The Consensus Method of Interpretation by the Inter-American Court of Human Rights

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This article examines treaty interpretation based on consensus, or the idea that legal or political practice that is not directly related to a treaty can be used in interpreting it, or at least in granting more discretion to States Parties. The practice of the Inter-American Court of Human Rights, contrasted with the well-settled practice of the European Court of Human Rights, reveals that consensus interpretation plays an important role in entrenching the legitimacy of international human rights courts. The Inter-American Court's practice seems to rely on consensus when it supports a progressive, teleological interpretation of human rights. The article argues that this selective engagement eliminates the legitimacy-building possibilities of the consensus method of interpretation, but that the Inter-American Court, in seeking legitimacy not from States Parties, but other stakeholders, does not seem particularly concerned with legitimacy costs (even if it probably should).

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I. Introduction

International human rights tribunals, in interpreting the treaties that delegate competence to them in cases brought by individuals, often resort to a number of tools. These tools are frequently described in the *Vienna Convention on the Law of Treaties*[1] ["*Vienna Convention*"]. Most notably among these is interpretation based on the object and purpose of the human rights treaty. But teleological interpretation of the text using intrinsic tools does not always yield the answers the human rights body needs, particularly in new areas of social activity. In these situations, human rights bodies, particularly the European Court of Human Rights ("ECtHR"), have referred to "consensus" as a method of interpretation.

Consensus interpretation mediates tensions between different types of interpretation, even if it has fallen under the shadows of the margin of appreciation attributed to States.[2] There are five key categories of consensus interpretation in the ECtHR jurisprudence: (1) consensus among States Parties of the Council of Europe; (2) international consensus identified by international treaties; (3) internal consensus within a State; (4) expert consensus; and (5) consensus among ECtHR judges.[3] *Tyrer v United Kingdom*[4] is the case that started the use of consensus as a means for

1. 23 May 1969, 1155 UNTS 331 art 18 (entered into force 27 January 1980) [*Vienna Convention*].
2. Kanstantsin Dzehtsiarou, "European Consensus: a way of reasoning" (2009) University College Dublin Law, Working Paper No 11/2009.
3. *Ibid*.
4. (1978), ECHR (Ser A) 24, 2 EHRR 1.

evolutive interpretation.[5] In this case, corporal punishment of a minor was seen as no longer acceptable by the majority of States Parties to the *European Convention for the Protection of Human Rights and Fundamental Freedoms*[6] ("*ECHR*"). This triggered an evolution of the standard for Article 3 of the *ECHR* on cruel and degrading punishment.

The idea of regional consensus as a treaty interpretation tool has been explored in the European context as a means to articulate the ECtHR's balancing of subsidiarity and the expansionist tendencies of interpreting an ever-evolving instrument.[7] But the evolutive interpretation of the *ECHR* through consensus is one that almost seeks States Parties' "pre-approval" of the standard, before the ECtHR intervenes. The role of European consensus, as far as the ECtHR is concerned, also seems to be the maintenance of a certain degree of unity in the region, as well as finding common denominators in domestic human rights practice. In doing so, consensus interpretation enhances the legitimacy of the ECtHR.[8]

The functions of consensus interpretation are: (1) to enhance the legitimacy of a regional human rights court; (2) to persuade States Parties of said legitimacy, and make judgment thereby more acceptable; (3) to avoid arbitrary decision-making; (4) to determine the scope of subsidiarity; and (5) to help the court in dealing with new matters of interpretation of the treaty, or otherwise controversial or important

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5. Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge: Cambridge University Press, 2015) at 139 [Dzehtsiarou, *European Consensus*].
6. 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).
7. See Dzehtsiarou, *European Consensus*, *supra* note 5 ("European consensus operates on the edge of the margin of appreciation and evolutive interpretation; both of these are necessary to maintain the stability of the Strasbourg system, with the former preventing the ECtHR from going too far in developing human rights standards and the latter ensuring that the ECHR does not turn into a meaningless instrument preserving views from 60 years ago when the Convention was drafted, signed and ratified by the original Contracting Parties" at 129).
8. *Ibid* at 1.

issues.[9]

Dzehtsiarou, in his monograph treatment of the topic, suggested that "European consensus should remain within European borders", and it may not be suitable for transplantation to other regional human rights contexts.[10] This piece takes on this challenge, and examines the idea of regional consensus in the Inter-American Court of Human Rights ("IACtHR"). The Americas would seem like an ideal context for the use of consensus, since the majority of countries subject to the IACtHR's jurisdiction share a linguistic and legal tradition, in contrast to the wider diversity found in Europe. This may even suggest that the use of consensus would be a given in the IACtHR's practice, and the search for it is almost a moot exercise, at least from an epistemological perspective.[11]

In spite of regional similarities, though, there is relatively sparse practice by the Inter-American Court in dealing with consensus methods of interpretation. More often than not, the IACtHR uses consensus as only one tool in its arsenal, relying on other methods of interpretation in the same case. This mixed record can be at least partly explained by the IACtHR being progressive in other, sometimes more, legitimacy-costing ways. In fact, it seems that the IACtHR cherry picks interpretation methods that serve an aspiration to foster the protection of human rights, which coincides with the expansion of the IACtHR's mandate. I argue that the IACtHR should take consensus interpretation more seriously as an interpretive tool in its case law, at least inasmuch as implementation of this method would require it being more deferential to states and subsidiarity as an initial step of its reasoning process. This choice is likely to translate into deeper entrenchment of the *American Convention on Human Rights "Pact of San Jose, Costa Rica"*[12] ("*ACHR*").

What follows discusses the uses of consensus interpretation methods by the IACtHR according to the different types of consensus, using Dzehtsiarou's three first categories, outlined above (consensus using international law; consensus using comparative law, and; consensus

9. *Ibid* at 184.
10. *Ibid* at 128.
11. I am thankful to Rosalind Dixon for this insight.
12. 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978).

using domestic politics), as these are the categories the IACtHR has engaged with the most. Underlying this discussion is the question of the connection between consensus interpretation and legitimacy of the IACtHR. Throughout these sections, the doctrinal schema developed with respect to the ECtHR will serve to frame the discussion, which will then highlight the specific experience of the IACtHR.

II. Consensus via International Law

The use of international law as a means to build consensus is perhaps the most common way in which the IACtHR engages with this method. This is related to the notion, discussed below, that the IACtHR seems to seek consensus from yardsticks external to the States Parties to the *ACHR* that have accepted its jurisdiction. Before getting to that, though, it is important to say a few words about the IACtHR's general approach to treaty interpretation.

