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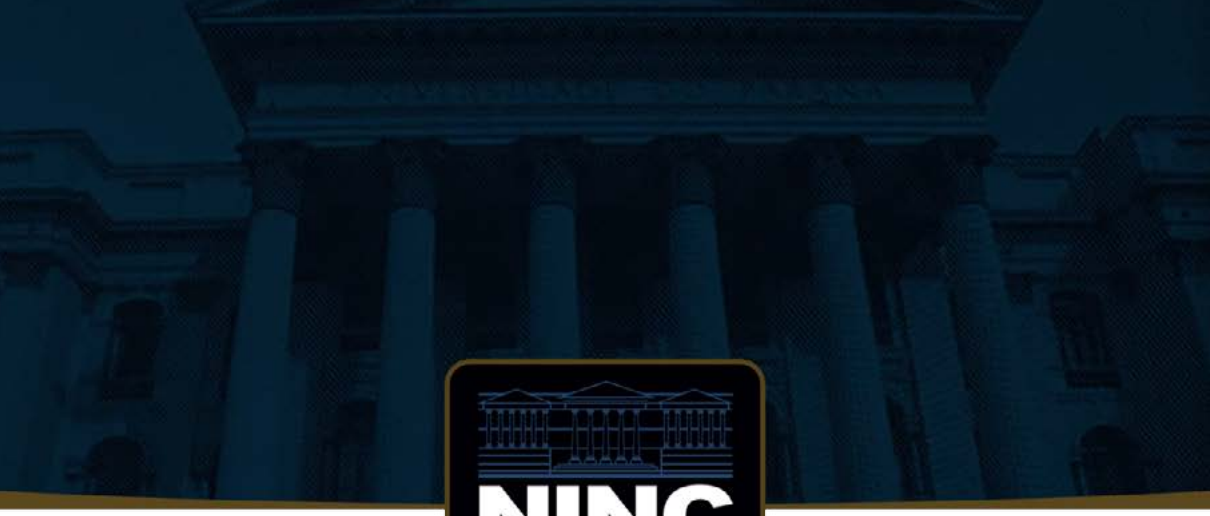

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Between global consensus and local deviation: a critical approach on the universality of human rights, regional human rights systems and cultural diversity

Entre consenso global e divergência local: uma abordagem crítica sobre universalidade dos direitos humanos, sistemas regionais de proteção dos direitos humanos e diversidade cultural

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Abstract

The global human rights regime, rooted in the Universal Declaration of Human Rights, nurtures a relatively uncontroversial consensus when it comes to the core principles and ideals of individual dignity and equality that stem from International Human Rights Law. Nonetheless, despite the longstanding and well-known debate concerning universalism versus cultural relativism, there still exists a thin and rather complex line between the universality of human rights on the one hand, and the respect for local practices and traditions on the other hand. This tension is further translated into the coexistence and

Resumo

O regime global de proteção dos direitos humanos, enraizado na Declaração Universal dos Direitos Humanos, é dotado de um consenso relativamente incontroverso no que se refere aos princípios básicos e ideais de dignidade e igualdade provenientes do Direito Internacional dos Direitos Humanos. No entanto, apesar do famigerado debate sobre a dinâmica entre universalismo e relativismo cultural, ainda existe uma linha tênue e complexa entre a universalidade dos direitos humanos, de um lado, e o respeito às práticas e tradições locais, de outro. Referida tensão reflete-se, igualmente, na coexistência e possível sobreposição

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overlapping between the universal and the regional systems for the protection of human rights, notably because the latter reflects an attempt to strengthen the protection of basic rights while underlining regional characteristics and common values shared by certain States, as opposed to an overarching, central scheme accused of overlooking the features of each region. Against this background, this brief research explores and, ultimately, rejects the claim that regional human rights systems hinder the successful protection and promotion of human rights at the regional level and undermine the effectiveness of the United Nations system.

Keywords: human rights; universality; cultural diversity; regional systems; global system.

entre o sistema universal e os sistemas regionais de proteção dos direitos humanos, especialmente porque estes buscam reforçar a proteção de direitos básicos ao mesmo tempo em que enfatizam características regionais e valores comuns compartilhados por certos Estados, em oposição a um sistema único e abrangente acusado de desconsiderar as características de cada região. Nesse contexto, o presente trabalho explora e, em última análise, rejeita a tese de que os sistemas regionais dificultam a efetiva proteção e promoção dos direitos humanos no âmbito regional e enfraquecem a eficácia do sistema de proteção orientado pelas Nações Unidas.

Palavras-chave: *direitos humanos; universalidade; diversidade cultural; sistemas regionais; sistema global.*

CONTENTS

1. INTRODUCTION

In order to be effective, international human rights standards must be domestically implemented and incorporated by States, hence the self-regulation characteristic of international human rights law at the domestic level.[1] Nonetheless, the implementation of local instruments on the ground to promote and protect human rights is subjected to the supervision of several human rights monitoring bodies, both at the global, regional and sub-regional level.

