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MAXIMIZING THE INTERNATIONAL HUMAN RIGHTS LITIGATION TOOLKIT: THE ROLE OF CONSENSUS

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ABSTRACT: Amongst the instruments making up the strategies for international human rights litigation, the notion of consensus constitutes a tool that is made available to the disputing parties by public international law. When expertly used, consensus can be quite useful to those invoking an evolutive interpretation and wishing to increase the scope of the rights protected by an international human rights treaty, as well as to those wishing to justify the necessity and the proportionality of the restrictions upon a right. This paper offers some recommendations to those practitioners seeking to invoke the notion of consensus in international human rights litigation through a systematisation of the practice before the European Court of Human Rights and the Inter-American Court of Human Rights.

KEYWORDS: *consensus generalis*; international human rights litigation; evolutive interpretation; national margin of appreciation; judicial activism.

MAXIMIZANDO LAS HERRAMIENTAS UTILIZADAS EN LA LITIGACIÓN INTERNACIONAL SOBRE DERECHOS HUMANOS: EL PAPEL DEL CONSENSO

RESUMEN: En el conjunto de instrumentos que componen las estrategias de litigación internacional sobre derechos humanos, la noción de consenso constituye una herramienta que el Derecho internacional público pone al servicio de las partes. Manejado con la suficiente pericia, el consenso puede ser muy útil tanto para quienes, invocando una interpretación evolutiva, desean ampliar el alcance de alguno de los derechos tutelados por un tratado internacional de derechos humanos, como

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para quienes pretenden justificar la necesidad y la proporcionalidad de las restricciones impuestas a un derecho. A partir de una sistematización de la práctica del Tribunal Europeo de Derechos Humanos y la Corte Interamericana de Derechos Humanos, el trabajo ofrece un conjunto de recomendaciones finales dirigidas a los operadores jurídicos interesados en invocar la noción de consenso en la litigación internacional sobre derechos humanos.

PALABRAS CLAVE: *consensus generalis*; Derecho internacional de los derechos humanos; interpretación evolutiva; margen de apreciación nacional; activismo judicial.

MAXIMISER LES OUTILS UTILISÉS DANS LE LITIGE INTERNATIONAL RELATIF À LA PROTECTION DES DROITS DE L'HOMME: LE PROTAGONISME DU CONSENSUS

RÉSUMÉ: Dans l'ensemble des instruments qui composent les stratégies de litige international sur les droits de l'homme, la notion de consensus constitue un outil que le droit international public met au service des parties. Géré avec une expertise suffisante, le consensus peut être très utile tant pour ceux qui, invoquant une interprétation évolutive, souhaitent élargir la portée de certains des droits protégés par un traité international des droits de l'homme, que pour ceux qui cherchent à justifier la nécessité et proportionnalité des restrictions imposées à un droit. Sur la base d'une systématisation de la pratique de la Cour européenne des droits de l'homme et de la Cour interaméricaine des droits de l'homme, l'ouvrage propose un ensemble de recommandations finales adressées aux opérateurs juridiques intéressés à invoquer la notion de consensus dans les litiges internationaux relatifs aux droits de l'homme.

MOTS-CLÉ: *consensus generalis*; contentieux international sur le droits de l'homme; interprétation évolutive; marge d'appréciation nationale; activisme judiciaire.

I. INTRODUCTION

International human rights litigation before tribunals[2] and other international bodies established under the United Nations framework[3] has increased exponentially over the last decades. In light of the above, this piece reflects upon the use of the notion of consensus, as well as on some technical challenges that this legal concept presents for practitioners.

This paper argues that, within the strategies of international human rights litigation, the concept of consensus constitutes a tool that is made available to the disputing parties by public international law. This notion can be quite useful to those invoking an evolutive interpretation, as well as to those wishing

[2] According to data issued by the Council of Europe, in 2020 the ECtHR received 41,700 applications. Though this number is lower to the one reached in 2010 (61,100), this tribunal still had approximately 62,000 pending cases in 2020. With regards to the Inter-American Commission on Human Rights, in 2019 it received a total of 3,034 petitions. This number should be confronted with those received in 1997 (435); the 885 petitions received in 2001; and the 1,658 petitions received in 2011.

[3] Until 2016, the Office of the United Nations High Commissioner for Human Rights had received a total of 2,932 petitions.

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to justify the necessity and the proportionality of the restrictions upon a right.

In particular, the paper focuses on the case law of the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR) that has interpreted the European Convention on Human Rights (ECHR)[4] and the American Convention on Human Rights (ACHR),[5] respectively.

