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Beyond the American Convention on Human Rights: an analysis of the role of external sources as a tool for the evolutive interpretation of the American Convention

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"Toda relación de dominación y sumisión trae consigo el germen de la destrucción; y el único verdadero y auténtico "progreso" es el que reside en un orden basado en valores humanos. El mundo contemporáneo ya no puede ser evaluado desde una perspectiva o dimensión puramente interestatal, dado el desplazamiento de millones de seres humanos y los trágicos éxodos contemporáneos que resultan de tantas injusticias. Debemos preservar el patrimonio cultural de la humanidad en un verdadero espíritu de solidaridad, sin el cual el futuro de la humanidad corre peligro."

Cançado Trindade, Antônio Augusto.
Separate opinion, para.27. In: Inter-American Court of Human Rights, Judgment (Interpretation of the Judgment of Merits, Reparations, and Costs), Case of the Moiwana Community v. Suriname, 8 February 2006.

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Human rights can be theorized upon, but they are first and foremost experienced. I dedicate this thesis to the people of Latin America, who resisted throughout a history of domination and brutality, who survive a system based on great inequalities and who still see the scars of centuries of slavery and decades of violent military dictatorships. This thesis is dedicated to all of those who bravely resist in order to exist with dignity.

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ABSTRACT

The thesis analyses the use of external sources as a tool for the evolutive interpretation of the American Convention on Human Rights, in light of the practice of the Inter-American Court of Human Rights and the general rule of treaty interpretation. By external sources, this study refers to instruments adopted outside of the scope of the Inter-American System of Human Rights, ranging from universal and regional conventions to soft law instruments. Examples of external sources that have guided the Court's evolutive interpretation of the American Convention and have accordingly contributed to an expansion of the content and scope of the provisions of the Convention include the Convention on the Rights of the Child, rules of international humanitarian law and resolutions of international organizations. This thesis develops around the research question on whether the broad use of external sources in the Inter-American System of Human Rights constitutes an interpretative method based on the Vienna Convention on the Law of Treaties of 1969. This research question encompasses two sub-questions, namely: (i) whether a certain level of consensus among the states parties to the American Convention should be a pre-condition for the use of an external source during the interpretation of this treaty; and (ii) whether soft law instruments should be used as an interpretative tool for the evolutive interpretation of the American Convention. To answer these questions, the thesis engages in an analytical and critical investigation of judgments and advisory opinions of the Inter-American Court of Human Rights, in light of the Vienna Convention of 1969 and related theories on treaty interpretation.

Key-words: evolutive interpretation; American Convention on Human Rights; external sources; Vienna Convention on the Law of Treaties of 1969.

LIST OF ABBREVIATIONS

ACHR	American Convention on Human Rights
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of Non-International Armed Conflicts
CRC	Convention on the Rights of the Child
ECtHR	European Court of Human Rights
ECHR	European Convention on Human Rights
IACtHR	Inter-American Court of Human Rights
IACommHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International humanitarian law
ILA	International Law Association
ILC	International Law Commission
IVF	*In vitro* fertilization
LGTBI	Lesbian, gay, bisexual, trans or transgender and intersex
OAS	Organization of American States
Protocol of San Salvador	Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
USA	United States of America
VCLT/69	Vienna Convention on the Law of Treaties of 1969
WTO	World Trade Organization

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1 INTRODUCTION

The American Convention on Human Rights (ACHR) was adopted in 1969, in order to consolidate "within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man" in the American continent.[1] The Convention contains 82 provisions, among which 22 safeguard a determined array of civil and political rights[2], and one establishes the obligation of states parties to adopt measures in order to progressively achieve "the full realization of the rights implicit in the economic, social, educational, scientific and cultural standards set forth in the Charter of the Organization of American States [OAS]".[3] Since its adoption, the ACHR has evolved and expanded in light of changing times and new living conditions. This expansion has not only taken place through the adoption of additional protocols, but also through the practice of the Inter-American Court of Human Rights (IACtHR) itself, as an interpreter of the ACHR. The Court has engaged in an evolutive interpretation of the American Convention, reached in light of a comparative study of international instruments, including rules and soft law instruments adopted outside of the Inter-American System of Human Rights (hereinafter, external sources). This thesis aims to investigate the role of external sources in the evolutive interpretation of the ACHR, in light of the practice of the IACtHR and the general rule of treaty interpretation embodied in Article 31 of the Vienna Convention on the Law of Treaties of 1969 (VCLT/69). It is guided by the research question on whether the Court's broad use of external sources constitutes an interpretative method based on the VCLT/69. To answer this question, it will engage in a critical study of relevant cases from the IACtHR, challenging the conclusions of the Court in light of the VCLT/69 and related theories on treaty interpretation. This research represents an essentially analytical and critical look into the application of the technique of external referencing as a tool for the evolutive interpretation in the Inter-American System of Human Rights.

[1] Organization of American States (OAS), *American Convention on Human Rights*, "Pact of San José", 22 November 1969, Preamble, para.1 (ACHR).

[2] Right to juridical personality; right to life; right to humane treatment; freedom from slavery; right to personal liberty; right to a fair trial; freedom from *ex post facto* laws; right to compensation; right to privacy; freedom of conscience and religion; freedom of thought and expression; right of reply; right of assembly; freedom of association; rights of the family; right to a name; rights of the child; right to nationality; rights to property; freedom of movement and residence; right to participate in government; right to equal protection; and right to judicial protection. See ibid, Articles 3-25.

[3] Ibid, Article 26.

The evolutive or dynamic interpretation of human rights treaties is a method of interpretation based on the understanding that human rights treaties are living instruments, which must effectively protect the rights and freedoms of individuals throughout the passing of time.[4] Were human rights treaties to regulate new situations not envisaged at the time of their adoption only through amendments or additional protocols, their effectiveness would be undermined. After all, the adoption of amendments and protocols is the product of long negotiations, in an often time-demanding process. In practice, to depend on such formal modifications to regulate new situations would imply placing said situations in a legal gap for an undermined (and often long) period of time. In this context, the evolutive interpretation of human rights treaties emerges as a method that allows human rights instruments to be dynamic and hence maintain their effectiveness in light of changing times and living conditions. By applying this method, human rights courts are able to regulate new situations within the framework of existing provisions. Today, this method is widely applied by the IACtHR and the European Court of Human Rights (ECtHR)[5].

Yet, to affirm that human rights treaties evolve does not clarify how this evolution takes place. In other words, how do courts assess the extent to which a given provision has evolved, and what are the elements that should be taken into consideration in this analysis? In the understanding of the IACtHR, put forward in its 1999 *Advisory Opinion on the Right to Consular Information*, "the interpretation of a treaty must take into account not only the agreements and instruments related to the treaty […], but also the system of which it is part".[6] In other words, the international legal system to which a given treaty is part and the instruments that compose it may offer guidance to an interpreter. In the understanding of the IACtHR, "[t]his

[4] Cf. Cançado Trindade, Antônio Augusto (2006) *International Law for Humankind: Towards a new Jus Gentium (II). General Course on Public International Law*, Leiden/Boston: Martinus Nijhoff, p.62; cf. De Pauw, Marijke, "The Inter-American Court of Human Rights and the Interpretative Method of External Referencing: Regional Consensus v. Universality," in *The Inter-American Court of Human Rights: theory and practice, present and future*, eds. Yves Haeck, Oswaldo Ruiz-Chiriboga, Clara Burbano Herrera (Intersentia, 2015), p.4.

[5] Cf. European Court of Human Rights (ECtHR), Judgment, *Tyrer* v. *United Kingdom*, Application no. 5856/72, 25 April 1978, para. 31; ECtHR, Judgment, 13 June 1979, *Marckx* v. *Belgium*, Application no. 6833/74, para. 41; and ECtHR, Judgment (preliminary objections), *Loizidou* v. *Turkey*, 23 March 1995, Case no. 15318/89, para.71; ECtHR, Judgment, *Christine Goodwin* v. *the United Kingdom*, Application no. 28957/95, 11 July 2002, para.74; ECtHR, Judgment, *Demir and Baykara* v. *Turkey*, Application no. 34503/97, 12 November 2008, para.85-86;

[6] Inter-American Court of Human Rights (IACtHR), Advisory Opinion, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law*, OC-16/99, 1 October 1999, para.113.

guidance is particularly relevant in the case of international human rights law, which has made great headway thanks to an evolutive interpretation of international instruments of protection".[7]

Accordingly, the IACtHR has often looked for guidance in external sources during the interpretation of the ACHR. By external sources, this thesis refers to instruments of international law that do not integrate the legal framework of the Inter-American System of Human Rights. Examples of such sources that have guided the decisions of the IACtHR include: United Nations (UN) treaties - such as the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC); Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of Non-International Armed Conflicts (AP II); rules emanating from the European Council; and even soft law instruments. By applying the technique of external referencing as a tool for the evolutive interpretation of the ACHR, the Court has recognized, among others: the right of individuals to change name and rectify public records and identity documents in conformity with one's self-perceived gender identity[8]; the right against discrimination on the grounds of sexual orientation[9]; the right not to be forcibly displaced[10]; and a child's right to life as encompassing their right to development in its broadest sense[11].

1.1 Treaty interpretation and the Vienna Convention on the Law of Treaties of 1969

External referencing is a technique for treaty interpretation. As such, it must be assessed in light of the general rule of treaty interpretation and any other rule of interpretation set out in the American Convention itself. Article 31 of the VCLT/69 codifies the general rule of treaty interpretation, according to which a treaty must be interpreted in good faith, in accordance with the ordinary meaning to be given to the words, in their context and in light of their object and purpose. Together with the context, an interpreter must also take into account subsequent agreement and practice, as well as applicable and relevant rules of international law.

Specific rules for the interpretation of the ACHR are set out in the American Convention itself, in its Article 29. This provision establishes that the Convention shall not be interpreted

[7] Ibid, para.114.

[8] IACtHR, Advisory Opinion, *Gender identity and equality and non-discrimination of same-sex couples*, OC-24/17, 24 November 2017.

[9] IACtHR, Judgment (Merits, Reparations and Costs), *Atala Riffo and Daughters* v. *Chile,* 24 February 2012.

[10] IACtHR, Judgment (Preliminary Objections, Merits and Reparations), *Santo Domingo Massacre* v. *Colombia,* 30 November 2012.

[11] IACtHR, Judgment (Preliminary Objections, Merits and Reparations), "*Juvenile Re-education Institute"* v. *Paraguay,* 2 September 2004.

as restricting or precluding other rights or guarantees safeguarded: (i) in the domestic laws of a state party to the Convention; (ii) in other treaties ratified by the state; or (iii) in the American Declaration on the Rights of Men and other instruments of the same nature. In its case-law, the IACtHR has referred to both Article 29 of the ACHR and Article 31 of the VCLT/69 when resorting to external referencing. However, are those provisions sufficient to justify the broad use of external sources by the Court?

The present thesis aims to analyse the use of external sources as a tool for the evolutive interpretation of the ACHR, in light of the general rule of treaty interpretation and the practice of the IACtHR. It develops around a main research question, namely, whether the broad use of external sources in the Inter-American System of Human Rights constitutes an interpretative method based on the VCLT/69. In other words, to what extent may external sources - such as other treaties, customs and soft law instruments - be indicatives of the evolution of the ACHR, in light of the general rule of treaty interpretation embodied in the VCLT/69?

This research question comprises two sub-questions. The first one is whether a certain level of consensus among the states parties to the ACHR should be a pre-condition for the use of an external source during the interpretation of the Convention. Through this sub-question, the thesis will analyse to what extent treaties only ratified by a small percentage of states parties to the ACHR should be used as guidance for the determination of the content and scope of the provisions of the American Convention. The second sub-question is whether soft law instruments should be used as an interpretative tool for the evolutive interpretation of the ACHR. To answer this question, the thesis will take a critical look into the practice of the IACtHR of relying in a broad range of non-binding instruments, including United Nations (UN) resolutions, the work of treaty bodies and declarations of principles.

Engaging in this investigation is of great relevance. After all, treaty interpretation is an indispensable component of the work of judicial and quasi-judicial bodies. Accordingly, understanding the processes through which the IACtHR determines the content and scope of the provisions of the ACHR is fundamental in order to comprehend this human rights regime. This analysis is particularly relevant in light of the innovative, distinctive and potentially transformative character of the interpretative approach adopted in the Inter-American System of Human Rights. Innovative, because, quoting De Pauw, the IACtHR is considered "a pioneer in the interpretation of treaty obligations regarding human rights".[12] Distinctive, because the IACtHR and the Inter-American Commission on Human Rights (IACommHR) have analysed

[12] De Pauw, *supra* note 4, p.4.

the content and scope of the evolution of human rights provisions by relying on a wide-range of external sources - including soft law - without being necessarily limited by regional consensus. Potentially transformative, in the sense that this approach may lead to an expansion of the content of the ACHR, to a degree not envisaged by the states parties to the Convention and not limited by the common practice of those states.

1.2 Legitimacy of the Inter-American Court of Human Rights

A critical analysis of the role of external sources in the evolutive interpretation of the ACHR and its limits may also contribute to the foreseeability of the decisions of the Court and the juridical security offered to the states parties. This study acquires particular significance in a moment where the legitimacy of the Court has been questioned by some of the states in the region. In 2012, following a judgment of the IACtHR, Venezuela denounced the ACHR, and it is no longer subject to the jurisdiction of the Inter-American Court.[13] In the 2018 general elections in Costa Rica, one of the leading candidates for the presidency was Fabricio Alvarado, a conservative evangelical pastor and singer who gained prominence by campaigning against same-sex marriage and *in vitro* fertilization[14], two topics that had been recently tackled by the IACtHR. The former, in the 2012 case of *Artavia Murillo et al. ("In vitro fertilization")* v. *Costa Rica* case, in which the Court decided that the prohibition of *in vitro* fertilization applied at the time in the country was in violation of the ACHR. Same-sex marriage, for its turn, was addressed in the Advisory Opinion requested by Costa Rica *on gender identity and equality and non-discrimination of same-sex couples*.[15] In this advisory opinion, delivered in November

[13] See "IACHR Deeply Concerned over Result of Venezuela's Denunciation of the American Convention", *OAS*, 10 September, 2013. Available at: <http://www.oas.org/en/iachr/media_center/preleases/2013/064.asp>; "Saída da Venezuela da Corte Interamericana de Direitos Humanos enfraquece a proteção aos direitos na região, diz comissária", *Veja*, 11 September 2012, available at: <http://veja.abril.com.br/mundo/saida-da-venezuela-da-corte-interamericana-de-direitos-humanos-enfraquece-a-protecao-aos-direitos-na-regiao-diz-comissaria/>; Cláudia Trevisan, "Falta de pagamento do Brasil à OEA contribuiu para crise da comissão de direitos humanos", *Estadão*, 25 May 2016. Available at: at: <http://internacional.estadao.com.br/noticias/geral,falta-de-pagamento-do-brasil-a-oea-contribuiu-para-crise-da-comissao-de-direitos-humanos,10000053387>. All of the electronic sources in this thesis were last accessed in 20 August 2017.

[14] Cf. Gil, Tamara, "Elecciones en Costa Rica: "Elegidos por Dios", la intensa influencia de las iglesias evangélicas en los comicios de ese país", *BBC*, 1 April 2018, available at: <https://www.bbc.com/mundo/noticias-america-latina-43582350>; "Alvarado v Alvarado: Costa Rica's election explained", *BBC*, 1 April 2018, available at: <https://www.bbc.com/news/world-latin-america-43610095>; Henley, Jon, "Costa Rica: Carlos Alvarado wins presidency in vote fought on gay rights", *The Guardian*, 2 April 2018, available at: <https://www.theguardian.com/world/2018/apr/02/costa-rica-quesada-wins-presidency-in-vote-fought-on-gay-rights>.

[15] *Advisory Opinion on Gender identity and equality and non-discrimination of same-sex couples*, *supra* note 8, para.1.

2017, the IACtHR considered, among other things, that the ACHR enshrines the right of an individual to change name and rectify public records and identity documents in conformity with one's self-perceived gender identity. It also affirmed that, in accordance with an evolutive interpretation of the Convention, "States must ensure full access to all the mechanisms that exist in their domestic laws, *including the right to marriage*, to ensure the protection of the rights of families formed by same-sex couples, without discrimination in relation to those that are formed by heterosexual couples".[16]

The local and the international press considered that the abovementioned judgment and, especially, the advisory opinion boosted the popularity of the conservative candidate Fabricio Alvarado.[17] This hypothesis gains particular force in light of the fact that, prior to the publication of the advisory opinion, the initial poles indicated that F. Alvarado gathered *circa* 3% of the voting intention. In February 2018, the situation had drastically changed, and the conservative candidate lead the first round of the presidential elections, with 24,9% of the votes.[18] F. Alvarado blatantly questioned the legitimacy of the Court and suggested that Costa Rica, the State where the Tribunal has been seated since 1979[19], should terminate its consent to the jurisdiction of the Court.[20] While the candidate lost the second round of the elections, this scenario reveals potential impacts of an evolving interpretation of the ACHR on the perceived legitimacy of the Court.

A similar trend is found in Brazil, where Jair Bolsonaro, a far-right wing politician and former member of the Military, now newly elected President of the Republic, refuted the

[16] Ibid, para.229. Italics added by the author.

[17] Elecciones en Costa Rica: "Elegidos por Dios", la intensa influencia de las iglesias evangélicas en los comicios de ese país", *supra* note 14; "Alvarado v Alvarado: Costa Rica's election explained", *supra* note 14; "Costa Rica: Carlos Alvarado wins presidency in vote fought on gay rights", *supra* note 14; "Candidate who opposed same-sex marriage loses Costa Rica's presidential election", *The Washington Times*, 1 April 2018, available at: <https://www.washingtontimes.com/news/2018/apr/1/fabricio-alvarado-anti-gay-marriage-candidate-lose/>; Murillo, Álvaro, "Fabricio Alvarado: un candidato caído del cielo", *El País*, 5 February 2018, available at: <https://elpais.com/internacional/2018/02/05/america/1517865061_521252.html>.

[18] "Perfil: Fabricio Alvarado, o pregador que disputará a presidência na Costa Rica", *O Estado de S. Paulo*, 5 February 2018, available at: <https://internacional.estadao.com.br/noticias/geral,perfil-fabricio-alvarado-o-pregador-que-disputara-a-presidencia-na-costa-rica,70002178710>.

[19] IACtHR (2018) *40 anos protegendo direitos*, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, p.18.

[20] Sequeira, Áaron, "Figura clave de Fabricio Alvarado propone sacar al país de Convención sobre Derechos Humanos", *La Nación*, 1 February 2018, available at: <https://www.nacion.com/el-pais/politica/figura-clave-de-fabricio-alvarado-propone-sacar-al/OWNMQDZPNFAQ7FKB4B3HQSDKB4/story/>; Romero, Fernanda, "Fabricio Alvarado dispuesto a salirse de la Corte IDH para que no le 'impongan' agenda LGTBI", *El Mundo CR*, 11 January 2018, available at: <https://www.elmundo.cr/fabricio-alvarado-dispuesto-salirse-la-corte-idh-no-le-impongan-agenda-lgtbi/>.

decision of the IACtHR in the case *Herzog* v. *Brazil*. This judgment concerns a well-known case of torture and extrajudicial execution that occurred in Brazil during its military dictatorship. At the time of the facts, the assassination was covered up by the authorities under an official version that explained the death of Mr. Herzog as suicide. In spite of the decision of the Court, Bolsonaro sustained the official version that was put forward by the military dictatorship and did not refrain from posteriorly questioning the qualification of said regime as a dictatorship.[21]

In light of this scenario, it is of foremost importance to discuss the legal basis and limits of the tools used by the Court to ascertain the evolution of the ACHR. It is this enquiry that the present thesis aims to address. The next section will describe the theoretical framework of the thesis and explain the research gap that it explores. It will also present the methods used in the research. Following, section 3 will introduce the evolutive interpretation of human rights treaties and analyse its legal basis in light of the VCLT/69. Section 4 will explain the role of external sources as an interpretative tool in light of case studies on three topics, namely: international humanitarian law (IHL), the rights of the child; and the rights of lesbian, gay, bisexual, trans or transgender and intersex (LGTBI) people. Section 5, for its turn, constitutes the back-bone of the thesis. It will analyse the legal basis for the technique of external referencing, in light of the practice of the IACtHR and the general rule of treaty interpretation. Section 6 will finalize the study, by providing concluding remarks.

2 METHODOLOGY

2.1 Theoretical framework

The theoretical framework of the research is the theory on the co-existence and co-ordination of mechanisms of international protection of human rights. This theory perceives a fundamental conceptual unity in human rights. Despite the existing differences between the many human rights instruments that are currently in force, all of them share the same source of inspiration, that is, the Universal Declaration of Human Rights (UDHR). Most importantly, they all "inhere in the human person, in whom they (also) find their ultimate point of

[21] "Sobre morte de Herzog, Bolsonaro afirma que 'suicídio acontece'", *O Globo*, 7 July 2018, available at: <https://oglobo.globo.com/brasil/sobre-morte-de-herzog-bolsonaro-afirma-que-suicidio-acontece-22863525>; "'Suicídio acontece, pessoal pratica', diz Bolsonaro ao se referir a Herzog", *Folha de S. Paulo*, 7 July 2018, available at: <https://www1.folha.uol.com.br/poder/2018/07/suicidio-acontece-pessoal-pratica-diz-bolsonaro-ao-se-referir-a-herzog.shtml>; Caleiro, João Pedro, "Em entrevistas, Bolsonaro nega que houve ditadura no Brasil e ataca Folha", *Exame*, 30 October 2018, available at: <https://exame.abril.com.br/brasil/em-entrevistas-bolsonaro-nega-ditadura-e-promete-respeitar-oposicao>.

convergence".[22] In light of these fundamental points of convergence, human rights treaties do not compete with each other, but rather co-exist and reinforce one another. At both global and regional levels, human rights instruments "compose a coordinated mechanism through which each treaty complements the others".[23]

Many consequences arise from the co-existence and co-ordination of the different mechanisms of international protection of human rights. One of the consequences is the interactive interpretation of human rights treaties, that is, the "interaction of instruments in the process of interpretation".[24] In the words of Cançado Trindade, "[g]iven the multiplicity of co-existing human rights instruments in our days, it comes as little or no surprise that the interpretation and application of certain provisions of one human rights treaty have at times been resorted to as orientation for the interpretation of corresponding provisions of another (usually newer) human rights treaty."[25]

2.2 Methods

As a general rule, the researcher departures from the case-law of the IACtHR to conduct the investigation. Accordingly, the practice of the Court, as well as that of the IACommHR, is studied and described in the various sections and sub-sections of the thesis. The selection of cases for analysis in the main body of the thesis was conducted having as a focus three fields of international law, namely: (i) IHL; (ii) the rights of the child; and (iii) the rights of LGTBI people.[26] IHL was chosen because, in the opinion of the researcher, one cannot properly analyse the role of external sources for the evolutive interpretation of the ACHR without tackling two cases concerning alleged violations of human rights law in the context of armed conflicts. These are the *Tablada* and the *Las Palmeras* case. In these two cases, the Inter-American Court and

[22] Trindade, Antônio Augusto Cançado (1987) *Co-Existence and Co-Ordination of mechanisms of International Protection of Human Rights (At Global and Regional Levels)*. The Hague: Martinus Nijhoff, p.89.

[23] Tuffi Saliba, Aziz. Garcia Maia, Tainá. "Judicial Protection in States of Emergency. An Analysis of the Amplitude of Judicial Protection of Fundamental Rights During the Application of Derogations," *in The Inter-American Court of Human Rights: Theory and Practice, Present and Future*, eds. Haeck, Yves. Ruiz-Chiriboga, Oswaldo. Burbano Herrera, Clara. (Cambridge/Antwerp/Portland: Intersentia, 2015).

[24] Cançado Trindade 1987, *supra* note 22, p.101.

[25] Ibid.

[26] Other fields of international law could have also integrated the case studies. Indigenous peoples' rights would be one such possibility. This field has been the object of the evolutive interpretation of the ACHR, and cases concerning such rights have involved the technique of external referencing. See: IACtHR, Judgment (Merits and Reparations), *Kichwa Indigenous People of Sarayaku* v. *Ecuador*, 27 June 2012, para.145; cf. IACtHR, Judgment (Merits, Reparations and Costs), *Case of the Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua*, 31 August 2001, para.148. Yet, due to word-limit constraints, the researcher chose to concentrate on the aforementioned three fields of international law.

Commission on Human Rights discussed the role of external sources in the Inter-American System and its limits in light of the competence of the Tribunal.