Over the past years, there has been a considerable growth of human rights treaties and regional initiatives aimed at monitoring the actions taken by States to protect and promote the rights enshrined in each treaty, bringing into question the extent to which regional frameworks would be best suitable for the implementation of human rights than global instruments. Regionalism, however, was at first regarded as a "breakaway movement, calling the universality of human rights into question."[2]

The relationship between universal human rights on the one hand, and the importance of local traditions and cultures on the other hand, is very controversial and still brings into question the legitimacy and consistency of a universal conception of humanity. The 2001 UNESCO Universal Declaration on Cultural Diversity emphasizes

[1] HEYNS, Christof; KILLANDER, Magnus. Towards Minimum Standards for Regional Human Rights Instruments. In: COGAN, Jacob Katz *et al* (Org.) **Looking to the Future: Essays on international law in honor of W Michael Reisman.** Leiden: Martinus Nijhoff Publishers, 2010. p. 1.

[2] VASAK, Karel; ALSTON, Philip (Org.), **The International Dimensions of Human Rights**. Paris: Greenwood Press, 1982. p. 451.

the importance of cultural diversity, the defence of which being "an ethical imperative, inseparable from respect for human dignity. (...) No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope."[3]

Cultural diversity and the heterogeneity of peoples and values around the world were the core arguments that embedded the development of regional mechanisms. The multiplicity of monitoring treaty bodies that supervise the implementation of international human rights standards by national authorities entails the question whether this coexistence undermines the consistency and harmony of the global system. At the same time, whilst the universal and indivisible features of human rights were to be constantly emphasized and reinforced by the United Nations (UN) system, being in fact the main purpose of the adoption of different global instruments, it was questionable whether these global arrangements would be effective in the implementation of human rights on the ground.

This paper investigates the overlapping between the universal and the regional systems for the protection of human rights so as to understand and, ultimately, reject the claim that regional human rights systems may hinder the effective protection and promotion of human rights through the lenses of universality.

2. THE UNIVERSALITY OF HUMAN RIGHTS AND CULTURAL DIVERSITY

The Universal Declaration of Human Rights is considered to be the milestone in the internationalization of the human rights movement.[4] Nonetheless, the mere assertion that human rights are inherent to every human being does not guarantee their immediate embracement by all communities. Not only there is a considerable gap between the places where universal assumptions are framed and the particular conditions in which they are to be implemented, but also a distance between the theoretical implementation of human rights standards by States and their practical regulation of the behaviour of private actors.

International human rights standards are embedded in conceptions of human dignity and justice, which differ according to cultural and social perceptions. In this sense, considering that "all societies have some form of moral system",[5] allegedly universal norms may confront traditional practices and local cultures, thus lacking universal legitimacy. The applicability of human rights treaties that challenge local practices

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[3] Article 4 of the 2001 UNESCO Universal Declaration on Cultural Diversity.

[4] DONNELLY, Jack. **Universal Human Rights in Theory and Practice**. 2. ed. Ithaca and London: Cornell University Press, 2003. p. 22.

[5] HATCH, Elvin. **Culture and Morality**: the relativity of values in anthropology. New York: Columbia University Press, 1983. p. 8.

is often undermined by national or local authorities on the basis of the significance of traditions and beliefs for social cohesion and maintenance of the *status quo*. Indeed, cultural practices and traditional beliefs are repeatedly used as justification for discriminatory practices and human rights violations. Moreover, cultural and social norms function as a basis of power and control of those who lack the necessary conditions to fight for social change.[6]

The question whether the right to cultural difference challenges the universality of human rights was addressed by the Declaration and Program of Action of the 1993 Vienna World Conference on Human Rights, which emphasised in Article 5 that "it is the duty of States, regardless of their political, economic and cultural system, to promote and protect all human rights and fundamental freedoms". In practice, though, there exists a gap between such universal language of human rights and agreements concerning the philosophical foundation, extent and content of human rights.[7]

Anthropologists have long ago challenged the universality of human rights, arguing that rather than a product of her or his own personal choices, the individual is shaped according to the traditions and beliefs of the culture of which she or he is a member, hence the importance of recognition of and respect for cultural differences. Accordingly, because individuals realize their personality, behaviour, moral values and aspirations through their culture, respect for individual differences entails a respect for cultural differences.[8]

The assertion that local traditions influence human rights can be illustrated by the Islamic religious law and its influence over the public and private lives of individuals of Muslim countries. This is because principles of Shari'a label all fields of human action as either permissible or impermissible, and as recommended or reprehensible, thus addressing the conscience of the individual in all capacities: private, public and official. This universal system of law and ethics regulate every aspect of life. Depending on the interpretation and application of specific provisions of the Islamic law – which varies from one State to another – such provisions may or may not be consistent with human rights and internationally recognized standards.[9]

The relation between human rights and cultural practices is extremely controversial and entails the well-known universalism versus relativism debate regarding North-South or West-East disputes. Despite the universalist claim that the human rights

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6 HIGGINS, Tracy E. Anti-Essentialism, Relativism, and Human Rights. **Harvard Women's Law Journal**, vol. 19, p.89-p.126, 1996. p. 114.