This piece is divided in two sections. Section II pinpoints some basic aspects related to the notion of consensus in public international law, as well as its use by the ECtHR and the IACtHR.[6] The purpose of this section is to present how these tribunals apply this notion in practice. While section III analyses recent case law in which the notion of consensus has played or might have played a relevant role in the settlement of the dispute. The paper closes (in section IV) with a series of recommendations to those practitioners interested in using a consensualist approach in international human rights litigation.

II. THE NOTION OF CONSENSUS IN INTERNATIONAL HUMAN RIGHTS LITIGATION: GENERAL CONSIDERATIONS

Section II offers a series of general considerations on the use of the notion of consensus in international human rights litigation. These considerations are divided into three subsections. The first explains the scope of the notion of consensus in public international law from a substantive dimension. The second deals with the way in which this notion contributes to the evolutive interpretation of regional human rights treaties. Finally, the third subsection reflects on the legal effects of a lack of consensus upon the interpretation of these international treaties.

1. The Scope of the Notion of Consensus in Contemporary International Law: Consensus As a Polyvalent Concept

The notion of consensus presents a double dimension in public

[4] *United Nations Treaty Series*, vol. 213, No. 2889, p. 221.

[5] *United Nations Treaty Series*, vol. 1144, No. 17955, p. 123.

[6] In essence, the first section of this paper encapsulates some of the main conclusions reached in Pascual-Vives, F., *Consensus-Based Interpretation of Regional Human Rights Treaties*, Brill/Nijhoff, Leiden/Boston, 2019.

international law. It can be considered both from a formal and a substantive dimension. The latter allows explaining the formation, modification, and termination of international obligations and also offers a theoretical basis to justify the binding nature of public international law.

From a formal dimension,[7] consensus can be conceived as a decision-making mechanism within the institutional framework. The United Nations Office of Legal Affairs issued a definition of consensus in these terms: "adoption of a decision without formal objections and vote; this being possible only when no delegation formally objects to a consensus being recorded, though some delegations may have reservations to the substantive matter at issue or to a part of it".[8]

From a substantive dimension, the notion of consensus implies a general agreement that is representative of the common interests and convictions of the States. This agreement (*consensus generalis*) allows States not only to identify the content of the international rules (treaties and customs) applicable in their relations, but also to explain their binding nature.[9] Public international law results from an agreement reached by States and such an agreement (*consensus gentium*) increases the probability of its observance.[10] In other words, States

[7] Suy, E., "Role et signification du consensus dans l'élaboration du droit international", in *Le Droit international a l'heure de sa codification.* Études *en l'honneur de Roberto Ago*, t. I, Giuffrè, Milan, 1987, pp. 521-542; Danilenko, G.M., *Law-Making in the International Community*, Martinus Nijhoff, Dordrecht, 1993, pp. 277-286; and Ferrer Lloret, J., *El consenso en el proceso de formación institucional de normas en el Derecho internacional*, Atelier, Barcelona, 2006, pp. 101-160.

[8] *United Nations Juridical Yearbook*, 1987, p. 174. In this sense: see "Consensus", in Salmon, J. (dir.), *Dictionnaire de droit international public*, Bruylant, Brussels, 2001, pp. 239-240; and Wolfrum, R. and Pichon, J., "Consensus", in Wolfrum, R. (dir.), *The Max Planck Encyclopaedia of Public International Law*, vol. II, Oxford University Press, Oxford, 2012, pp. 673-678.

[9] Mosler, H., "The International Society as a Legal Community", *Recueil des Cours*, t. 140, 1973, pp. 1-320, pp. 96-97; Weil, P., "Le droit international en quête de son identité. Cours général de droit international public", *Recueil des Cours*, t. 237, 1992, pp. 9-370, pp. 68-80; Carrillo Salcedo, J.A., "El fundamento del Derecho internacional: algunas reflexiones sobre un problema clásico", *Revista Española de Derecho Internacional*, vol. L, 1998, pp. 13-31, p. 23; Kamto, M., "La volonté de l'État en droit international", *Recueil des Cours*, t. 310, 2004, pp. 9-428, pp. 60-67; and Jiménez Piernas, C., "El Derecho internacional contemporáneo: una aproximación consensualista", in *XXXVII Curso de Derecho Internacional organizado por el Comité Jurídico Interamericano*, Organisation of American States, Washington, 2011, pp. 2-64, pp. 27-31.

[10] Higgins, R., "International Law and the Avoidance, Containment and Resolution of Disputes. General Course on Public International Law", *Recueil des Cours*, t. 230, 1991, pp.

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only participate in the creation of those norms that satisfy their interests and consequently comply with them precisely for this reason.

Therefore from a substantive dimension, consensus is a polyvalent concept. In its double format as *consensus generalis* and *consensus gentium*, it provides an explanation of the formation, amendment and termination of customary rules and international treaties, as well as it offers a plausible theoretical justification for their mandatory nature.