A significant feature in the IACtHR's approach to treaty interpretation is the evolutionary interpretation of treaties, but packaged in way that promotes the object and purpose of the *ACHR*, rather than changes in society. The IACtHR has frequently asserted that the *American Convention* and other instruments should be given a *pro homine* interpretation, that is, that they should be interpreted in the way that is most protective of human rights. This declared "bias" of the Court is another means of advancing interpretation in accordance with the purpose of the treaty; by choosing the *pro homine* way, the IACtHR dismisses the interpretation of its instrument according to the ordinary meaning of its words (the primary rule of interpretation) or any other traditional canons of interpretation, instead directly serving the teleology of the instrument.[13] This approach seems to be somewhat at odds with

13. *Ricardo Canese v Paraguay* (2004), Inter-Am Ct HR (Ser C) No 111, at para 181; *Herrera-Ulloa v Costa Rica* (2004), Inter-Am Ct HR (Ser C) No 107, at para 184; *Baena-Ricardo et al v Panama* (2001), Inter-Am Ct HR (Ser C) No 72. For a broader discussion of treaty interpretation by the IACtHR, see Lucas Lixinski, "Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law" (2010) 21 European Journal of International Law 585.

the ECtHR's approach.[14] While the ECtHR's approach to evolutionary interpretation aims at updating the instrument, the IACtHR's approach makes it so that there is an incidental effect of a much more fundamental and declared bias. It is thus less conducive to finding consensus as a baseline, or even to addressing consensus among Member States. It puts the IACtHR in a position largely out of sync with Member States, which seems to reflect other postures, discussed below.

The IACtHR also engages with the need to interpret the *ACHR* in light of changing circumstances. In *Mapiripán Massacre v Columbia*,[15] when analyzing the issue of attribution to the State of responsibility for human rights violations perpetrated by non-State actors, the Court stepped away from general rules of international law. By doing so, the Court affirmed the independence of human rights from the general international legal system, based precisely on the special character of human rights obligations due to the purposes of human rights treaties and obligations.[16] The IACtHR then affirmed that human rights treaties must be interpreted in accordance with current circumstances, as opposed to an understanding based on an "original meaning". In saying that, the IACtHR used not only Article 29 of the *ACHR* (which is specifically on interpretation rules), but also the rules of the *Vienna Convention*.[17] Further, in an Advisory Opinion, the IACtHR also reinforced the point that human rights considerations permeate other areas of international law. That is, when human rights interests are concerned, legal obligations should be interpreted in a dynamic manner so as to cover new situations

14. Mark Toufayan, "Human Rights Treaty Interpretation: A Postmodern Account of Its Claim to "Speciality"" (2005) NYU Center for Human Rights and Global Justice Working Paper No 210 (arguing that there is no preferred method of interpretation in the European System). In a contrary sense, see Theodor Meron, "International Law in the Age of Human Rights: General Course on Public International Law" (2003) 301 Collected Courses of the Hague Academy of International Law 9 at 192-93.
15. (2005), Inter-Am Ct HR (Ser C) No 134.
16. *Ibid* at paras 104-108.
17. *Ibid* at para 106.

on the basis of pre-existing rights.[18] Therefore, in trying to articulate connections to broader areas of international law, the IACtHR will use the *ACHR* as a means to inject adaptability to changing circumstances into the law external to the Inter-American System. However, it seems more reluctant to invoke changing circumstances with respect to the *ACHR* itself, instead focusing on the *pro homine* method.

Consensus is often based on reliance on other international treaties.[19] This reliance helps clarify the scope of the treaty the human rights court is in charge of overseeing, and it also helps signal towards regional public opinion with respect to an issue. It is used by the IACtHR often in isolation, but increasingly also in conjunction with the domestic law of States Parties. For instance, in *Kawas-Fernández v Honduras*,[20] the IACtHR used a combination of non-Inter-American treaties, domestic law of States Parties, and even an Inter-American treaty to establish competence over environmental matters.[21]

The IACtHR often uses other treaties and what it calls the "*corpus juris* of international human rights law".[22] Those are in addition to the Inter-American treaties beyond the *ACHR* that give specific competence to the IACtHR for its application.[23] But, as I have discussed elsewhere,[24] the IACtHR tends to use only treaties to which the State in question is a party, aligning with the requirements of the *Vienna Convention*, Article 31.3.c.

The IACtHR has systematically invoked treaties outside of the Inter-American System as a means to expand its jurisdiction, using Article 29 of the *ACHR* as a catapult for expanding its mandate. There is some variation in the ways in which this will happen. In more politically

18. Antônio Augusto Cançado Trindade, "International Law for Humankind: Towards a New *Jus Gentium* (II)" (2005) 317 Collected Courses of the Hague Academy of International Law 9 at 62.
19. Dzehtsiarou, *European Consensus*, *supra* note 5 at 46-47.
20. (2009*)*, Inter-Am Ct HR (Ser C) No 196.
21. *Ibid* at para 148.
22. Jo M Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, 2d (Cambridge: Cambridge University Press, 2013) at 13.
23. *Ibid* at 122-25.
24. Lixinski, *supra* note 13.

delicate contexts such as economic, social and cultural rights, and indigenous rights, municipal law (or internalized international treaties) seems to play a larger role in interpreting the *ACHR*. In other areas, such as international humanitarian law, the Court has more easily referred to other international treaties as interpretive aids. However, it has also shown some reluctance in invoking international criminal law, using it only as part of the "factual matrix" of the case, rather than directly affecting the interpretation of provisions of the *ACHR*.[25]

The case of *Yean and Bosico Children v Dominican Republic*[26] ("*Yean and Bosico*"), involving the denial of nationality to two women of Haitian descent born in the Dominican Republic, is particularly relevant to thinking about the boundaries of this use of external treaties. In it, the court considered the status of a treaty to which the Dominican Republic was not a party and whether it could influence the judgment.[27]

In *Yean and Bosico*, the IACtHR engaged with a treaty which the State had signed, but not ratified. The treaty in question is the *Convention on the Reduction of Statelessness*,[28] which was signed by the Dominican Republic on December 5, 1961 and had been in force since December 13, 1975.[29] The treaty had by then only been ratified by 26 States, certainly not a particularly representative share of the international community sufficient to prove a consensus. Nevertheless, and without mentioning the principle of good faith with respect to treaties that have not entered into force for a State,[30] the IACtHR added the treaty to the list of norms that needed to be contextually considered in deciding the scope of obligations under the *ACHR*. In a Separate Opinion in that case, Judge Cançado Trindade went even further: he examined the *Convention on the Reduction of Statelessness*, alongside the *Convention Relating to the*

25. *Ibid*.
26. (2005), Inter-Am Ct HR (Ser C) No 130 [*Yean and Bosico*].
27. *Ibid* at 143.
28. 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975).
29. *Yean and Bosico*, *supra* note 26 at 143.
30. *Vienna Convention*, *supra* note 1, art 18.

