by dynamics of (human rights) law.[8] Regions are both geographical and law-made yet can reconstruct symbolic spaces as hardened social structures changing public perception of what constitutes regional identity and where its boundaries lie.

The geographic spans of regional human rights regimes can at first call into question the coherence of the very notion of a region as manifested in regional human rights regimes. Among the three, only the African regime corresponds with a clear continental understanding of the concept. The American system spans two continents but coheres around a hemisphere. The European regime has seen the expansion of the notion of Europe as once comprising a limited number of West European states to one now stretching from Reykjavik and Murmansk to Valetta and Vladivostok, thus embracing parts of Asia and the Mediterranean.

The units we focus on, however, emit what is recognized as regional human rights law by both their global and their domestic constitutional audiences. Although the boundaries of Europe are set differently by the Council of Europe (CoE) and the European

[8] Benedict Anderson, Imagined Communities: Reflections on the Origin and Spread of Nationalism (2006).

Union (EU), and remain an object of negotiation, this continuous boundary problem is not overshadowing the fact that the regional human rights identity coheres around the European Court of Human Rights. Similarly, although the Inter-American Human Rights Court does not have jurisdiction over all member states of the Organization of American States (OAS), the United States and Canada being the notable exceptions, it has produced a notion of regional unity around the vast majority of Spanish- and Portuguese-speaking member states and a few Caribbean island states. In Africa, with the exception of Morocco, which was readmitted to the African Union in early 2017, all African Union member states have accepted the African Charter on Human and Peoples' Rights, thus subjecting themselves to the individual complaints competence of the African Commission on Human and Peoples' Rights (African Commission). Although only thirty of the fifty-five African Union (AU) member states have ratified the Protocol establishing the African Court on Human and Peoples' Rights, it remains a key organ under the AU. In other words, the three regions in focus are fairly established social–political and geographical zones delineated by international law.

Focusing on these three regimes does not negate the existence of other regional, subregional, or cross-regional human rights regimes, such as the one recently established under the Association of East Asian Nations (ASEAN), which may be described as covering a subregion of ten states in a part of Asia. The one under the Organisation of Islamic Co-operation (OIC), which, with its fifty-seven members all across the world, may be viewed as a religion-based cross-regional system. Under the League of Arab States (LAS), "region" takes on a much more pan-national understanding. Insofar as part of our research looks at the subregional, we see subregions as entities within a continental context—in our case, Africa. Insights relevant to regional courts also arise from the discussion of the role of subregional courts in the protection of human rights in Africa. However, many of the mentioned other regions and human rights regimes have currently produced very little output, which makes a meaningful comparison difficult. We do, however, plan to launch a wider study, encompassing more than just the three regimes under review here, at a subsequent stage.

3. Promises of comparative regional human rights

The comparative study of regional human rights regimes promises a distinct level of analysis in the field of human rights law studies and comparative international law more generally. Taking as the unit of comparative analysis regional rather than individual constitutional regimes, the study of comparative regional human rights law is located at a different, in some respects higher, level of abstraction than comparative constitutional law. Comparative regional human rights law, however, is a more contained level of analysis than comparative international human rights law or comparative transnational human rights law. The former would include all international human rights law created by all international treaties, be this at the United Nations, at regional levels, or at subregional levels. The latter, in addition, would also include human rights law that is emitted by constitutional courts. Understood as an in between semi-autonomous layer of law between global human rights law and constitutional law, the study of regional human rights

regimes is able to unravel how both the top-down and bottom-up demands concerning the development of human rights law are negotiated and how the feedback effects of such negotiations effect the development of human rights as law, domestically and globally.

The comparative study of regional human rights regimes offers two specific promises when compared to carrying out comparative analyses based on the level of rights, issues or single institutions.

The first is the ability to capture large trends in the evolution of the regional systems and to assess whether regional human rights law is moving more toward convergence or divergence, or both, with respect to either the UN human rights regime or with respect to each other. In this symposium, we submit that a regime-level comparison can capture larger trends if the systems are analyzed in terms of three core markers of the institutionalization of human rights as a legal domain. These markers are *access*, *interpretation*, and *remedies*.