7 MUTUA, Makau Wa. The Ideology of Human Rights. **Virginia Journal of International Law**, vol. 36, p. 589-p. 658, 1996. p. 590.

8 American Anthropological Association. Statement on Human Rights. **American Anthropologist**, vol. 49, n. 4, part 1, p.539-543, Oct-Dec 1947. p. 539.

9 AN-NA'IM, Abdullahi A. Human Rights in the Muslim World: socio-political conditions and scriptural imperatives – a preliminary inquiry. **Harvard Human Rights Journal**, vol. 3, p.13-52, 1990. p.18.

regime is universal based on the concept of human dignity and equality, adepts of this theory do not ignore that "many basic rights (...) allow for historically and culturally influenced forms of implementation."[10]

Whilst based upon universally agreed standards, the international human rights movement has been criticized as an attempt to the homogenization of different traditions according to Western values that are insensitive to the multiplicity of cultures. On the other hand, cultural relativists argue that human rights are constructed upon cultural contexts. Therefore, as moral values vary significantly from one culture to the other, it is rather impossible to reach a consensus on universally recognized ideals. Nevertheless, culture discourses may be used to justify oppressive traditions and legitimate dominant power structures, thus avoiding renegotiation of exclusionary inter-social arrangements.

Elvin Hatch states that relativists have been criticized "as conservative in their attitudes toward change and therefore as promoting the subservience of the underdeveloped nations" and tend to ignore the fact that "the exotic cultures to which they grant equal validity are poverty-stricken, powerless, and oppressed."[11] Similarly, Tracy Higgins stresses that "the relativist cannot criticize Western imperialism and at the same time ignore non-Western states' selective use of the defense of culture in the service of state power."[12]

The idea of culture as an instrument for the maintenance of power relations is also reaffirmed by Abdullahi An-Na'im, who suggests a different interpretation of the Qur'an and Sunna in accordance with current social, economic, and political contexts, albeit recognizing the difficulties of implementing a reform that "challenges the vested interests of powerful forces in the Muslim world and may upset male-dominate traditional political and social institutions."[13]

In addition, culture may be understood as a mechanism of legitimization of claims of power and authority rather than a stable or homogeneous set of beliefs and practices. These practices encompass contested values and are influenced by external factors, thus being subject to constant change. Cultural practices and discourses can either legitimize or challenge relations of power.[14] According to Jack Donnelly, culture

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[10] STEINER, Henry J.; ALSTON, Philip; GOODMAN, Ryan. **International Human Rights in Context**: Law, Politics, Morals. 3. ed. New York: Oxford University Press, 2007. p. 517.

[11] HATCH, Elvin. **Culture and Morality**: the relativity of values in anthropology. New York: Columbia University Press, 1983. p. 128.

[12] HIGGINS, Tracy E. Anti-Essentialism, Relativism, and Human Rights. **Harvard Women's Law Journal**, vol. 19, p.89-p.126, 1996. p. 111-112.

[13] AN-NA'IM, Abdullahi A. Human Rights in the Muslim World: socio-political conditions and scriptural imperatives – a preliminary inquiry. **Harvard Human Rights Journal**, vol. 3, p.13-52, 1990, p. 50.

[14] MERRY, Sally E. **Human Rights and Gender Violence**: translating international law into local justice. Chicago and London: The University of Chicago Press, 2006. p. 1954.

is "constructed through selective appropriations from a diverse and contested past and present. Those appropriations are rarely neutral in process, intent, or consequences. Cultural relativism arguments thus regularly obscure often troubling realities of power and politics".[15]

It follows that the effectiveness of human rights depends on dissemination and incorporation of these ideas into local contexts to challenge certain harmful or discriminatory practices that are embedded in a culture under the argument of ancient tradition. This paradox means that "rights need to be presented in local cultural terms in order to be persuasive, but they must challenge existing relations of power in order to be effective."[16]

The adoption of one or the other conflicting idea – or mixing both of them – highly influences the implementation of human rights by national States. Not only that, international and regional supervisory bodies and courts interpret international treaties taking into account the thin line between the universality of certain standards and the need for recognition of local cultures.

It is important to notice, however, that the notions of universalism and cultural relativism do not need to be considered as antagonists. On the contrary, it is suggested that "rather than seeing universalism and cultural relativism as alternatives to which one must choose, once and for all, one should see the tension between the positions as part of the continuous process of negotiating ever-changing and interrelated global and local norms."[17] Despite acknowledging that cultural relativism is an undeniable fact, Jack Donnely argues for a universalistic approach to internationally recognized human rights that focuses on the overlapping consensus on the Universal Declaration of Human Rights instead of on the fundamental differences between, for instance, Western and non-Western values and perceptions.[18]

Some scholars suggest a universalism based on cultural pluralism, according to which, notwithstanding the recognition of certain universal human rights, these standards must be interpreted differently by different cultures.[19] Indeed, it is rather unrealistic to consider culture as a monolithic body of norms, as this approach "fails to respect relevant intra-cultural differences just as the assumption of the universality

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[15] DONNELLY, Jack. **Universal Human Rights in Theory and Practice**. 2. ed. Ithaca and London: Cornell University Press, 2003, p. 102.