Status of Stateless Persons,[31] and the *European Convention on Nationality*,[32] to make a claim for a general principle of international law to prevent statelessness.[33]

In engaging in this type of consensus, though, there is a chance that the status of the consensus-building tools may get blurred. It is one thing to use international treaties to which the State in question is a party, a long-recognized method of interpretation contained in the *Vienna Convention.*[34] But to use international treaties to which the State is not a party, or other sources, to make an argument for the existence of applicable general principles of international law, as Judge Cançado Trindade did in *Yean and Bosico*, is a different type of effort. It requires the human rights court to find validity in a norm, the existence of which still needs to be proven, and then apply it to the State Party. Sometimes this application can be done by merging custom and consensus: that is, by claiming there is a regional consensus, one can claim there is in fact a norm of (regional) customary international law that applies to the parties. Consensus can thus become a custom-making tool as well.[35]

Even if consensus interpretation is in many ways analogous to regional customary international law, the ECtHR does not treat consensus interpretation as custom. Instead the ECTHR simply treats it as as practice under the treaty,[36] which is also a recognized means of treaty

31. 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960).
32. 6 November 1997, Eur TS 166 (entered into force 1 March 2000).
33. See *Yean and Bosico*, *supra* note 26 at paras 8-9 for the separate opinion of Judge AA Cançado Trindade.
34. *Vienna Convention*, *supra* note 1, art 31(3)(c). For a discussion on the application of this provision by the ECtHR, see Vassilis Tzevelekos, "The Use of Article 31(3)(c) of the VCLT in the Case-law of the ECtHR: an Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of the Teleology of Human Rights? Between Evolution and Systemic Integration" (2010) 31 Michigan Journal of International Law 621.
35. Vassilis Tzevelekos & Kanstantsin Dzehtsiarou, "International Custom Making and the ECtHR's European Consensus Method of Interpretation" (2016) 16 European Yearbook of Human Rights 313 at 343 [Tzevelekos & Dzehtsiarou].
36. *Ibid* at 316.

interpretation under the *Vienna Convention*.[37] Even if consensus could be used as a means to identify regional custom, it is deployed by the ECtHR for a different purpose. But admittedly, from an international legal perspective, the analogy between custom and consensus interpretation helps lend some legitimacy to consensus interpretation more broadly by making the method more familiar.[38]

The IACtHR could use consensus to identify regional custom in the Americas, but it has refrained from doing so thus far. Identifying regional custom would require making a claim for regionalism and specialization in the field of human rights protection that the IACtHR has not often done itself, rather opting to selectively rely on ECtHR case law (as well as the findings of UN Treaty Bodies) to develop their own jurisprudence. It would seem that relying on regional custom could in theory enhance the legitimacy of the Inter-American system, at least inasmuch as it would clearly ground the IACtHR in the Americas. It would certainly come a long way in addressing concerns, expressed by States like Venezuela, about the IACtHR allegedly behaving as a "colonial power", incapable of taking local circumstances into account.[39] But at the same time, it may put the broader legitimacy of international human rights law at risk, and which seems to be a more important concern for the IACtHR. The important question here is, "legitimacy for whom?" As far as the ECtHR is concerned, it would seem that legitimacy before States Parties is the key concern. Conversely, for the IACtHR, even though it appears to be more criticized by domestic governments than the ECtHR, legitimacy before the world seems to be key.

One must bear in mind that, even if regional custom were identified as such by the IACtHR, it is unclear whether the court could use it as custom or if it would still need to package it as practice under the treaty. Given the IACtHR's fairly restricted mandate, which allows it to directly apply only certain Inter-American human rights treaties, it seems no practical benefit would arise for the IACtHR to use consensus to apply

37. *Vienna Convention*, *supra* note 1, art 31(3)(b).
38. Tzevelekos & Dzehtsiarou, *supra* note 35 at 342.
39. Pasqualucci, *supra* note 22 at 303.

custom. However, pre-existing custom can be, and has been, used to challenge domestic law of States Parties as *Yean and Bosico* demonstrates.

In its use of international treaties as a means of identifying consensus, the IACtHR has adopted a somewhat expansionist angle. It does not see itself as declaring violations of those treaties, in fact, it has explicitly declared that as falling outside its competence. It does, however, use international treaties as means to expand on the meaning of provisions of the *ACHR*, and to ultimately build a more harmonized international legal order. This practice has an overall positive impact on the legitimacy of the IACtHR, but it assumes (or at least unintendedly reinforces) a fairly strict separation between the domestic and the international, which can be detrimental to the legitimacy of the Court. I will come back to this issue below. Before then, it is necessary to examine how the counterpart of international law, being domestic law of States not parties to a case, has been used.

III. Consensus via Comparative Law

The use of comparative law (that is, the domestic law of a number of countries) is the principal form of consensus interpretation in the ECtHR. However, while the IACtHR has used comparative law, it has not done so to the same extent. The strict separation between domestic and international that the IACtHR adopts prevents more reliance on domestic law, even if it would have positive legitimacy impacts on the IACtHR.

There are two variations on the use of comparative law as a tool to measure consensus: one, used more often, is to rely only on the domestic law of the States subject to the human rights tribunal's jurisdiction; the other is to look more broadly at domestic law across the world, regardless of whether they are parties to the relevant human rights treaty. While the latter practice can have a positive impact on developing general principles of law as a source of international law, it seems to be less important for the purposes of identifying consensus relevant to the interpretation of one specific treaty. As discussed in the previous section, the relationship between consensus interpretation and non-treaty sources of international law is only an incidental effect and not an objective. That said, the

IACtHR has referred to both types of comparative law use.

Consensus interpretation based on domestic law (as a proxy to domestic attitudes) is often used with respect to morally sensitive issues, such as the ECtHR's case law on LGBTI rights.[40] The same can be said with respect to the IACtHR. *Atala Riffo and Daughters v Chile*[41] ("*Atala Riffo*") is the first case of the IACtHR dealing with LGBTI rights. The case revolves around the rights of Karen Atala Riffo and her daughters in the context of custody and administrative proceedings. An important dimension of the case has to do with disciplinary proceedings against Ms. Atala, and the implications of the IACtHR judgment for judicial design in Chile.[42] For present purposes, I will focus on the custody proceedings, and the fact that Ms. Atala is a lesbian in a committed relationship with children from a previous (heterosexual) union. I will focus on the custody proceedings, resulting in the loss of custody of her three daughters, and the case's focus on the alleged international responsibility of the State for discriminatory treatment and arbitrary interference in the private and family life suffered by Ms. Atala due to her sexual orientation in this matter.[43]

The IACtHR asserted its role as a subsidiary jurisdiction, holding that it would not re-scrutinize the findings of domestic jurisdictions on the facts or evidence. It restricted its mandate to compliance with international human rights norms.[44] Subsidiarity also meant the IACtHR would not make a finding with respect to custody.[45]

In determining whether the IACtHR could include sexual orientation among the grounds upon which discrimination is prohibited, the IACtHR said that:

> [t]he Court has established, as has the European Human Rights Court, that

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40. Dzehtsiarou, *European Consensus*, *supra* note 5 at 34.
41. (2012), Inter-Am Ct HR (Ser C) No 239 [*Atala Riffo*].
42. David Kosar & Lucas Lixinski, "Domestic Judicial Design by Regional Human Rights Courts" (2015) 109 American Journal of International Law 713 [Kosar].
43. *Atala Riffo*, *supra* note 41 at para 3.
44. *Ibid* at para 65.
45. *Ibid* at para 66.

> human rights treaties are living instruments, whose interpretation must go hand in hand with evolving times and current living conditions[.] This evolving interpretation is consistent with the general rules of interpretation set forth in Article 29 of the American Convention, as well as those established in the Vienna Convention on the Law of Treaties.[46]

But the IACtHR immediately followed that with the *pro homine* principle, in saying that:

> [i]n this regard, when interpreting the words "any other social condition" of Article 1(1) of the Convention, it is always necessary to choose the alternative that is most favorable to the protection of the rights enshrined in said treaty, based on the principle of the rule most favorable to the human being[.][47]

Therefore, in this case, evolutionary and teleological interpretations seem to come hand in hand. With respect to Latin American consensus, the IACtHR said:

> [w]ith regard to the State's argument that, on the date on which the Supreme Court issued its ruling there was a lack of consensus regarding sexual orientation as a prohibited category for discrimination, the Court points out that the alleged lack of consensus in some countries regarding full respect for the rights of sexual minorities cannot be considered a valid argument to deny or restrict their human rights or to perpetuate and reproduce the historical and structural discrimination that these minorities have suffered. The fact that this is a controversial issue in some sectors and countries, and that it is not necessarily a matter of consensus, cannot lead this Court to abstain from issuing a decision, since in doing so it must refer solely and exclusively to the stipulations of the international obligations arising from a sovereign decision by the States to adhere to the American Convention.[48]

In the same way the separation of domestic and international was used to promote subsidiarity and deference to domestic law early in the judgment, that separation is used here to promote the authority of the international court (IACtHR).