The topic of the rights of the child, for its turn, was chosen in light of two factors. First, the IACtHR has a jurisprudence *constante* in relying on the CRC to determine the content and scope of Article 19 of the American Convention. Second, the CRC has an almost universal ratification rate among the UN states members, and it is ratified by all of the states that have accepted the jurisdiction of the IACtHR.[27] Therefore, external referencing to the CRC constitutes a good case study on the Court's reliance on other rules applicable to the respondent state.

Finally, two reasons explain the choice of selecting cases concerning the rights of LGTBI people to integrate the study. First, some of the decisions of the Court on this topic, including the abovementioned Advisory Opinion OC-24 requested by Costa Rica, prompted a significant public debate within OAS states. The advisory opinion in question was even met with inquiries concerning the legitimacy of the Court. Hence, these cases constitute good illustrations of the importance of investigating the legal basis of the technique of external referencing as a tool for the evolutive interpretation of the ACHR. Second, some of the cases on this topic constitute good examples of the use of soft law instruments by the IACtHR during the interpretation of the American Convention.

A few cases that do not fit into these three fields of law have nonetheless been analysed in the main body of the thesis because of their unique contribution to the study – more specifically, for their relevance to the topic of the evolutive interpretation of human rights treaties and the clarity of the deliberation of the IACtHR on issues of hermeneutics. This is notably the case of *Artavia Murillo et al. ("In Vitro Fertilization")* v. *Costa Rica*, *Trabalhadores da Fazenda Brasil Verde* v. *Brazil* and *Claude Reyes et al.* v. *Chile*. In *In Vitro Fertilization* v. *Costa Rica*, the IACtHR discussed the dynamic interpretation of the ACHR and its reliance on comparative law (see section 5.1.4). *Trabalhadores da Fazenda Brasil Verde* v. *Brazil*, for its turn, is a great illustration of the use of the *pro homine* principle in the evolutive interpretation of the ACHR. Additionally, it is a good case study for the investigation on whether the Court should or not apply a uniform interpretation of the ACHR to all of the states parties to the American Convention (see section 5.1.2). Finally, in *Claude Reyes* v. *Chile*, the IACtHR applied the concept of regional consensus and identified it in light of OAS resolutions.

[27] United Nations Office of the High Commissioner for Human Rights, "Interactive Dashboard", available at: <http://indicators.ohchr.org>; IACtHR, "Signatario y ratificaciones - Convención Americana sobre Derechos Humanos", available at: <https://www.cidh.oas.org/Basicos/Spanish/Basicos2a.htm>.

This makes the case unique for the study on whether soft law instruments can be evidence of regional consensus (see section 5.2.2).

Yet, it should be highlighted that describing the practice of the IACtHR is far from the purpose of the thesis. The latter will pursue an analytical and critical investigation of the conclusions of the IACtHR, in light of the VCLT/69 and related theories on treaty interpretation. Its research question and sub-questions will be addressed through a qualitative analysis.

Major sources to tackle the research question and its two sub-questions include international treaties, teachings of high qualified publicists, as well as judicial and quasi-judicial decisions. Notably, the ACHR, the VCLT/69 and decisions from the IACtHR, the IACommHR and the World Trade Organization (WTO) Panel and Appellate Body will be of great value for this research. The inclusion of the WTO on this list might generate some surprise, but it is only natural in light of the decisions of its dispute settlement mechanism which explicitly refer to Article 31 of the VCLT/69 and develop on its meaning.

Another important source is interviews. These were conducted in person with 4 lawyers of the IACtHR, in San José, Costa Rica. Those individuals were invited to participate in the research due to their expertise on the issues that are tackled here. Their identity will not be disclosed in the thesis. Hereinafter, the interviewed participants will be referred as participants A, B, C and D. The guide for the semi-structured interview can be found at Annex I.

This research will not engage in a comparative analysis of the impact of the universalistic approach and the regional consensus approach upon state compliance with the decisions of human rights courts. Nor will it tackle the impact of these approaches upon state consent to international jurisdiction. These two topics extrapolate the object of the present research. They are, however, highly intriguing, and it is the intention of the researcher to tackle them in a future investigation, which will be built upon the results of the present research.

Additionally, it should be stressed that the thesis will not analyse whether the IACtHR is competence to apply other Inter-American instruments beyond the ACHR. Other instruments adopted within the OAS are not external sources to the Inter-American System of Human Rights, but rather internal sources. Such an investigation would thus extrapolate the object of the thesis.

2.3 Added value of the research

This thesis builds upon the work of highly-qualified publicists which have extensively researched on the general rule of treaty interpretation, including Antônio Augusto Cançado

Trindade, Joost Pauwelyn and Mustafa Kamil Yasseen. The latter conducted extensive research on treaty interpretation in light of the law of treaties. His research gave rise to the book *L'interprétation des traités d'après la convention de Vienne sur le droit des traités*, which analyses in detail Articles 31 to 33 of the VCLT/69.[28] Cançado Trindade, for his turn, has an extensive academic production on the humanization of international law and on the co-existence and co-ordination of human rights instruments.[29] Through the lenses of these two theories, the present thesis appraises the VCLT/69 through the perspective of the special nature of human rights treaties. Yet, it should be noted that the purpose of the thesis is not to comment on Article 31 of the VCLT/69, as did Yasseen, nor to justify considerations of humanity in the law of treaties, as did Cançado Trindade. Instead, the thesis applies the general theories of these two publicists to a very specific object, that is, external sources as a tool for the evolutive interpretation of the American Convention on Human Rights.

Turning now to Joost Pauwelyn, this author engaged in an in-depth analysis of Article 31(3)(c) of the VCLT/69, problematizing it in light of the practice of the WTO, in her book *Conflict of Norms in Public International Law. How WTO Law Relates to other Rules of International Law*.[30] She also developed a theory on the extent to which non-WTO rules of international law should be taken into consideration in dispute settlements within the organization. Pawelyn's analysis and her innovative proposals have been tackled in the present thesis in order to determine what would constitute a "relevant applicable rule" to the interpretation of the ACHR, under Article 31(3)(c) of the Vienna Convention (see section 5.1.1). Yet, it is necessary to stress that the object of this thesis is wider than Article 31(3)(c), which is mainly tackled in one subsection of the present study.

The object of this research more closely resembles the one tackled by Marijke De Pauw and Magnus Killander. The former is this author of a book chapter called "The Inter-American Court of Human Rights and the Interpretive Method of External Referencing: Regional Consensus v. Universality".[31] In this chapter, De Pauw explains that the IACtHR has consistently opted for a "universalist interpretive approach", instead of focusing on "finding a

[28] Yasseen, Mustafa Kamil (1976) *L'interprétation des traités d'après la convention de Vienne sur le droit des traités*, Collected Courses of the Hague Academy of International Law, Volume 151, Leiden/Boston: Brill Nijhoff.

[29] See Cançado Trindade (2006), *supra* note 4, Chapter XVIII; Cançado Trindade 1987, *supra* note 22.

[30] Pauwelyn, Joost (2003) *Conflict of Norms in Public International Law. How WTO Law Relates to other Rules of International Law*, Cambridge/New York/Melbourne/Madrid/Cape Town/Singapore/São Paulo: Cambridge University Press.

[31] Ibid.

common ground among its member states".[32] She then discusses the Court's application of the universalistic approach, notices its broad use of external sources and presents some arguments to justify it in light of the law of treaties and international human rights law. She concludes her chapter by proposing that "more attention should be given to the effects of this interpretive practice, rather than the never-ending debate on legitimacy".[33] She also suggests that the IACtHR should clarify "its motivation for using external sources and to what extent these have influenced its decisions", for this constitutes "an essential factor that would confer more legitimacy to this interpretive practice"[34].

De Pauw addresses many questions that are common to this thesis. Therefore, her research offers a particularly relevant contribution to the present investigation. First, by providing a very comprehensive overview of the case-law of the Court relevant to the topic of external referencing. Second, by introducing her perception that regional consensus has played a very limited role in the Inter-American System of Human Rights. Finally, by tackling some legal arguments to justify the use of non-binding instruments as interpretative guidance for the IACtHR. Yet, her discussion of the legal basis in general international law for the use of external sources by the IACtHR is rather brief, perhaps because the author considers that more emphasis should be placed on the effects of this practice, rather than on its legitimacy. Accordingly, to a great extent, De Pauw does not problematize legal arguments on the use of non-binding instruments as interpretative guidance, but rather limits herself to introducing them. Nor does she provide an in-depth analysis of this interpretative technique in light of the law of treaties.

Killander, for his turn, wrote an article called "Interpreting Regional Human Rights Treaties".[35] In the article, he notes that human rights treaties have a special nature. Yet, he underscores that having this special nature "does not mean that such treaties should be interpreted in a way that is inconsistent with the Vienna Convention".[36] Accordingly, Killander introduces the role of the VCLT/69 on the interpretation of human rights treaties. The author stresses the importance of the object and purpose of human rights treaties, their context and the need for effectiveness in the process of interpretation. Additionally, he notes that the ECtHR and the IACtHR have each adopted a specific interpretative approach. While the former

[32] De Pauw, *supra* note 4, p.5.

[33] Ibid, p.23.

[34] Ibid, p.18.

[35] Killander, Magnus (2010) "Interpreting Regional Human Rights Treaties", *Sur – International Journal on Human Rights*, vol.7 n.13.

[36] Ibid, p.146.

"usually looks for a 'common denominator' among member states", the IACtHR "looks for guidance in international instruments", including treaties and even soft law instruments.[37] Killander explains these two interpretative approaches and discusses them in light of the decisions from regional human rights courts.[38]

Killander's greatest contribution to this thesis resides in his discussion of the role of the VCLT/69 on the interpretation of human rights treaties. His perception that the special nature of human rights does not preclude them from been interpreted in consonance with the VCLT/69 is central to this research. Additionally, Killander introduces a series of interesting arguments on the legal basis in the VCLT/69 for the interpretative approach taken by regional human rights courts. Among other considerations, the author argues that soft law can be taken into account during the process of interpretation because it "could illustrate emerging consensus on an issue and therefore possibly be considered 'practice' in terms of article 31(3)(b) [of the VCLT/69]".[39] The present thesis will challenge this conclusion, as well as his conclusion that "it is not necessary that the relevant state has ratified the international treaty which is used as an aid of interpretation".[40]

Killander focuses on the rules of treaty interpretation applied to human rights treaties. When compared to the work of De Pauw, his article provides a less comprehensive overview of the case-law from the IACtHR, but it analyses, in a more comprehensive manner, the interpretative approaches adopted by regional human rights courts in light of the VCLT/69. Yet, some of his conclusions on the legal basis for the use of external sources as interpretative guidance seem to contradict the wording of the VCLT/69. More specifically, it is not easy to qualify soft law as subsequent practice nor to conclude that treaties not ratified by the parties to a case may nonetheless provide interpretative guidance based on Article 31(3)(c) of the VCLT/69. While it is interesting to read Killander's considerations on these controversial points, it is reasonable to argue that the author did not provide the sufficient level of problematization over these controversies.

Additionally, in the papers of both De Pauw and Killander, the reader lacks a clear and objective definition of the universalistic approach. While both of them describe this approach by referring to case-law from regional human rights courts, they do not clarify what they understand by such term. Hence, developing a definition of the universalistic approach and

[37] Ibid, p.148.

[38] Ibid, Section 2 and 3.

[39] Ibid, p.149.

[40] Ibid.

providing a comprehensive analysis of the evolutive interpretation of the ACHR in light of the VCLT/69 are some legal issues which call for further investigation in scholarly research. Furthermore, both Killander and De Pauw present the universalistic approach and regional consensus as two separate interpretative approaches, without analysing the intersections among them and the extent to which they may co-exist and reinforce one another. This thesis purports to address the abovementioned issues. As explained in the Introduction, it will tackle relevant cases from the IACtHR, through an analytical and critical investigation conducted in light of the VCLT/69 and related theories of treaty interpretation.

3 THE EVOLUTIVE INTERPRETATION OF HUMAN RIGHTS TREATIES

The evolutive or dynamic interpretation of human rights treaties is a widespread method of interpretation, applied both at the global and regional levels, which extends the scope and content of human rights provisions in light of a new social reality.[41] It is based on the recognition that human rights treaties have an intertemporal dimension, or, in other words, they are "live instruments". Accordingly, their interpretation "must go hand in hand with evolving times and current living conditions".[42]

Christian Steiner and Patricia Uribe explain the evolutive interpretation of human rights treaties as a method of interpretation that takes into consideration contemporary conditions, recognizing the evolution of human rights and, accordingly, their progressive interpretation.[43] In a concise manner, Malcolm Shaw defines it as "a more flexible and programmatic or purpose-oriented method of interpretation", evident "in the context of human rights treaties".[44] This method does not equate to recognizing new living conditions as automatically safeguarded under the ACHR. As explains the IACtHR Judge Eduardo Vio Grossi, "the evolutive interpretation of the [American] Convention, or considering the Convention a living law, does not mean interpreting it to legitimize, almost automatically, the social reality at the time of the

[41] Cf. Steiner, Christian. Uribe, Patricia (Eds.) (2014) *Convención Americana sobre Derechos Humanos. Comentario*, Berlim/Bogotá: Konrad Adenauer Stiftung, p.708. Steiner and Uribe note that this method of interpretation was developed over the last decades by international jurisprudence on the field of human rights, in a converging manner: "Toda la jurisprudencia internacional en materia de derechos humanos ha desarrollado, de forma convergente, a lo largo de las últimas décadas, una interpretación dinámica o evolutiva de los tratados de protección de los derechos del ser humanos."

[42] IACtHR, Judgment (Merits, Reparations, and Costs), *"Mapiripán Massacre"* v. *Colombia*, 15 September 2005, para.106.

[43] Steiner and Uribe, *supra* note 41, p.708, p.710.

[44] Shaw, Malcolm N. (2008) *International Law*, 6th edition, New York: Cambridge University Press, p.937.

interpretation".[45] Rather, it means "understanding its provisions in the perspective of determining how they stipulate that these innovative matters or problems should be approached".[46]

The present section will introduce the evolutive interpretation of human rights treaties and discuss it within the framework of the VCLT/69. It is comprised by two subsections. The first one will analyse how a court may determine the extent to which a given provision has evolved. More specifically, it will explain two interpretative approaches that have been used tools for the evolutive interpretation of human rights, that is, the universalistic approach and the regional consensus approach. Subsequently, it will analyse the evolutive interpretation of human rights treaties in light of the general rule of treaty interpretation codified in Article 31 of the VCLT/69.

3.1 Ascertaining how human rights treaties evolve: the universalistic approach and regional consensus

Human rights treaties are living instrument which evolve with time. However, to say that these treaties evolve in light of changing times does not clarify how this evolution takes place. To what extent does a given provision evolve, and what are the sources used to measure the scope, the content and the limits of such evolution? Different approaches have been developed to answer these questions. One of them is the regional consensus approach.

Francisco Pascual Vives defines consensus as "a general agreement among the subjects that operate in the international system, which, by indicating and representing the interests and convictions accepted by them, allows for the identification of the content and binding character of the international norms applicable in their relations".[47] This concept becomes relevant for

[45] Partially dissenting opinion of Judge Eduardo Vio Grossi, p.7. In: IACtHR, Judgment (Preliminary Objections, Merits, Reparations and Costs), *Duque* v. *Colombia*, 26 February 2016, p.7. The original and complete text, in Spanish, is: "En ese orden de ideas, la interpretación evolutiva de la Convención o la consideración de que ella es derecho vivo, no consiste en que se le interprete con el fin de hacer legítimo, de modo casi automático, lo que la realidad social exprese en el momento de la interpretación, pues en tal evento dicha realidad sería el intérprete y aún la que ejercería la función normativa. Lo que, en cambio, significa la interpretación evolutiva de la Convención es entender sus disposiciones en la perspectiva de determinar cómo jurídicamente ellas prescriben que se deben abordar esos novedosos asuntos o problemas"; cf. Separate opinion of Judge Grossi, para.93. In: *Advisory Opinion on Gender identity and equality and non-discrimination of same-sex couples*, *supra* note 8.

[46] Ibid.

[47] Vives, Francisco Pascual (2014) "Consenso e Interpretación Evolutiva de los Tratados Regionales de Derechos Humanos", *Revista Española de Derecho Internacional*, vol. LXVI/2, p.116. Translation made by the author. The original text, in Spanish, is: "Desde una óptica material el consenso representa un acuerdo general de los sujetos que operan en el sistema internacional que, en tanto que resulta indicativo y

treaty interpretation by allowing human rights courts to assess the evolution of a given provision in light of a common understanding among the states parties.[48] If a common ground or, in the words of the IACtHR, a "generalized practice"[49] can be identified among states, it may guide the interpretation of the relevant provision in light of current living conditions.

The regional consensus approach is widely used at the ECtHR. The latter has consistently searched for common denominators in the domestic law of the states parties to the European Convention on Human Rights (ECHR). [50] Laurence R. Helfer explains that, in order to interpret the ECHR as a living instrument, the ECtHR has searched "for the existence of rights-enhancing practices and policies among the Contracting States that affect human rights".[51] If said practices achieve "a certain measure of uniformity", or, in other words, evidence a European consensus, the Court could "raise the standard of rights protection to which all states must adhere".[52]

It is important to note that, while consensus implies a certain level of uniformity, it does not necessarily equate to unanimity. Killander explains that consensus can be identified in light of a "common denominator"[53] among the vast majority of states parties.[54] Similarly, Kanstantsin Dzehtsiarou explains that the ECtHR "does not necessarily wait for unanimity; it can be satisfied with the existence of a *trend* in the laws of the Contracting Parties", that is, a "general direction in which something is developing or changing".[55]

The regional consensus approach has been explained by the ECtHR itself. In *Goodwin* v. *the United Kingdom*, the Court affirmed that, "since the [European] Convention [on Human Rights] is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States

representativo de los intereses y convicciones generalmente aceptados por éstos, permite identificar el contenido y la obligatoriedad de las normas internacionales aplicables en sus relaciones."

[48] Cf. Lixinski, Lucas (2017) "The Consensus Method of Interpretation by the Inter-American Court of Human Rights", *Canadian Journal of Comparative and Contemporary Law*, vol.3, issue 65 (2017), p.66 and 67.

[49] IACtHR, Judgment (Preliminary Objections, Merits, Reparations and Costs), *Artavia Murillo et al. ("In Vitro Fertilization"*) v. *Costa Rica*, 28 November 2012, para.256.

[50] Lixinski (2017), *supra* note 48, p.75.

[51] Helfer, Laurence R. (1993) "Consensus, Coherence and the European Convention on Human Rights", *Cornell International Law Journal*, vol. 26, p.134.

[52] Ibid.

[53] Killander, *supra* note 35, p.148; cf. Heringa, Aalt Willem (1996) "The Consensus Principle'. The role of 'common law' in the ECHR case law*", Maastricht Journal of European and Comparative L*aw, vol. 3, p.109.

[54] Ibid, p.151.

[55] Dzehtsiarou, Kanstantsin (2015) *European Consensus and the Legitimacy of the European Court of Human Rigths*. Cambridge: Cambridge University Press, p.12. Italics included by the author.

generally and respond, for example, to any evolving convergence as to the standards to be achieved".[56] Similarly, in *Stafford* v. *the United Kingdom*, the ECtHR affirmed that it must respond to "to any emerging consensus as to the standards to be achieved".[57]

The concept of regional consensus is not foreign to the Inter-American System of Human Rights. In 2016, in its Advisory Opinion concerning *Entitlement of Legal Entities to Hold Rights Under the Inter-American Human Rights System*, the IACtHR noted that all of the states that had consented to its jurisdiction had recognized fundamental rights of juridical entities.[58] In this context, the Inter-American Court took into consideration the national Constitutions of these states and relevant provisions concerning the entitlement of juridical entities to holding rights. As an outcome of this analysis, it identified the rights that were more commonly conferred to juridical entities by the states of the region.[59] In addition, it noted that four Latin-American states had expressed their understanding that the ACHR did not confer rights to juridical entities.[60]

In light of these factors, the IACtHR concluded that, "despite an apparent will among the states of the region to recognize the entitlement of legal entities to hold rights and provide them with resources to make such rights effective, it is evident that these indications are not sufficient, because not every state has made this recognition in the same way or to the same extent".[61] In other words, the Court concluded that a consensus capable of justifying an evolutive interpretation of the Convention on this thematic was still incipient. It also affirmed that the abovementioned position of the states of the region was made evident in their domestic law, which could not, by itself, modify the scope of Article 1.2 of the ACHR. This statement

[56] *Goodwin* v. *the UK*, *supra* note 5, para.74.

[57] ECtHR, Judgment, *Stafford* v. *the United Kingdom*, 28 May 2002, para.68.

[58] IACtHR, Advisory Opinion, *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(I)(A) and (B) of the Protocol of San Salvador)*, OC-22/16, 26 February 2016, para.64.

[59] The right to property, freedom of expression, association and petition. With regards to the latter, the Court noted that most of the states in the region recognize the right of juridical entities to fill the remedy of *amparo* or a similar recourse. It also noted that, in some cases, the abovementioned rights are recognized to special types of juridical entities, such as unions, political parties, indigenous peoples and afrodescendant communities. See ibid, para.64-65.

[60] Ibid, para.66.

[61] Ibid, para.67. Translation made by the author. The original text, in Spanish, is: "Teniendo en cuenta lo anterior, la Corte considera que, a pesar de que pareciera que existe una disposición en los países de la región para reconocer la titularidad de derechos a las personas jurídicas y otorgarles recursos para hacerlos efectivos, lo cierto es que estos antecedentes no son suficientes, por cuanto no todos los Estados realizan el reconocimiento de la misma forma y el mismo grado".

should not be interpreted as a dismissal of the regional consensus approach in the Inter-American System of Human Rights. Rather, it should be perceived as an indication that a certain threshold of uniformity must be achieved for state practice to amount to regional consensus and thus serve as a tool for the evolutive interpretation of the ACHR. This interpretation appears to be the most adequate in light of the practice of the IACtHR and the IACommHR, as will be shown below.

In a series of cases, the IACtHR has taken notice of the practice of the states of the region.[62] One example is the 2012 judgment on the case of *Kichwa Indigenous People of Sarayaku v. Ecuador*, in which the Court considered that indigenous communities have the right to consultation in decisions that affect their rights, in particular their right to communal property.[63] While this right is not expressly safeguarded in Article 21 of the American Convention (right to property), it is protected under the ILO Convention no. 169. The IACtHR noted that several OAS member states had incorporated the standards concerning free, prior and informed consent that are set out in the ILO Convention. To reach such a conclusion, it referred both to the domestic legislation of the countries in the region and to decisions of domestic courts, including those of countries that had not ratified the ILO Convention.[64] In light of these factors, the Inter-American Court concluded that the obligation to consultation had developed into a general principle of international law.[65]

Another example of the role of the domestic practice in the decision-making process of the IACtHR is the 2018 case of *Herzog v. Brazil*. As mentioned in the Introduction section, this case concerns the torture and assassination of a journalist by state agents during the Brazilian military dictatorship.[66] In its judgment, the IACtHR affirmed that, when crimes against humanity are perpetrated, the international community is entitled to exercise universal

[62] Cf. IACtHR, Judgment (Merits, Reparations and Costs), *Kawas-Fernández* v. *Honduras*, 3 April 2009; *"In Vitro Fertilization"* v. Costa Rica, *supra* note 49, para.245-246; *Advisory Opinion on Gender identity and equality and non-discrimination of same-sex couples*, *supra* note 8, para.45 and 80; *Kichwa Indigenous People of Sarayaku* v. *Ecuador*, *supra* note 26, para.164; IACtHR, Judgment (Preliminary Objections, Merits, Reparations and Costs), *Anzualdo Castro* v. *Peru*, 22 September 2009, para.61; IACtHR, Judgment (Preliminary Objections, Merits, Reparations and Costs), *Heliodoro Portugal* v. *Panama*, 12 August 2008, para.111.

[63] Ibid, para.160.

[64] Ibid, para.164; cf. ibid, para.161.

[65] Ibid, para.164.