Access to regional human rights courts determine the range, quality, and quantity of interactions that regional courts and commission have with individuals, states, non-governmental organizations, and legal experts alongside interactions with domestic courts. It tells us who can appear before these institutions and with what effect and how these relationships have evolved over time. *Interpretation* of the substantive convention texts enables regional courts to establish the domain of substantive regional human rights law. It furthermore provides a proxy for understanding the extent to which such institutions use external sources, be it international or domestic, in the justification and expansion of jurisprudence. *Remedies* are the core means of interaction between regional human rights regimes and state institutions that lose cases before regional human rights courts and commissions. In practice, they are an important tool for regional courts and commissions for negotiating their level of intrusiveness in the domestic constitutional orders of states.[9]

All of these—access, interpretation, and remedies—are legal and institutional tools available to the regional courts and commissions to calibrate their interaction with law, politics, and society both globally and domestically. They are, in other words, legal tools for the institutionalization, autonomization, and legitimization of these institutions, which the institutions themselves, to a certain extent, can form and adjust to local particularities, problems, and sensibilities[10]; that is, they can potentially enhance their authority by striking the right balance between these key features of regional adjudication.[11] Regional human rights regimes moreover move in different directions on account of each of these three distinct markers.

While we separate these three dimensions for the purpose of analytical clarity in the articles that follow, they ultimately are deeply inter-connected. In order to identify more precisely how each of these three dimensions have impacted on the comparative

[9] For examples, *see* Mikael R. Madsen, *The Protracted Institutionalization of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence*, *in* The European Court of Human Rights Between Law and Politics (Jonas Christoffersen & Mikael Rask Madsen eds., 2011).

[10] For a discussion, *see* Mikael R. Madsen, *The Legitimization Strategies of International Courts: The Case of the European Court of Human Rights*, *in* Selecting Europe's Judges 253 (Michal Bobek ed., 2015).

[11] Karen J. Alter, Laurence R. Helfer, & Mikael Rask Madsen, *How Context Shapes the Authority of International Courts*, 79 Law & Contemp. Probs. 1 (2016).

institutionalization and judicialization of regional human rights courts and regimes, the individual articles trace the transformations over time of these three factors.

The comparative study of regional human rights courts and commissions in this symposium in turn offers a new research agenda concerned with drivers of similarities and differences with regard to the design and subsequent development of human rights law across the access, interpretation, and remedy spectrum. Do regional human rights converge over time even though they come from radically different drafting histories? What institutional peculiarities persist regionally and what explains this? Both of these questions enable us to turn our attention to the extent to which regionalism plays the role of conduit between national constitutional systems and the universalism of international human rights law. It enables us to ask which regimes are more responsive to the bottom-up pressures from the regional domestic systems and which regimes are the drivers of the universality of human rights.

The second promise of the regime-level approach is the analytical space it opens for theorizing how a more general global evolution of law and institutions take place through regions. Viewing the national and, in our case, regional from the vantage point of the global has recently spurred much debate among historians.[12] Termed "global history," it suggests a relative connectedness of the world.[13] This questions the possibility of viewing, for instance, regional legal regimes in isolation or only the result of one-directional transplants originating from Europe. The symposium, thus, is interested in uncovering the directionality of trends, whether one region is leading the way of universalistic interpretations and the extent to which regional regimes interact with one another despite catering for diverse constitutional systems and constituting regional legal cultures in their respective regions.

4. Comparing regional human rights regimes: Key findings

The contributors to this symposium underline that dynamics of convergence and divergence are simultaneously at stake in the evolution of regional human rights regimes.

All regional human rights regimes have, at some point in their development, undergone reform; in particular, all three regions have evolved to create regional human rights courts. The institutional setups of each system, however, continue to operate differently. While all regional regimes allow for individuals to appear against states before third-party adjudication, the way in which individuals appear before these bodies varies significantly. At the legal–doctrinal level each regional human rights regime relates in a broadly similar way to canons of interpretation in the Vienna Convention on the Law of the Treaties. All three regional human rights regimes are committed to dynamic interpretations of the substantive provisions of human rights treaties. While this is the case, each treaty has unique rights provisions and courts and commissions have interpreted both the substantive and the procedural articles of their respective treaties differently over time. All regional

[12] On the debate on global history, *see, e.g.*, Bruce Mazlish, *Comparing Global History to World History*, 28 J. Interdisc. Hist. 385 (1998).

[13] *See* Sebastian Conrad, What Is Global History? ch. 1 (2016).

human rights regimes are committed to delivering a diverse range of remedies to victims of human rights violations, but the actual remedies and their intrusiveness in the domestic legal orders of states differ significantly. All three regimes' courts and now two commissions have engaged in comparative borrowing, although only the African Commission has an explicit textual basis (articles 60 and 61 of the African Charter) for doing so.