Consensus interpretation was also invoked by a partially dissenting judge in *Atala Riffo*. Judge Alberto Pérez Pérez used constitutional provisions of thirteen Latin American countries to suggest that consensus had not emerged as to whether a same-sex couple and the children of one of them could be considered a "family". He clearly tied the evolutionary

46. *Ibid* at para 83.
47. *Ibid* at para 84.
48. *Ibid* at para 92.

interpretation of the *ACHR* to the need for a consensus to be established, asserting that, while consensus could be found to support the idea that discrimination based on sexual orientation violates human rights, the same could not be said about same-sex couples constituting families in Latin America.[49] It is somewhat telling that the IACtHR seems to have ignored what, by all effects, is an orthodox application of the consensus method. It has done so in favor of a more progressive interpretation of the *ACHR* with respect to Article 17 (family protection), and still used a version of consensus interpretation with respect to the grounds for discrimination (Article 1(1)). A selective approach to consensus interpretation seems to have been adopted by the IACtHR, meaning that only a consensus interpretation that supports a more progressive view of human rights will ultimately be deployed by the IACtHR.

Consensus was even more central in *Artavia Murillo et al ("In Vitro Fertilization") v Costa Rica*.[50] In this case, the IACtHR considered a prohibition of the practice of *in vitro* fertilization ("IVF") in Costa Rica in the aftermath of a ruling of the Constitutional Chamber of the Costa Rican Supreme Court of Justice ("Constitutional Chamber"). The IACtHR considered whether the prohibition amounted to an arbitrary interference in the right to private life and the right to found a family, the right to equality, and the disproportionate impact of the ban on women and women's rights.[51] The IACtHR used evolutionary interpretation (and consensus as a key component of it) particularly bearing in mind that IVF is a procedure that did not exist when the *ACHR* was drafted, and used it in respect to two issues: "(i) the pertinent developments in international and comparative law concerning the specific legal status of the embryo, and (ii) the regulations and practice of comparative law in relation to IVF".[52]

With respect to the latter, the IACtHR said that:

> [t]he Court considers that, even though there are few specific legal regulations

49. *Ibid* at paras 19-23 for the partially dissenting opinion of Judge Alberto Pérez Pérez.
50. (2012), Inter-Am Ct HR (Ser C) No 257.
51. *Ibid* at para 2.
52. *Ibid* at para 246.

> on IVF, most of the States of the region allow IVF to be practiced within their territory. This means that, in the context of the practice of most States Parties to the Convention, it has been interpreted that the Convention allows IVF to be performed. The Court considers that this practice by the States is related to the way in which they interpret the scope of Article 4 of the Convention, because none of the said States has considered that the protection of the embryo should be so great that it does not permit assisted reproduction techniques and, in particular, IVF. Thus, this generalized practice is associated with the principle of gradual and incremental – rather than absolute – protection of prenatal life and with the conclusion that the embryo cannot be understand as a person.[53]

In making this assessment, the IACtHR also relied on rules of the *Vienna Convention*, particularly in articulating "generalized practice" as meaning subsequent practice under the *ACHR*. The Court used consensus to rule out the argument that the prohibition of IVF could be justified to protect the right to life of the embryo.[54] The IACtHR concluded that an embryo is not entitled to the right to life until it is implanted in the uterus, when it becomes a fetus.[55] The IACtHR used multiple methods of interpretation, among them, consensus, and decided that they all led to a similar conclusion on the matter.

Reliance on comparative law can be useful in examinations of proportionality, which is an important element in tension with the "Margin of Appreciation" doctrine (at least inasmuch as they both act as defenses for the state). Resorting to the law of multiple states helps legitimize choices as it testifies to the success of a particular model.[56]

This practice is somewhat limited, in that it undertakes a fairly superficial reading of the law of the other countries involved, particularly in the absence of IACtHR cases dealing with the same set of laws in the other jurisdictions (which is more often than not the case when invoking the consensus method of interpretation). In doing so, an important factor to consider is that the analysis fails to take into account the domestic context of the many consulted jurisdictions where legislation itself does not adequately measure support around an existing law; it is

53. *Ibid* at para 256.
54. *Ibid*.
55. *Ibid* at para 264.
56. Rosalind Dixon, "Proportionality & Comparative Constitutional Practice" 5 (manuscript on file, cited with permission).

simply a proxy for it.[57] The situation is perhaps sharper when speaking of repeals of legislation, rather than positive creation of statutes. But it still applies, at least to the extent that the presence of legislation itself is at best an imperfect way to measure consensus, since it fails to take into account domestic politics.[58] Part of this is just a shortcoming of broad comparison in which contextualism falls by the wayside instead focusing on functional equivalents across jurisdictions.

In addition, the mechanism of seeking consensus through looking at the domestic law of States Parties has been pursued by the IACtHR in its advisory competence. According to the drafters of the *ACHR*, the advisory competence of the IACtHR was intended to be wide. They particularly envisioned the possibility of States Parties asking for Advisory Opinions on the compatibility of their domestic laws with the *ACHR*,[59] a type of Advisory Opinion that the IACtHR has rendered on a number of occasions.[60] In a way, these opinions have paved the way for the IACtHR to consider comparative domestic law as an avenue of interpretation.

It was only in a recent Advisory Opinion that the IACtHR tackled the matter of consensus interpretation. In the Advisory Opinion on

57. *Ibid* at 4.
58. *Ibid* at 5.
59. Pasqualucci, *supra* note 22 at 39.
60. *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica* (1984), Advisory Opinion OC-4/84, Inter-Am Ct HR (Ser A) No 4; *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts 13 & 29 of the American Convention on Human Rights)* (1985), Advisory Opinion OC-5/85, Inter-Am Ct HR (Ser A) No 5; *The Word "Laws" in Article 30 of the American Convention on Human Rights* (1986), Advisory Opinion OC-6/86, Inter-Am Ct HR (Ser A) No 6; *Enforceability of the Right to Reply or Correction (Arts 14(1), 1(1) & 2 of the American Convention on Human Rights)* (1986), Advisory Opinion OC-7/85, Inter-Am Ct HR (Ser A) No 7; *Compatibility of Draft Legislation with Article 8(2)(h) of the American Convention on Human Rights* (1991), Advisory Opinion OC-12/91, Inter-Am Ct HR (Ser A) No 12; *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts 1 & 2 of the American Convention on Human Rights)* (1994), Advisory Opinion OC-14/94 (Ser A) No 14.