[66] IACtHR, Judgment (Preliminary Objections, Merits, Costs and Reparations), *Herzog y otros* v. *Brasil*, 15 March 2018.

jurisdiction.[67] This conclusion was reached in light of the case-law of international criminal tribunals, as well as state practice. With regards to the latter, the Court made express reference to the domestic legislation of Argentina, Bolivia, Ecuador, El Salvador and Panama, as well as to official pronouncements made by the State of Brazil before the OAS General Assembly.[68]

Not only the Inter-American Court, but also the Inter-American Commission on Human Rights has taken notice of the domestic practice of the states of the region. In 2017, the IACommHR submitted to the Court the case of *Tulio Alberto Álvarez v. Venezuela*, concerning the effects of a criminal prosecution against Mr. Álvarez for the crime of "ongoing aggravated defamation" committed against the then President of the National Assembly of Venezuela. In its merits report, the Commission took note of legislative reforms in several states of the region, including Mexico, Jamaica, Ecuador, Argentina and Uruguay, to "either repeal crimes against honor or better define their scope".[69] In the understanding of the Commission, these reforms would constitute "evidence of regional progress".[70]

As shown above, regional consensus plays a role in the interpretative exercise of the Inter-American Court and Commission on Human Rights.[71] Nonetheless, it is not perceived as a *conditio sine qua non* for the evolutive interpretative of ACHR. In *Atala Riffo* v. *Chile*, a case concerning the alleged "discriminatory treatment and arbitrary interference in the private and family life suffered by Ms. Atala due to her sexual orientation"[72], the State of Chile argued that there was no consensus that sexual orientation constituted a prohibited category for discrimination.[73] The IACtHR, however, affirmed 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

[67] Ibid, para.302.

[68] Ibid, para. 300-301.

[69] Inter-American Commission on Human Rights (IACommHR), Report no. 4/17, Case 12.663, Merits, *Tulio Alberto Álvarez* v. *Argentina*, 26 January 2017, para.72.

[70] Ibid, para.78.

[71] This was further confirmed in the interviews with experts B and C. Expert B noted that the IACtHR has engaged in an analysis of comparative law in a series of topics, including amnesty laws, forced disappearance, typification of torture and other cruel, inhuman or degrading treatment, freedom of expression, rights of the child and discrimination on the grounds of sexual orientation (Interview 2, 29min39s-31min). Expert C considered that a regional consensus could be identified among the States Parties tot eh ACHR on topics such as the death penalty and the prohibition of torture, while cautiously stressing that the identification of regional consensus is not a matter of opinion, but rather a matter of fact, which demands investigation.

[72] *Atala Riffo and Daughters* v. *Chile*, *supra* note 9, para.3.

[73] Ibid, para.74-75.

structural discrimination that these minorities have suffered".[74] In the understanding of the Court, the fact that the issue in question is controversial "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".[75] This understanding was later recalled on the 2017 Advisory Opinion on *Gender identity and equality, and non-discrimination for same-sex couples*.[76]

These pronouncements indicate that the IACtHR does not regard the absence of regional consensus as a ground for justifying a restrictive interpretation on the evolution of the ACHR. When the evolution of a provision can be identified through other elements, such as external sources to the Inter-American System of Human Rights, the lack of regional consensus will not represent an unsurmountable obstacle for its dynamic interpretation. In other words, regional consensus plays a role in the Inter-American System of Human Rights, limited by the *pro homine* or *pro persona* principle, that is, by the prevalence of the most favourable interpretation to the individual. If a more favourable interpretation of the ACHR can be solidly reached through other means, but not through regional consensus, the more beneficial interpretation must prevail. This conclusion is shared by one of the interviewed experts (Expert C), who considers that "regional consensus should only be used to increase human rights protection, (…) never to reduce a right or deny it".[77] Expert C concluded that the regional approach could complement the universalist approach whenever it can be used to increase the protection to the alleged victim or, in other words, whenever this use would be in accordance with the *pro homine* principle.[78]

In fact, the IACtHR has relied to a greater extent in external sources, without necessarily looking for consensus among the states of the region. In the words of Gerald

[74] Ibid, para.92.

[75] Ibid.

[76] *Advisory Opinion on Gender identity and equality and non-discrimination of same-sex couples*, *supra* note 8, para.83 and 219; cf. IACtHR, Resolución, *Solicitud de opinión consultiva presentada por la Comisión Interamericana de Derechos Humanos*, 27 January 2009, para.4 and 5. When requesting the Advisory Opinion, the Inter-American Commission on Human Rights sustained that, despite the lack of consensus in the practice of the states parties to the ACHR on the prohibition of corporal punishment against children, the Court could nonetheless declare such practice in violation with the Convention.

[77] Interview 3, 23min50s to 25min38s. Translation by the author. The original text is: "solo se debe utilizar el instrumento de consenso cuando sirve para aumentar la protección de derecho. Nunca para seccionarlos, nunca para reducir los derechos. Nunca para negar los derechos."

[78] Interview 32min to 33min. Translation by the author. The original text is: "[sería posible que el sistema regional complemente el sistema universal] con una condición: que es cuando el sistema regional sirva para mejorar lo derecho, para expandirlo, para aumentarlo, para dar mayor protección. Lo que nos sirve es como en la otra forma racional que te decía con el consenso regional: sí, siempre que sea *pro homine*".

Neuman, "progressive elaboration of rights is supported partly by the [Inter-American] Court's own normative reasoning, partly by invocation of subsequent OAS human rights instruments, and quite often by references to the global and European human rights regimes".[79]

When relying on external sources without necessarily searching for a regional consensus, the Court is applying the universalistic approach, also referred to as universalism or integrationist approach. Universalism is grounded on the unity and universality of human rights. As affirmed the IACtHR in its Advisory Opinion on *"Other Treaties" Subject to the Consultative Jurisdiction of the Court*, "[m]ankind's universality and the universality of the rights and freedoms which are entitled to protection form the core of all international protective systems".[80] In other words, the different regional and universal systems of human rights share a common core and, together, give rise to the international protection of human rights. Therefore, they do not exclude each other. Instead, they co-exist and reinforce one another.

This interaction between universal and regional human rights instruments manifests itself in treaty interpretation, through the technique of external referencing.[81] This technique is essential to the universalistic approach and consists in the integration of different instruments that concern human rights for the purposes of interpretation. This means that the content and scope of human rights provisions, which evolve over time, are to be assessed through a comparative method that takes into consideration other relevant instruments of international law, be they regional or universal. This takes place, for example, when the IACtHR examines recent developments on universal, European and African human rights law in order to determine how the ACHR provisions safeguard gender identity, and equality and non-discrimination of same-sex couples.

The universalistic approach and the consensus approach are not mutually excluding. Instead, they may coexist with one another. A combined use of these two approaches may strengthen the conclusion that a given provision has evolved in a certain direction. Additionally, the present researcher argues that a specific type of consensus, consensus via international law, may be perceived as a combination *per se* of universalism and the consensus approach.

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[79] Neuman, Gerald (2008) "Import, Export, and Regional Consent in the Inter-American Court of Human Rights". *The European Journal of International Law*, vol.19 no.1, p.107.

[80] IACtHR, Advisory Opinion, *"Other treaties" subject to the advisory jurisdiction of the Court (Article 64 American Convention on Human Rights)*, OC-1/82, 24 September 1982, para.40; cf. Hennebel, Ludovic (2011) "The Inter-American Court of Human Rights: the Ambassador of Universalism", *Quebec Journal of International Law*, p.89. In the interpretation of Hennebel, the IACtHR understands that "the unity of human nature and the universal character of guaranteed rights and liberties form an international protection system"

[81] Cf. *Advisory Opinion on "Other treaties" subject to the advisory jurisdiction of the Court*, ibid, para.40 and 93.

Publicists such as Dzehtsiarou and Lucas Lixinski explain that there are different categories of consensus.[82] While the ECtHR has usually identified consensus in light of the domestic practice of the states parties to the European Convention, this is simply one category of consensus, which has been regarded by Dzehtsiarou as the proper "European consensus".[83] A different one is consensus by international treaties, which the abovementioned author has classified as more international than regional.[84] It emerges when international instruments evidence a common ground.[85] In the words of Dzehtsiarou, "[c]onsensus based on international treaties is usually identified through analysis of the treaties ratified, or at least signed, by the Contracting Parties".[86] The author also notes that, "[i]n establishing this type of consensus, the [European] Court can also rely on soft law mechanisms adopted by international organisations".[87]

The present researcher contends that consensus by international treaties is, intrinsically, a combination of the universalistic approach and the consensus approach. For illustrative purposes, consider that a given regional human rights court is aiming at determining whether its regional convention has evolved to cover the right of a child against corporal punishment. When making such a determination, the court may take into account the fact that the prohibition against corporal punishment has been addressed in different international instruments, which, as a group, have been accepted by a large number of states that integrate the regional organization in question or even by the international community as a whole. Those instruments would be relevant for treaty interpretation, first, in light of the universality of human rights, and

[82] Lucas Lixinski identified in the jurisprudence of the European Court of Human Rights (ECtHR) five categories of consensus interpretation, namely: "(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". See Lixinski, Lucas (2010) "Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law". *The European Journal of International Law*, vol.21, no.3, p.66. Dzehtsiarou, for his turn, argues that the ECtHR has applied four categories of consensus, namely: (i) consensus based on comparative analysis of the laws and practices of the Contracting Parties; (ii) consensus based on international treaties; (iii) internal consensus in the respondent Contracting Party; and (iv) expert consensus. See Dzehtsiarou (2015), *supra* note 55, p.39. Both of these authors recognize that consensus is a concept that manifests itself in different forms, and it can be identified in light of international law.

[83] Dzehtsiarou, ibid.

[84] Dzehtsiarou argues that consensus based on a comparative analysis of the laws and practices of the contracting parties is the proper regional consensus, while consensus based on international treaties would be more international than regional. Yet, he recognizes that consensus based on international treaties may be called regional or, in the particular case of the European System of Human Rights, European, "when the ECtHR mentions treaties and other documents drafted and adopted within the Council of Europe or if these treaties are ratified by the majority of the Contracting Parties". See ibid, p.39-40.

[85] Cf. Heringa, *supra* note 53, p.122.

[86] Dzehtsiarou (2015), *supra* note 55, p.39.

[87] Ibid, p.39-40.

second, in light of the acceptance of this standard by a large number of states. What is searched here is an international consensus or, in other words, a common denominator identified in light of international instruments, such as other treaties and even soft law instruments.[88] The value of this specific category of consensus will be further analysed in Section 5.1.3 and 5.2.2.

3.2 A necessary method in light of the object and purpose of human rights treaties

Independently of which approach is adopted to ascertain the evolution of a human rights treaty, a common feature in the practice of different human rights courts is the understanding that human rights treaties are non-static, "living" instruments, capable of adjusting to new living conditions and social needs. This dynamic feature of human rights treaties manifests itself through the evolutive interpretation of these instruments. Being the latter a method of interpretation, it is important to analyse it in light of Article 31 of the VCLT/69, a provision that codifies the general rule of treaty interpretation and which has been recognized as customary law by the International Court of Justice (ICJ)[89].

According to Article 31 of the VCLT/69, "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[90] Subsequent agreement and practice, as well as relevant rules of international law, shall also be taken into account.[91] This provision codifies an understanding that had already been put forward by the Permanent Court of International Justice, according to which a treaty must always "be read as a whole", for "[its] particular phrases (…) may be interpreted in more than one sense".[92]

The object and purpose of a treaty emerge as essential elements of treaty interpretation. It is in light of these two elements that the ordinary meaning of the terms of a given treaty can be confirmed, expanded or narrowed.[93] In the words of the Permanent Court of International

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[88] Cf. Ibid, p.128.

[89] International Court of Justice (ICJ), Judgment, *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, 3 February 1994, para.41.

[90] United Nations (UN), Vienna Convention on the Law of Treaties, 23 May 1969, Articles 31(1) (VCLT/69).

[91] Ibid, Art. 31 (3).

[92] Permanent Court of International Justice (PCIJ), Advisory Opinion, *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture*, Series B, no. 2, 12 August 1922, p. 23.

[93] Cf. Dissenting opinion of Judge Anzilotti, p.22. In: PCIJ, *Advisory Opinion on Interpretation of the Convention of 1919 Concerning Employment of Women During the Night*, Series A/B 50, 15 Nov. 1932. The original and complete text, in French, is: "Mais je ne vois pas comment il est possible de dire qu'un article d'une convention est clair avant d'avoir déterminé l'objet et le but de la convention, car c'est seulement dans cette convention et par rapport à cette convention que l'arti- cle assume sa véritable signification. Ce n'est que lorsqu'on connaît ce que les Parties contractantes se sont proposées de faire, le but qu'elles ont voulu atteindre, que l'on peut constater, soit que le sens naturel des termes employés dans tel ou tel article cadre avec la véritable intention

Justice Judge Dionisio Anzilotti, "I do not see how it is possible to say that an article of a convention is clear until the subject and aim of the convention have been ascertained, for the article only assumes its true import in this convention and in relation thereto".[94] The importance of these two elements has been further emphasised for the interpretation of human rights treaties. According to Cançado Trindade, "in the International Law of Human Rights, somewhat distinctly [from traditional International Law], there has been a clear and special emphasis on the element of the object and purpose of the treaty, so as to ensure an effective protection (*effet utile*) of the guaranteed rights".[95]

The purpose of human rights treaties is not limited to establishing reciprocal obligations among the states parties. Instead, these instruments "transcend the sphere of bilateral relations of the States parties"[96] and are established in collective interest.[97] The IACtHR has clarified what constitutes this collective interest, by affirming that human rights treaties have the object and purpose of protecting "the basic rights of individual human beings irrespective of their

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des Parties, soit que le sens naturel des termes employés reste en deçà ou va au delà de ladite intention. Dans le premier cas, on dit avec raison que le texte est clair et qu'on ne saurait, sous couleur d'interprétation, lui donner une signification dif- férente de celle qui répond au sens naturel des mots. Dans les autres cas, puisque les mots n'ont de valeur qu'en tant qu'expression de la volonté des Parties, on constatera, soit que les termes ont été employés dans un sens plus large que celui qui leur revient normalement (interprétation dite extensive), soit que les termes ont été employés dans un sens plus étroit que celui qui leur revient normalement (interprétation restrictive)".

[94] Ibid.

[95] Cançado Trindade 2006, *supra* note 4, p.60. One example of this special emphasis is the consistent practice of the Human Rights Committee of reading into Article 2 of the International Covenant on Civil and Political Rights an extraterritorial human rights obligation, despite the wording of the Article. See: Human Rights Committee (HRC), *Lilian Celiberti de Casariego* v. *Uruguay*, Communication n. 56/1979, U.N. Doc. CCPR/C/OP/1, 29 July 1981; individual opinion of Mr. Christian Tomuschat. In: HRC, *Lilian Celiberti de Casariego* v. *Uruguay*, Communication n. 56/1979, U.N. Doc. CCPR/C/OP/1, 29 July 1981; HRC, *Sergio Euben Lopez Burgos* v. *Uruguay*, Communication n. R.12/52, U.N. Doc. Supp. no. 40 (A/36/40), 29 July 1981, para. 12.2; individual opinion of Mr. Christian Tomuschat. In: HRC, *Sergio Euben Lopez Burgos* v. *Uruguay*, n. R.12/52, U.N. Doc. Supp. no. 40 (A/36/40), 29 July 1981, para.12.2; HRC, *Miguel Angel Estrella* v. *Uruguay*, Communication n. 74/1980, U.N. Doc. Supp. no. 40 (A/38/40), 29 March 1983, para. 4.1; HRC, *Antonio Viana Acosta* v. *Uruguay*, Communication n. 110/1981, U.N. Doc. Supp. no. 40 (A/39/40), 29 March 1984, para.6. See also ICJ, Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, para.109. Eirik Bjorg, for his turn, argues that one should not compare the object and purpose of different treaties, but rather weight different factors of interpretation. In his opinion, "[i]t must surely be wrong, therefore, to say that because of the importance of the object and purpose of human rights treaties this particular element of interpretation should take on greater importance when one is interpreting human rights treaties than when one is interpreting other types of treaty". Bjorg rather understands that the distinguished relevance of the element of object and purpose is not peculiar to human rights treaties. In his words, "[in descriptive terms,] the jurisprudence of international courts and tribunals show that the object and purpose is, together with the intentions of the parties, the prevailing elements for interpretation in any type of treaty". In: Bjorge, Eirik (2014) *The Evolutionary Interpretation of Treaties*, Oxford University Press, p.35-36.

[96] International Law Commission (2001) *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, p.126.

[97] Cf. Cançado Trindade 2006, *supra* note 4, p.60.

nationality, both against the State of their nationality and all other contracting States".[98] Similarly, in *Velásquez Rodríguez* v. *Honduras*, the IACtHR hold that "[t]he object and purpose of the American Convention is the effective protection of human rights". [99] In the understanding of the Court, this entails the interpretation of the ACHR "so as to give it its full meaning and to enable the system for the protection of human rights entrusted to the Commission and the Court to attain its 'appropriate effects".[100]

Killander explains that "[t]he requirement of interpretation 'in light of the object and purpose' and in 'good faith' is meant to ensure the 'effectiveness of its terms".[101]Perceiving human rights treaties as a stagnated document, instead of a live instrument, would not be in accordance with the principle of effective interpretation. The effectiveness of the terms of a human rights convention that is applied today can only be reached if the convention itself is read in light of current living conditions. This interconnexion between the evolutive interpretation of human rights and the effectiveness of these instruments was recognized by the ECtHR. In its 2002 Judgment on the case of *Christine Goodwin* v. *the United Kingdom*, the European Court affirmed that "[i]t is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory".[102] In the words of the ECtHR, "failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement".[103]

In conclusion, the distinctive nature of human rights treaties differentiates them from conventions that merely envisage the establishment of reciprocal obligations among states. In light of the VCLT/69, the special nature of human rights treaties, reflected in their object and purpose, must be taken into account in their interpretation. In this context, some interpretative methods have emerged, one of which is the evolutive interpretation of human rights treaties. The latter is a *condition sine qua non* for the effectiveness of human rights treaties, and accordingly indispensable in light of their object and purpose. Hence, it can be concluded that this interpretative method is not only in accordance with the VCLT/69, but also indirectly

[98] IACtHR, Advisory Opinion, *The Effect of Reservations on the Entry into Force for the American Convention on Human Rights (Arts. 74 and 65)*, OC-2/82, 24 September 1982, para. 29; cf. *Advisory Opinion on Gender identity and equality and non-discrimination of same-sex couples*, *supra* note 8, para.56: "(…) the Court has asserted that, in the case of the American Convention, the object and purpose of the treaty is "the protection of the fundamental rights of the human being."

[99] IACtHR, Judgment (Preliminary Objections), *Velásquez Rodríguez* v. *Honduras*, 26 June 1987, para. 30.

[100] Ibid.

[101] Killander, *supra* nota 35, p.147.

[102] *Goodwin* v. *the UK*, *supra* note 5, para.74.

[103] Ibid.

required by it. In other words, it is justified in light of the object and purpose of human rights treaties and accordingly finds its legal basis in Article 31(1) of the VCLT/69.

4 THE ROLE OF EXTERNAL SOURCES IN THE CASE-LAW OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

The previous section explained that one of the interpretative techniques developed to ascertain the extent to which a human rights treaty has evolved is the use of external sources. The present section will investigate the role of these sources in the case-law of the IACtHR and the limits of such use. In other words, it will assess which types of external sources have been used by the Court and how they have contributed to an evolutive interpretation of the American Convention. It will also tackle the limits of external referencing, in light of the competence of the IACtHR. In order to provide such an analysis, this section will engage in case studies in three areas, namely: (i) IHL; (ii) the rights of the child; and (iii) the rights of LGTBI people.

4.1 International humanitarian law

In 1997, the IACommHR delivered its report on the case *Juan Carlos Abella v. Argentina*, also known as *Tablada* case. This case concerns events that took place in January 1989, at the barracks of the General Belgrano Mechanized Infantry Regiment no. 3 (RIM 3), which were located at La Tablada, Buenos Aires province.[104] On 23 January 1989, a group of 42 armed persons launched an attack on the RIM 3 barracks, under the allegation that a military *coup d'etat* was being planned there.[105] The military personnel of Argentina responded to the attack, engaging in a combat that lasted approximately 30 hours.[106]

The petitioners of the case argued before the Commission that the State of Argentina had violated the rights of 49 persons in connection with the events at the La Tablada base. More specifically, they alleged that, "after the fighting at the base had ceased, State agents participated in the summary execution of four of the captured attackers, the disappearance of six others, and the torture of a number of other captured attackers, which occurred both in the barracks and in police facilities".[107]

[104] Inter-American Commission on Human Rights (IACommHR), *Juan Carlos Abella* v. *Argentina*, 19 November 1997, para.1.

[105] Ibid, para.1 and 7.

[106] Ibid, para.1.

[107] Ibid, para.3.

Before addressing the specific claims of the petitioners, the IACommHR considered it relevant to clarify the role of IHL in its decisions.[108] Firstly, it noted the "shared nucleus of non-derogable rights" and the common purpose of international human rights law and IHL, that is, the protection of human life and dignity.[109] Secondly, it noted the convergence and mutual reinforcement of these two branches. To exemplify this, the Commission observed that both Common Article 3 of the 1949 Geneva Conventions and Article 4 of the ACHR protect the right of an individual not to be arbitrarily deprived of life. In an armed conflict, not being arbitrarily deprived of life implies a distinction between combatants and civilians, as well as the test of necessity and proportionality. Considering that such a distinction and the aforementioned tests are not provided in the ACHR, the Commission "must necessarily look to and apply definitional standards and relevant rules of humanitarian law as sources of authoritative guidance in its resolution of this and other kinds of claims alleging violations of the American Convention in combat situations".[110] Concluding otherwise would result, in practice, in an insurmountable obstacle to the exercise of jurisdiction by the Commission over certain situations involving indiscriminate attacks committed during an armed conflict. In the words of the IACommHR, "[s]uch a result would be manifestly absurd in light of the underlying object and purposes of both the American Convention and humanitarian law treaties".[111]

IHL is relevant for the interpretation of the ACHR and it can be legitimately relied upon in the process of interpretation of the ACHR, as will be further explained in Section 5. Yet, what is peculiar in the *Tablada* case is that the Commission did not limit itself to grounding the use of IHL instruments in the process of interpretation of the American Convention. It went further and affirmed that it was competent to directly apply rules of IHL, based on Article 29(b) of the ACHR and the *pro homine* principle protected therein. In the words of the Commission, if the same or comparable rights are safeguarded by the ACHR and an IHL instrument, "the Commission is duty bound to give legal effort to the provision(s) of that treaty with the higher standard(s) applicable to the right(s) or freedom(s) in question".[112] When the higher standard is safeguarded under a rule of IHL, the latter should be applied. The Commission thus concluded that it has the "authority under Article 29 (b) to apply humanitarian law, where it is relevant".[113]

[108] Ibid, para.157.

[109] Ibid, para.158.

[110] Ibid, p.161.

[111] Ibid.

[112] Ibid, para.165.

[113] Ibid, para.166.