2. An Evolutive Interpretation of Regional Human Rights Treaties through the Notion of Consensus

The concept of consensus can be used in international litigation before the ECtHR and the IACtHR to undertake an evolutive interpretation of the rights conferred by the ECHR and the ACHR. These treaties were signed in 1950 and 1969, respectively. The notion of consensus, understood as the agreement by a significant number of States regarding the content and the mandatory nature of a rule, paves the way for an evolutive interpretation of the ECHR and the ACHR. The following paragraphs analyse some precedents that highlight how the ECtHR and the IACtHR have resorted to a consensualist approach. In order to successfully argue this approach, evidence of *consensus generalis* can be found in universal and regional treaty practice.

A. Evidence of Consensus within the Universal Treaty Practice: A Manifestation of Intra-systemic Coherence

Following a consensualist approach, international treaties on human rights and international humanitarian law have been cited before the ECtHR and the IACtHR in order to demonstrate the existence of a *consensus generalis* on which to base an evolutive interpretation.

In this sense, we can mention the International Covenant on Civil and Political Rights;[11] the Convention on the Elimination of All Forms of

9-342, p. 41; and Zemanek, K., "The Legal Foundations of the International System. General Course on Public International Law", *Recueil des Cours*, t. 266, 1997, pp. 9-336, pp. 31-32.

[11] *United Nations Treaty Series*, vol. 999, No. 14668, p. 171 (*Soering v. United Kingdom*, 7 July 1989, §§ 88 and 108, Series A, No. 161; *The Right of Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, IACtHR Advisory Opinion OC-16/99 of 1 October 1999, Series A, No. 16, paras. 116-121; *Bayatyan v. Armenia* [GC], No. 23459/03, § 105, ECtHR 2011; and *Sitaropoulos and Giakoumopoulos v. Greece* [GC], No. 42202/07, §§ 72-75, ECtHR 2012).

Discrimination against Women;[12] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[13] the Convention on the Rights of the Child;[14] the Statute of the International Criminal Court;[15] the Convention on the Rights of Persons with Disabilities;[16] or the International Convention for the Protection of All Persons from Enforced Disappearance.[17]

One of the main legal challenges to evolutive interpretation rises when the respondent State is not a party to an international treaty that has been argued by the applicant before the ECtHR or the IACtHR as evidence of *consensus generalis*. The respondent State could object to an evolutive interpretation on the basis of the principle of sovereign equality. If a State is not a party to a treaty, following a "voluntarist argument", no obligations arising from that treaty are binding for the latter, except in the circumstances prescribed under Articles 35-38 of the Vienna Convention on the Law of Treaties.[18]

However, *consensus generalis* implies a general (but not necessarily a unanimous) agreement. In this context, the "voluntarist argument" often used by respondent States might not be persuasive enough. In fact, the ECtHR and the IACtHR have not hesitated to undertake an evolutive interpretation on the

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[12] *United Nations Treaty Series*, vol. 1249, No. 20378, p. 13 (*Ünal Tekeli v. Turkey*, No. 29865/96, §§ 30-31, ECtHR 2004).

[13] *United Nations Treaty Series*, vol. 2515, No. 44910, p. 3 (*Soering v. United Kingdom*, 7 July 1989, §§ 87-88, Series A, No. 161; and *Case of Caesar v. Trinidad and Tobago*, IACtHR Judgment of 11 March 2005, Series C, No. 123, para. 61).

[14] *United Nations Treaty Series*, vol. 1577, No. 27531, p. 3 (*T. v. United Kingdom*, No. 24724/94, §§ 74-75, ECtHR 1999; *V. v. United Kingdom*, No. 24724/94, §§ 76-77, ECtHR 1999; *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala*, IACtHR Judgment of 19 November 1999, Series C, No. 63, para. 193; *Juridical Condition and Human Rights of the Child*, IACtHR Advisory Opinion OC-17/02 of 28 August 2002, Series A, No. 17, para. 29; and *S. and Marper v. United Kingdom* [GC], No. 30562/04 and No. 30566/04, § 124, ECtHR 2008).

[15] *United Nations Treaty Series*, vol. 2187, No. 38544, p. 3 (*Scoppola v. Italy (No. 2)* [GC], No. 10249/03, § 105, ECtHR 2009).

[16] *United Nations Treaty Series*, vol. 2515, No. 44910, p. 3 (*Glor v. Switzerland*, No. 13444/04, § 53, ECtHR 2009; and *Alajos Kiss v. Hungary*, No. 38832/06, §§ 14 and 44, ECtHR 2010).

[17] *United Nations Treaty Series*, vol. 2716, No. 48088, p. 3 (*Case of Blake v. Guatemala*, IACtHR Judgment of 22 May 1999, Series C, No. 48, paras. 96-97; and *Varnava and Others v. Turkey* [GC], No. 16064/90, No. 16065/90, No. 16066/90, No. 16068/90, No. 16069/90, No. 16070/90, No. 16071/90, No. 16072/90 and No. 16073/90, § 163, ECtHR 2009).