whether corporations are holders of human rights under the *ACHR*,[61] the IACtHR noted that consensus could be a means to verify whether corporations are entitled to human rights. Even though it ultimately concluded that extending human rights to corporations fell outside the text of the *ACHR*, it engaged with the idea that evolutionary interpretation gives particular relevance to comparative law.[62]

The IACtHR recognized that all States Parties to the *ACHR* which have accepted the jurisdiction of the court directly granted human rights to legal entities. However, there were some differences among States Parties with respect to which rights were granted to legal entities and which legal entities were entitled to human rights.[63] The IACtHR noted that, despite their domestic law positions, a number of these countries held that ultimately the *ACHR* did not support conferring human rights to legal entities. Specifically, the IACtHR said that differences in approach among States Parties, and the fact that the domestic law was not seen as being pursuant to implementing the *ACHR*, made it so that consensus was not a determining factor in the interpretation of the *ACHR* in this respect.[64]

At the time of writing this article, a request for an Advisory Opinion of the IACtHR is open and may help shed some light on the consensus method in the Inter-American System. This Advisory Opinion is being requested by Costa Rica, in which the State asks about the extent of *ACHR* obligations with respect to implementing name changes for transgender persons, as well as property rights flowing from same-sex relationships.[65]

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61. *Entitlement of Legal Entities to Hold Rights Under the Inter-American Human Rights System (Interpretation and Scope of Article 1(2), in relation to Articles 1(2), 8, 11(2), 13, 16, 21, 24, 25, 29, 30, 44, 46 and 62(3) of the American Convention on Human Rights, as well as of Article 8(1)(A) and (B) of the Protocol of San Salvador*) (2016), Advisory Opinion OC-22/16, Inter-Am Ct HR (Ser A) No 22.
62. *Ibid* at para 63.
63. *Ibid* at para 64.
64. *Ibid* at paras 66-67.
65. Solicitud de Opinión Consultiva presentada por el Estado de Costa Rica, online: Corte Interamericana de Derechos Humanos <www.corteidh.or.cr/cf/jurisprudencia2/observaciones_oc.cfm?nId_oc=1671>.

This opinion, being about issues involving changing social mores and minority groups, could be an important opportunity for the IACtHR to engage again in the consensus method, especially in light of its findings in *Atala Riffo*.

Therefore, the IACtHR's use of domestic law seems to be more restricted to issues not squarely within the *ACHR*. International treaties, on the other hand, are often used in these contexts, and also more generally to support the IACtHR's reasoning. These choices speak to the limited reliance by the IACtHR on the domestic law of States, which is indicative of its troubled relationship with the principle of subsidiarity, discussed further below.

Before getting to that, there is another possibility within the realm of consensus interpretation which has been discussed in some particularly volatile cases in the IACtHR jurisprudence. These have to do with whether a State can rely on relatively clear expressions of domestic democratic will as a means to interpret its international human rights obligations. To those situations I move next.

IV. Consensus via Domestic Politics

Assuming consensus is related to treaty interpretation, the lack of consensus can work for States, since it creates a presumption in favor of the solution adopted by the State on a given matter, and deferring to said position.[66] After all, once the State has deviated from consensus, it can justify the domestic posture by stating that consensus does not quite cover the State's interference with human rights, or, even if it does, that the State has a particularly strong justification to pursue alternative behavior.[67]

In the ECtHR context, European Consensus is meant to create a rebuttable presumption that the ECtHR will follow the majority of States Parties. That presumption can be rebutted in the presence

66. Dzehtsiarou, *European Consensus*, *supra* note 5 at 29.

67. Kanstantsin Dzehtsiarou, "European Consensus and the Evolutive Interpretation of the European Convention on Human Rights" (2011) 12 German Law Journal 1730 at 1733 [Dzehtsiarou, "Evolutive Interpretation"].

of "particularities of the historical and political development of a respondent State or moral sensitivity on the matter at issue".[68] Rebutting the presumption on these grounds, however, imposes a high burden on the State, significantly raising the stakes of a case, or at least further underlining high stakes.

Consensus can thus be used in international human rights adjudication as reliance on internal consensus, that is, the political views within certain states, as opposed to across a region. Of tools to gauge internal consensus, referenda have been used by the ECtHR on certain occasions, in part because of their clarity and "objectivity" on a specific matter. Naturally, these tools are not always available, but when they are (as in cases involving abortion rights in Ireland), they offer powerful subsidies to rebut the presumption in favor of regional consensus on a topic.[69] In the IACtHR practice, the Court has consistently rejected the possibility of relying on internal democratic consensus. Results have been mixed in the aftermath of cases, leading to attacks on the legitimacy of the IACtHR and its judgments *vis-à-vis* States Parties.

One instance in which domestic debate and controversy ran counter to the IACtHR's position was *Gomes Lund et al ("Guerrilha do Araguaia") v Brazil*,[70] having to do with amnesty laws enacted in Brazil in the aftermath of the country's military dictatorship (which lasted from 1964 to 1985). Between 1972 and 1975, a rural guerrilla group, Guerrilha do Araguaia, was persecuted by the military dictatorship, and was ultimately decimated by the armed forces. In 1979, an amnesty law was enacted in Brazil which covered acts between 1961 and 1979, and extended to government officials and non-governmental opposition forces. Reparations were granted to surviving relatives of the guerrilla's

68. Dzehtsiarou, *European Consensus*, *supra* note 5 at 3.
69. *Ibid* at 52-54.
70. (2010), Inter-Am Ct HR (Ser C) No 219 [*Gomes*].

members in the 1990s.[71]

A case was brought to the Inter-American Commission by relatives of members of the Guerrilha do Araguaia, and made its way to the Inter-American Court of Human Rights. Months before the hearing at the IACtHR, the Brazilian Federal Supreme Court ruled in favor of the constitutionality of the amnesty law. The Brazilian government made an argument based on internal consensus, and relied on the finding of the law's constitutionality. Specifically, it presented an objection to the IACtHR's jurisdiction in the case. The Brazilian government argued that, if the IACtHR were to hear the merits of the case, it would in fact, act as a court of fourth instance, and review the judgment of the Brazilian Federal Supreme Court. To that, the IACtHR responded saying its role was not to scrutinize internal legality, but rather compatibility with an international human rights treaty.[72] In particular, it stated that:

> [o]n numerous occasions, the Court has held that ascertaining whether the State violated its international obligations by means of its actions before its judicial organs, can lead to this Court examining the particular domestic procedures, eventually including the decisions of the higher courts, so as to establish the compatibility with the American Convention. In the present case, the Inter-American Court is not called to carry out an analysis of the Amnesty Law in relation with the National Constitution of a State, an analysis of domestic law which is not of its jurisdiction, and which is an issue of the Non-compliance Action No. 153 …, but rather it must assess a conventional control, namely to assess the alleged non-compatibility of said law with Brazil's international obligations pursuant to the American Convention. As a consequence, the arguments in regard to the objections are matters related directly with the merits of the controversy, which can be examined by the Court under [the] American Convention, without contravening the rule of the "fourth instance." As such, the Court dismisses this preliminary objection.[73]

In support of the idea that the judgments of higher domestic courts can

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71. Yolanda Gamarra, "National Responses in Latin America to International Events Propelling the Justice Cascade: The *Gelman* Case" in José María Beneyto & David Kennedy, eds, *New Approaches to International Law: The European and the American Experiences* (The Hague: TMC Asser Press, 2012) 75 at 86.
72. *Ibid* at 87.
73. *Gomes*, *supra* note 70 at para 49.