Subsequently, in the case *Las Palmeras* v. *Colombia*, the IACommHR argued once more that it had competence to analyse whether the state concerned had violated rules of IHL.[114] This case concerned extrajudicial executions, including the killing of a child, and related covering up acts allegedly committed by the Army of Colombia and the country's National Police in a place known as Las Palmeras, in January 1991.[115] In its application before the Court, the IACommHR requested the Tribunal to declare the violation of Article 4 of the ACHR and Common Article 3 of the 1949 Geneva Conventions.[116] When justifying such request at the hearing of the case, the Commission considered that "ignoring the meaning and scope of certain international obligations of the State and renouncing the task of harmonizing them with the competence of the organs of the inter-American system in an integral and teleological context, would imply betraying the ethical and juridical benefit promoted in Article 29".[117] The IACommHR went on to affirm that this would equate to betraying "the best and most progressive application of the American Convention".[118] It concluded that its claim "regarding the violation of Article 4, in a way which is coextensive with the common Article 3, not only does not exceed its competence, but rather constitutes part of its mandate as an organ entrusted with ensuring observance of the fundamental human rights under the jurisdiction of the States Parties".[119]

In 2000, the IACtHR tackled the preliminary objections to this case and analysed, among other allegations, the claim of the Commission regarding the competence of these two organs to directly apply IHL. The Court disagreed with the Commission and affirmed that the ACHR "has only given the Court competence to determine whether the acts or the norms of the States are compatible with the Convention itself, and not with the 1949 Geneva Conventions".[120] In this respect, it noted that Article 62(3) of the ACHR "provides for the existence of the Inter-American Court to hear 'all cases concerning the interpretation and application' of its provisions".[121]

On the same year, the Court reaffirmed the *Las Palmeras* understanding, on the case *Bámaca-Velásquez* v. *Guatemala*. This latter concerns the alleged torture and forced

[114] IACtHR, Judgment (Preliminary Objections), *Las Palmeras* v. *Colombia*, 4 February 2000, para.28-31.
[115] IACtHR, Judment (Merits), *Las Palmeras* v. *Colombia*, 6 December 2001, para.2.
[116] *Las Palmeras* (2000), *supra* note 114, para.28.
[117] Ibid, para.31.
[118] Ibid.
[119] Ibid.
[120] Ibid, para.33.
[121] Ibid, para.32.

disappearance committed by the Guatemalan armed forces against Bámaca-Velásquez, a member of a guerrilla group in the country. In light of these facts, the IACommHR requested the Court to declare the violation of Article 1(1) of the ACHR (obligation to respect rights) in relation to Common Article 3 of the 1949 Geneva Conventions.[122] When justifying its request, the Commission highlighted that, under Article 29 of the ACHR, the provisions of the Convention "may not be interpreted in the sense of restricting the enjoyment of the rights recognized by other conventions to which Guatemala is a party; for example, the Geneva Conventions of August 12, 1949".[123] Hence, "considering that Article 3 common to those Conventions provides for prohibitions against violations of the right to life and ensures protection against torture and summary executions, Bámaca Velásquez should have received humane treatment in accordance with the common Article 3 and the American Convention".[124]

The Court, for its turn, upheld that it "lacks competence to declare that a State is internationally responsible for the violation of international treaties that do not grant it such competence".[125] The Tribunal could, however, "observe that certain acts or omissions that violate human rights, pursuant to the treaties that they do have competence to apply, also violate other international instruments for the protection of the individual, such as the 1949 Geneva Conventions and, in particular, common Article 3".[126] Accordingly, the Court observed the similarities between Common Article 3 to the Geneva Conventions and the provisions of the American Convention regarding non-derogable human rights. It then concluded that, as "already indicated in the *Las Palmeras Case* (2000), (…) the relevant provisions of the Geneva Conventions may be taken into consideration as elements for the interpretation of the American Convention".[127]

In the 2004 case of *Serrano-Cruz Sisters* v. *El Salvador*, the Inter-American Commission appears to have adjusted its practice to the Court's understanding of the limits of the universalistic approach.[128] As the Commission itself highlighted in its arguments before the Court, it "had not requested the Court to apply international humanitarian law, but to apply the

[122] IACtHR, Judgment (Merits), *Bámaca-Velásquez* v. *Guatemala*, 25 November 2000, para.203.

[123] Ibid.

[124] Ibid.

[125] Ibid, para.208.

[126] Ibid.

[127] Ibid, para.209.

[128] None of the interviewed participants could recall a dispute posterior to the *Las Palmeras* case in which the IACommHR had requested the Court to directly apply IHL.

American Convention in order to establish the international responsibility of El Salvador for the forced disappearance of the Serrano Cruz", in the context of an armed conflict.[129] This time, the practice of the IACtHR and the IACommHR were in consonance, and the Court reaffirmed its competence to "use the provisions of international humanitarian law, ratified by the defendant State, to give content and scope to the provisions of the American Convention".[130]

The jurisprudence *constante* of the IACtHR does not constitute, in any way, a bar on the practice of external referencing, but rather a delimitation of the universalistic approach in light of the competence of the Inter-American Court and Commission. Although the Court has competence only[131] to determine whether States Parties to the ACHR acted or not in consonance with such Convention, other sources of law, including IHL, serve as interpretative tools for the determination of the content and scope of the provisions of the ACHR. In fact, five years after the *Las Palmeras* case, in its the 2005 Judgment on *"Mapiripán Massacre"* v. *Colombia*, the IACtHR took into consideration humanitarian law, particularly Common Article 3 to the 1949 Geneva Conventions, in order interpret the provisions of the ACHR. It relied on Article 29(b) of the ACHR to affirm that, "[w]hile it is clear that this Court cannot attribute international responsibility under International Humanitarian Law, as such, said provisions are useful to interpret the Convention".[132] Hence, while making clear that Article 29(b) does not expand its competence, the Court evidenced that "rights complement each other or become integrated to specify their scope or their content".[133] Accordingly, when deciding the merits of the case, the Tribunal considered that "[t]he content and scope of Article 19 of the American Convention must be specified, in cases such as the instant one, taking into account the pertinent provisions of the Convention on the Rights of the Child (…) and of Protocol II to the Geneva Conventions".[134]

The *"Mapiripán Massacre"* case is simply one example of external referencing to rules of IHL by the IACtHR. In the last few years, AP II to the 1949 Geneva Conventions and rules

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[129] IACtHR, Judgment (Preliminary Objections), *Serrano-Cruz Sisters* v. *El Salvador*, 23 November 2004, para.109.

[130] Ibid, para.119.

[131] The IACtHR is also competent to declare the violation of additional protocols to the ACHR in the manner so provided in the text of those instruments. It is also competent to declare the violations of other Inter-American conventions that establish, in their text, the possibility of a case being submitted to an international for a whose competence has been recognized by the state party to a controversy. This is the case of the Inter-American Convention to Prevent and Punish Torture. See *Herzog v. Brazil*, *supra* note 66, para.33, 36 and 37.

[132] *"Mapiripán Massacre"* v. *Colombia*, *supra* note 42, para.115.

[133] Ibid.

[134] Ibid, para.153.

of customary IHL have been referred to by the IACtHR in the process of interpretation of Article 21 (the right to property)[135] and Article 22 of the ACHR (freedom of movement and residence)[136], as well as in the analysis of the compatibility of amnesties laws with Articles 8 and 25 of the American Convention.[137]

4.2 The rights of the child

The debate on whether the IACtHR is competent to directly apply external sources is not present in cases concerning the rights of the child or the rights of LGTBI people. Nonetheless, those two fields provide good case studies on the range of sources that have been used by the Court during the interpretation of the ACHR and how these instruments have guided the evolutive interpretation of the Convention.

In 1999, the IACtHR delivered its judgment on the case "*Street Children" (Villagran-Morales et al.)* v. *Guatemala*.[138] This case concerns the abduction, torture and murder of four youths that used to live on the streets of Guatemalan City, and the murder of a fifth one, alleged committed by state agents, including members of the National Police Force.[139] The IACtHR referred to the victims as "street children".[140] Considering that three of the victims were minors at the time of the violations, the IACommHR requested the Court to declare, among other things, the violation of Article 19 of the ACHR (rights of the child).[141]

In its judgment, the Court looked for guidance in the CRC to define the term "child", present in Article 19 of the American Convention. Subsequently, it tackled the content and scope of that provision. Article 19 provides that "[e]very minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state".[142] Yet, it does not specify which measures of protection would those be. Accordingly, the IACtHR referred to the CRC, whose articles allow it to interpret the words

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[135] *Santo Domingo Massacre* v. *Colombia*, *supra* note 10, para.270-272; IACtHR, Judgment (Preliminary Objections, Merits, Reparations and Costs), *Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis)* v. *Colombia*, 20 November 2013, para 349.

[136] IACtHR, Judgment (Preliminary Objections, Merits, Reparations and Costs), *Ituango Massacres* v. *Colombia*, 1 July 2006, para.209.

[137] IACtHR, Judgment (Merits and Reparations), *Gelman* v. *Uruguay*, 24 February 2011, para.210-211.

[138] IACtHR, Judgment (Merits), *"Street Children" (Villagran-Morales et al.)* v. *Guatemala*, 19 November 1999.

[139] Ibid, para.77-79 and 142.

[140] Ibid, para.2.

[141] Ibid, para.3.

[142] ACHR, *supra* note 1, Article 19.

"measures of protection" from different angles.[143] For the purposes of this case, the Court emphasized the angles "that refer to non-discrimination, special assistance for children deprived of their family environment, the guarantee of survival and development of the child, the right to an adequate standard of living, and the social rehabilitation of all children who are abandoned or exploited".[144] In light of this interpretation, it concluded that the State of Guatemala had violated Article 19 of the ACHR.[145]

The 2004 case of *"Juvenile Re-education Institute"* v. *Paraguay* also illustrates the use of the CRC by the IACtHR for interpretative purposes. This case concerns the living conditions in a juvenile reeducation institute in Paraguay, the *Colonel Panchito López* Institute. The alleged victims were children detained in this institute which, in the words of the IACommHR, "embodied a system that was the antithesis of every international standard pertaining to the incarceration of juveniles, given the allegedly grossly inadequate conditions under which the children were interned".[146] In its judgment, the Court relied on the CRC to interpret the words "measures of protection" present in Article 19 of the American Convention in light of the circumstances of the case.[147] Additionally, it relied on this external source during the interpretation of Article 4 (the right to life), 5 (right to humane treatment), 7 (right to personal liberty) and 8 (right to a fair trial) of the ACHR.[148] For illustrative purposes, the Court's considerations on the content and scope of the right to life will be described in the paragraph that follows.

The Court noted that Articles 6 and 27 of the CRC "include within the right to life the State's obligation to 'ensure to the maximum extent possible the survival and development of the child."[149] "Development", for its turn, has been interpreted by the Committee on the Rights of the Child "in its broadest sense as a holistic concept, embracing the child's physical, mental, spiritual, moral, psychological and social development".[150] In light of this legal framework, the IACtHR concluded that "a proper interpretation" of Article 4 of the ACHR (the right to life), "in combination with the pertinent provisions of the Convention on the Rights of the Child and

[143] *"Street Children"* v. *Guatemala*, *supra* note 138, para.196.

[144] Ibid.

[145] Ibid.

[146] "*Juvenile Re-education Institute"* v. *Paraguay*, *supra* note 11, para.4.

[147] Ibid, para.147-149.

[148] Ibid, para.151-234.

[149] Ibid, para.161.

[150] Ibid, para.161.

Article 13 of the Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights [Protocol of San Salvador]", imply to the State the positive obligation of providing children deprived of their liberty with "special periodic health care and education programs".[151] Therefore, the Court concluded that Paraguay had violated Article 4 of the ACHR, first, by denying "regular medical supervision that would ensure the children's normal growth and development so essential to their future".[152] Secondly, by failing to ensure their right to adequate education", which undermines "their chances of actually rejoining society and carrying forward their life plans".[153]

The Court upheld this broad interpretation of a child's right to life in its 2011 Judgment of *Gelman* v. *Uruguay*. This case concerns the enforced disappearance of María Claudia García Iruretagoyena de Gelman in Buenos Aires, "during the advanced stages of her pregnancy", and posterior abduction to Uruguay, where her new-born daughter was given away to a Uruguayan family.[154] The enforced disappearance, abduction and alleged murder of María Claudia García and the abduction of her daughter, Maria Macarena Gelman, took place during the military dictatorship period in Argentina and Uruguay. These facts occurred in connection with "Operation Cóndor", described by the IACtHR as "the alliance of the security forces and intelligence services of the Southern Cone dictatorships in their repression of and fight against individuals designated "subversive elements".[155]

In its judgment, the Court affirmed that Uruguay had the obligation to ensure the survival and development of Maria Macarena Gelman, "particularly through the protection of the family and the non-interference of an unlawful or arbitrary nature in the family life of the children, given that family plays an essential role in their development".[156] In light of Article 19 of the ACHR and Article 6 of the CRC, the Court considered that Uruguay had placed Maria Macarena Gelman's survival and development at risk and hence affected her right to life, as enshrined in Article 4(1) of the American Convention, by separating her from her family. Furthermore, the Court considered that the referred situation had interfered with Maria Macarena Gelman's right to identity, which safeguards "the collection of attributes and

[151] Ibid, para.172.

[152] Ibid, para.173 and 176.

[153] Ibid, para.174 and 176.

[154] *Gelman* v. *Uruguay*, *supra* note 137, para.2.

[155] Ibid, para.44; cf. IACtHR, Judgment (Merits, Reparations and Costs), *Goiburú et al.* v. *Paraguay*, 22 September 2006, para.61(6).

[156] *Gelman* v. *Uruguay*, *supra* note 137, para.130.

characteristics that allow for the individualization of the person in a society".[157] In this respect, it recognized that such a right "is not expressly established in the [American] Convention". Nonetheless, on the basis of Article 8 of the CRC, the Court considered that it was possible to determine the content and scope of this right.[158]

4.3 Rights of LGTBI persons

In the 2012 case of *Attala Riffo and Daughters* v. *Chile*, the IACtHR analysed whether Chile had violated the ACHR "in the legal process that resulted in the loss of care and custody" of Ms. Atala's daughters due to her sexual orientation.[159] In its decision, the IACtHR considered that discrimination on the grounds of sexual orientation was prohibited under the Convention, in spite of the fact that the text of this instrument did not list "sexual orientation" as a prohibited ground for discrimination.[160] To reach this decision, the Court took into consideration the case law of the ECtHR, as well as the work of UN treaty bodies, including the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Rights of the Child, the Committee against Torture and the Committee on the Elimination of Discrimination against Women, which have classified sexual orientation as one of the forbidden categories of discrimination.[161] Furthermore, the Court referred to numerous other soft law instruments, namely: the Declaration on Human Rights, Sexual Orientation, and Gender Identity, adopted by the United Nations General Assembly; the 2011 "Joint statement on ending acts of violence and related human rights violations based on sexual orientation and gender identity", filed before the UN Human Rights Council; a resolution on human rights, sexual orientation and gender identity approved by the Council; and a series of reports presented by UN Special Rapporteurs.[162] In light of this development in international human rights law, and despite an alleged lack of consensus on the issue, the Court concluded that "sexual orientation and gender identity of persons is a category protected by the [American] Convention".[163]

More recently, in its 2017 Advisory Opinion on *Gender identity and equality and non-discrimination of same-sex couples*, the IACtHR read into the ACHR the right of individuals to

[157] Ibid, para.122.

[158] Ibid.

[159] *Atala Riffo and Daughters* v. *Chile*, *supra* note 9, para.3.

[160] Ibid para.83-93.

[161] Ibid, para.88-89.

[162] Ibid, para.90.

[163] Ibid, para.91; cf. ibid, para.92.

change name and rectify public record and identity documents in conformity with one's self-perceived gender identity.[164] According to the Court, this right can be derived from the ACHR "under the provisions that ensure the free development of the personality (Articles 7 and 11(2)), the right to privacy (Article 11(2)), the recognition of juridical personality (Article 3), and the right to a name (Article 18)".[165] Some of the external sources that have provided assistance to the IACtHR during the interpretation of these provisions were reports of the UN High Commissioner for Human Rights, documents from UN treaty bodies and UN Special Rapporteurs[166], rulings from domestic courts and domestic norms.[167]

4.4 Conclusion

When determining the responsibility of states parties to the ACHR for wrongful acts, both the Inter-American Commission and the Inter-American Court of Human Rights have resorted to sources adopted outside of the Inter-American System of Human Rights. These sources have ranged from other applicable rules to documents of soft law, from proper human rights instruments to instruments that concern human rights, but whose primary object is foreign to that field of law.

External sources have contributed to an expansion of the content and scope of the provisions of the American Convention. Yet, what is the limit for the use of these sources in light of the competence of the judicial and quasi-judicial human rights organs of the OAS? In 1999, in the *Tablada* case, the IACommHR argued that Article 29 of the ACHR would attract other relevant instruments of international law to its competence. On that same year, during the public hearings to the *Las Palmeras* case, the Commission upheld the understanding that itself and the Court would be competent to directly apply rules of IHL. The Court, however, did not agree with the Commission. Instead, it explicitly stated that its competence was limited by Article 62(3) of the ACHR, which conferred upon it the competence to interpret and apply the American Convention. The Court concluded that external sources could only be used as guidance for the interpretation of the provisions of the American Convention.

This understanding put forward by the Inter-American Court in the year 2000 has been upheld in posterior cases. External sources, including soft law instruments, have been often used by the Court in its decisions, but only for interpretative purposes, as shown in the three

[164] *Advisory Opinion on* Gender *identity and equality and non-discrimination of same-sex couples*, *supra* note 8.
[165] Ibid, para.115.
[166] Cf. ibid, para.113 and 129.
[167] Cf. ibid, para.139, 140, 142 and 156.

subsections above. In conclusion, external sources are used by the IACtHR during the interpretation of the ACHR to provide guidance in the delimitation of the content and scope of the obligations arising from the Convention. The Court does not consider itself competent to declare violations of said sources. Instead, it uses them as a tool for the evolutive interpretation of the American Convention.

5 THE EXTERNAL REFERENCING TECHNIQUE IN LIGHT OF THE VCLT/69

Section 3 showed that the evolutive interpretation of human rights treaties is a method justified in light of the distinctive object and purpose of human rights treaties, which finds its legal basis in Article 31(1) of the VCLT/69. Yet, is the technique of external referencing, as applied in the Inter-American System of Human Rights, similarly in consonance with the VCLT/69? Does this general rule of treaty interpretation offer sufficient grounds for a court to rely on a broad range of external sources, including soft law or treaties that were not ratified by the parties of the case? This will be tackled in the present section.

Section 5.1 will analyse the legal basis for reliance on other treaties, principles and customary norms applicable to the parties during the interpretation of the ACHR. Section 5.2 will engage in the same analysis, but with regards to reliance on soft law and non-applicable rules to the parties. Finally, Section 5.3 will put forward recommendations to the Court, reached in light of the analysis carried out throughout the thesis.

5.1 Reliance on external rules

The IACtHR has relied on customary international law and other treaties, applicable or not to the respondent state. Examples of this type of external sources have included: the ICCPR[168]; the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (CAT)[169]; the CRC[170]; AP II[171]; and customary rules of IHL[172].

The abovementioned 2004 case of "*Juvenile Re-education Institute"* v. *Paraguay* is one example of the use of other international treaties by the IACtHR in the process of interpretation of the ACHR. In its Judgment, the IACtHR observed that children "have the same rights as all

[168] Cf. IACtHR, Judgment (Merits, Reparations, and Costs), *Claude Reyes* v. *Chile*, 19 September 2006, para.76.

[169] Cf. IACtHR, Judgment (Merits, Reparations and Costs), *Maritza Urrutia* v. *Guatemala*, 27 November 2003, para.90-98; IACtHR, Judgment (Merits), *Cantoral-Benavides* v. *Peru*, 18 August 2000, paras.101.

[170] Cf. "*Juvenile Re-education Institute"* v. *Paraguay*, *supra* note 11, para.147; *Gelman* v. *Uruguay*, *supra* note 137, para.121;*"Street Children"* v. *Guatemala*, *supra* note 138, para.188, 192-196.

[171] *Santo Domingo Massacre* v. *Colombia*, *supra* note 10, para.270.

[172] Ibid.

human beings [...] and also special rights derived from their condition".[173] Such special rights are protected in Article 19 of the ACHR, according to which "[e]very minor child has the right to the *measures of protection required by his condition as a minor*".[174] However, the ACHR does not specify what constitutes "measures of protection required by his condition as a minor". The IACtHR thus referred to the CRC and the Protocol of San Salvador.[175]

In the words of the Court, "[t]hese instruments and the American Convention are part of a very comprehensive international *corpus juris* for the protection of children that the Court must honor".[176] Accordingly, the IACtHR took them into consideration when determining the content and scope of Article 19 of the ACHR. Yet, it first noted that Paraguay had ratified both the CRC and the Protocol of San Salvador.[177] It was only then that it took into consideration those two instruments when interpreting Article 19 of the ACHR. Among other conclusions, the Court affirmed that the ACHR "go well beyond the sphere of strictly civil and political rights", and that "[t]he measures that the State must undertake, particularly given the provisions of the Convention on the Rights of the Child, encompass economic, social and cultural aspects that pertain, first and foremost, to the children's right to life and right to humane treatment".[178]

The 2012 case of *Santo Domingo Massacre v. Colombia* is another good example for this section, because, on its Judgment, the IACtHR not only resorted to other international treaties, but also referred to customary rules of IHL. The case concerns a bombardment on the village of Santo Domingo, allegedly perpetrated by the Colombian Air Force during an armed conflict between the State of Colombia and the Colombia Revolutionary Armed Forces (FARC). The bombardment resulted in the death of 17 civilians, including children, 27 injured civilians, displacement of civilians and destruction of property.[179] When analysing whether Colombia had complied with Article 21 of the ACHR (the right to property), the IACtHR considered rules specific to the protection of civilian property during times of armed conflict. The Court found it "useful and appropriate to interpret the scope of Article 21 of the American Convention using other international treaties"[180], as well as customary international law. More

[173] Ibid, para.147.
[174] ACHR, *supra* note 1, Article 19. Italics added by the author.
[175] Ibid.
[176] Ibid.
[177] "*Juvenile Re-education Institute"* v. *Paraguay*, *supra* note 11, para.148.
[178] Ibid, para.149.
[179] *Santo Domingo Massacre* v. *Colombia*, *supra* note 10, para.3.
[180] Ibid, para.270.

specifically, it referred to AP II and Rule 7 of the Customary Rules of IHL, which prohibit attacks directed to civilian objects and looting.[181]

These are some illustrations of how the IACtHR uses other international treaties and customary rules of international law when interpreting the ACHR. Following, subsections 5.1.1 to 5.1.4 will analyse whether this use of external source is in consonance with the general rule of treaty interpretation embodied in Article 31 of the VCLT/69. Subsection 5.1.1 will discuss whether the use of these sources is grounded on Article 31(3)(c) of the VCLT/69, which refers to relevant rules of international law applicable in the relation between the parties. Subsection 5.1.2 will discuss whether reliance on other treaties applicable to the respondent state is not only possible, but rather necessary in light of the object and purpose of the ACHR. Next, subsection 5.1.3 will tackle the IACtHR's use of human rights treaties not ratified by the parties to a case as interpretative guidance and discusses whether this practice can be justified in light of a consolidated international consensus. Finally, subsection 5.1.4 will analyse whether international human rights law as a whole is within the context of the ACHR and thus relevant for treaty interpretation in light of Article 31(1) of the VCLT/69.

5.1.1 *External rules applicable to the parties and Article 31(3)(c) of the VCLT/69*

Under Article 31(3)(c) of the VCLT/69, "relevant rules of international law applicable in the relations between the parties" shall be taken into account in treaty interpretation, together with the context.[182] Hence, based on this Article, for a source to be used for interpretative purposes, it must be: (i) a rule of international law; (ii) relevant to the interpretation of the treaty in question; and (iii) applicable in the relations between the parties.

With regards to the first requirement, a rule of international law may take different forms. It may be established under an international treaty, it may form part of customary international law[183] or even be embodied in a general principle. It may also originate from other sources of international law, such as binding resolutions of international organizations. In all of these cases, the first requirement will be met.

Turning now to the second requirement, a rule will be "relevant" for the interpretation of the ACHR if is pertinent to the protection of the fundamental rights and freedoms of the human person. Human rights treaties clearly, but not exclusively, meet this requirement. As

[181] Ibid, para.270-272.

[182] Ibid, Art. 31 (3).

[183] Cf. *Herzog* v. *Brasil*, *supra* note 66, para.269.

explained the IACtHR in its Advisory Opinion on *The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law*, "a treaty can concern the protection of human rights, regardless of what the principal purpose of that treaty might be".[184] What is pertinent here is not that a given rule be centered around human rights, but rather that its content be relevant to the protection of human rights. Therefore, if a convention concerning corruption, the environment or even consular relations contains a provision on, or related to, the rights of the individual, that provision might constitute a rule relevant to the interpretation of the ACHR, under Article 31(3)(c) of the VCLT/69. For the same reasons, IHL qualifies as relevant to the interpretation of the ACHR. After all, while human rights law continues to be in force during situations of armed conflict, human rights provisions were adopted having in mind, essentially, peace times. IHL, for its turn, specifically regulates the situation of armed conflicts. In such context, many of the rules of IHL will clarify how certain rights, such as the right to life, the right to liberty and the right to property, are protected during armed conflicts. Hence, they are relevant to the interpretation of the American Convention.

The third and final requirement for the applicability of Article 31(3)(c) of the VCLT/69 is that the rule be "applicable in the relations between the parties".[185] A treaty only binds its states parties.[186] Therefore, a rule that originates from such an instrument is applicable to the states that are parties to the treaty in question. A customary rule of international law, for its turn, is binding upon all states, except: (i) if the state in question qualifies as a persistent objector; or (ii) if the custom is regional, and the state in question is not part of that region. If such exceptions do not arise, the custom qualifies as a rule of international law applicable in the relation between the parties, for the purposes of the VCLT/69.

A question that arises from the word "applicable" is whether Article 31(3)(c) refers to rules that were already in force at the time of the adoption of the treaty or to rules in force at the time of the interpretation. According to Mark Villinger, "[t]he applicable rules are those in force at the time of the interpretation of the treaty".[187] Villinger's understanding is based on the drafting history of the VCLT/69. He notes that the 1964 Draft Articles on the Law of Treaties

[184] *Advisory Opinion on the Right to Information on Consular Assistance*, *supra* note 6, para.76.