These similarities and differences, the symposium finds, stem not only from the legal–textual and historical features of regional regimes but also, more centrally, from the active exercise of agency by regional courts and commissions in negotiating regional legal human rights cultures, responsive to pressures from national and global levels. Exercising this agency, regional courts and commissions have been able to bring the regional systems both closer and further away from each other. Despite textual convergence, for example, the Inter-American and European Courts of Human Rights have come to diverge quite markedly on the question to what extent deference should be given to national authorities in the interpretation of qualified rights.[14]

By framing our inquiry in a global history perspective, a key explanatory factor for convergences over time comes from the broader literature on the globalization of law more generally. The formal, but mostly informal, connections between regional human rights regimes generate patterns of harmonization of human rights law interpretation and convergence despite differences in historical, textual, and institutional trajectories. Empirically there are also important trends of horizontal citation among regional regimes and a turn to comparative human rights law as an essential aid for interpretation.[15] The important strands of unity in the trajectories of the European, Inter-American, and African human rights regimes we find are linked to the international human rights project that gained prominence after World War II and evolved as part of a broader international human rights system.

We also find that regional divergences are best explained by how regional history, regional legal culture, and past political and legal experiences, including constitutional experiences in the regions, cast important shadows on regional human rights practices. Regional understandings about the purpose of the regional human rights texts, such as resisting dictatorships and embedding democracies, become significant in this context. For example, how a regional regime understands its role in supporting democratic institutions and domestic courts as a matter of regional legal and political culture is a factor accounting for the divergences in the regional human rights regimes. The more a regional regime sees itself as a co-interpreter of rights alongside domestic courts, for example, the more it may adopt a deferential view toward national constitutionalist interpretations of human rights rather than seeking to build a general, regional interpretive canon.[16]

[14] Pablo Contreras, *National Discretion and International Deference in the Restriction of Human Rights: A Comparison Between the Jurisprudence of the European and the Inter-American Court of Human Rights*, 11 Nw. J. Int'l Hum. Rts. 28 (2012).

[15] African Court on Human and Peoples' Rights, App. Nos. 9/2011, 11/2011 *Tanganjika Law Society and Others v. Tanzania; Mtikila and Another v. Tanzania*, Judgment (June 14, 2013) [hereinafter *Mtikila*].

[16] See Başak Çalı, *Towards a Responsible Domestic Courts Doctrine? The European Court of Human Rights and the Variable Standard of Judicial Review of Domestic Courts, in* Shifting Centers of Gravity in Human Rights Protection: Rethinking the Relations Between the ECHR, EU and National Legal Orders 144 (Oddný Mjöll Arnardóttir & Antoine Buyse eds., 2016).

In all these aspects, we find the longevity of the regional regime emerging as an important intervening factor. Regional regimes with a longer history of interpreting human rights in certain ways may be bolder in holding on to their patterns of interpretation. But equally the younger regional regimes have more options when adopting or shifting interpretive styles. Considering the different models that the European and the American regimes stand for, the African Court and Commission are drawn by the two models pulling, at times, in opposite directions.

5. Outline of symposium

The symposium consists of five articles. The first article by Alexandra Huneeus and Mikael Rask Madsen shows how the overriding geopolitical structure of the Cold War initially created a broader normative framework within which each region came to realize, re-shape, and re-signify common institutional scripts. In the post-Cold War era, all three regimes equally responded to the new structural changes and in many ways, beginning in the 1990s, converged on new ideas of judicialization and constitutionalization.

The second article, co-authored by Françoise Hampson, Claudia Martin, and Frans Viljoen, provides a comparative analysis of access provisions and practices. Drawing on the sociolegal theory of dispute pyramids, the article demonstrates how access differs among the three regimes, but shows that all three regimes have important limitations with respect to access albeit at different stages of legal proceedings. The article argues that despite the overall cross regional trend toward judicialization, this, paradoxically, does not necessarily mean greater access for individuals to regional human rights courts and commissions

The third article, authored by Laurence Burgorgue-Larsen, examines how regional human rights courts and commissions use external legal sources. The article shows that despite differences in legal basis, different levels of authority and stages of development, there is a clear trend in all regional human rights systems toward openness to external sources and harmonious interpretation.

The fourth article, authored by Başak Çalı, comparatively assesses the next stage of the judicial process: the apparent and ongoing variation in the intrusiveness of remedies in domestic legal orders across the three regional regimes. It argues that neither textual differences nor case histories before regional regimes are able to adequately account for why remedy regimes continue to be a point of significant divergence. Instead, Çalı finds that the regional institutional legal cultures and their ongoing negotiation account for why remedies vary from a spectrum of more to less intrusive remedies.

The final article, by Laurence Helfer, conducts a comparison of subregional courts in West, East, and South Africa and their right of freedom of movement case law and finds that institutionalization of access, interpretation, and remedies has taken a much narrower development in subregional courts than in the three regional human rights regimes. It finds that lacking a direct international human rights law mandate coupled with strong political backlash has prevented these courts from being part of the trends of constitutionalization, judicialization, and interpretive and remedial openness.