be scrutinized, the IACtHR cited a number of previous cases.[74] It also used a number of domestic judgments,[75] as well as the findings of regional and international bodies (including the African and European Systems, the United Nations Security Council, UN Treaty Bodies, the UN High Commissioner for Human Rights and several UN Rapporteurs, as well as International Criminal Tribunals) to make the case for an existing international consensus against amnesties.[76] The Court concluded by saying:

> [t]his Court has previously ruled on the matter and has not found legal basis to part from its constant jurisprudence that, moreover, coincides with that which is unanimously established in international law and the precedent of the organs of the universal and regional systems of protection of human rights. In this sense, regarding the present case, the Court reiterates that amnesty provisions, the statute of limitation provisions, and the establishment of exclusions of responsibility that are intended to prevent the investigation and punishment of those responsible for serious violations to human rights such as torture, summary, extrajudicial, or arbitrary executions, and enforced disappearance are not admissible, all of which are prohibited for contravening irrevocable rights recognized by International Law of Human Rights.[77]

In this judgment, the IACtHR used international consensus as a means to disregard strong internal consensus, as in *Gelman v Uruguay*[78] ("*Gelman*"). Further, consensus became a tool to maintain findings of the IACtHR in comparable cases and not deviate from them. International consensus served the purpose of maintaining the internal legitimacy of the IACtHR, by making its judgments more consistent among comparable cases.

With respect to the Brazilian Federal Supreme Court's judgment in particular, the IACtHR concluded that Brazil owed an obligation

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74. *"Street Children" (Villagrán-Morales et al) v Guatemala* (1999), Inter-Am Ct HR (Ser C) No 63, at para 222; *Escher et al v Brazil* (2009) Inter-Am Ct HR (Ser C) No 200, at para 44; *Dacosta Cadogan v Barbados* (2009), Inter-Am Ct HR (Ser C) No 204, at para 24.
75. *Gomes*, *supra* note 70 at paras 163-69.
76. *Ibid* at paras 150-62.
77. *Ibid* at para 171, citing *Barrios Altos v Perú* (2001), Inter-Am Ct HR (Ser C) No 75, at para 41; *La Cantuta v Peru* (2006), Inter-Am Ct HR (Ser C) No 162, at para 152; *"Las Dos Erres" Massacre v Guatemala* (2009), Inter-Am Ct HR (Ser C) No 211, at para 129.
78. (2011), Inter-Am Ct HR (Ser C) No 221 [*Gelman*].

to undertake control of conventionality and thus follow the *ACHR*, as interpreted by the IACtHR, in considering the constitutionality of domestic law. The IACtHR said that "[t]he conventional obligations of States Parties bind all the powers and organs of the State, those of which must guarantee compliance with conventional obligations and its effects (*effet utile*) in the design of its domestic law".[79]

After the IACtHR declared amnesties, and specifically the Brazilian Supreme Federal Court's upholding of amnesties, as a breach of international human rights obligations, the response of the Brazilian government has been, to date, to ignore the IACtHR judgment so as not to upset internal consensus. Partial compliance with the judgment is underway, but unlike Uruguay which eventually did away with the amnesty law, Brazil remains convinced of the importance of the amnesty law for internal stability. Thus, in this case, the reliance on international consensus, and not allowing for internal consensus to challenge it, has meant a direct attack on the legitimacy of the IACtHR and an accusation of overreach of its mandate.

In *Gelman*, the IACtHR examined the issue of going against the expressed will of the Uruguayan people. In 1986, Uruguay passed what is known as an "Expiry Law", which essentially shut the door on prosecutions for crimes perpetrated during the country's military dictatorship.[80] Two plebiscites attempting to change the law failed in 1989 and 2009, and the IACtHR in *Gelman* was then faced with whether these referenda

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79. *Gomes*, *supra* note 70 at para 177, citing *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)* (1994) Advisory Opinion OC-14/94 (Ser A) No 14, at para 35; *Miguel Castro-Castro Prison v Perú* (2006), Inter-Am Ct HR (Ser C) No 160, at para 394; *Zambrano Vélez et al v Ecuador* (2007), Inter-Am Ct HR (Ser C) No 166, at para 104; *Castillo-Petruzzi et al v Peru* (1999), Inter-Am Ct HR (Ser C) No 59 (considering clause 3); *De la Cruz Flores v Perú* (2010), Order of the Int-Am Ct HR (considering clause 5).

80. For commentary on this law, see generally, Daniel Soltman, "Applauding Uruguay 's Quest for Justice: Dictatorship, Amnesty, and Repeal of Uruguay Law No. 15.848." (2013) 12 Washington University Global Studies Law Review 829.

could justify the existence of the amnesty law.[81] In Uruguay, support for amnesties in the context of the dictatorship goes back to at least the late 1970s, when Uruguayans in exile demanded amnesty, for instance, for a military officer who fled to Europe because he refused to participate in torture in Uruguay. In fact, an amnesty law, commonly known as the "National Pacification Law", was eventually passed, granting amnesties to people on both sides of the conflict in Uruguay. This law had several loopholes which allowed prosecutions for certain crimes, however the military refused to accept these loopholes, and refused to cooperate with civilian courts. As a result, the Expiry Law was passed, preventing prosecutions for the majority of conduct before March 1, 1985.[82]

Shortly after the passage of the law, human rights groups mobilized and collected enough signatures for a national referendum for the abolition of the Expiry Law. This referendum, which took place in 1989, resulted in 56.7% of the population voting in favor of the Expiry Law, and 43.3% voting for its repeal. There has been a fair amount of speculation as to whether fear of retaliation from the military played a role in this outcome, but no conclusive evidence has been found to support the idea.[83]

The second referendum, in 2009, came when international legal opinion from academics and activists had clearly crystalized to say that amnesties were incompatible with international law. Uruguay's Supreme Court had similarly found the application of certain parts of the Expiry Law to be incompatible with the Constitution in the context of a specific criminal case (however, did not rule directly on the constitutionality in the abstract). Even still, the President of Uruguay was considering prosecuting former Heads of State in Uruguay under the dictatorship.

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81. For an in-depth discussion of this history, see Karen Engle, "Self-Critique, (Anti) Politics and Criminalization: Reflections on the History and Trajectory of the Human Rights Movement" in José Maria Beneyto & David Kennedy, eds, *New Approaches to International Law: The European and the American Experiences* (The Hague: TMC Asser Press, 2012) 41 at 61-68.
82. *Ibid* at 62-63.
83. *Ibid* at 64.