[185] Ibid. Italics added by the author.

[186] VCLT/69, *supra* note 90, Article 26.

[187] Villinger, Mark (2009) *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden/Boston: martinus Nijhoff Publishers, p.433; cf. Herdegen, Matthias (2013) "Interpretation in International Law". In: *Max Planck Encyclopedia of Public International Law*, Oxford University Press, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e723>.

makes express reference to "the general rules of international law *in force at the time of its conclusion*".[188] Yet, in 1966, the International Law Commission (ILC) decided to delete the words "in force at the time of its conclusion".[189] In Villinger's opinion, this indicates that such an understanding was dropped and, therefore, was not incorporated into Article 31(3)(c) of the Vienna Convention.

The same legal reasoning was applied by Judge Patrick Robinson, in the International Criminal Tribunal for the Former Yugoslavia (ICTY). In his declaration in the *Furundžija* case, Judge Robinson highlighted the significance of the 1966 modification in the text of the ILC's Draft Articles on the Law of Treaties.[190] Additionally, in light of the ILC's commentaries to the Draft Articles on the Law of Treaties, he asserted that the abovementioned modification in the text of the 1964 Draft was made "so as to take account of 'the effect of an evolution of the law on an interpretation of legal terms in a treaty".[191] The ICTY Judge thus concluded that "the relevant rule of international law need not have been in force at the time of the conclusion of the treaty being interpreted; it need only be in force at the time of the interpretation of the treaty".[192]

A different theory is put forward by Mustafa Kamil Yasseen. The author argues that, in the absence of express reference in Article 31(3)(c) of the VCLT/69 to the inter-temporal nature of the relevant rules of international law applicable in the relation between the parties, one should look for guidance in general public international law. In international law, the rules of *jus cogens* limit the freedom of states in treaty-making. In accordance with Article 64 of the VCLT/69, if such a rule emerges after the adoption of a given treaty, and the latter is contrary to the recently established peremptory rule of international law, this treaty will become void. This provides evidence that rules of *jus coges* must be taken into consideration during the process of interpretation of a treaty, even if they emerged after the entry into force of the treaty in question.[193]

With regards to other types of norms, such as customary rules of international law and conventional norms, Yasseen affirms that one should look at the treaty itself and the intention

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[188] ILC (1996) *Draft Articles on the Law of Treaties with commentaries*, Yearbook of the International Law Commission, 1966, vol. II, p.222, para.16. Italic added by the author.

[189] Ibid.

[190] Declaration of Judge Patrick Robinson, para.276. In: International Criminal Tribunal for the Former Yoguslavia, *Prosecutor* v. *Furundžija*, 21 July 2000.

[191] Ibid; cf. Draft Articles on the Law of Treaties with commentaries, *supra* note 188, p.222, para.16.

[192] Declaration of Judge Robinson, *supra* note 190, para.276.

[193] Yasseen, *supra* note 28, p.66.

of the parties. If the text of the treaty does not regulate this issue, its object and purpose might. In light of the object and purpose of certain treaties, it is reasonable to assume that the parties did not intend to object to the interpretation of the treaty in light of the rules in force at the time of the interpretation.[194] This thesis argues that this would be the case of human rights treaties. After all, in order for such a treaty to be effective in a changing world, its interpretation must take into account the evolution that has occurred in the rules of international law.[195]

Yasseen's legal reasoning seems to go in the same direction as the ILC's commentaries to the Draft Articles on the Law of Treaties. According to the ILC, "the relevance of rules of international law for the interpretation of treaties in any given case was dependent on the intentions of the parties", and the "correct application of the temporal element would normally be indicated by interpretation of the term in good faith".[196] Whether an interpretation is conducted in good faith must be assessed with consideration to the object and purpose of a

[194] Ibid, p.66.67. The complete text, in its original language, is: "Tout ici est affaire d'espèce, tout dépend de ce que le traité prévoit, de ce que les parties veulent. Certaines catégories de traités dont le but est d'établir une solution stable sont réfractaires à tout changement. Même si les parties à ces traités ne le disent pas expressément, il est raisonnable de présumer que leur intention est en harmonie avec le but qu'elles poursuivent et, par conséquent, inconciliable avec la remise en question d'un règlement qu'elles veulent définitif. Nous citerons l'exemple des traités établissant des frontières . Mais d'autres catégories peuvent de par leur nature se prêter à une interprétation évolutive, notamment les traités normatifs qui énoncent des règles de droit et surtout les traités de codification et de développement progressif de droit international. Même écrites, les règles de droit ne sont pas à l'abri de l'évolution subséquente de l'ordre juridique dont elles font partie. Il est donc aisé de présumer que les parties à ces traités ne s'opposent pas à ce que ces traités ou certaines de leurs dispositions soient interprétés à la lumière du droit international en vigueur à l'époque de cette interprétation."

[195] Cf. ICJ, Advisory Opinion, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, 21 July 1971, para.53: "Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the [League] Covenant - "the strenuous conditions of the modern world" and "the well-being and development" of the peoples concerned - were not static, but were by definition evolutionary, as also, therefore, was the concept of the "sacred trust". The parties to the Covenant must consequently be deemed to have accepted them as such. That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the frame- work of the entire legal system prevailing at the time of the interpretation." See also: Arbitration Institute of the Stockholm Chamber of Commerce, Award on Jurisdiction, *RosInvestCo UK Ltd.* v. *Russian Federation*, SCC Case No Arb V079/2005, October 2007, para.39-40: "human rights [treaties] (...) represent the very archetype of treaty instruments in which the Contracting Parties must have intended that the principles and concepts which they employed should be understood and applied in the light of developing social attitudes (…). The common thread among the multilateral examples just referred to is that their nature or circumstances provide evidence that the Parties themselves intended or understood that an evolutionary approach was appropriate to the interpretation and application of what they had agreed upon".

[196] Draft Articles on the Law of Treaties with commentaries, *supra* note 188, p.222, para.16.

treaty. As Villinger explains, the good faith requirement "prevents an excessively literal interpretation of a term" and "implies consideration of the object and purpose of a treaty".[197]

An interpretation in good faith and in light of the object and purpose of the ACHR indicates that its parties did not intend to create a stagnated instrument, whose interpretation remains indifferent to the evolution of international law. Quite on the contrary, they created a dynamic instrument, which aims to effectively protect the fundamental rights and freedoms of the human person, form 1969 onwards and even in light of changing living conditions. Hence, the fact that a rule emerged after 1969 should not be perceived as an obstacle for it to be used in the process of interpretation of the ACHR, in accordance with Article 31(3)(c) of the VCLT/69.

A final question with regards to the "applicable" requirement is whether the words "*applicable between the parties*" refer to the party to a contentious case or to all of the states parties to the treaty that is the object of interpretation. In other words, if an external treaty is ratified by the state party to a case before the IACtHR, but not by all states parties to the ACHR, can it be used in the process of interpretation of the American Convention?

Yasseen understands that only rules that are common to (all) the parties of the treaty can have a "direct juridical effect upon said treaty".[198] The same understanding was upheld by the WTO Panel Report to the dispute *Measures Affecting the Approval and Marketing of Biotech Products*.[199] In this dispute, the WTO noted that "Article 31(3)(c) does not refer to 'one or more parties' (…) [, n]or does it refer to 'the parties to a dispute".[200] Hence, the Panel adopted a restrictive understanding of the meaning of the terms "applicable in the relations between the parties", as referring to all the states parties to the organization.

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[197] Villinger, *supra* note 187, p.426.

[198] Yasseen, *supra* note 28, p.63.

[199] World Trade Organization (WTO) Panel Report, *European Communities - Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R; WT/DS292/R; WT/DS293/R (n. 2), 29 November 2006.

[200] Ibid, para.7.68. The complete text is: "Furthermore, and importantly, Article31(3)(c) indicates that it is only those rules of international law which are "applicable in the relations between the parties" that are to be taken into account in interpreting a treaty. This limitation gives rise to the question of what is meant by the term "the parties". In considering this issue, we note that Article 31(3)(c) does not refer to "one or more parties". Nor does it refer to "the parties to a dispute". We further note that Article 2.1(g) of the *Vienna Convention* defines the meaning of the term "party" for the purposes of the *Vienna Convention*. Thus, "party" means "a State which has consented to be bound by the treaty and for which the treaty is in force". It may be inferred from these elements that the rules of international law applicable in the relations between "the parties" are the rules of international law applicable in the relations between the States which have consented to be bound by the treaty which is being interpreted, and for which that treaty is in force. This understanding of the term "the parties" leads logically to the view that the rules of international law to be taken into account in interpreting the WTO agreements at issue in this dispute are those which are applicable in the relations between the WTO Members."

However, in the 2006 Report of the ILC Study Group finalized by Martti Koskenniemi, the WTO Panel Report was (rightly) criticized by the ILC itself.[201] In the words of the ILC Study Group, "[b]earing in mind the unlikeliness of a precise congruence in the membership of most important multilateral conventions, it would become unlikely that *any* use of conventional international law could be made in the interpretation of such conventions".[202] Upholding such a restrictive view would have "the ironic effect that the more the membership of a multilateral treaty such as the WTO covered agreements expanded, the more those treaties would be cut off from the rest of international law".[203] The practical result would thus be "the isolation of multilateral agreements as 'islands' permitting no references *inter se* in their application", in a manner that seems "contrary to the legislative ethos behind most of multilateral treaty-making and, presumably, with the intent of most treaty-makers".[204] Additionally, reference to important treaties, "which represent the most important elaboration of the content of international law on a specialist subject matter" and which enjoy an almost universal acceptance, would be precluded.[205] Transposing this scenario to the context of the Inter-American System of Human Rights, upholding the restrictive understanding of Article 31(3)(c) of the VCLT/69 put forward by the WTO would mean, for example, that the IACtHR would be prevented from relying on the CAT, because Suriname, a state party to the ACHR which has accepted the jurisdiction of the Court[206], is not a party to this UN Convention.[207]

In the opinion of the ILC Study Group, "[a] better solution is to permit reference to another treaty *provided* that the parties *in dispute* are also parties to that other treaty".[208] However, the ILC Study Group calls for caution to be paid on the use of external sources not ratified by all parties to a treaty if said treaty establishes obligations *erga omnes partes*, that is, if it protects collective interests instead of being limited to promoting individual and reciprocal interests. In the case of treaties concluded *erga omnes partes*, the ILC Study Group affirms that it might be useful to "take into account the extent to which that other treaty relied upon can be

[201] ILC, *Report of the ILC Study Group finalized by Martti Koskenniemi*, "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", A/CN.4/L.682, 13 April 2006.

[202] Ibid, para.471.

[203] Ibid.

[204] Ibid.

[205] Ibid.

[206] Signatario y ratificaciones - Convención Americana sobre Derechos Humanos, *supra* note 27.

[207] UN Interactive Dashboard, *supra* note 27.

[208] *Report of the ILC Study Group finalized by Martti Koskenniemi*, *supra* note 202, para.472. Italics added by the author.

said to have been 'implicitly' accepted or at least tolerated by the other parties, 'in the sense that it can reasonably be considered to express the common intentions or understanding of all members as to the meaning of the (…) term".[209] It would be upon the interpreter to ascertain whether these common intentions or understanding of all the parties are met.

Margareth Young understands that such an implicit acceptance would take place, for example, when states have signed, but not ratified, a given treaty.[210] In order to illustrate this theory, let us apply it to a hypothetical case concerning the Inter-American System of Human Rights. Today, all states parties to the ACHR have ratified the CRC. Yet, what would happen if the United States of America (USA), which did not ratify the CRC, decided to become a party to the American Convention? Would the Court be prevented from relying on the CRC when interpreting the ACHR, despite the fact that it has done so previously, prior to this hypothetical ratification of the American Convention by the USA? If yes, this would mean that the expansion of ratifications of the ACHR and a larger consent to the jurisdiction of the Court could imply, in practice, a reduced protection of human rights in the American continent. Such a result clearly undermines the effectiveness of the American Convention. Yet, a different outcome emerges if an implicit acceptance of the CRC by all states parties to the American Convention suffices for its use as interpretative guidance. The United States has signed the CRC, an act which can be considered, in the understanding of Young, as tolerating or implicitly accepting this instrument. The requirement of "relative consensus" endorsed by the ILC Study Group would thus be met, and the IACtHR would still be able to apply the CRC when interpreting the ACHR, despite the USA's lack of ratification of the Convention on the Rights of the Child.

Still, what would happen if, a year from now, Brazil, a party to the ACHR who consented to the jurisdiction of the IACtHR, decided to denounce the ICCPR? Would the Court be prevented from relying on this instrument during the process of interpretation of the ACHR, even in cases that does not have Brazil as a party and despite the fact that all the remaining state parties to the ACHR have at least signed the Covenant? Some theories have emerged tackling this legal problem.[211] While recognizing the relevance of this topic and the undeniably

[209] Ibid, para.472; cf. Pauwelyn, *supra* note 30, p.263; cf. Young, Margaret A. (2007) "The WTO's Use of Relevant Rules of International Law: An Analysis of the Biotech Case", The International and Comparative Law Quarterly, Vol. 56, no. 4, p.915.

[210] Young, ibid, p.917; cf. Dissenting Opinion of Gavan Griffith QC. In: Permanent Court of Arbitration, Decision, *Dispute concerning access to information under Article 9 of the Ospar Convention (Ireland Versus United Kingdom of Great Britain and Northern Ireland)*, 2 July 2003, p.69, para.9-19.

[211] Pauwelyn, *supra* note 30, p.463-463: "One other distinction must be made, namely between applying non-WTO rules as legal norms that may decide a dispute and relying on non-WTO rules as facts or evidence in support

intriguing quality of the theories that have been developed on it, entering in more depth on them goes beyond the object of the present research. After all, other legal basis can be provided to the use of rules of international law which are applicable to some, but not all, of the states parties to the ACHR, as will be explained on the next subsections.

5.1.2 *A necessary technique in light of the pro homine principle*

Today, there is a myriad of human rights treaties in force. While they all share the same source of inspiration - that is, the UDHR -, the wording of each instrument varies in relation to the others. Some treaties detail certain rights in more depth, while others are more generalist. Some have more restrictive provisions, and others have norms that are more beneficial to the alleged victims. Notwithstanding those differences, human rights treaties do not conflict with each other, but rather co-exist and interact with one another. One form of interaction is through the prevalence of the most favourable norm to the alleged victim. In practical terms, this means that, when a state ratifies a new human rights treaty, it incurs in obligations that add to the ones already acquired by force of previous treaties. In other words, when a state ratifies a new human rights treaty, it maintains the human rights obligations it acquired under previous treaties, and expands them to cover new obligations, established under the most recently ratified treaty.

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of, or against, a claim of violation of WTO law. In establishing the relevant facts of a dispute and applying WTO rules to these facts, non-WTO rules may, indeed, constitute proof of certain factual circumstances that must be present, for example, if WTO rules are not to be violated. The standard example is a multilateral environmental convention that calls for the imposition of certain trade restrictions to protect the environment from product X which is considered harmful to human health under the convention. Even if this convention is not binding on all WTO members, or on the disputing parties in the particular case (in particular, the complainant), the fact that, say, ninety countries including half of the WTO membership have ratified the convention may constitute significant factual evidence under GATT Art. XX(b) that the defendant's measure is, indeed, 'necessary for the protection of human health'. The role that non-WTO rules may play as 'facts' can be especially important in defending trade restrictions prescribed in an environmental convention against non-parties. Even if those non-parties (members of the WTO) are not legally bound by the convention and a WTO panel could therefore not apply this non-WTO rule (with a view to its prevailing over the relevant WTO rule, depending on the conflict rule to be applied), the convention could nonetheless constitute strong support for the defendant's contention that the trade restriction is 'necessary' pursuant to GATT Art. XX(b). Nonetheless, in these circumstances, the non-WTO rule then exerts influence not as a legal right or obligation, but as evidence of an alleged fact ('necessary to protect health'), meaning that it may not be conclusive. The complainant may be able to disprove the veracity of, or rebut the factual evidence reflected in, the non-WTO rule. Without such an option, a group of WTO members might conclude a convention stating, for example, that hormone-treated beef is dangerous. In doing so, they might hope to bind non-signatories which could challenge their ban on hormone- treated beef in the WTO. In these circumstances, a WTO panel would not be compelled to accept the premise sthat hormones are dangerous as an established fact. It would need to weigh that premise in the convention against other evidence on the record and might conclude, as it did in EC -- Hormones, that science does not support a ban on hormone-treated beef."

This co-existence and reinforcement of human rights treaties is nothing more than logical. After all, all human rights treaties share the purpose of protecting the fundamental rights and freedoms of the human person. Were the act of ratification of a new human rights treaty to equate with reducing the rights and guarantees of individuals, the object and purpose of the treaty in question would be undermined.

On the case "*Mapiripán Massacre*" *v. Colombia*, the IACtHR recalled that human rights treaties are live instruments, "whose interpretation must go hand in hand with evolving times and current living conditions".[212] In this regard, it explained that, "when interpreting the Convention[,] it is always necessary to choose the alternative that is most favorable to protection of the rights enshrined in said treaty, based on the principle of the rule most favorable to the human being".[213] Hence, the different human rights obligations assumed by a state compose a unified system, in which the rule that is more favourable to the alleged victim must prevail.[214]

The prevalence of the most favourable rule is dictated by the *pro homine* or *pro persona* principle and is an outcome of the distinctive object and purpose of human rights treaties. This principle is expressly safeguarded in many human rights treaties. In the ACHR, it is codified in Article 29 (b) of the ACHR.[215] In light of this provision, if a convention other than the ACHR details a given right and provides a more beneficial treatment to the individual, and that convention has been ratified by a party to a case before the Court, said rule must be taken into consideration during the interpretation of the American Convention. For example, since the CRC contains detailed provisions on the rights of the child, this Convention must be taken into consideration during the interpretation of Article 19 of the ACHR (rights of the child). Not taking it into consideration would be to the detriment of the alleged minor victims and not in consonance with the *pro homine* principle.

This legal justification for the use of other relevant rules should be distinguished from the one presented in the subsection above, that is, Article 31(3)(c) of the VCLT/69. Article 29(b) of the American Convention does not require that the external rule to be used during the interpretation of the American Convention be binding upon all of the states parties, nor does the *pro homine* principle require so. What is relevant for the use of other treaties in light of the

[212] *"Mapiripán Massacre"* v. *Colombia*, *supra* note 42, para.106.

[213] Ibid.

[214] Cf. IACtHR, Advisory Opinion, *Juridical Condition and Human Rights of the Child*, OC-17/02, 28 August 2002, para.21.

[215] Cf. Article 53 of the ECHR and Article 5(2) of the ICCPR.

pro homine principle and Article 29(b) of the ACHR is the binding nature of the norm before the respondent state. This understanding was also upheld by one of the interviewed experts (Expert B), according to whom it would be legitimate to consider that, when a state ratifies a more beneficial treaty or even adopts a domestic law that protects to a larger extent a given right, the obligations derived from the ACHR to said state on the topic in questin would expand, in light of Article 29 of the ACHR.[216] Here, the evolution of the ACHR would not bind all of the states parties to the American Convention, but only the state that bound itself to external sources that guarantee a higher threshold of protection.[217] To illustrate this understanding, Expert B referred to the 2016 Judgment on the case *Trabalhadores da Fazenda Brasil Verde* v. *Brazil*. This case concerns forced labour and servitude for debts in *Fazenda Brasil Verde*, located in Pará, Brazil.[218] Brazil had argued before the IACtHR that its domestic legislation set a higher standard of protection than the ACHR and, accordingly, the acts committed in Pará could amount to forced labour under Brazilian law, but not under international law.[219] The Court rejected such claim by noting, first, that the prohibition against forced labour established under Brazilian domestic law should not be characterized as "too wide" or distinct from the one present at the ACHR.[220] Secondly, the Court tackled the situation in which a given state adopts a norm that sets a higher standard of protection to the human person than that initially set out in the American Convention, as could arguably be the case of the prohibition against slavery established since 2003 under the domestic legal framework of Brazil. In such a scenario, the Inter-American Court upheld that it could not restrict its analysis of the specific situation based on a less favourable norm to the alleged victim.[221] The Court also noted that this conclusion is in consonance with Article 29 of the American Convention.[222]

The prevalence of the most favourable interpretation is necessary for the effectiveness of human rights treaties and for the full realization of their object and purpose.[223] After all, it is clear that the prevalence of a rule less protective to the individual would contradict the purpose of these instruments. The interaction of human rights treaties ratified by the respondent state

[216] Interview 2, 38min-44min.

[217] Ibid. To illustrate this understanding.

[218] IACtHR, Judgment (Preliminary objections, merits, reparations and costs), *Trabalhadores da Fazenda Brasil Verde* v. *Brasil*, 20 Octobre 2016, para.1.

[219] Ibid, para.307.

[220]Ibid, para.309.

[221] Ibid, para.311.

[222] Ibid, para.311-312.

[223] Cf. Steiner and Uribe, *supra* note 41, p.711; cf. Cançado Trindade (2006), *supra* note 4, p.61.

supports the effective application of human rights treaties and strengthens the realization of their distinctive object and purpose.[224] Hence, the use of other treaties applicable to the party to a case before the IACtHR for the purposes of interpretative guidance is in accordance with Article 31(1) of the VCLT/69.

It is relevant to stress that the *pro homine* principle does not imply expanding the competence of the IACtHR or the IACommHR to cover other treaties than the American Convention. Rather, it is to be applied during the interpretation of the ACHR itself. In light of this principle, the IACtHR must take into consideration relevant rules applicable to the respondent state in the process of interpretation of the ACHR, so that the most favorable interpretation of the American Convention will be adopted.

5.1.3 *Interactive interpretation in light of an international consensus*

The terms present in a human rights treaty have an objective nature, that is, they have an autonomous meaning that will not necessarily coincide with their definition under the domestic law of states.[225] This autonomous meaning is one proper to international human rights law, which must be assessed in accordance with the general rule of treaty interpretation set out in Article 31 of the VCLT/69.

The objective nature of human rights treaties was recognized by the IACtHR, in the *Mapiripán Massacre* case. In this case, the Court affirmed that human rights treaties are "inspired by higher shared values (focusing on protection of the human being), (…) they are applied according to the concept of collective guarantees [and] they embody obligations that are essentially objective".[226] The Court concluded that "[t]his special nature of said treaties and their collective implementation mechanism entail the need to apply and interpret their provisions in accordance with their object and purpose, so as to ensure that the States Party guarantee compliance with them and their *effet utile* in their respective domestic legal systems".[227]

According to Article 31(1) of the VCLT/69, the wording of a treaty must be interpreted in light of its object and purpose. While the wording of every human rights treaty is not identical to each other, most rights are covered by more than one treaty. In light of this dialogue between

[224] Cançado Trindade, Antônio Augusto (1999) *Tratados de Direito Internacional dos Direitos* Humanos, 2nd volume, first edition Porto Alegre: Sergio Antonio Fabris Editor, p.35 and 43.
[225] Cf. Cançado Trindade 1987, *supra* note 22, p.93.
[226] "*Mapiripán Massacre*" v. Colombia, *supra* note 42, para.104.
[227] Ibid, para.105.

different human rights treaties, as well as their objective nature and shared purpose, it does not come as a surprise that these conventions interact with each other during the process of interpretation. Such interaction can take place when a given treaty details the content of a right that is also safeguarded under another human rights treaty. To illustrate this issue, let us look once more at the convergence between Article 19 of the ACHR (rights of the child) and the CRC. Both the ACHR and the CRC establish the obligation for states to adopt special measures of protection for the child. However, only the CRC details which measures of protection would those be. Interpreting the words "measures of protection" in the ACHR is a restrictive manner, while interpreting these measures more broadly in the CRC, would be utterly illogical. Furthermore, if the IACtHR were to ignore the provisions of the CRC when interpreting Article 19 of the ACHR, despite the fact that the CRC develops in more detail what type of special measures states must adopt, this interpretative choice would significantly undermine the purpose of the ACHR of providing an effective protection of human rights.

The common object and purpose of human rights treaties leads the interpreter to consider the formulation of different conventions that safeguard the same or similar rights. As shown above, the search for a certain unity in interpretation of the same terms and topics covered in more than one human rights treaty makes it possible for the IACtHR to adopt an interpretation that protects the individual to a larger extent and thus strengthens the realization of the purpose of the ACHR.