[16] MERRY, Sally E. **Human Rights and Gender Violence**: translating international law into local justice. Chicago and London: The University of Chicago Press, 2006. p. 1948.

[17] COWAN, Jane K.; DEMBOUR, Marie-Bénédicte; WILSON, Richard. **Culture and rights**: anthropological perspectives. Cambridge: Cambridge University Press, 2001. p. 6.

[18] DONNELLY, Jack. **Universal Human Rights in Theory and Practice**. 2. ed. Ithaca and London: Cornell University Press, 2003, p. 89.

[19] RELIS, T. Human Rights and Southern Realities. **Human Rights Quarterly**, vol. 33, n. 2, p.509-p.551, May 2011, p. 519.

oh human rights standards fails to respect cross-cultural differences."[20] Consequently, treaty interpretation and its application by supervisory bodies either within the global system or as part of regional systems, must embrace cultural diversity and tolerance whilst accompanying social drive and cultural dynamism.

Cultural practices, thus, ought to be recognized and reaffirmed as an inherent part of human rights. Cultural diversity needs to be respected "not because it is different, or because it is characteristic, but to the extent that it reflects the autonomous choices of the rights-holding individuals who participate in the practices in question."[21]

3. THE ESTABLISHMENT OF REGIONAL HUMAN RIGHTS SYSTEMS AND THE ALLEGED THREAT TO THE UNIVERSALITY OF HUMAN RIGHTS

At the global level, the Charter of the United Nations and the Universal Declaration of Human Rights established a basic framework of International Human Rights Law. Accordingly, the global human rights regime, or the UN system, consists of charter-based and treaty-based organs. In essence, charter-based organs are those created by the UN Charter or established by UN organs whose authority stems from the UN Charter, such as the General Assembly, the Security Council, the Human Rights Council, the Commission on the Status of Women and the Sub-Commission on the Promotion and Protection of Human Rights. On the other hand, treaty-based organs are those created by human rights treaties within the UN, such as the respective monitoring committees established by the International Covenant on Civil and Political Rights and by the Convention on the Elimination of All Forms of Discrimination against Women.[22]

Following the principles and norms set forth by the global regime, States belonging to different geopolitical regions took a step further and decided to develop regional rules and institutions that would strengthen the protection of fundamental rights and, at the same time, emphasize regional characteristics and common values shared by such States so as to counterpart the universal scheme. Against this background, regional systems may be considered to be an extension of the global system, in such a way that the implementation of human rights by States is more efficient and contextualized when locally embraced. Bearing in mind the relevance of regional arrangements, it is argued that "regional and sub-regional mechanisms, with all the

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[20] HIGGINS, Tracy E. Anti-Essentialism, Relativism, and Human Rights. **Harvard Women's Law Journal**, vol. 19, p.89-p.126, 1996, p. 112.

[21] DONNELLY, Jack. **Universal Human Rights in Theory and Practice**. 2. ed. Ithaca and London: Cornell University Press, 2003, p. 84.

[22] STEINER, Henry J.; ALSTON, Philip; GOODMAN, Ryan. **International Human Rights in Context**: Law, Politics, Morals. 3. ed. New York: Oxford University Press, 2007. p. 737.

potential for conflict they entail, are a vital part of this enterprise to make the human rights project more inclusive."[23]

In 1980, the Commission to Study the Organization of Peace identified four main arguments that significantly vindicated in favour of regional human rights arrangements. First, that States that belong to a certain region usually share cultural and historical perceptions and are geographically bonded. Second, that recommendations issued by regional bodies might be more easily accepted by States than those issued by the global system. Third, that regional systems will allow for decisions regarding human rights to be more effectively disseminated, and that publicity concerning human rights will be broader and more successful. And fourth, that global recommendations are more likely to be vague, general, and constructed on political grounds.[24]

Regional human rights systems can be found in Europe, Africa, and America, taking into account the requirements suggested by Dinah Shelton for the recognition of a system. According to the scholar, a system must contain a catalogue of internationally guaranteed human rights and equivalent State obligations, permanent institutions, and compliance or enforcement procedures.[25] Under this perspective, it cannot be said that the Association of South East Asian Nations (ASEAN), the League of Arab States or other regional or sub-regional initiatives fit into the categorization of regional human rights systems, due to a range of compelling reasons.[26] It is important to notice that, despite not considered to be proper regional human rights systems, these attempts were accounted for in the discussion concerning prospect backlashes of shifting the monitoring of human rights to regional institutions.