Regardless, the referendum failed to repeal the law again.[84]

To whether the referenda could be validly used to oppose the IACtHR's very strong anti-amnesty stance, the Court stated:

> [t]he fact that the Expiry Law of the State has been approved in a democratic regime and yet ratified or supported by the public, on two occasions, namely, through the exercise of direct democracy, does not automatically or by itself grant legitimacy under International Law. The participation of the public in relation with the law, using methods of direct exercise of democracy, – referendum (paragraph 2 of Article 79 of the Constitution of Uruguay) – in 1989 and "plebiscite (letter A of Article 331 of the Constitution of Uruguay) regarding a referendum that declared as null Articles 1 and 4 of the Law – therefore, October 25, 2009, should be considered, as an act attributable to the State that give rise to its international responsibility.
>
> The bare existence of a democratic regime does not guarantee, *per se*, the permanent respect of International Law, including International Law of Human Rights, and which has also been considered by the Inter-American Democratic Charter. … the protection of human rights constitutes a impassable limit to the rule of the majority, that is, to the forum of the "possible to be decided" by the majorities in the democratic instance, those who should also prioritize "control of conformity with the Convention" … which is a function and task of any public authority and not only the Judicial Branch. … *Other domestic courts have also referred to the limits of democracy in relation to the protection of fundamental rights*.[85]

The IACtHR then went on to consider the domestic jurisprudence not only of States Parties to the *ACHR* (like Costa Rica and Colombia), but also of non-parties such as the United States. The IACtHR even considered countries outside the Americas such as Slovenia, South Africa, and Switzerland. In casting such a wide net, one could say the IACtHR relied on a version of "international consensus" in other countries' domestic legal systems, and of domestic courts relying on international consensus via international instruments, to overrule internal consensus.

The exercise in *Gelman* of looking at other domestic jurisdictions seems to align with what the ECtHR once did when it referred to "international trends", that is, the domestic law of States outside the jurisdictional scope of the court, as a means to identify consensus building

84. *Ibid* at 65-66.

85. *Gelman*, *supra* note 78 at paras 238-39 [emphasis added].

worldwide.[86] This tool is too much of an interpretive stretch and does little to enhance the legitimacy of a regional body before States Parties. But, it can enhance the body's legitimacy before stakeholders outside the jurisdictional scope of the court, which seems to be a desirable outcome for the IACtHR.

Coupled with the conventionality control doctrine, *Gelman* shows a limited understanding and use of subsidiarity as a governing principle of international law.[87] This is in marked contrast with the embrace of subsidiarity in *Atala Riffo*. In fact, the IACtHR in *Gelman* insisted on a separation between domestic circumstances and international law, circumscribing its role as assessing compatibility with international legal obligations, regardless of domestic consensus. In *Atala Riffo*, the same argument of separation was made to isolate certain aspects of the domestic proceedings, such as the merits of the custody hearing. In *Gelman*, though, the IACtHR went as far as suggesting that the referenda, which had been organized by the State, were in fact acts of State for which Uruguay was internationally responsible.[88] So, while the separation between domestic and international meant subsidiarity and legitimacy in *Atala Riffo*, it meant disregarding domestic consensus and mandate creep in *Gelman*.

In the aftermath of the IACtHR judgment in *Gelman*, the President of Uruguay signed a law repealing the Expiry Law, just a few days before the statutes of limitations created additional obstacles for prosecution. The new law also made certain conduct before March 1, 1985 criminal under international law, to which statutory limitations did not apply, thus chastising the country's Supreme Court which had, in May 2011, classified enforced disappearances as an ordinary crime.[89] Therefore, the reliance on international consensus helped override internal consensus not only as far as the IACtHR was concerned, but it also helped

86. Dzehtsiarou, *European Consensus*, *supra* note 5 at 65.
87. Jorge Contesse, "Contestation and Deference in the Inter-American Human Rights System" (2016) 79 Law and Contemporary Problems 123 at 135.
88. Gamarra, *supra* note 71 at 90.
89. Engle, *supra* note 81 at 66.

domestically, where arguments about international consensus became vital in overturning the law.

Importantly, though, one must be mindful of what reliance on internal consensus ultimately means for the legitimacy of an international court. To be sure, it may mean more ready acceptance of a Court's judgment domestically if it takes into account strong domestic support, but at the same time it can have negative ripple effects across a region, especially if the regional court is seen to be creating exceptions in its own case law. On the other hand, as Mahoney has argued, "[w]here societal values are still the subject of debate and controversy at national level, they should not easily be converted by the Court into protected Convention values allowing for only one approach".[90]

These multiple threads of consensus interpretation all relate to the legitimacy of the IACtHR. Some of them can be used to enhance the legitimacy of the IACtHR *vis-à-vis* States Parties, whereas others seem to have the opposite effect, and actually align themselves more closely with the idea that, because human rights law is quintessentially a counter-majoritarian type of discourse, it should not worry about democratic will (which in fact can be oppressive of minorities). Underlying the uses of consensus interpretation are questions about the (de)legitimizing effects of treaty interpretation by the IACtHR. But a number of questions need to be answered in order to understand how legitimacy plays a role in the IACtHR's context. The next section addresses these issues.

V. Consensus and Legitimacy

In the European context, consensus interpretation is fundamentally a response to legitimacy challenges raised. These are challenges raised against attempts by the ECtHR when it engages in evolutionary interpretation, or the idea of treating the *ECHR* as a living instrument that must be adapted to everyday circumstances.[91] Because evolutionary interpretation

90. Paul Mahoney, "Marvellous Richness of Diversity of Invidious Cultural Relativism?" (1998) 17 Human Rights Law Journal 1 at 3, cited in Dzehtsiarou, *European Consensus*, *supra* note 5 at 54.

91. Dzehtsiarou, "Evolutive Interpretation", *supra* note 67 at 1730.

is also a common feature of the IACtHR's jurisprudence (as discussed above), staking consensus interpretation against evolution, and the legitimacy concerns that come with it, seems to be a good starting point.

The adjudication of international human rights law by regional courts is for the most part considered to be subsidiary to States' own efforts in internalizing these norms and following them. Therefore, at the crux of the debate between evolutionary interpretation and consensus is the respect that regional human rights courts owe to the principle of subsidiarity, and therefore respect to States' rights to implement their own international human rights obligations. It is only when subsidiarity fails that consensus comes into operation, as a means to bring the human rights court to a point that simultaneously respects its own subsidiary role by paying respect to States' discretion as a first step of its reasoning, but at the same time advancing human rights protection (using other States' discretionary application of human rights norms to impose responsibility on a non-complying State).

The breadth of subsidiarity granted to a State (in the ECtHR's terminology, the State's Margin of Appreciation) depends on: (1) the nature of the right protected; (2) its importance; (3) the interference by the State on the enjoyment of said right; (4) the object of interference; and (5) regional consensus around the issue.[92] Evolutionary interpretation is a counterpoint to subsidiarity that can undermine the legitimacy of a human rights court, at least in that it may require a human rights court to undermine its own judgments, thus reducing the predictability of outcomes. Consensus, or more specifically the change in consensus, can work as a shield to help a court justify a change of position.[93] The IACtHR uses consensus to reinforce its own case law, as discussed above.

As Jorge Contesse has argued, the IACtHR "embraces a maximalist model of adjudication", one that makes little to no room for State discretion, or subsidiarity more generally.[94] In fact, former IACtHR Judge and President, Cançado Trindade, has been a strong opponent of

92. Dzehtsiarou, *European Consensus*, *supra* note 5 at 135.
93. *Ibid* at 139.
94. Contesse, *supra* note 87 at 124.

the IACtHR officially adopting the doctrine of margin of appreciation.[95] Part of the reason for Trindade's opposition rests in a distrust of domestic judicial and other legal structures, particularly the lack of strong judiciaries, a problem that the IACtHR has consistently tackled in its own jurisprudence. As I have co-argued elsewhere, when the IACtHR engages with domestic judiciaries, it does so with the intent of strengthening domestic institutions; but, in doing so, the IACtHR also strengthens itself.[96] It is thus unclear whether the building up of domestic legal structures could ever reach a stage in which subsidiary could be trusted by cynics to perform the role of restricting the scope of application of the IACtHR. The consequence is that the maximalist approach of the IACtHR still reigns, and with it, evolutionary interpretation.