Yet, consider a hypothetical situation in which Brazil, a party to the ACHR who has consented to the jurisdiction of the IACtHR, denounces the CRC. If Brazil is no longer bound by this convention, could the IACtHR nonetheless rely on this treaty when interpreting the ACHR in a case against Brazil? The CRC is widely accepted internationally. Even if Brazil or another OAS member state decided to denounce it, the Convention would likely continue to have a very high rate of ratifications and set almost universal rules to the international community. Accordingly, the IACtHR could perceive that there is an international consensus towards the norms that are set out in the CRC.

If the international community or, at a minimum, the great majority of states parties to the ACHR has agreed that the standard of protection of a given human right has been raised, it is only logical to take such common understanding into consideration when interpreting the provision that safeguards said right in the ACHR. An interpretation that takes into consideration consensus based on international treaties contributes to the effectiveness of the American Convention and is in accordance with the object and purpose of the Convention.

A certain degree of consent in the international community or, at a minimum, among the states parties to the ACHR, should be perceived by the Court for it to rely on a treaty not ratified by the party to a case. After all, were the ACHR to be expanded based on the existence of any human rights treaty whatsoever, the states parties to the ACHR would be subject to a great juridical insecurity. This situation could undermine the legitimacy of the Court, potently reduce state consent to its jurisdiction and hence weaken the object and purpose of the American Convention. For illustrative purposes, let us consider a hypothetical treaty, established a year ago and which has merely 20 states parties, not including, among those, the majority of Latin American states. Said treaty cannot evidence, by itself, a regional or international consensus and should accordingly not be used by the IACtHR, in isolation, during the process of interpretation of the ACHR. On the other hand, a series of instruments that indicate the same consistent evolution in human rights law and that, together, gather a significant number of ratifications could indicate an international consensus and thus be used as interpretative guidance. Quoting Aalt Willem Heringa, "it is advisable to use other international standards as a framework for interpretation in those cases in which they can serve to establish a common ground, including cases in which a respondent State has not ratified that convention or treaty".[228]

5.1.4 *International human rights law within the context of the ACHR*

In 2012, the IACtHR delivered its judgment on the case *"In Vitro Fertilization" v. Costa Rica*.[229] This case concerns "the presumed general prohibition of the practice of *in vitro* fertilization (hereinafter, 'IVF'), which had been in effect in Costa Rica since 2000, following a ruling of the Constitutional Chamber of the Costa Rican Supreme Court of Justice".[230] The referred ruling determined that the practice of *in vitro* fertilization could take place in Costa Rica under the condition that there was "no embryonic loss whatsoever".[231] The IACtHR considered that such a decision constituted, in practice, "a prohibition of IVF, because (...) to date, there is no option for practicing IVF without some possibility of embryonic loss".[232] In this context, the Court analysed whether Costa Rica had violated the ACHR by instituting this

[228] Heringa, *supra* note 53, p.122.

[229] *In Vitro Fertilization"* v. Costa Rica, *supra* note 49.

[230] Ibid, para.2.

[231] Ibid, para.159.

[232] Ibid.

general prohibition on IVF. In order to engage in this analysis, the IACtHR considered relevant to investigate the content and scope of Article 4 of the American Convention, under which the state has the obligation to respect and protect the right to life, "in general, from the moment of conception".[233] It is precisely this section of the decision that is relevant for the present thesis, for there the Court engaged in a throughout discussion of hermeneutics.

According to the Court, it is appropriate to interpret Article 4 of the ACHR using two methods of interpretation, namely: (i) the evolutionary and teleological interpretation; and (ii) the systematic and historical interpretation.[234] The evolutionary and teleological interpretation was considered "particularly relevant" for the case under analysis, because "IVF is a procedure that did not exist when the authors of the Convention adopted the content of Article 4(1) of the Convention".[235] For this reason, the IACtHR recalled the consistence of the evolutive interpretation of the ACHR "with the general rules of interpretation established in Article 29 of the American Convention, as well as in the Vienna Convention on the Law of Treaties".[236] Additionally, it explained that it has granted special relevance to international and comparative law when making an evolutive interpretation of the ACHR.[237]

One example of an international norm the Court used to analyse the protection granted to the embryo was the Oviedo Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine.[238] The Oviedo Convention was adopted within the framework of the European Union. Hence, it is clearly not applicable to Costa Rica. Nonetheless, it was one of the sources used by the Court in analysing the content and scope of Article 4 of the ACHR.

The Court also noted that, under the systematic and historical method of interpretation, "norms should be interpreted as part of a whole, the meaning and scope of which must be defined based on the legal system to which they belong".[239] More specifically, the Court

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[233] ACHR, *supra* note 1, Article 4.

[234] *"In Vitro Fertilization"* v. Costa Rica, *supra* note 49, para.190.

[235] Ibid, para.246.

[236] Ibid, para.245.

[237] Ibid, para.245 and 246.

[238] Ibid, para.248.

[239] Ibid, para.191; cf. IACtHR, Judgment (Preliminary Objection, Merits, Reparations, and Costs), *Case of González et al. ("Cotton Field")* v. *Mexico*, 16 November 2009, para.43. In its Advisory Opinion on *Gender identity and equality and non-discrimination of same-sex couples*, the Court repeated this *dictum*, but specified that it was referring to the Inter-American System of Human Rights as the system to which the ACHR belongs. See *Advisory Opinion on* Gender *identity and equality and non-discrimination of same-sex couples*, *supra* note 8, para.183.

affirmed that "the interpretation of a treaty should take into account not only the agreements and instruments formally related to it (Article 31(2) of the Vienna Convention), but also its context (Article 31(3))'; in other words, international human rights law".[240] Hence, the Court considered international human rights law, as a whole, to be within the context of the ACHR. Based on this understanding, it analysed the current state of the Inter-American, the European, the African and the universal systems of human rights.[241] This comparative analysis was conducted in order to assess Costa Rica's argument that there is an absolute protection of prenatal life in treaties other than the ACHR.

Before addressing whether international human rights law as whole should be considered within the context of the ACHR, it should first be noted that the Court was incorrect in identifying Article 31(3) of the VCLT/69 as setting the elements of context for the purposes of treaty interpretation. As explains the ILC, Article 31(3) refers to elements[242] that are extrinsic to the context[243], which is rather defined by Article 31(2) of the same instrument.[244] Similarly, on the dispute on *Measures Affecting Imports of Automobile Parts*, the Appellate Body of the WTO upheld that, "for a particular provision, agreement or instrument to serve as *relevant* context in any given situation", it must, simultaneously: (i) "fall within the scope of the formal boundaries identified in Article 31(2)"; and (ii) "have some pertinence to the language being interpreted that renders it capable of helping the interpreter to determine the meaning of such language".[245]

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[240] *"In Vitro Fertilization"* v. *Costa Rica*, *supra* note 49, para.191.

[241] Ibid, para.192-244.

[242] Subsequent practice, subsequent agreement and other rules of international law.

[243] Draft Articles on the Law of Treaties with commentaries, *supra* note 188, p.222, para.16. Additionally, as carefully explained in sub-section 4.1.1, Article 31(3)(c), which refers to relevant and applicable rules of international law, not only do not form part of the context of the treaty, but also do not encompass international human rights law as a whole. Neither does Article 31(3)(a) and (b), that is, subsequent practice and agreement, as will be explained in sub-section 4.2.3; Cf. Interview 1. Expert A criticized the qualification of Article 31(3) as an element of the context of a treaty.

[244] Draft Articles on the Law of Treaties with commentaries, ibid, p.221, para.13. The ILC explain that it is paragraph 2 of Article 31 of the Vienna Convention that "seeks to define what is comprised in the 'context' for the purposes of the interpretation of the treaty".

[245] WTO, Report of the Appellate Body, *China - Measures Affecting Imports of Automobile Parts*, AB-2008-10, 15 December 2008, para.151. The complete text is: "Yet context is relevant for a treaty interpreter to the extent that it may shed light on the interpretative issue to be resolved, such as the meaning of the term or phrase at issue. Thus, for a particular provision, agreement or instrument to serve as relevant context in any given situation, it must not only fall within the scope of the formal boundaries identified in Article 31(2), it must also have some pertinence to the language being interpreted that renders it capable of helping the interpreter to determine the meaning of such language."

International human rights law is certainly "capable of helping the interpreter to determine the meaning"[246] of the provisions of the ACHR. Yet, can it be classified as within the context of the ACHR, according to Article 31(2) of the VCLT/69? Under this provision, the context of a treaty comprises: (i) its text, preamble and annexes; and (ii) agreements or instruments made in connection to the conclusion of the treaty and related to it, or, in simple terms, unilateral documents that hold a connection to the treaty that is being interpreted.

As explained the ILC in its commentaries to the VCLT/69, a unilateral document will only be regarded as forming part of the context of a treaty for the purposes of interpretation if two criteria are met, namely: (i) the unilateral document must have been made "in connexion with the conclusion of the treaty"; and (ii) "its relation to the treaty [must have been] accepted in the same manner by the other parties".[247] Human rights treaties and customary international law cannot be classified as "unilateral documents", and they have not been made "in connection with the conclusion"[248] of the ACHR, nor do not directly relate to the American Convention. Therefore, they do not fit in Article 31(2)(a) and (b) of the VCLT/69. Could they then fit in the elements of context specified in Article 31(2) *caput*, that is, the text of the treaty, its preamble and annexes?

A brief reference to external sources of international human rights law is included in the Preamble of the ACHR. In its third paragraph, the Preamble notices that the principles that are safeguarded therein have likewise been set forth in the UDHR and "have been reaffirmed and refined in other international instruments, worldwide as well as regional in scope".[249]

A more comprehensive reference to external sources can be found in the text of the American Convention, more specifically, in Article 29(b) and (c). These two provisions

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[246] Ibid.

[247] Draft Articles on the Law of Treaties with commentaries, *supra* note 188, p.221, para.13. According to Richard Gardner, an example of an agreement that would qualify as within the context of a treaty, in light of Article 31(2) of the VCLT/69, would be "a diplomatic conference's 'Final Act', which typically provides a brief account of the proceedings leading up to the treaty's adoption and may include interpretative indications agreed by the negotiators". Gardner's example of an instrument concluded in connection to the treaty and accepted by the parties as related to it, as required by Article 31(2) (b) of the VCLT/69, would be an interpretative declaration attached by a state party when ratifying a given treaty. See Gardiner, Richard (2012) "The Vienna Convention Rules on Treaty Interpretation", *in* Hollis, Duncan B. (ed.), *The Oxford Guide to Treaties*, Oxford University Press, Section II.2.

[248] VCLT/69, *supra* note 90, Article 31(2).

[249] ACHR, *supra* note 1, Preamble. The complete text reads: "Considering that these principles have been set forth in the Charter of the Organization of American States, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights, and that they have been reaffirmed and refined in other international instruments, worldwide as well as regional in scope".

integrate the text of the ACHR, which comprises: (i) the text the specific article that is being interpreted; and (ii) other articles, sections or chapters of the treaty in question. The WTO has called the former "immediate context", and the latter "broader context".[250] In order to illustrate these concepts, let us look at Article 12(3) of the ACHR, which addresses limitations to the freedom to manifest religion or belief. The immediate context of Article 12(3) are all the terms of the sentence and the paragraph under analysis, as well as the other paragraphs that integrate this Article. For its turn, the broader context of Article 12(3) is the text of the ACHR as whole. Taking the broader context of a provision into consideration is only logical, because, as explained Mark Villiger, "[t]reaty terms are not drafted in isolation, and their meaning can only be determined by considering the entire treaty text".[251] Therefore, when interpreting Article 12(3) of the ACHR or any given provision of the Convention, the IACtHR must always consider the broader context of the provision, that is, the American Convention as a whole. Accordingly, the interpretation of any article of the Convention must take into consideration the other articles that integrate it, one of which is Article 29, which sets guidelines for the interpretation of the Convention and which makes express reference to external sources.

Article 29(b) of the ACHR establishes that the Convention shall not be interpreted as "restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party".[252] In other words, the proper interpretation of the ACHR shall take into consideration the laws of a given state and other conventions concerning human rights to which the state in question is a party. Note that Article 29(b) does not refer to treaties to which all of the states parties to the ACHR are also a party, but rather to treaties to which "one of the said states is a party".[253] It is therefore not necessary for a treaty to be ratified by all of the states parties to the ACHR in order for it to be considered during the process of interpretation of the Convention in accordance to Article 29(b).

In addition, this provision does not make any reference to the principal purpose of the referred external sources. For a rule to be considered during the interpretation of the ACHR based on this Article, it must concern human rights, even if its primary object is not human

[250] WTO, Report of the Appellate Body, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, 12 September 2005, para.193; cf. Lo, Chang-fa (2017) *Treaty Interpretation Under the Vienna Convention on the Law of Treaties. A New Round of Codification*, Taipei: Springer, p.199-200.

[251] Villinger, *supra* note 187, p.427.

[252] ACHR, *supra* note 1, Article 29(b).

[253] Ibid.

rights law. This would be the case, for example, of anti-corruption conventions that contain clauses on the right to access state-held information, IHL conventions, among others. After all, as the IACtHR explained, "a treaty can concern the protection of human rights, regardless of what the principal purpose of that treaty might be".[254] In this sense, Hennebel notes that the IACtHR perceives that "it is not only the different human rights protection mechanisms (regional and universal) which form a whole, but also the different branches of law which artificially distinguish between international humanitarian law, international criminal law, and international human rights law".[255]

Article 29(c) of the ACHR, for its turn, establishes that other rights and guarantees that are inherent to the human person or derived from representative democracy must also be taken into consideration when interpreting the content and scope of the rights of the ACHR. One should note that such inherent rights and guarantees could be safeguarded under treaties to which the respondent is not a party.[256] They can also be safeguarded in rules of customary international law or even in rules of *jus cogens*.

By adding in the Preamble and, notably, in Article 29 of the ACHR explicit reference to fundamental rights and guarantees found in other instruments, the drafters of the American Convention revealed an intent that these external sources be applied in the context of the Convention.[257] In other words, the technique of cross-referencing present in the Preamble of the ACHR and particularly in Article 29 suggests that the drafters intended to include these external references in the broader context of the ACHR. On this topic, one should note the IACtHR's Advisory Opinion on *"Other Treaties" Subject to the Consultative Jurisdiction of the Court*. According to the Court, "[a] certain tendency to integrate the regional and universal systems for the protection of human rights can be perceived in the Convention".[258] The Court perceived this tendency both in the Preamble of the ACHR and in several of its provisions, including Articles 22, 26, 27 and 29. Additionally, it considered that a "[s]pecial mention should be made in this connection of Article 29, which contains rules governing the interpretation of

[254] Cf. *Advisory Opinion on the Right to Information on Consular Assistance*, supra note 71, para.76.

[255] Hennebel, *supra* note 80, p.90.

[256] Cf. Steiner and Uribe, *supra* note 41, p.714.

[257] Chang-fa Lo discusses the relevance of cross-referencing in treaty interpretation, but with regards to provisions of a given instrument that make cross-referencing to other provisions of the same instrument. See: Lo, *supra* note 251, p.200.

[258] *Advisory Opinion on "Other treaties" subject to the advisory jurisdiction of the Court*, *supra* note 80, para.41.

the Convention, and which clearly indicates an intention not to restrict the protection of human rights to determinations that depend on the source of the obligations".[259]

In conclusion, the text and the Preamble of the ACHR do not attract international human rights law *as a whole* to the broader context of the American Convention. They rather attract *certain* external rules that concern the protection of human rights to the broader context of the Convention. These are: treaties ratified by a state party to a case before the IACtHR; and rules (be they conventional or not) that safeguard rights and guarantees that are inherent to the human person or derived from representative democracy. It is not necessary that such rules are human rights rules by excellency. Rather, when determining if a given external rule is attracted to the broader context of the ACHR, what is relevant is whether: (i) the rule in question concerns the protection of human rights; (ii) is capable of assisting the interpreter of the American Convention; (iii) is enshrined in a treaty ratified by the respondent state or, alternatively, constitutes rights and guarantees that are inherent to the human person or derived from representative democracy. If such conditions are met, the use of these rules during the interpretation of the ACHR is in consonance with Article 31(1) of the VCLT/69.

5.2 Reliance on soft law instruments

In order to assess the evolution of the provisions of the ACHR, the IACtHR has not only relied on other rules, but also on non-binding instruments. Examples of these instruments have included: Europeans directives and recommendations[260]; UN declarations and principles[261];

[259] Ibid.

[260] *Claude Reyes* v. *Chile*, *supra* note 168, para.81.

[261] Cf. Ibid; *Serrano-Cruz Sisters* v. *El Salvador* (2004), *supra* note 129, para.102-103; IACtHR, Judgment (Merits, reparations and costs), *Miguel Castro-Castro Prison* v. *Peru*, 25 November 2006, para.303; *Gelman* v. *Uruguay*, *supra* note 137, para.198, 199, 201, 203 and 204.

reports of UN special rapporteurs[262]; and concluding observations[263], general comments[264], recommendations[265], communications[266], reports[267] and final comments[268] of UN treaty bodies.

One case in which the IACtHR relied on soft law for interpretative purposes is *Claude Reyes* v. *Chile* (2006). The case concerns the refusal of the Chilean government to provide information for certain individuals on a deforestation project to be executed in the country.[269] When analyzing Chile's compliance with Article 13 of the ACHR (freedom of thought and expression), the Court considered that, "by expressly stipulating the right to 'seek' and 'receive' 'information", this Article "protects the right of all individuals to request access to State-held information".[270] The Court supported this conclusion by noting the Rio Declaration on Environment and Development, OAS resolutions and a series of recommendations, directives and declarations of the Council of Europe that safeguard the right to access state-held information.[271]

On the 2012 case of *Santo Domingo Massacre* v. *Colombia*, already discussed in section 5.1, the IACtHR also relied on soft law instruments for interpretative guidance. This case concerns a bombardment in a Colombian village, allegedly perpetrated by the Colombian Air Force, during an armed conflict against the FARC. In its decision, the IACtHR expanded the content and scope of Article 22 (freedom of movement and residence) to cover the right not to be forcibly displaced within a state party to the Convention.[272] According to the Court, the UN Guiding Principles on Internal Displacement "[allow] the content and scope of Article 22 of the

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[262] Cf. IACtHR, Judgment (Merits, reparations and costs), *Caesar* v. *Trinidad and Tobago*, 11 March 2005, para.57-61; *Gelman* v. *Uruguay*, ibid, para.200.

[263] Cf. *Caesar* v. *Trinidad and Tobago*, ibid, para.62; cf. *Atala Riffo and Daughters* v. *Chile*, *supra* note 9, para.88.

[264] Cf. *Caesar* v. *Trinidad and Tobago*, ibid; *Atala Riffo and Daughters* v. *Chile*, ibid, para.81 and 88; "*Street Children"* v. *Guatemala*, *supra* note 138, para.144-146; IACtHR, Judgment (Preliminary Objections, Merits, Reparations and Costs), *Suarez Peralta* v. *Ecuador*, 21 May 2013, para.135 and 152; *Gelman v. Uruguay*, *supra* note 137, para.205; IACtHR, Judgment (Preliminary Objections, Merits, Reparations and Costs), *YATAMA* v. *Nicaragua*, 23 June 2005, para.208; IACtHR, Judgment (Preliminary Objections, Merits, Reparations and Costs), *Liakat Ali Alibux* v. *Suriname*, 30 January 2014, paras.90.

[265] Cf. *Castro Prison* v. *Peru*, *supra* note 262, para.303.

[266] Cf. *Caesar* v. *Trinidad and Tobago*, *supra* note 263, para.63; *Gelman* v. *Uruguay*, *supra* note 137, para.206; *Liakat Ali Alibux* v. *Suriname*, *supra* note 110, para.91, 92 and 93; *Atala Riffo and Daughters* v. *Chile*, *supra* note 9, para.88.

[267] *Castro Prison* v. *Peru*, *supra* note 262, para.325.

[268] *Gelman* v. *Uruguay*, *supra* note 137, para.206-207.

[269] *Claude Reyes* v. *Chile*, *supra* note 168, para.3.

[270] Ibid, para.77.

[271] Ibid, para.81. For an example of a case in which the Court referred to the African System of Human Rights, when interpreting the ACHR, see *Gelman* v. *Uruguay*, *supra* note 137, para.214.

[272] *Santo Domingo Massacre* v. *Colombia*, *supra* note 10, para.25. According to the Court: "(…) by an evolutive interpretation of Article 22 of the Convention, taking into account the applicable norms of interpretation and in accordance with Article 29(b) thereof, the Court has considered that this provision also protects the right not to be displaced forcibly within a State Party to the Convention"; cf. *Ituango Massacres* v. *Colombia*, *supra* note 135, para.207.

Convention to be incorporated into the context of internal forced displacement".[273] This soft law instrument was the only source explicitly used by the Court in its justification of the expansion of scope and content of Article 22 of the ACHR.

Similarly, in *Atala Riffo and Daughters* v. *Chile*, the Court concluded that sexual orientation constituted a prohibited ground for discrimination under the ACHR, after taking into consideration a series of soft law instruments, as already discussed in section 4.3.[274] Another good illustration of how soft law can be used for interpretative guidance is the dissenting opinion of Judge Manuel E. Ventura Robles, on the IACtHR case of *Serrano-Cruz Sisters* v. *El Salvador* (2005).[275] The facts of the case refer to the alleged capture, abduction and forced disappearance of two persons, then children, by members of the Salvadoran Army during an internal armed conflict in the country.[276] By five votes to two, the Court decided not to rule on the alleged violations of the rights of the family, the rights to a name and the rights of the child, due to restrictions on its temporal jurisdiction. Judge Robles wrote a dissenting opinion on the matter, in which he first dismisses the conclusion that the Court lacks temporal jurisdiction to analyse such violations and then engages in the analysis of merits involving the referred rights.

In his analysis, Judge Robles relies on the evolutive interpretation of the ACHR to read into the Convention the right to an identity and the right of the family to be reunited in a situation of armed conflict. With regards to the right to an identity, he notes that the latter is recognized by the CRC, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, the Declaration on Race and Racial Prejudices and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. It is not, however, explicitly safeguarded in the ACHR. Nonetheless, Judge Robles concludes that the right to an identity is protected in the ACHR "based on an evolutionary interpretation of the contents of the rights embodied, *inter alia*, in Articles 3, 4, 5, 11, 12, 13, 17, 18, 19 and 20 thereof".[277] In his words, "every person has the right to an identity", which

[273] *Santo Domingo Massacre* v. *Colombia*, ibid, para.256. Cf. *Ituango Massacres* v. *Colombia*, *supra* note 136, para.207. In the case of *Ituango Massacres* v. *Colombia*, however, the Court referred both to the UN Guiding Principles on Internal Displacement and to Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II to the 1949 Geneva Conventions).

[274] *Atala Riffo v. Chile*, *supra* note 9, para.83-93.

[275] Dissenting opinion of Judge Manuel E. Ventura Robles. In: IACtHR, Judgment (Merits, reparations and costs), *Serrano-Cruz Sisters* v. *El Salvador*, 1 March 2005.

[276] *Serrano-Cruz Sisters* v. *El Salvador* (2005), ibid, para.2 and 131.

[277] Ibid.

"includes a series of attributes and characteristics that allow each person to be individualized as unique".[278] Additionally, Judge Robles reads in Article 17 of the ACHR (rights of the family) the obligation of the state to reunite separated families "as soon as circumstances permitted".[279] In doing so, he referred to the United Nations Guiding Principles on Internal Displacement, as well as Protocol II to the 1949 Geneva Conventions.[280]

The abovementioned cases provide an illustration of how the IACtHR has relied on soft law, in isolation or in conjunction with hard law instruments, in order to interpret the content and scope of the provisions of the ACHR. Below, sub-sections 5.2.1 to 5.2.3 will discuss three possible legal bases for the use of non-binding instruments during the process of interpretation of the IACtHR. Sub-section 5.2.1. will analyse whether soft law instruments are relevant elements to the context of the ACHR. Sub-section 5.2.2 will then analyse whether soft law constitutes "subsequent practice", in the sense of Article 31(3)(b) of the VCLT/69. Following, sub-section 5.2.3 will discuss remaining cases of the use of soft law instruments by the IACtHR which were not justified in the previous sections.

5.2.1 *Soft law instruments within the context of the ACHR*

Recalling section 5.1.3, the elements of the context of a treaty are described in Article 31(2) of the VCLT/69, and include: (i) its text, preamble and annexes; and (ii) agreements or instruments made in connection to its conclusion and related to it, which are nothing more than unilateral documents which hold a connection to the treaty object of the interpretation. Soft-law instruments are not "unilateral documents", nor do not relate to the ACHR directly. Hence, they do not fit in Article 31(2) (a) and (b) of the VCLT/69. Could they be attracted to the broader context of the ACHR by virtue of the text and the preamble of this treaty?