[18] *United Nations Treaty Series*, vol. 1155, No. 18232, p. 331.

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basis of a *consensus generalis* that excludes the respondent State.

In *Demir and Baykara v. Turkey*, the international responsibility of Turkey was declared despite the respondent State being outside the scope of a general consensus regarding the right to collective bargaining of public servants. Turkey based part of its defence on the fact that upon ratifying the European Social Charter,[19] it had excluded the application of Articles 5 (right to organize) and 6 (right to bargain collectively).

The ECtHR found that the disputed right could be integrated into the scope of application of the right to freedom of assembly and association envisaged in the ECHR.

In reaching this conclusion, the Grand Chamber pondered the evolution of labour relations both within the International Labour Organisation (ILO)[20] and Europe. The ECtHR was not persuaded by the "voluntarist argument" put forward by Turkey:

> in searching for common ground among the norms of international law it has never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent State. [...] in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases. [...] [I]t is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies.[21]

The Grand Chamber noted that Turkey had ratified two international

[19] *Council of Europe Treaty Series*, No. 35.

[20] *Demir and Baykara v. Turkey* [GC], No. 34503/97, §§ 146-150, ECtHR 2008.

[21] *Ibidem*, §§ 78 and 85-86.

treaties concluded within the auspices of the ILO on the trade union rights of public servants (the ILO Convention No. 87[22] and the ILO Convention No. 98[23]). Therefore, although Turkey was not bound by the obligations set out in the European Social Charter, it could not be said that it was completely alien to them under other international treaties.[24]

Within the Inter-American system, *Saramaka People v. Suriname* serves as precedent. In this case the parties disputed over the application to Suriname of a doctrine already established by the IACtHR to favour indigenous peoples on the basis of the implementation of the Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169).[25]

The particular feature of this case was that the respondent State had not ratified the ILO Convention No. 169 (on which the IACtHR could base an evolutive interpretation of the ACHR). In this vein, Suriname used a "voluntarist argument" to base its defence. However, the IACtHR stressed that non-ratification of the aforementioned treaty did not leave Suriname outside an international consensus on the right of indigenous peoples to communal ownership over their lands. In particular, the IACtHR noted that Suriname had ratified other international treaties (such as the International Covenant on Civil and Political Rights) from which that right could also be deduced:

> Suriname's domestic legislation does not recognize a right to communal property of members of its tribal communities, and it has not ratified ILO Convention 169. Nevertheless, Suriname has ratified both the International Covenant on Civil and Political Rights as well as the International Covenant on Economic, Social, and Cultural Rights. The Committee on Economic, Social, and Cultural Rights, which is the body of independent experts that supervises State parties' implementation of the ICESCR, has interpreted common Article 1 of said instruments as being applicable to American indigenous peoples. Accordingly, by virtue of the right of indigenous peoples to self-determination recognized under said Article 1, they may "freely pursue their economic, social and cultural development", and may "freely dispose of their natural wealth and

[22] *United Nations Treaty Series*, vol. 68, No. 881, p. 17.

[23] *United Nations Treaty Series*, vol. 96, No. 1341, p. 257.

[24] *Demir and Baykara v. Turkey* [GC], No. 34503/97, §§ 100-101, 123-125, 151-152 and 166, ECtHR 2008.

[25] *United Nations Treaty Series*, vol. 1650, No. 28383, p. 383.

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> resources" so as not to be "deprived of [their] own means of subsistence". Pursuant to Article 29(b) of the American Convention, this Court may not interpret the provisions of Article 21 of the American Convention in a manner that restricts its enjoyment and exercise to a lesser degree than what is recognized in said covenants. This Court considers that the same rationale applies to tribal peoples due to the similar social, cultural, and economic characteristics they share with indigenous peoples.
>
> Similarly, the Human Rights Committee has analyzed the obligations of State Parties to the ICCPR under Article 27 of such instrument, including Suriname, and observed that "minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture [, which] may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority.[26]

Demir and Baykara v. Turkey and *Pueblo Saramaka v. Suriname* demonstrate how the ECtHR and IACtHR can invoke a consensualist approach to undertake an evolutive interpretation of the ECHR and the ACHR, respectively. In accordance with the substantive dimension of the notion of consensus, neither tribunal requires unanimity, but a general agreement amongst States. A *consensus generalis* in which the respondent State might not necessarily participate. This fact to some degree is a limitation upon the principle of State sovereignty (and upon the "voluntarist argument"). On the other hand, it consolidates the coherence of international human rights law (inter-systemic coherence).