These regional systems, albeit a result of different historical and political factors, still share common features and elements that reflect and reproduce universally recognized human rights and standards. In its preamble, the American Convention on Human Rights recognizes that "in accordance with the Universal Declaration of Human Rights, the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and

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23 HEYNS, Christof; KILLANDER, Magnus. Towards Minimum Standards for Regional Human Rights Instruments. In: COGAN, Jacob Katz *et al* (Org.) **Looking to the Future**: Essays on international law in honor of W Michael Reisman. Leiden: Martinus Nijhoff Publishers, 2010. p. 45.

24 Regional Promotion and Protection of Human Rights: twenty-eighth report of the Commission to Study the Organization of Peace. In: STEINER, Henry J.; ALSTON, Philip; GOODMAN, Ryan. **International Human Rights in Context**: Law, Politics, Morals. 3. ed. New York: Oxford University Press, 2007, p.930.

25 SHELTON, Dinah. **Regional Protection of Human Rights**. New York: Oxford University Press, 2008, p.15.

26 See DONNELLY, Jack. **Universal Human Rights in Theory and Practice**. 2. ed. Ithaca and London: Cornell University Press, 2003, p.144-145. See also HEYNS, Christof; KILLANDER, Magnus. Towards Minimum Standards for Regional Human Rights Instruments. In: COGAN, Jacob Katz *et al* (Ed.) **Looking to the Future**: Essays on international law in honor of W Michael Reisman. Leiden: Martinus Nijhoff Publishers, 2010, p.27-34; STEINER, Henry J.; ALSTON, Philip; GOODMAN, Ryan. **International Human Rights in Context**: Law, Politics, Morals. 3. ed. New York: Oxford University Press, 2007.

cultural rights, as well as his civil and political rights", and refers to a set of principles concerning the essential rights of men as set forth in the Universal Declaration of Human Rights. The African Charter on Human and People's Rights recognizes the importance of promoting international cooperation "having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights." Finally, the preamble of the European Convention on Human Rights begins with the recognition of the Universal Declaration of Human Rights and states that "the governments of European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration."

Despite allegedly inspired and guided by the Universal Declaration of Human Rights, the expansion of regional systems might be considered a threat to universal standards for which the international community has long fought, especially if one considers that human rights are inherent in every human being and thus must be implemented and monitored by global mechanisms.

Initially, one may argue that regionalism shifts away the universality of human rights by decentralizing the enforcement and monitoring of such recognized rights from the UN system. It is also claimed that regional systems may pose lower criteria of protection of human rights and therefore weaken the effectiveness of the global system.[27] This issue was raised regarding the Arab Charter of Human Rights, the ASEAN Human Rights Body, and the possibility of the African Court of Human Rights being mandated with jurisdiction over international crimes.[28] In this regard, the debate on the creation of a criminal chamber in the African Court was guided both by mediate and immediate causes. The long-term reasons included the indictment of several African state officials before domestic courts of some European States, such as former leaders of Libya, Mauritania, Rwanda, Congo, Equatorial Guinea, Gabon, Burkina Faso and Angola; and cases brought before the International Court of Justice. Immediate grounds related to the indictment of President al Bashir of Sudan by the International Criminal Court and of ex-President Hissène Habré of Chad by Belgian domestic courts, to which the African Union opposed.[29] This initiative shows that "regional solutions will be found if necessary to pre-empt and prevent unwelcome international interference."[30]

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[27] ROBBINS, Melissa. Powerful States, Customary Law and the Erosion of Human Rights through Regional Enforcement. **California Western International Law Journal**, vol. 35, n. 2, p. 275-p. 302, Spring 2005. p. 275.

[28] HEYNS, Christof; KILLANDER, Magnus. Towards Minimum Standards for Regional Human Rights Instruments. In: COGAN, Jacob Katz *et al* (Ed.) **Looking to the Future: Essays on international law in honor of W Michael Reisman.** Leiden: Martinus Nijhoff Publishers, 2010. p. 4.

[29] MURUNGU, Chacha Bhoke. Towards a Criminal Chamber in the African Court of Justice. **Journal of International Criminal Justice**, vol. 9, n. 5 p.1067-p.1088, November 2011, p. 1069-1070.

[30] HEYNS, Christof; KILLANDER, Magnus. Towards Minimum Standards for Regional Human Rights Instruments. In: COGAN, Jacob Katz *et al* (Ed.) **Looking to the Future**: Essays on international law in honor of W Michael

Additionally, albeit the Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights refer to international human rights standards and instruments,[31] the Commission lacks any significant protective powers and do not constitute an independent institution capable of investigating the situation of human rights on-site. Similarly, the Arab Human Rights Committee also lacks any form of individual complaints procedures or investigative powers.[32]

Even more alarming is the possibility that regional mechanisms be used by States to avoid global scrutiny under the argument that no further supervision is necessary once the State is submitted to regional monitoring, thus avoiding overlapping or double examination. This was further identified as a possible insulation of specific regions from outside influences.[33] As a consequence, regional systems "could become a shield against global scrutiny, rather than a platform for human rights protection."[34] This concern also refers to national systems and local human rights courts, the proliferation of which led to the establishment of the Paris Principles[35] in order to set a range of criteria to assess and inform the work of local and national institutions, thus reducing the applicability of lower standards.