Article 29(d) of the ACHR determines that the Convention shall not be interpreted in a manner that excludes or limits "the effect that the American Declaration of the Rights and Duties of Man or other international acts of the same nature may have".[281] The American Declaration was approved within the OAS a few months before the UDHR, thus constituting the first human rights instrument of this kind. It is not a treaty of international law, but rather a soft law instrument, more specifically, a declaration of international law. For an instrument to have the same nature of the American Declaration, it must be an international declaration.

[278] Dissenting opinion of Judge Robles, *supra* note 275, para.6.
[279] Ibid.
[280] Ibid.
[281] Ibid, Article 29(d).

Hence, only the latter is the object of the cross-referencing technique used in Article 29(d) of the ACHR.

A possible legal basis for the use of other soft law instruments beyond international declarations as interpretative guidance can be found Article 29(c) of the ACHR. According to this provision, an interpretation of the American Convention must not preclude "other rights or guarantees that are inherent to the human personality or derived from representative democracy".[282] While instruments of soft law do not generate rights or obligations, they might nonetheless give precision to the scope of legally binding instruments. As affirmed the IACtHR in its Advisory Opinion on gender identity and equality and non-discrimination, "a series of rules of a general nature or otherwise called *soft law* [provide] guidance on the interpretation of [binding rules of international human rights law] (…), because they give greater precision to the minimum content established in the treaties".[283]

Still, it is hard to perceive soft law instruments as the object of the cross-reference that takes place in Article 29(c), which clearly refers to rights and guarantees, and not to standards or guidelines. The fact that a soft law instrument clarifies the content of legally binding rights is not sufficient to include it in the broader context of the American Convention. Only an express reference to those instruments in the provisions of the ACHR would be capable of doing so. Therefore, while it is true that soft law instruments other than international declarations may clarify the content of human rights provisions and accordingly have an undeniable legal relevance, the legal basis for their use as tools for the evolutive interpretation of the ACHR does not seem to rely on Article 29(c) of the American Convention.

In conclusion, Article 29 of the ACHR attracts a specific type of soft law to the broader context of the ACHR, that is, international declarations. Hence, the use of declarations for interpretative purposes is in accordance with Article 31(1) of the VCLT/69. The next sub-section will analyse another hypothesis to ground, more generally, the use of soft law instruments during the process of the interpretation of the ACHR. More specifically, it will analyse whether soft law constitutes subsequent practice, in the sense of Article 31(3)(b) of the VCLT/69.

[282] Ibid, Article 29(c).

[283] *Advisory Opinion on Gender identity and equality and non-discrimination of same-sex couples*, *supra* note 8, para.60.

5.2.2 *Soft law instruments as subsequent practice*

According to Article 31(3)(b) of the VCLT/69, "any *subsequent practice* in the application of the treaty *which establishes the agreement of the parties* regarding its interpretation" shall be taken into account together with the context.[284] According to the WTO Appellate Body in the *Japan-Alcoholic Beverages* case, "the essence of subsequent practice in interpreting a treaty has been recognized as a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties regarding its interpretation."[285] In other words, subsequent practice does not refer to an isolated act, but to a sequence of acts that establishes a discernible pattern. Said pattern must evidence an agreement of the states parties to a given treaty concerning its content and scope.

In its 1966 commentaries to the VCLT/69, the ILC noted that, in drafting Article 31(3)(b) of the Vienna Convention, the Commission intended to refer to the practice of the parties of the treaty as a whole. Yet, this does not mean that each and every party must have engaged in a given practice for it to qualify as "subsequent practice" under Article 31(3)(b) of the Vienna Convention. Rather, in the words of the ILC, "it suffices that [the state party] should have accepted the practice".[286] Tacit acceptance or acquiescence would thus suffice for a common practice among the parties to be identified.[287] To argue for a stringent definition of "subsequent practice" which demands that all of the parties must have actively engaged in a given practice would not only be in dissonance with the understanding of the ILC itself, but also be to the detriment of the effectiveness of human rights treaties. The latter would be undermined if the dynamic interpretation could be paralyzed by the fact that a few groups of states have not *actively* engaged in a practice that is consistent and common among the other parties.

The paragraphs that follow will analyse four hypotheses to qualify certain soft law instruments as subsequent practice. The first hypothesis was put forward by the International Law Association (ILA), according to which the responses of states to the work of human-rights treaty bodies may be regarded as state practice. The second hypothesis to be tested is whether the practice of treaty-bodies is tantamount to the practice of states parties themselves. Third,

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[284] VCLT/69, *supra* note 90, Article 31(3)(b). Italic added by the author.

[285] WTO Appellate Body, Report, *Japan – Taxes on Alcoholic Beverages*, 4 October 1996, p.13.

[286] Draft Articles on the Law of Treaties with commentaries, *supra* note 188, p.222, para.15.

[287] MacGrogan, David (2014) "On the Interpretation of Human Rights Treaties and Subsequent Practice", *Netherlands Quarterly of Human Rights*, vol.32, issue 4, p.353 and 368.

whether the adoption of a resolution is, in itself, evidence of state practice. The fourth and last hypothesis was raised by Killander, according to whom resolutions of international organization may be evidence of an emerging consensus on a given issue.

In its report to the Berlin Conference, the ILA affirmed that Article 31 of the VCLT/69 was "written as if no monitoring body had been established by a treaty, as if no third-party interests existed, and as if it were only for other States to monitor each other's compliance and to react to non-compliance". [288] Yet, human rights treaties are different from regular multilateral treaties, and many of them have established, under their provisions, an independent monitoring mechanism. In this context, the ILA considered that "relevant subsequent practice might be broader than subsequent *State* practice and include the considered views of the treaty bodies adopted in the performance of the functions conferred on them by the States parties". [289]

According to the ILA, even if one adopts a traditional approach to interpretation of human rights treaties, under which only the practice of states could constitute "subsequent practice", the work of treaty bodies would still generate (although not constitute) subsequent practice for the purposes of Article 31(3)(b) of the VCLT/69. After all, many states have responded to general comments and recommendations of these organs. In the understanding of the ILA, "a positive or supportive response by a State or group of States, or the acquiescence of States in a finding by a committee might constitute 'subsequent practice ... which establishes the agreement of the parties regarding its interpretation". [290] Yet, the Association highlights that, "[i]f this analysis is preferred, then the consequence is that in any given case the status of a particular general comment or recommendation or decision, or other findings would depend on the results of a detailed analysis of how States parties [have] responded to that output". [291]

One should note that, in the hypothesis put forth by ILA, it would not be the soft law instruments themselves that would constitute subsequent practice, but rather the action or omission of the state when responding to them. It is not, though, the responses or the acquiescence of states that is mentioned by the IACtHR during the interpretation of the ACHR. It is the soft law instruments themselves. The theory put forward by ILA is thus insufficient for the purposes of justifying the practice of external referencing in the Inter-American Court.

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[288] International Law Association (ILA) (2004) *Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies*, Berlin Conference, p.629.

[289] Ibid.

[290] Ibid, p.629, para.21.

[291] Ibid, p.630, para.27.

Turning now to the second hypothesis, David MacGrogan has argued that the practice of treaty-bodies in interpreting the treaty under their competence could be constitutive of subsequent practice establishing the agreement of the parties, as long as tacit approval of that practice, on the part of the states parties to the treaty in question, is present. MacGragon's understanding is based on two factors. First, in light of the *travaux préparatoires* of the VCLT/69, he perceives that tacit approval of a practice would be sufficient to indicate the existence of a subsequent practice, in the sense of Article 31(3)(b) of the VCLT/69. Second, the author notes that certain treaties "entrust some organs with the competence to detail the content of treaty provisions requiring interpretation".[292] In light of these factors, MacGrogan concludes that it would not be unfounded to perceive "the practice of the treaty bodies as constituting a devolved or delegated form of subsequent practice"[293], if this practice is met with acquiescence from the states parties[294]. The latter would indicate tacit endorsement to the practice of the treaty body by the states parties.

One could go even further than McGrogan and argue that the ratification of a treaty or additional protocol that creates a treaty body and entrusts it with the competence to clarify the terms of this treaty could, by itself, imply tacit approval with the practice of that organ. However, the work of treaty bodies is generally devoid of binding force, and the interpretation put forward by them is not mandatory for states parties. Therefore, it appears to be far-reaching to perceive the practice of these organs as automatically equating to that of states parties and establishing "the agreement of the parties regarding its interpretation"[295]. On the other hand, if the practice of a treaty body is met with acquiescence from states parties, as argues MacGrogan, a tacit agreement among the parties could be identified, and the practice of these organs could amount to subsequent practice, in the sense of Article 31(3)(b) of the Vienna Convention.[296]

However, the work of a treaty body may only be considered as subsequent practice regarding the interpretation of the specific treaty that is within its competence. For illustrative purposes, let us take a look at the Committee on the Rights of the Child. The Committee was established under the CRC, which provided it with the competence to clarify the provisions of

[292] MacGrogan, *supra* note 287, p.351.

[293] Ibid.

[294] Ibid, p.354.

[295] VCLT/69, *supra* note 90, Article 31(3)(b).

[296] It can similarly be argued that, when states ratify a treaty that creates an international organization, the practice of the organization in question in relation to the interpretation of its constitutive treaty, if generally accepted by the member states, can be tantamount to the practice of its members. The practice of the UN, for example, is relevant for the interpretation of its constitutive charter, the UN Charter. Cf. *Advisory Opinion on Namibia*, *supra* note 195, para.22.

that convention. Accordingly, if met with the acquiescence of the states parties to the CRC, the practice of the Committee may be considered as subsequent practice for the purposes of interpretation of that convention, and only that convention. The practice of the Committee on the Rights of the Child is not, in any way, subsequent practice regarding the interpretation of other treaties, such as the American Convention.

Yet, this thesis has explained that the CRC has been legitimately used by the IACtHR as an external source or, in more technical terms, as a relevant external rule applicable to the parties of the American Convention. When the IACtHR relies on an external rule, it is relying on its content and scope, which can only be determined through interpretation. Hence, if the work of the Committee on the Rights of the Child is perceived as subsequent practice for the interpretation of the CRC, it enables the IACtHR to properly rely on said treaty during the interpretation of the American Convention. It is thus relevant for the interpretative exercise conducted by the IACtHR.

One should note, however, that the theories discussed in this subsection regarding the work of treaty bodies as subsequent practice are controversial. It is far from unanimous that Article 31(3) of the VCLT/69 can be interpreted as covering more than plain *state* practice. Regarding this debate, De Pawn affirms that "it becomes clear from the comments by the International Law Commission to draft Article 31(3) VLCT, however, that it did not intend to include under 'subsequent practice' the work of the UN treaty bodies, which as such are not representative of the understandings of the States parties of the respective UN human rights treaties".[297].

Turning now to the use of non-binding resolutions in treaty interpretation, it may be argued that resolutions of international organizations can be considered as "subsequent practice" because the act of a state of voting in favour of a resolution and thus contributing to its adoption may, in itself, constitute state practice. Two objections arise in light of this hypothesis. First, if it is the vote of states on the adoption of a resolution that qualifies as state practice, it would be such vote, and not the resulting soft law instrument, which would be relevant for treaty interpretation. Second, one should note that, when states adopt a resolution, they are acting on the capacity of members of an international organization. In this context, should the approval of a resolution inside an international organization be regarded as the state practice or practice of the international organization in question? Benedetto Conforti argues that certain documents approved within an international organization should be regarded as

[297] De Pauw, *supra* note 4, p.18.

state practice. This would be the case of declarations of principles, such as the UDHR and the Millenium Declaration. In the words of Conforti, "[w]ith regard to customary law, the Declarations play a role in the process of its formation, as *State practice*, as the synthesis of the attitudes of States that adopt them and not as formal acts of the UN".[298] Conforti's theory is interesting for qualifying declarations of principles as subsequent practice for the purposes of the treaty interpretation. Yet, it is insufficient for the purposes of this thesis, because the IACtHR has not limited itself to using declarations of international organizations during the process of interpretation of the ACHR.[299]

A different hypothesis was put forward by Killander, who suggests that a resolution could be considered "subsequent practice", in the sense of Article 31(3)(b) of the VCLT/69, because it "could illustrate emerging consensus on an issue".[300] In connection with this claim, Killander argues for a modern conception of customary international law. According to the author, an emphasis could be placed on the element of *opinio* juris, and a more flexible definition of state practice should be adopted. In Killander's words, "*opinio juris* and verbal state practice can in itself form customary international law".[301]

In a traditional conception of the term, rules of international customary law are composed of a subjective element (*opinion juris*) and an objective element (state practice). *Opinio juris* can be defined as the understanding that behaving in a certain way is required by law, or, in other words, that a given behavior derives from a legal obligation. Resolutions from international organizations may be regarded as evidence of *opinio juris*. After all, they represent a common ground reached by a group of states and may indicate new developments in international law. This holds particularly true for resolutions of the General Assembly of the United Nations, whose approval means that an agreement was reached among the majority of the 192 states that are members of the UN. As indicated the ICJ, in its Advisory Opinion concerning *Legality of the Threat or Use of Nuclear Weapons*, "[General Assembly resolutions] can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*".[302] The Court considered that "a series of resolutions

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[298] Conforti, Benedetto (2005) *The Law and Practice of the United Nations*, Leiden/Boston: Martinus Nijhoff Publishers, Third Edition, p.301.

[299] Cf. *Serrano-Cruz Sisters* v. *El Salvador* (2005), *supra* note 275, para.21; Dissenting opinion of Judge Robles, *supra* note 275, para.6.

[300] Killander, *supra* note 35, p.148.

[301] Ibid, p.148-149.

[302] ICJ, Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, para.70.

may show the gradual evolution of the *opinio juris* required for the establishment of a new rule".[303]

Modern conceptions of international customary law have emerged proposing a wider definition of state practice and a greater focus on *opinio juris* in fields that deal with important moral issues, such as international human rights law.[304] One such modern conception of custom was put forward by Jan Wouters and Cedric Ryngaert, whose work has been expressly referred by Killander. Wouters and Ryngaert affirm that, in the field of human rights law and IHL, *opinio juris* would "play a more important role than state practice".[305] This does not mean that state practice does not play a role in the formation of customs of human rights law and IHL. Quite on the contrary, even Wouters and Ryngaert recognize that "the existence of the customary rule in the *opinio juris* of states should still be confirmed by practice".[306] Yet, what is innovative in the work of these two authors is their understanding that practice is not necessarily physical but could also be verbal. When physical state practice is inconsistent, verbal state practice would gain preeminence. Examples of the latter are public statements of states, in which they orally reaffirm or deny certain practices.[307]

By directly referring to the work of Wouters and Ryngaert, Killander seems to build an argument for regarding resolutions of international organizations as *opinio juris* and thus recognizing their distinguished value for the formation of international customary law. Coupled with verbal state practice, such as statements of states in the drafting and adoption of resolutions, resolutions of international organizations could give rise to rules of customary human rights law. Yet, even if this is the case, it would be the verbal practice of states that would constitute subsequent practice for the purposes of treaty interpretation, and not the resulting resolutions.

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[303] Ibid. The complete quotation is: "The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradua1 evolution of the *opinio juris* required for the establishment of a new rule".

[304] Cf. Roberts, Anthea Elizabeth (2001) "Traditional and Modern Approaches to Customary International Law: A Reconciliation", *The American Journal of International Law*, vol.95.

[305] Wouters, Jan. Ryngaert, Cedric (2009) "Impact on the process of the formation of customary international law". In: Kamminga, Menno T. Scheinin, Martin. The impact of human rights law on general international law. Oxford: Oxford University Press, p.111.

[306] Ibid, p.115.

[307] Ibid.

Still, Killander noted that resolutions "could illustrate emerging consensus on an issue".[308] Could that, by itself, suffice for these instruments to be considered as "subsequent practice", in the sense of Article 31(3)(b) of the VCLT/69? Scholars such as David MacGrogan[309] and Yasseen[310] explain that Article 31(3)(b) refers to a concordant, common and consistent practice which establishes an agreement between the parties of the treaty. The fact that a consensus has not yet been reached seems to indicate that those requirements are not yet met. On the other hand, a consolidated consensus, which results from a common, concordant and consistent practice of the vast majority of states parties to the ACHR, appears to fit well with the concept of subsequent practice set forth in Article 31(3)(b) of the VCLT/69.[311]

A consolidated international consensus may, indeed, be identified in light of a series of resolutions of international organization. This understanding was upheld by the IACtHR itself, in the abovementioned case of *Claude Reyes* v. *Chile*. In its judgment, the IACtHR read into Article 13 of the ACHR (freedom of thought and expression) the "right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention".[312] The Court affirmed that it was "important to emphasize that there is a regional consensus among the States that are members of the Organization of American States (...) about the importance of access to public information and the need to protect it".[313] In this regard, it mentioned resolutions issued by the General Assembly of the Organization of American States (OAS) on this specific right.[314]

As explained in Section 3.1, consensus is a concept that transcends common practices among the states in a region. In light of the jurisprudence of the ECtHR, Lixinski and Dzehtsiarou identify different categories of consensus.[315] Similarly, Vives explains that consensus may be identified in light of regional practice or even in light of the international

[308] Killander, *supra* note 35, p.148.

[309] MacGrogan, *supra* note 287, p.352-353.

[310] Yasseen, *supra* note 28, p.48.

[311] Cf. Tzevelekos, Vassilis. Dzehtsiarou, Kanstantsin (2016) "International Custom Making and the ECtHR's European Consensus Method of Interpretation". *European Yearbook on Human Rights*, vol.16, p.24.

[312] *Claude Reyes* v. *Chile*, *supra* note 168, para.77.

[313] Ibid, para.78.

[314] Ibid, para.78. The IACtHR referred to the following resolutions of the OAS General Assembly: Resolution AG/RES. 1932 (XXXIII-O/03) of June 10, 2003, on "Access to Public Information: Strengthening Democracy"; Resolution AG/RES. (XXXIV-O/04) of June 8, 2004, on "Access to Public Information: Strengthening Democracy"; Resolution AG/RES. 2121 (XXXV-O/05) of June 7, 2005, on "Access to Public Information: Strengthening Democracy"; and AG/RES. 2252 (XXXVI-O/06) of June 6, 2006, on "Access to Public Information: Strengthening Democracy."

[315] Lixinski (2010), *supra* note 82, p.66; Dzehtsiarou (2015), *supra* note 55, p.39.

legal order.[316] The latter refers to a general and common agreement accepted by the international community as a whole. It can be perceived via the adoption of universal treaties or other norms and their acceptance within the international community.[317] Consensus via regional practice, for its turn, refers to a common agreement among the member states of a given regional organization, identified in light of the practice of this organization (for example, regional treaties or even resolutions).[318] Indeed, taking into consideration the importance of international organizations in the international community and in the development of international law, it would be unreasonable to disregard resolutions as an indicative that a consensus has been reached on a certain topic. In conclusion, resolutions of international organizations may be perceived as an indicative of an agreement among a certain collectivity or, in other words, a consensus.

Yet, could resolutions constitute subsequent practice, in the sense of Article 31(3)(b) of the Vienna Convention? Article 31(3)(b) does not specify who should be the agent of subsequent practice, but refers to "any *subsequent practice* in the application of the treaty *which establishes the agreement of the parties*".[319] The IACtHR is a regional human rights court that integrates the OAS. It was within the framework of the latter that the American Convention was adopted. In this context, the practice of the organization cannot be irrelevant for the interpretation for the ACHR. If met with tacit agreement or acquiescence of the states parties to the American Convention, it is not unfounded to consider this practice as subsequent practice in the sense of Article 31(3)(b) of the Vienna Convention. Alternatively, even if one considers that Article 31(3)(b) refers *exclusively* to state practice, a series of resolutions that indicate the existence of regional consensus would still be relevant for the interpretation of the ACHR, as will be explained in the section below.

5.2.3 *The remaining cases: non-binding resolutions and the work of experts*

The sections above provided legal justifications for the use other treaties, principles and customary rules of international law related to the protection of human rights and international declarations as interpretative guidance. While the thesis presented some theories to justify reliance on the work of treaty bodies and non-binding resolutions, it nonetheless recognized that those justifications are controversial. In the lines that follow, the thesis will argue that, even

[316] Vives, *supra* note 47, p.134 and 139.

[317] Ibid, p.134-136.

[318] Ibid, p.139-141.

[319] VCLT/69, *supra* note 90, Article 31(3)(b). Italics added by the author.

if a more traditional approach to treaty interpretation is adopted, the work of experts (such as the ILC, treaty-bodies or Special Rapporteurs) and non-binding resolutions will still have legal significance for treaty interpretation.

Subsection 5.2.2 discussed whether non-binding resolutions and the work of treaty-bodies could constitute subsequent practice. Taking into consideration that "subsequent practice" has been understood by some as referring, exclusively, to state practice, the present subsection will present an alternative justification for reliance on those instruments. It will argue that international resolutions can be the evidence of international consensus and be taken into consideration as such in light of the object and purpose of human rights treaties. With regards to the work of treaty-bodies, this subsection will contend that these instruments can be considered legal doctrine and be taken into consideration as the work of relevant interpreters.

Tackling first the case of non-binding resolutions, an international consensus can be identified in light of a series of instruments that evidence the consolidation of a common ground among a group of states regarding the evolution of a given right. While a single resolution may not, by itself, prove international consensus, it can be an additional element to its identification. In conjunction with relevant instruments – such as a great number of resolutions that evidence the same evolution in human rights law and which have been widely adopted by the international community, or even rules of international law, including regional or universal treaties, custom or principles -, non-binding resolutions might reveal the existence of an international consensus. In other words, non-binding resolutions of international organizations can be an additional element in the IACtHR's assessment that a consensus has been reached with regards to the evolution of the content and scope of a certain human right.

To be effective, the ACHR must evolve in light of changing times and living conditions. The existence of an international consensus on a given issue highlights the emergence of a new social reality and the evolution of international law in a certain direction. Keeping the ACHR isolated from those developments would be to the detriment of its effectiveness. Hence, in light of the object and purpose of the ACHR, the IACtHR may expand the content and scope of a provision of the American Convention by taking into consideration instruments that are sufficient to evidence the existence of international consensus on a given topic.

This subsection will now tackle the value of the work of experts for the interpretation of the ACHR. Article 38 of the Statute of the International Court of Justice lists primary means for the determination of rules of international law, namely: treaties, customs and general principles of international law. These are regarded as primary sources of international law, that is, sources from which legally binding obligations emanate. While legal obligations emanate

from the primary sources of international law, their precise content and scope are determined with the assistance of doctrine and judicial decisions, which are subsidiary means for the determination of international law, according to Article 38(d) of the ICJ Statute.

The importance of doctrine for the determination of the rules of international law was explained by Matthias Herdegen, according to whom highly-qualified publicists are relevant interpreters, and, hence, the legal doctrine they produce constitutes an important source of treaty interpretation.[320] In other words, highly-qualified publicists are themselves interpreters of international law. They apply Article 31 of the VCLT/69, engage in an in depth-analysis and produce work that clarifies the content and scope of international treaties. Their work represents an interpretation of rules of international law, and this interpretation can be taken into consideration by the IACtHR in light of Article 38 of the ICJ Statute.

While the IACtHR relies on other rules when interpreting the ACHR, the wording of such external rules might be vague, and their meaning might be dubious. It is on this point that the importance of legal doctrine manifests itself. The IACtHR may rely on the authoritative interpretation of highly-qualified publicists regarding a given rule of international law before taking said rule into consideration during the process of interpretation of the ACHR.

The concept of legal doctrine covers both the work of publicists in their individual capacity, as well as the work of groups of experts. As affirmed Malcolm Shaw when discussing the legal significance of the work of the ILC, "it is not to be overlooked that the International Law Commission is a body composed of eminently qualified publicists, including many governmental legal advisers, whose reports and studies may be used as a method of determining what the law actually is, in much the same way as books".[321] Similarly, treaty-bodies are composed by experts on their field, whose work is the collective product of the efforts of a group of highly qualified publicist from around the world, elected by states to clarify and develop international law. To consider the work of one expert, in isolation, as legal doctrine,

[320] Herdegen, *supra* note 187. The complete text is: "The group of relevant interpreters must be defined broadly. With regard to treaties, interpretation by the parties is of paramount relevance. Decisions and other opinions of international courts, such as the International Court of Justice (ICJ) or human rights courts, of non-judicial treaty bodies and of national courts as well as legal doctrine, constitute important sources of interpretation. The understanding of treaties establishing international organizations is influenced by the practice of executive and rule-making organs of such organizations (International Organizations or Institutions, Decision-Making Bodies). Non-governmental organizations and other actors also take part in the continuous process of interpretation. Unilateral acts call for interpretation by the subjects of international law to which they are addressed and by whom they have been issued."