B. Evidence of Consensus within the Regional Practice of States: Some Substantive Challenges

In addition to international treaties with universal application, the ECtHR and the IACtHR also use regional practice as evidence of a *consensus generalis* upon which to undertake an evolutive interpretation of the ECHR and the ACHR, respectively. In this context, it is worth analysing a pair of precedents that refer, on one hand to the influence exercised by the European integration process on the ECtHR (*Christine Goodwin v. United Kingdom*) and, on the other hand, to the role of the resolutions of the General Assembly of the Organisation of American States (OAS General Assembly) within the IACtHR (*Atala Riffo and daughters v. Chile*).

[26] *Case of the Saramaka People v. Suriname*, IACtHR Judgment of 28 November 2007, Series C, No. 172, paras. 93-94.

Both cases share as common denominator the fact that the ECtHR and the IACtHR looked for evidence of a *consensus generalis* within the European and Inter-American treaty practice. However, they pose different substantive challenges. *Christine Goodwin v. United Kingdom* delves into the interaction between the Council of Europe and the European Union (EU). While *Atala Riffo and daugthers v. Chile* delves into the interaction between the substantive and formal dimensions of the notion of consensus.

a. Challenges Arising from the Interaction between the Council of Europe and the European Union

In *Christine Goodwin v. United Kingdom* a number of issues were discussed in relation to the scope of Articles 8 (right to respect for private and family life), 12 (right to marry) and 14 (prohibition of discrimination) of the ECHR and the treatment afforded by the United Kingdom to transsexuals. The applicant requested the recognition of her right to modify the information in her birth certificate based on these provisions, after the authorities of the United Kingdom had denied her request. The ECtHR had examined similar applications prior to this precedent, but had always maintained a position of deference towards States.[27] However, in *Christine Goodwin v. United Kingdom* it finally accepted the applicant's claims.

One of the main argumentative challenges that the Grand Chamber had to address was the inexistence of a "common approach"[28] amongst the members of the Council of Europe. The absence of consensus made it difficult for the ECtHR to invoke an evolutive interpretation. However, the Grand Chamber found for the applicant as to the right to marriage without abandoning a consensualist approach.[29] The ECtHR used the European integration process and, particularly, the provisions of the EU Charter of Fundamental Rights[30]

[27] *Rees v. United Kingdom*, 17 October 1986, §§ 37 and 44, Series A, No. 106; *Cossey v. United Kingdom*, 27 September 1990, §§ 37, 40 and 46, Series A, No. 184; *X, Y and Z v. United Kingdom* [GC], No. 21830/93, §§ 47-48, ECtHR 1997; and *Sheffield and Horsham v. United Kingdom*, No. 22985/93 and No. 23390/94, § 60, ECtHR 1998.

[28] *Christine Goodwin v. United Kingdom* [GC], No. 28957/95, § 85, ECtHR 2002.

[29] For a complete analysis of the consensualist approach developed in this case by the ECtHR: see Morawa, A., "The 'Common European Approach', 'International Trends', and the Evolution of Human Rights Law. A Comment on *Goodwin and I v. the United Kingdom*", *German Law Journal*, vol. 3, 2002, para. 33.

[30] *OJ* C 326, 26 October 2012, p. 389.

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recognizing the right to marriage, to base its findings:

> the Court is not persuaded that at the date of this case it can still be assumed that these terms must refer to a determination of gender by purely biological criteria (…). There have been major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality (…). The Court would also note that Article 9 of the recently adopted Charter of Fundamental Rights of the European Union departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women.[31]

This precedent evidences the argumentative challenges faced by the ECtHR when it fails to identify a "common approach" amongst the member States of the Council of Europe; a *consensus generalis* that would otherwise pave the way for an evolutive interpretation of the ECHR. As the United Kingdom was then still a member of the EU, the Grand Chamber "imported" the *consensus generalis* in light of the legal developments within the European integration process.

As is reflected in *Christine Goodwin v. United Kingdom*, the coexistence of two regional subsystems in Europe can promote a certain "dialogue" between the political and the judicial institutions of the Council of Europe and the EU. This interplay favours the legal coordination and enhances the coherence amongst both subsystems (inter-systemic coherence).

b. Challenges Arising from the Interaction between the Substantive and the Formal Dimensions of Consensus

Atala Riffo and daughters v. Chile is a precedent where the interaction between the substantive and formal dimensions of the notion of consensus was at stake.[32] The IACtHR recognised a violation of the right to family life after Chilean tribunals had removed the custody of two minors from a lesbian woman who cohabitated with another woman. To reach this finding, it made an evolutive interpretation of the legal scope of the right to family life on the basis, amongst other arguments, of the resolutions adopted by the

[31] *Christine Goodwin v. United Kingdom* [GC], No. 28957/95, § 100, ECtHR 2002.