Furthermore, States may be subjected to different human rights monitoring bodies that may overlap each other. Because there is no hierarchy between the different supervisory bodies from different systems, regional and global arrangements could concurrently be in odds with each other, as a finding adopted by one body may be different from that issued by another body regarding the same complaint. It is true, however, that the Inter-American Court of Human Rights, the African Court on Human and People's Rights and the European Court of Human Rights will find a case inadmissible if it is already under the jurisdiction of another international court, or has been judged by other international court. Nonetheless, there is still the possibility of

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Reisman. Leiden: Martinus Nijhoff Publishers, 2010. p.5.

31 The Terms of Reference of the ASEAN Intergovernmental Commission of Human Rights was adopted on 20 July 2009 and, among its proposed purposes, Article 1.6 thereof includes the following objective: "To uphold international human rights standards as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and international human rights instruments to which ASEAN Member States are parties."

32 HEYNS, Christof; KILLANDER, Magnus. Towards Minimum Standards for Regional Human Rights Instruments. In: COGAN, Jacob Katz *et al* (Ed.) **Looking to the Future**: Essays on international law in honor of W Michael Reisman. Leiden: Martinus Nijhoff Publishers, 2010. p. 29-33.

33 Regional Promotion and Protection of Human Rights: twenty-eighth report of the Commission to Study the Organization of Peace. In: STEINER, Henry J.; ALSTON, Philip; GOODMAN, Ryan. **International Human Rights in Context**: Law, Politics, Morals. 3. ed. New York: Oxford University Press, 2007. p. 930.

34 HEYNS, Christof; KILLANDER, Magnus. Towards Minimum Standards for Regional Human Rights Instruments. In: COGAN, Jacob Katz *et al* (Org.) **Looking to the Future**: Essays on international law in honor of W Michael Reisman. Leiden: Martinus Nijhoff Publishers, 2010. p.3.

35 Principles Relating to the Status of National Institutions (The Paris Principles), GA Resolution 48/134 of 20 December 1993 <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>. Last access: 02 dec. 2015.

conflicting findings between regional and global mechanisms. Despite the fact that UN treaty bodies do not permit concurrent consideration of cases that are subject to other international bodies, there is no prohibition on such bodies to hear cases that have already been settled at the regional level.[36]

The overlapping of recommendations and the coexistence of contradictory decisions may occur not only between regional and universal mechanisms, but also among instruments enshrined in different global treaties. This might be the case of the Universal Periodic Review, established by the Human Rights Council to function as an impartial and independent mechanism of assessing the situation of human rights of all UN Member States.[37] Notwithstanding the disadvantages of the Universal Periodic Review,[38] and despite the concern that it might undermine the treaty body system, this mechanism was designed to complement rather than substitute other treaty bodies and human rights monitoring instruments, notably "in encouraging States to meet their procedural obligations and as a form of interim follow-up to outstanding substantive issues raised by treaty bodies."[39]

Likewise, regarding the relation between universal and regional arrangements, the Commission to Study the Organization of Peace has further suggested that "the global instrument would contain the minimum normative standard, whereas the regional instrument might go further, add further rights (...) and take into account special differences within the region."[40] This argument thus rejects the idea that regional human rights systems might pose a threat to universally recognized standards of protection.

Furthermore, as previously stated, regional systems entail common features that derive from the universalist conception of human rights. The relevant instruments that established the regional systems refer to the Universal Declaration of Human Rights and to principles originated from it, thus reinforcing the universality of human rights

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[36] HEYNS, Christof; KILLANDER, Magnus. Towards Minimum Standards for Regional Human Rights Instruments. In: COGAN, Jacob Katz *et al* (Org.) **Looking to the Future: Essays on international law in honor of W Michael Reisman.** Leiden: Martinus Nijhoff Publishers, 2010. p. 12.

[37] SWEENEY, Gareth; SAITO, Yuri. An NGO Assessment of the New Mechanisms of the UN Human Rights Council. **Human Rights Law Review**, vol. 9, n. 2, p.203-p.223, March 2009, p. 204.

[38] See GAER, Felice D. A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System. **Human Rights Law Review**, vol. 7, n. 1, p. 109-139, January 2007. p. 135. More information on the Universal Periodic Review and updates on recent developments, sessions and country reviews can be obtained at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx>.

[39] SWEENEY, Gareth; SAITO, Yuri. An NGO Assessment of the New Mechanisms of the UN Human Rights Council. **Human Rights Law Review**, vol. 9, n. 2, p.203-223, mar. 2009. p. 213-214.