[321] Shaw, *supra* note 44, p. 121.

but not the work of a group of experts elected to clarify and develop international law, would be utterly illogical.

In conclusion, the work of the ILC and of treaty-bodies may be considered as legal doctrine. The same considerations apply to the work of Special Rapporteurs and guiding principles approved within international organizations[322]. They are relevant in the process of interpretation, not as elements *per se* of the general rule of treaty interpretation, but as instruments that clarify the elements of said general rule. Quoting Anthea Elizabeth Roberts, "[t]hough not formal sources of law, [writings by publicists] may provide authoritative evidence of the state of the law".[323]

5.3 Recommendations

Throughout its 40 years, the IACtHR appears to have adopted different methodologies in the process of interpretation of the American Convention. When relying on an external treaty for the purposes of treaty interpretation, the Court has, in some cases, explicitly noted that the respondent state ratified the external treaty in question. In other cases, however, no such consideration was made. In this context, the thesis recommends that the Court standardize its methodology on the technique of external referencing.

Additionally, it notes that the IACtHR has chosen to essentially repeat, throughout its cases, that the evolutive interpretation of the ACHR is consistent both with Article 29 of that Convention and with the VCLT/69. This general and concise reference to Article 29 of the ACHR and Article 31 of the VCLT/69 does not, however, clarify how the process of evolution takes place and, more specifically, it does not explain the role that each external source plays on this process. As noted De Pauw, "[i]n many other cases, (…) the Court fails to clarify its reasons to turn to external treaties, resolutions, declarations etc., as well as to what extent these instruments have influenced its decision".[324]

In cases in which the Court did provide further explanation for its reliance on external sources, such as *"In Vitro" Fertilization v. Costa Rica*, it did so through an all-encompassing justification, which essentially notes that the ACHR is part of the *corpus juris* of international human rights law. Yet, this justification does not explain why or to what extent the specific

[322] Guiding principles, as the product of the work of an expert on the field, could be considered as legal doctrine. When adopted within an international organization, it could also be regarded as evidence of subsequent practice, in the sense that was explained in section 5.2.2, or as evidence of an international consensus, as explained above in this subsection.

[323] Roberts, *supra* note 304, p.774-775.

[324] De Pauw, *supra* note 4, p.17.

external sources that were used by the Court have guided the evolutive interpretation of the ACHR. It should also be noted that, in the case of *"In Vitro" Fertilization v. Costa Rica*, the Court wrongly applied a *dictum* from the Advisory Opinion concerning the *Right to Information on Consular Assistant*, according to which "the interpretation of a treaty must take into account not only the agreements and instruments related to the treaty (paragraph 2 of Article 31), but also the system of which it is part (paragraph 3 of Article 31)".[325] In *"In Vitro" Fertilization v. Costa Rica*, the Court substituted the word "system" in the abovementioned *dictum* for the word "context".[326] This resulted in an incorrect identification of Article 31(3) of the Vienna Convention as setting the elements of context for the purposes of treaty interpretation. Yet, the elements mentioned in Article 31(3) of the VCLT/69 are not part of the context of a treaty but are rather independent elements to be considered in addition to the context.

The present thesis thus recommends that the Court no longer refer to Article 31(3) of the VCLT/69 as a provision that indicates the context of a treaty. Additionally, it recommends that the Court go beyond the abovementioned "all-encompassing" justification for the use of external sources. First, because the fact that the ACHR is part of a *corpus juris* for the protection of human rights does not constitute a sufficient basis for the use of international human rights law as a whole in treaty interpretation. Second, because Article 31(3) is also insufficient to justify the Court's broad use of external sources. Different justifications apply to different types of external sources. While the use of other applicable rules to the parties during the interpretation of the ACHR may be justified in light of Article 31(3) of the VCLT/69, the same does not hold true for the use of rules not applicable to the respondent state or to reliance on soft law instruments for treaty interpretation. With regards to the latter, it is noteworthy that soft law instruments have an undeniable legal relevancy for the evolution of international human rights law and, naturally, to the activity of the Court. Yet, the fact that they are relevant for treaty interpretation does not equate to recognizing them as sufficient evidence of the extent to which a given provision has evolved throughout time. Article 31 of the VCLT/69 and Article 29 of the ACHR do not provide a comprehensive justification for the use of each and any soft

[325] *Advisory Opinion on the Right to Information on Consular Assistance*, *supra* note 6, para.113; cf. "*Juvenile Re-education Institute"* v. *Paraguay*, *supra* note 11, para.148; cf. "*Street Children"* v. *Guatemala, supra* note 138, para.192-194; cf. IACtHR, Judgment (Merits, Reparations, and Costs), *Case of the Gómez-Paquiyauri Brothers* v. *Peru*, 8 July 2004, para.164-165; cf. IACtHR, Judgment (Preliminary Objections, Merits, Reparations, and Costs), *Case of Tibi* v. *Ecuador*, 7 September 2004, para.144.

[326] *"In Vitro Fertilization"* v. *Costa Rica*, *supra* note 49, para.191; see also *Serrano-Cruz Sisters* v. *El Salvador* (2004), *supra* note 129, para.119. This has not been repeated in the 2017 Advisory Opinion on *Gender identify and equality and non-discrimination of same sex couple*, which may indicate that the Court is already reassessing this connection of Article 31(3) with the context of a treaty.

law instrument that integrate the *corpus juris* of international human rights law. Rather, the analysis of the relevancy of a given soft law instrument to the interpretation of the ACHR must be individualized and conducted in light of Article 31 of the VCLT/69 and Article 29 of the American Convention, as explained in section 5 of the thesis.

Lastly, this thesis argues that, if the Court were to clarify the reasons for relying on the specific external sources used by it and the extent to which these sources have influenced the interpretation of the ACHR, it could provide more guidance to the states parties to the American Convention in predicting the evolution of their obligations. This would potentially provide the states parties with more legal certainty and juridical security. It could also contribute to the perceived legitimacy of the IACtHR and the IACommHR before the states members of the OAS.[327] Additionally, this approach would increase the possibilities for states to adjust their behavior before the establishment of a legal controversy and, hence, could avoid future violations of the ACHR. Therefore, a series of positive outcomes may emerge from a more standardized methodology and from the choice by the Court to explain further (in an explicit manner) the use of external sources during the process of treaty interpretation. For these reasons, the present thesis recommends that, in future decisions, the IACtHR choses to explicitly assess the applicability and relevancy of the external sources used in the interpretation of the ACHR, through a consistent methodology.

6 CONCLUSION

In 2018, the IACtHR celebrated its 40-year anniversary. Throughout this time, it has produced ground-breaking judgments and advisory opinions that led to modifications in the domestic legislation and national policies of Latin-American states. At the same time, it has witnessed pushbacks in the continent, including in the last few years. Almost half a century after the adoption of the ACHR, powerful politicians are questioning the role of the Inter-American Court and Commission on Human Rights.[328] What changed since states ratified this

[327] De Pauw, *supra* note 4, p.17 and 18.

[328] This "crisis" in human rights institutions may be perceived in the Inter-American System of Human Rights, as well as in the European System. See "IACHR Deeply Concerned over Result of Venezuela's Denunciation of the American Convention", *supra* note 13; "Saída da Venezuela da Corte Interamericana de Direitos Humanos enfraquece a proteção aos direitos na região, diz comissária", *supra* note 13. In 2013, the newspaper The Guardian wrote that: "[t]he justice secretary, Chris Grayling, is 'reviewing Britain's relationship' with an institution he says has 'reached the point where it has lost democratic acceptability" [see: Henley, John, "Why is the European court of human rights hated by the UK right? Court designed to protect the vulnerable is respected in Europe but despised by many Tories and UK newspapers", *The Guardian*, 22 December 2013, available at: <https://www.theguardian.com/law/2013/dec/22/britain-european-court-human-rights>. In 2016, Theresa May affirmed that "the case for remaining a signatory of the European Convention on Human Rights,

human rights treaty, and why are some of them now questioning the jurisdiction they have accepted decades ago? Could the IACtHR have gone too far? Could it have read into the American Convention too many obligations that the states could not have envisaged when ratifying the treaty? In other words, was the evolutive interpretation of human rights treaties counter-productive to the protection of human rights? Or did it rather contribute to the development of human rights law?

Inquiries on the impact of the interpretative approaches adopted by the IACtHR are of great importance, but one cannot properly problematize them without first understanding the legal nature and limits of the approaches in question. In other words, it is only when the legal basis and limits of an interpretative method are ascertained, that it is possible to analyse how said method impacts on the legitimacy of a court and even on the degree of compliance of states with the decisions of the court. Accordingly, the present thesis decided to focus on the first step of this multifaceted analysis. It tackled the use of external sources as a tool for the evolutive interpretation of the ACHR, in light of the practice of the Court and the general rule of treaty interpretation enshrined in the Vienna Convention of 1969.

The evolutive interpretation of human rights treaties departures from the understanding that those treaties are "live instruments" and, hence, their "interpretation must go hand in hand with evolving times and current living conditions".[329] A simple and precise explanation of this method is provided by Antônio Augusto Cançado Trindade, according to whom the evolutive interpretation of human rights treaties aims at fulfilling "the evolving needs of protection of the

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which means Britain is subject to the jurisdiction of the European Court of Human Rights, is not clear" [see: "Home Secretary's speech on the UK, EU and our place in the world (Archived)", *GOV.UK*, 25 April 2016, available at: <https://www.gov.uk/government/speeches/home-secretarys-speech-on-the-uk-eu-and-our-place-in-the-world>]. According to May, the European Court of Human Rights "can bind the hands of the Parliament, adds nothing to our prosperity [and] makes us less secure by preventing the deportation of foreign nationals" [see: Asthana, Anuashka. Mason, Rowena. "UK must leave European convention on human rights, says Theresa May", *The Guardian*. 25 April 2016. Available at: <https://www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum>]. Still in 2016, the IACommHR went through a serious financial crisis. One of the factors that contributed to the crisis was the lack of voluntary contributions by Brazil, which had not made voluntary payments to the Commission since 2009, despite being the third largest contributor to the Organization of American States (OAS) [see: Trevisan, *supra* note 13]. Another factor was the scarce contributions, as a whole, to the Commission. For the purposes of comparison, according to the newspaper *El País*, the states of the American continent donated almost US$ 20 million to the International Criminal Court by the end of 2015. Yet, in that same period, the voluntary contributions of the American states to the IACommHR reached only US$ 199 thousand [see: Ayuso, Silvia. "Comissão Interamericana de Diretos Humanos fica sem dinheiro. Entidade alerta que poderá parar de funcionar se não receber pagamento dos países", *El País*, 24 May 2016. Available at: <https://brasil.elpais.com/brasil/2016/05/23/internacional/1464011157_343108.html>].

[329] *"Mapiripán Massacre" v. Colombia*, *supra* note 42, para.106. Cf. *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, *supra* note 26, para.146.

human being"[330], by extending "protection in new situations (…) on the basis of pre-existing rights".[331]

The evolutive interpretation of human rights treaties is a *condition sine qua non* for the effectiveness of these conventions and, accordingly, required in light of their object and purpose. It responds to changed social conditions and enables a proper interpretation of human rights provisions, "[giving] ever fuller effect to the ideas which inspired [them]".[332] In Section 3, this thesis concluded that the IACtHR is correct to affirm that the evolutive interpretation of the ACHR "is consequent with the general rules of interpretation set out in Article 29 of the American Convention, as well as with those established by the Vienna Convention on the Law of Treaties".[333] Yet, is the use of external sources, as applied in the Inter-American System of Human Rights, similarly justified in light of these two provisions?

Section 4 tackled a divergence among the IACommHR and the IACtHR concerning the limits for the use of external sources, in light of the competence of these organs. It showed that the IACtHR has consistently applied external sources for interpretative purposes, as tools for the determination of the content and scope of the obligations that derive from the American Convention. It also noted that the Commission appears to have adjusted its practice to the understanding of the Court, and the debate on whether these organs are competent to directly apply external sources is not present in recent cases.

Section 5 then analysed the use of external sources in the process of interpretation of the ACHR in light of the general rule of treaty interpretation, embodied in Article 31 of the VCLT/69, and in light of Article 29 of the ACHR. The external sources that have been used by the IACtHR in its decision-making process can be divided on the following categories: (i) other applicable rules; (ii) other rules which are not applicable to the party to a case before the IACtHR; and (iii) non-binding instruments. In the next paragraph, the first category of external sources will be addressed.

According to Article 31(3)(c) of the VCLT/69, other rules shall be taken into consideration during the process of treaty interpretation, as long as they are: (i) rules of international law, that is, sources of international obligations, such as treaties, international

[330] Cançado Trindade (2006), *supra* note 4, p.62.
[331] Ibid.
[332] Sørensen, Max, "Do the Rights Set Forth in the European Convention on Human Rights in 1950 Have the Same Significance in 1975?", *Proceedings of the Fourth International Colloquy about the European Convention on Human Rights*, Rome, 1975, Strasbourg, Council of Europe, 1976, p.98 and 106, APUD Cançado Trindade 1987, *supra* note 22, p.100.
[333] *Advisory Opinion on Gender identity and equality and non-discrimination of same-sex couples*, *supra* note 8, para.58 and 69.

customary law, general principles of international law and binding resolutions of international organizations; (ii) relevant to the interpretation of the ACHR; and (iii) applicable to the parties. If any of these requirements is not met, the use of the external source in question is not based on Article 31(3)(c) of the VCLT/69. The most controversial requirement of these three is the one according to which the rule must be "applicable in the relation between the parties". Different theories have emerged with regards to the meaning of these terms. Some of them sustain that Article 31(3)(c) only refers to rules binding upon all of the states parties to the treaty that is being interpreted. Others affirm that such a restrictive interpretation erodes the effectiveness of the treaty and thus should not be adopted. Instead, they argue that other rules could be used as interpretative guidance as long as they are at least tolerated or implicitly accepted by all of the parties to the treaty object of interpretation. While this discussion is certainly interesting and involves highly intriguing theories, it is not necessary to enter further on the meaning of "applicable in the relation between the parties", for the purposes of this thesis. After all, a different justification can be provided for reliance on other treaties ratified by some, by not all of the states parties to the ACHR, as will be recalled below.

Reliance on other treaties ratified by the party to a case, but not by all of the states parties to the ACHR, can be justified as a necessary approach in light of the *pro homine* principle. This principle establishes that, when a given provision can be interpreted in more than one direction, the interpretation most favourable to the individual must be the one adopted. This is in consonance with the object and purpose of human rights treaties, because adopting an interpretation to the detriment of the alleged victim would undermine the effectiveness of human rights treaties and, hence, their purpose of protecting fundamental rights and freedoms.

It is only possible to adopt the most favourable interpretation of the American Convention if the treaties concerning human rights that are ratified by the respondent state interact with each other during the process of interpretation of the ACHR. In other words, an interactive interpretation of human rights treaties is a precondition for a proper application of the *pro homine* principle. Hence, reliance on other relevant rules applicable to the respondent state is necessary to guarantee an effective interpretation of the ACHR and thus to realize its object and purpose. Accordingly, taking into consideration other treaties that were ratified by the respondent state, even if said treaties were not ratified by all of the states parties to the American Convention, is in consonance with Article 31(1) of the VCLT/69.

Reliance on other applicable rules to the respondent state in light of the *pro homine* principle does not require unanimity nor consensus among the states parties to the ACHR. What is here relevant is whether the rule in question binds the state party to a case before the IACtHR.

If said state consented to a norm that sets a higher threshold of protection, that norm must be taken into consideration during the interpretation of the American Convention. To argue otherwise would equate to claiming that the ACHR authorizes states to stagnate in a minimum threshold of human rights protection, even if such action is considered insufficient and would thus constitute a wrongful act in light of other obligations voluntarily acquired by that state or even in light of the domestic legislation of the state in question. Such an interpretation would undermine the effectiveness of the ACHR and the realization of the object and purpose of the Convention.

Article 29(b) the ACHR also provides a legal basis for the use of other treaties ratified by one, but not all, of the parties to the American Convention. This provision determines that the proper interpretation of the ACHR will take into consideration other relevant conventions of which one of the states parties to the ACHR is also a party. Therefore, by virtue of Article 29(b), the interpreter must apply the *pro homine* principle and rely on other relevant applicable treaties to the respondent state during the process of interpretation of the ACHR.

A final justification for the use of applicable rules to the party to a case is the context of the ACHR. Article 31(1) of the VCLT/69 determines that a treaty must be interpreted in their context. The Preamble and the text of the ACHR, in particular its Article 29, are part of the broader context of the American Convention. The Preamble of the American Convention refers to "other international instruments". While this reference is rather vague, it is clarified by Article 29(b) and (c) of the same instrument, which refers to other treaties ratified by a state party to the ACHR and to other rights and guarantees that are inherent to the human personality or derived from representative democracy. Through this cross-reference, applicable treaties to the party to a case and norms that safeguard rights and guarantees that are inherent to the human personality or derived from representative democracy are attracted to the broader context of the American Convention. Reliance on such legally-binding instruments is thus in consonance with the general rule of treaty interpretation set in the Vienna Convention of 1969. In summary, reliance for interpretative purposes on external rules applicable to the respondent state is justified in light of Articles 31(1) and, arguably, Article 31(3)(c) of the VCLT/69, as well as Article 29(c) of the ACHR.

Turning now to the second category of external sources used by the Court, that is, relevant rules that are *not* applicable to the respondent state, a legal justification can be provided for their use for interpretative purposes. If a given human rights treaty evidences an evolution in human rights law which is met with a certain level of international consensus, said evolution may be taken into consideration in light of the object and purpose of the ACHR. This could be

the case of a human rights treaty which has an almost universal ratification rate among the international community or among the states parties to the ACHR. In summary, reliance for interpretative purposes on external rules not applicable to the respondent state may be justified in light of Articles 31(1) of the VCLT/69, when such a rule is backed up by a certain level of consensus.

With regards to the third and last category of external sources, that is, non-binding instruments, no general legal basis can be provided to justify the use of all types of soft law instruments during treaty interpretation. Article 29(d) of the ACHR can, however, provide a legal basis for the use of a specific type of soft law instrument, that is, international declarations. This provision establishes that the American Convention must not be interpreted in a manner that excludes or limits "the effect that the American Declaration of the Rights and Duties of Man or other international acts of the same nature may have".[334] Therefore, other international acts of the same nature as the American Convention, that is, other international declarations, are relevant for the interpretation of the provisions of the ACHR. By expressly referring to other declarations, Article 29 attracts them to the broader context of the Convention. They thus become relevant elements in light of the general rule of treaty interpretation embodied in Article 31(1) of the Vienna Convention Vienna Convention.

The work of treaty-bodies, for its turn, can be justified in light of Article 31(3)(b) of the VCLT/69 as subsequent practice of the states parties to UN treaties. When the IACtHR relies on a UN treaty during the interpretation of the ACHR, it may consider the work of their respective treaty-bodies as subsequent practice to clarify the relevant provisions of those treaties that are used for interpretative purposes. This hypothesis, however, faces the opposition of scholars that consider that Article 31(3)(b) of the VCLT/69 only refers to state practice, and does not encompass the practice of UN bodies. Yet, even if such a criticism is adopted, the work of groups of experts will still be relevant for the interpretation of the ACHR, although not as an element *per se* of treaty interpretation. Groups of experts, such as the ILC and treaty-bodies, are relevant interpreters, and their work can be considered as legal doctrine, which is a subsidiary means for the determination of the rules of international law, in light of Article 38 of the ICJ Statute.

Finally, non-binding resolutions of international organizations are relevant for treaty interpretation for three reasons. First, because they can be evidence of the *opinion juris* of states and hence confirm the emergence of a new rule of international customary law. In that case, it

[334] ACHR, *supra* note 1, Article 29(d).

is the latter which will guide the process of interpretation of the ACHR, and non-binding resolutions will have served as a tool for the identification of a rule of international law. Alternatively, if a rule of international customary law cannot be identified, non-binding resolutions of international organizations may still constitute evidence of an international or regional consensus. On that case, taking these instruments into consideration contributes to the effectiveness of the ACHR and is thus in consonance with its object and purpose. Additionally, if met with tacit agreement or acquiescence of the states parties to the ACHR or to another treaty used by the IACtHR as interpretative guidance, non-binding resolutions that evidence a consolidated consensus may amount to subsequent practice, in the sense of Article 31(3)(b) of the VCLT/69.

The third and final possible scenario is that in which no consensus nor a rule of customary international law can be identified. On that case, the present thesis recommends that the IACtHR refrain from relying on the resolutions in question to justify an evolutive interpretation of the provisions of the ACHR. The Court could, however, rely on these instruments as evidence of emerging rules of customary law or even an emerging consensus, and thus regard them as indicatives of an *upcoming* evolution of the IACtHR.

The present thesis hopes to have contributed to the critical assessment of the practice of the Court in its use of external sources as a tool for the evolutive interpretation of the ACHR. It finalizes by stressing its recommendation that the Court adopts a consistent methodology in its use of external sources for treaty interpretation and that it clarifies to a greater degree its reliance on these sources and the role that the latter plays in the evolutive interpretation of the American Convention. If legitimacy is to be fostered, the use of external sources must be linked to a clear methodology and be based on the rules of treaty interpretation, more specifically, Article 31 of the VCLT/69 and Article 29 of the ACHR. A greater engagement of the IACtHR in a critical analysis concerning the use of external sources during the interpretation of the ACHR may also contribute to bypassing accusations of "cherry-picking" against the Inter-American Court and to strengthening the juridical security of the states of the region.

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ANNEX I

SEMI-STRUCTURED INTERVIEW GUIDE

Question 1: The Inter-American Court of Human Rights (IACtHR) and the Inter-American Commission on Human Rights (IACommHR) have applied the universalistic approach in order to assess the content and scope of the provisions of the American Convention of Human Rights (ACHR). Accordingly, they have relied on a wide range of external sources, including soft law instruments, to interpret the American Convention.

In your expert opinion, does soft law qualify as "subsequent practice", for the purposes of treaty interpretation (Article 31(3)(b) VCLT/69)? If not, does it qualify as elements to be taken into consideration as part of the context of the ACHR and in light of its object and purpose (Article 31(1) VCLT/69)?

If the answers you have provided for these two questions were negative, please answer: what is, in your opinion, the legal basis for the use of soft law as guidance in the interpretation of the ACHR?

Question 2: Is there a limit for the evolutive interpretation of human rights treaties? And for the use of external sources by the Inter-American System of Human Rights?

Question 3: In the *Las Palmeras* case (2000), the IACommHR argued that the IACtHR would be competent to declare a violation of international humanitarian law (IHL). Yet, the Court considered that it only had jurisdiction over the ACHR itself, and that IHL could only be used as an interpretative tool for the rights safeguarded in the American Convention. This was once more highlighted by the IACtHR in its 2012 judgment in the case of *Santo Domingos Massacre* v. *Colombia*.

Are you familiar with the current practice of the IACommHR? Has it argued after the *Las Palmeras* case that itself and the Court were competent to declare a violation of IHL or of another rule external to the Inter-American System of Human Rights?

Question 4: In your expert opinion, can Article 29 of the ACHR be regarded as a referral clause, thus extending the competence of the IACommHR and the IACtHR to declare the violation of a rule external to the Inter-American System of Human Rights?

Question 5: Is regional consensus adequate to the Inter-American System of Human Rights? Some of the points that can be discussed here include whether Latin America and the Caribe are too fragmented for regional consensus to be identified and whether this interpretative approach is compatible with the history of the region.

If have answer that regional consensus is indeed adequate to the Inter-American System of Human Rights, please answer: is it necessary for this regional system?

Question 6: Is it possible for a regional system of human rights to rely both on the universalistic approach and on regional consensus? Would such a balance be adequate to the Inter-American System of Human Rights?

Question 7: Could you identify some legal topics with regards to which there is a regional consensus among the States Parties to the ACHR? Could the prohibition of corporal punishment of children be such an example?

Question 8: In your expert opinion, does the evolutive interpretation of human rights treaties, as applied in the Inter-American System of Human Rights, have negative effects on the conferral or maintenance of consent to the jurisdiction of the IACtHR?

If your answer was positive, please answer as well: what measures could be applied to reach a better balance or to counter this pattern in state behavior?