[32] In the first subsection of this piece we have already outlined how the notion of consensus has a substantive dimension (the process of creating international norms) and a formal dimension (the process of adopting decisions within international organisations).

OAS General Assembly with regards to non-discrimination based on sexual orientation.[33]

The IACtHR relied on the OAS General Assembly resolutions to deduce the existence of a *consensus generalis* (formal dimension of consensus).[34] This approach allowed the IACtHR to invoke an evolutive interpretation of the ACHR (substantive dimension of consensus). The IACtHR found that Chile had committed an arbitrary interference of the right of family life. This finding was reached despite the fact that the States parties to the OAS had only reached consensus regarding the need to avoid discrimination on the basis of sexual orientation, but no *consensus generalis* had been reached regarding the concept of family:

> the American Convention contains two provisions that protect family life in a complementary manner. Indeed, the Court considers that the imposition of a single concept of family should be analysed not only as possible arbitrary interference with private life, in accordance with Article 11(2) of the American Convention, but also, because of the impact it may have on a family unit, in light of Article 17 of said Convention.[35]

When analysing this precedent from a consensualist approach, at least two observations can be noted. First, the IACtHR recognised that there was no *consensus generalis* within the Inter-American system regarding sexual orientation as a category prohibiting discrimination.[36] Second, the IACtHR gave particular relevance to the international[37] and European[38] practice.

In this context, the use of both dimensions of consensus before an international tribunal must be done with caution. The generic argument cannot

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[33] *Case of Atala Riffo and daughters v. Chile*, IACtHR Judgment of 24 February 2012, Series C, No. 239, para. 86.

[34] See AG/RES. 2435 (XXXVIII-O/08), "Human rights, sexual orientation and gender identity", 3 June 2008; AG/RES. 2504 (XXXIX-O/09), "Human rights, sexual orientation and gender identity", 4 June 2009; AG/RES. 2600 (XL-O/10), "Human rights, sexual orientation and gender identity", 8 June 2010; and AG/RES. 2653 (XLI-O/11), "Human rights, sexual orientation and gender identity", 7 June 2011.

[35] *Case of Atala Riffo and daughters v. Chile*, IACtHR Judgment of 24 February 2012, Series C, No. 239, para. 175.

[36] *Ibidem*, para. 92.

[37] *Toonen v. Australia* (CCPR/C/50/D/488/1992, 31 March 1994).

[38] *Schalk and Kopf v. Austria*, No. 30141/04, §§ 93-95, ECtHR 2010.

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be made that a resolution that was adopted by consensus within an international organisation could and should always generate rights and obligations to those States participating in its adoption. The International Court of Justice has confirmed this conclusion in the case concerning the *Obligation to Negotiate Access to the Pacific Ocean*, when stating that:

> resolutions of the General Assembly of the OAS are not per se binding and cannot be the source of an international obligation. Chile's participation in the consensus for adopting some resolutions therefore does not imply that Chile has accepted to be bound under international law by the content of these resolutions. Thus, the Court cannot infer from the content of these resolutions nor from Chile's position with respect to their adoption that Chile has accepted an obligation to negotiate Bolivia's sovereign access to the Pacific Ocean.[39]

In other words, consensus (understood from its formal dimension) does not automatically generate international obligations (substantive dimension). The practice of States after the adoption by consensus of any non-binding resolution within the institutional framework (international organisations) is an essential element to determine if that resolution can reach binding nature.

3. Some Limits to Evolutive Interpretation of Regional Human Rights Treaties Arising from the Notion of Consensus

When there does not seem to be consensus amongst the member States of the ECHR or the ACHR, regional human rights tribunals may adopt a decision in line with the principle of subsidiarity and therefore favourable to the respondent State. Such decision would lead to a result contrary to the one that would have been reached using an evolutive interpretation. In order to achieve this outcome, the ECtHR has developed the notion of the national margin of appreciation. The IACtHR has also invoked this concept, though with less enthusiasm. The following lines analyse this concept and, in particular, its influence in practice.

A. The National Margin of Appreciation: An Indeterminate Legal Concept

The national margin of appreciation can be used in regional human rights systems to modulate the tension between sovereignty and cooperation. As a former member of the ECtHR noted, it is a concept that is "at the heart of

[39] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Judgment, I.C.J. Reports 2018*, p. 507, para. 171.

virtually all major cases that come before the Court".[40] At the outset, the ECtHR conceived this concept in a praetorian fashion.[41] First within the framework of interstate litigation,[42] though it later was transferred to other disputes.[43] In *Handyside v. United Kingdom* the ECtHR stated that by reason of its:

> direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them. The Court notes at this juncture that, whilst the adjective 'necessary', within the meaning of Article 10 para. 2 (…), is not synonymous with 'indispensable' (…), neither has it the flexibility of such expressions as 'admissible', 'ordinary' (…), 'useful' (…), 'reasonable' (…) or 'desirable'. Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context. Consequently, Article 10 para. 2 (…) leaves a margin of appreciation to the Contracting States. This margin is given both to the domestic legislator ('prescribed by law') and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force (…).[44]

Occasionally, the national margin of appreciation has been "imported" to the Inter-American system. In its advisory opinion regarding the *Proposed amendments to the Naturalization provision of the Constitution of Costa Rica*, the IACtHR indicated that:

> Although it cannot be denied that a given factual context may make it

[40] Macdonald, R.St.J., "The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights", in *International Law at the Time of its Codification. Essays in Honour of Roberto Ago*, t. III, Giuffrè, Milan, 1987, pp. 186-208, p. 208.

[41] Other international courts and tribunals have also developed legal categories seeking to recognise deference towards States: see *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 4, para. 270; *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Uruguay* (ICSID Case No. ARB/10/7, Award of 8 July 2016, para. 388); or *Duzgit Integrity Arbitration (Malta* v. *Sao Tomé and Principe)*, PCA Case No. 2014-07, Award of 6 September 2016, paras. 209-210.

[42] *Greece v. United Kingdom*, No. 176/56, vol. II, Report of 26 September 1958, para. 318; or *Ireland v. United Kingdom*, 18 January 1978, § 207, Series A, No. 25.

[43] *Wilde, Ooms and Versyp (Vagrancy) v. Belgium*, 18 June 1971, § 93, Series A, No. 12.

[44] *Handyside v. United Kingdom*, 7 December 1976, § 48, Series A, No. 24.

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> more or less difficult to determine whether or not one has encountered the situation described in the foregoing paragraph, it is equally true that, starting with the notion of the essential oneness and dignity of the human family, it is possible to identify circumstances in which considerations of public welfare may justify departures to a greater or lesser degree from the standards articulated above. One is here dealing with values which take on concrete dimensions in the face of those real situations in which they have to be applied and which permit in each case a certain margin of appreciation in giving expression to them.[45]

Nevertheless, its impact in the Inter-American system has not been as vigorous. At this juncture, it is important to recall that the first cases before IACtHR were based on the right to life or the prohibition on torture and these rights are not within the realm of application of the national margin of appreciation.[46]

The national margin of appreciation is an indeterminate and flexible legal concept. Its application by regional human rights tribunals cannot be easily predicted because its invocation depends on a series of intrinsic factors[47] (the legal nature of the disputed obligation[48] or of the protected public or private interest).[49] In addition, we argue that the national margin of appreciation can be further activated through an extrinsic element, the consensus of States.

B. *Consensus Generalis*: An Element Conditioning the Application of the National Margin of Appreciation

This subsection analyses how the ECtHR and the IACtHR have dealt with the interplay between the national margin of appreciation and the notion of

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[45] *Proposed amendments to the Naturalization provision of the Constitution of Costa Rica*, IACtHR Advisory Opinion OC-4/84 of 19 February 1984, Series A, No. 4, para. 58.

[46] Legg, A., *The Margin of Appreciation in International Human Rights Law. Deference and Proportionality*, Oxford University Press, Oxford, 2012, pp. 4-5.

[47] Mahoney, P., "Marvellous Richness of Diversity or Invidious Cultural Relativism?", *Human Rights Law Journal*, vol. 19, 1998, pp. 1-6.

[48] Orakhelashvili, A., "Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights", *European Journal of International Law*, vol. 14, 2003, pp. 529-568, p. 533.

[49] Compare *Mouvement Raëlien Suisse v. Switzerland* [GC], No. 16354/06, § 62, ECtHR 2012 with *Casado Coca v. Spain*, 24 February 1994, § 50, Series A, No. 285-C and *Wingrove v. United Kingdom*, No. 17419/90, § 58, ECtHR 1996.

consensus. In this context, two arguments can be highlighted in international human rights litigation.

a. Generalist Argument: The Lack of Consensus Triggers the National Margin of Appreciation

Lautsi and Others v. Italy focused on whether the exhibition of a crucifix in Italian public schools was in accordance with the ECHR and can be conceived as a precedent to illustrate the generalist argument.