[40] Regional Promotion and Protection of Human Rights: twenty-eighth report of the Commission to Study the Organization of Peace. In: STEINER, Henry J.; ALSTON, Philip; GOODMAN, Ryan. **International Human Rights in Context: Law, Politics, Morals.** 3. ed. New York: Oxford University Press, 2007. p. 930.

whilst strengthening standards therein contained.[41] Dinah Shelton stresses that regional and global arrangements produce converging principles in fundamental human rights standards given "cross-referencing and mutual influence in jurisprudence",[42] thus reinforcing the idea that the various regimes complement and strengthen each other.

Regional arrangements are of special relevance if one considers the problems and critiques faced by the UN treaty body system concerning notably two aspects: resources and coherence,[43] which led to several proposals of reform by national and international organizations, stakeholders, and treaty body members. In 2006, the then United Nations High Commissioner for Human Rights, Louise Arbour, identified the main concerns that involved the UN treaty body system, such as the lack of engagement and political will of States; duplication resulting from overlapping of provisions and competencies; lack of effective national follow-up instruments; absence of coordination between different treaty bodies thus occasioning conflicting jurisprudence; and variable quality of State party reports.[44]

Regional systems must be sufficiently empowered in order to improve the situation of human rights on the ground. These measures entail the existence of a strong monitoring body mandated with investigative powers and on-site visits; mechanisms capable of effectively dealing with emergency situations; special rapporteurs and working groups; inter-state communications and state-reporting; opening of investigations triggered by individual complaints; more expressive methods of diffusion of their reports and decisions; and so forth.[45]

In addition, it is proposed that membership of inter-governmental organizations "should be conditioned upon observance of human rights and democracy criteria, in terms of the admission and possible expulsion of member states."[46] Vasak and Alston go further to suggest that "regional protection must come within the framework

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41 See the preamble of the American Convention on Human Rights, the African Charter on Human and People's Rights and the European Convention on Human Rights.

42 ROBBINS, Melissa. Powerful States, Customary Law and the Erosion of Human Rights through Regional Enforcement. **California Western International Law Journal**, vol. 35, n. 2, p. 275-p. 302, spring 2005. p. 110.

43 O'FLAHERTY, Michael. Reform of the UN Human Rights Treaty Body System: Locating the Dublin Statement. **Human Rights Law Review**, vol. 10, n. 2, p. 319-335, 2010. p. 320.

44 UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS. The Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body, 14 March 2006, HRI/MC/2006/2. p. 7-10.

45 HEYNS, Christof; KILLANDER, Magnus. Towards Minimum Standards for Regional Human Rights Instruments. In: COGAN, Jacob Katz *et al* (Org.) **Looking to the Future: Essays on international law in honor of W Michael Reisman.** Leiden: Martinus Nijhoff Publishers, 2010, p. 26.

46 HEYNS, Christof; KILLANDER, Magnus. Towards Minimum Standards for Regional Human Rights Instruments. In: COGAN, Jacob Katz *et al* (Org.) **Looking to the Future: Essays on international law in honor of W Michael Reisman.** Leiden: Martinus Nijhoff Publishers, 2010, p. 25.

of regional organization in accordance with the Charter of the United Nations and become one aspect of the policy of integration."[47]

Most importantly, the UN treaty bodies usually do not have access to sufficient information that allows for detailed and specific analysis of the situation of human rights in the State concerned, and that, consequently, "their recommendations may lack the precision, clarity and practical value required to enhance implementation".[48] Such a precision, however, may be reached through regional bodies that grasp local and regional needs and translate them into programs of action and enforcement of internationally recognized rights.

4. CONCLUSION

Rather than undermining the role of global mechanisms, regional arrangements enhance the promotion and protection of human rights that derived from the UN system. In addition, considering Heinrich Scholler's assertion that "the universality of human rights is expressed both in the historical, vertical direction and in their horizontal, geographical spread",[49] it can be reasoned that regional systems improve both dimensions. Geographically, regional arrangements play an inclusive role by reaching a larger number of States and reinforcing the implementation of rights contained in regional instruments by States that would otherwise reject external interventions under the argument of Western values being imposed upon non-Western cultures. Historically, regional systems are an extension of the global system and complement developments in the field of human rights protection. A key example of such an interaction is the ground-breaking decision of the Inter-American Court of Human Rights regarding the incompatibility of amnesty provisions with International Human Rights Law,[50] which set the path for this precedent to serve as robust jurisprudence by other Courts.

It is important not to forget that human rights mechanisms are aimed at improving the situation of human rights on the ground. The manifold international approaches to human rights must be balanced with regional solutions that adapt global standards into local contexts, taking into account universally agreed standards and specific issues and concerns with which only a region-specific system is capable of dealing.

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47 VASAK, Karel; ALSTON, Philip (Org.), **The International Dimensions of Human Rights**. Paris: Greenwood Press, 1982, p. 455.

48 O'FLAHERTY, Michael. Reform of the UN Human Rights Treaty Body System: Locating the Dublin Statement. **Human Rights Law Review**, vol. 10, n. 2, p. 319-335, 2010. p. 321.