Attacks on the legitimacy of the IACtHR and its perceived "intrusiveness" seem incapable of mounting a credible challenge to its expansive mandate. This attitude makes it nearly impossible for the IACtHR to seriously engage with consensus interpretation as a means to restrict its own mandate. After all, excessive deference to States Parties, the first step triggering the use of consensus interpretation, is missing .[97] But the fact that consensus method can lend additional legitimacy to the IACtHR creates an incentive for the method to be deployed in other, creative ways.

Consensus interpretation is one way of representing the tipping point necessary for evolutionary interpretation of a human rights treaty. It also helps draw a clearer line in the balancing of subsidiarity and evolution.[98] However, consensus interpretation does not necessarily run counter to evolution, it merely slows down the pace of evolution by restricting some

95. *Ibid* at 133-34.
96. Kosar and Lixinski, *supra* note 42 at 747.
97. But see Nino Tsereteli, "Emerging doctrine of deference of the Inter-American Court of Human Rights?" (2016) 20 International Journal of Human Rights 1097 (arguing for the emergence of a doctrine of deference in the IACtHR practice, at least in regard to cases that do not involve state violence or vulnerable groups).
98. Dzehtsiarou, *European Consensus*, *supra* note 5 at 5.

of it.[99]

States in the European context still use their original consent as a means to challenge the ECtHR.[100] Similarly, in the Americas, a range of States have criticized the IACtHR's action for straying too far from the original consensus of States Parties. As a result, there have been proposals for "strengthening process[es]" with respect to the Inter-American System within the parent organization, which would undermine the Inter-American Commission's powers.[101] It may even undermine attempts at pitting one organ of the Inter-American System against another, such as the request for an Advisory Opinion in which Venezuela asked the Inter-American Court to explain whether it had the power to "control the legality" of acts of the Commission. If the Court said yes, it would risk alienating the Commission; if the Court said no, it would come across as ineffectual towards States Parties.[102] Regardless, the IACtHR is usually dismissive of original consent, and instead relies on the protection of human rights (the *pro homine* approach) as the key goal of its interpretive activity.

A related argument is that the opposite of consensus is pluralism, which can also be seen as a desirable goal.[103] Pluralism can be not only ethnic pluralism, but also recognition of the diversity of legal solutions, and, with it, the authority of individual States to rule their own affairs. But in the ethnic context, consensus interpretation also has its potential problematic effects, as Benvenisti argues.[104] After all, it can prevent courts from fulfilling their roles as independent guardians of an international

99. Dzehtsiarou, "Evolutive Interpretation", *supra* note 67 at 1736.
100. Dzehtsiarou, *European Consensus*, *supra* note 5 at 152.
101. Contesse, *supra* note 87 at 144.
102. I/A Court H.R., Control of due process in the exercise of the powers of the Inter-American Commission on Human Rights (Articles 41 and 44 to 51 of the American Convention on Human Rights). Advisory Opinion OC-19/05 of November 28, 2005. Series A No.19.
103. Tzevelekos & Dzehtsiarou, *supra* note 35 at 325.
104. Eyal Benvenisti, "Margin of Appreciation, Consensus, and Universal Standards" (1999) 31 Journal of International Law and Politics 843 at 853, cited in Dzehtsiarou, *European Consensus*, *supra* note 5 at 127.

human rights treaty.[105] This is a reason why it has been rejected by the IACtHR in *Atala Riffo*,[106] as discussed above. The counter-majoritarian argument also played a role in *Gelman*, discussed above. The IACtHR in *Gelman* stated that international human rights law is a limit on majoritarian rule, and as such should be implemented by States in spite of existing domestic consensus.[107] Thus, it seems that the counter-majoritarian argument can be used to reject consensus interpretation across the board by a court, like the IACtHR, staunchly in favor of human rights and the protection of less favored social groups.

Relatedly, there is naturally a risk that too much emphasis on consensus as a tool for interpretation will promote a "lowest common denominator" approach to human rights protection, which is the opposite of what a human rights court's mandate should be. Judges at the ECtHR seem to be aware of this risk.[108] This is precisely a risk that the IACtHR seems to wish to avoid when it sets a higher bar to human rights protection through mechanisms like *pro homine* interpretation and conventionality control.

As a result, the IACtHR avoids the limiting potentials of consensus interpretation. It will rely on them in order to assert legitimacy of its already existing jurisprudence, but not when consensus challenges said jurisprudence. In doing so, the IACtHR seems to imply that it draws legitimacy not from the States Parties, but from external stakeholders, and an abstract idea of human rights and human dignity. Thus, consensus will be used more readily if it is in line with an expansion of the IACtHR's mandate.

VI. Conclusion

It seems that the IACtHR searches for consensus across a number of areas, many of which match strategies adopted by the ECtHR. But, in doing so, the IACtHR does not use consensus as closely tied to subsidiarity; rather,

105. Dzehtsiarou, "Evolutive Interpretation", *supra* note 67 at 1735.
106. Dzehtsiarou, *European Consensus*, *supra* note 5 at 127-28.
107. Gamarra, *supra* note 71 at 90-91.
108. Dzehtsiarou, *European Consensus*, *supra* note 5 at 202.

it seems to reject subsidiarity, and use the separation between domestic and international not as a means to promote subsidiarity, but rather as a means to distance itself from domestic concerns that may have impact on its judgments. It is only broader domestic consensus that will be relied upon, and, even then, more often than not in support of more expansionist interpretations of the *ACHR*. In this sense, consensus interpretation in the IACtHR jurisprudence appears to be not a mechanism of legitimacy *vis-à-vis* States Parties, but one of mandate creep.

In other words, the activity of the IACtHR on consensus interpretation does not seem to be particularly connected to the subsidiarity of human rights. It is rather undertaken, in conjunction with other interpretive techniques, to advance a greater mandate for the IACtHR, one that seeks legitimacy not from the States Parties, but rather from external sources. The *corpus juris* of international human rights may be a legitimating source, and it is something the IACtHR sees itself as contributing to first and foremost. Thus, while in the ECtHR context, consensus interpretation is a tool to enhance legitimacy *vis-à-vis* States Parties, this is only partly true in the IACtHR context. In fact, it seems that legitimacy gains are only seen as unintended consequences of the use of consensus interpretation, and not their objective. The IACtHR's primary commitment is still to the defense of human rights in the region, in spite of States Parties.

This attitude of the IACtHR can have deep impacts on its legitimacy *vis-à-vis* States Parties. Even if this legitimacy is not a primary concern for the IACtHR, it ultimately affects its ability to promote the change it seeks to implement across the Americas. The IACtHR should thus consider the possibilities of consensus interpretation more seriously, at least inasmuch as it can create pathways for entrenchment of the *ACHR*, as interpreted by the IACtHR.