49 SCHOLLER, Heinrich. The Universality of Human Rights. **Current Concerns**, n. 2, p.1, february 2009. Available at: <http://www.voltairenet.org/IMG/pdf/CC_2009_02.pdf>. Last access: 6 dec. 2015.

50 CORTE INTERAMERICANA DE DERECHOS HUMANOS. **Caso Barrios Altos Vs. Perú.** Fondo. Sentencia de 14 de marzo de 2001. Available at: <http://www.corteidh.or.cr/docs/casos/articulos/Seriec_75_esp.pdf>. Last access: 30 nov. 2015. p. 15.

Inis Claude's claim that "while global organization may be too large, in that it may ask states to be concerned with matters beyond the limited horizons of their interests, regional organization may be too small, in that it may represent a dangerous form of confinement for local rivalries"[51] to date reflects the importance of both regional and global solutions and their complementary, rather than exclusionary, roles.

There is a thin line between the universality of human rights and the respect for local practices that, albeit intrinsic to certain traditions, seem to disrespect the very basis of the human rights discourse: individual dignity and equality. The tension between human rights and cultural practices exists because the former promotes autonomy and individual entitlements that may contradict the latter. Universally accepted rights must be locally translated in order to have an impact on the daily lives of ordinary people. Moreover, "the objective and purpose of human rights treaties requires the recognition and enforcement of positive obligations."[52] At the same time, as the main purpose of the human rights ideal is "to give voice to and make visible the suffering and oppressed in order to empower them and ameliorate their situations",[53] these ideals must confront prevailing relations of power and "empower free people to build for themselves lives of dignity, value, and meaning".[54]

International rules that are incompatible with local norms or traditions have proven to have little effect over the lives of the victims, as the mere incorporation of universally recognized standards into domestic legislation does not guarantee effective implementation of those rights. Upendra Baxi's concept of critical human rights realism suggests that human rights "should be used as a resource for the poor and oppressed in their fight for a better life."[55]

As a result, it is important to move away from abstract and generalized debates that conceptualize culture as a homogenous, static and enclosed entity[56] and find a balance between the universal conceptions of human rights and the reality of their implementation in different national and cultural frameworks.[57]

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51 STEINER, Henry J.; ALSTON, Philip; GOODMAN, Ryan. **International Human Rights in Context: Law, Politics, Morals.** 3. ed. New York: Oxford University Press, 2007. p. 928.

52 KILLANDER, M. Interpreting Regional Human Rights Treaties. **Sur – International Journal of Human Rights**, São Paulo, vol. 7, n. 13, p.145-169, December 2010. p. 163.

53 RELIS, T. Human Rights and Southern Realities. **Human Rights Quarterly**, vol. 33, n. 2, p.509-551, May 2011. p. 550.

54 DONNELLY, Jack. **International Human Rights**. 4. ed. Boulder: Westview Press, 2013. p.47.

55 RELIS, T. Human Rights and Southern Realities. **Human Rights Quarterly**, vol. 33, n. 2, p.509-551, May 2011. p. 524. See also: DENG, F.; AN-NA'IM, A.; GHAI, Y.; BAXI, U. **Human Rights, Southern Voices**. Cambridge: Cambridge University Press, 2009.

56 PREIS, Ann-Belinda S. Human Rights as Cultural Practice: An Anthropological Critique. **Human Rights Quarterly**, vol. 18, n. 2, p. 286-315, May 1996. p. 289.

57 ADDO, Michael K. Practice of United Nations Treaty Bodies in the Reconciliation of Cultural Diversity with Universal Respect for Human Rights. **Human Rights Quarterly**, vol. 32, n. 3, p.601-664, August 2010. p. 627.

A holistic interpretation of international human rights treaties should aim at accomplishing effective results whilst fostering recognition of local values and practices. More than being compatible with international human rights ideals, cultural diversity itself constitutes an important human right that deserves respect and promotion. As accurately noticed by Will Kymlicka, "cultural identities should be tolerated and accommodated, at least to some degree, in a free and democratic society".[58] The task, however, is not easy, and will continue to face challenges. Human rights are meant to be the voice of the invisible, the forgotten, the oppressed. *A luta continua*.[59]

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[58] KYMLICKA, Will. **The Rights of Minority Cultures**. New York: Oxford University Press, 2009. p. 9.

[59] The expression *A luta continua*, or *Aluta continua* (roughly translated as "the struggle continues" and usually followed by the sentence *Victoria acerta* – "victory is certain") was originally adopted as the motto in the Mozambican revolution and war of liberation and soon began to represent transnational solidarities towards struggles against oppression in Southern African countries. The expression was also embraced during and after the struggle against the Apartheid regime in South Africa, and it is currently embodied by a neon art piece by Thomas Mulcaire located at the entrance lobby of the Constitutional Court of South Africa, in Johannesburg, so as to add to the story of transformation and democracy told by the Court's building, installations and art gallery.

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