The judgment issued by the Chamber had outlined the duty of the State to maintain a neutral position regarding all religions. Based on this argument,[50] it had concluded that it did not understand how the exhibition of crucifixes "could serve the educational pluralism".[51] To the contrary, the presence of the crucifix implied a religious symbol that exercised important pressure on those students who did not profess the Catholic religion:

> The presence of the crucifix may easily be interpreted by pupils of all ages as a religious sign, and they will feel that they have been brought up in a school environment marked by a particular religion. What may be encouraging for some religious pupils may be emotionally disturbing for pupils of other religions or those who profess no religion. That risk is particularly strong among pupils belonging to religious minorities. Negative freedom of religion is not restricted to the absence of religious services or religious education. It extends to practices and symbols expressing, in particular or in general, a belief, a religion or atheism. That negative right deserves special protection if it is the State which expresses a belief and dissenters are placed in a situation from which they cannot extract themselves if not by making disproportionate efforts and acts of sacrifice.[52]

However, the judgment of the Grand Chamber in 2011 confirmed that member States of the Council of Europe might enjoy a wider margin of appreciation to develop their obligation to offer an education in accordance with their own religious and philosophical convictions.[53] Though the Grand Chamber admitted that the presence of crucifixes in the classrooms constituted

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[50] Martín-Retortillo Baquer, L., *Estudios sobre libertad religiosa*, Reus, Madrid, 2011, p. 252.

[51] *Lautsi v. Italy*, No. 30814/06, § 56, ECtHR 2009.

[52] *Ibidem*, § 55.

[53] *Lautsi and Others v. Italy* [GC], No. 30814/06, § 61, ECtHR 2011.

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"above all" a religious symbol,[54] its decision was centred upon analysing the effects of exhibiting such religious symbols. Unlike other "powerful external symbols" such as the *yihab*, the crucifix was considered a "passive symbol" that gave the Catholic religion a preponderant place, but did not generate indoctrinating or discriminating effects upon the students.[55]

This slightly less than convincing argument allowed the Grand Chamber to diverge from the judgment that the Chamber had adopted. It endorsed the interpretation made by the Italian authorities as to the meaning of the crucifix.[56] In order to fully understand this Copernican turn, it is important to take note of the absence of a *consensus generalis* amongst the member States of the Council of Europe regarding the presence of religious symbols in public schools:

> the decision whether crucifixes should be present in State-school classrooms is, in principle, a matter falling within the margin of appreciation of the respondent State. Moreover, the fact that there is no European consensus on the question of the presence of religious symbols in State schools […] speaks in favour of that approach.[57]

In the absence of consensus, the Grand Chamber opted for an aseptic decision, respectful of the principle of subsidiarity. It was left for Italy to decide the scope of the issue. From this perspective, *Lautsi and Others v. Italy* is coherent and consistent with the role of the notion of consensus in public international law.

Consensus generalis becomes a fundamental element to set off the evolution of regional human rights treaties. The absence of consensus tends to reinforce the use of the national margin of appreciation while consensus encourages

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[54] *Ibidem*, § 66.

[55] *Ibidem*, §§ 71-74.

[56] Lozano Contreras, F., "TEDH - Sentencia de 03.11.2009, Lautsi c. Italia, 30814/06 - Artículo 9 CEDH - Protocolo nº 1 - la presencia de crucifijos en las aulas frente al derecho a la educación y a la libertad religiosa en la enseñanza pública", *Revista de Derecho Comunitario Europeo*, No. 35, 2010, pp. 223-237; Parejo Guzmán, M.J., "Reflexiones sobre el asunto *Lautsi* y la jurisprudencia del TEDH sobre símbolos religiosos: hacia soluciones de carácter inclusivo en el orden público europeo", *Revista de Derecho Comunitario Europeo*, No. 37, 2010, pp. 865-896; and Simón Yarza, F., "Símbolos religiosos, derechos subjetivos y derecho objetivo. Reflexiones en torno a *Lautsi*", *Revista de Derecho Comunitario Europeo*, No. 43, 2012, pp. 901-925.

[57] *Lautsi and Others v. Italy* [GC], No. 30814/06, § 70, ECtHR 2011.

their evolutive interpretation. However, in a particular legal regime such as international human rights law, a particularistic argument can also be made.

b. Particularistic Argument: The Lack of Consensus May Also Trigger Judicial Activism

The interaction between consensus and the national margin of appreciation has particular features within the Inter-American system. This particularism can be based on the notable gravitational force exercised by Article 29 of the ACHR. This provision recognises a "pro individual" principle and prohibits the alienation of the rights granted to individuals. Further, it establishes an obligation for the IACtHR not to limit the use and enjoyment of the rights recognised through other international (regional or universal) treaties that may have been concluded by the member States of the ACHR. It is for this reason that the IACtHR often resorts to this provision when invoking an evolutive interpretation of the ACHR:

> This Court has indicated on other occasions that human rights treaties are living instruments, whose interpretation must keep abreast of the passage of time and current living conditions. This evolving interpretation is consistent 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. In making an evolutionary interpretation, the Court has granted special relevance to comparative law, and has therefore used domestic norms or the caselaw of domestic courts when analysing specific disputes in contentious cases. For its part, the European Court has used comparative law as a mechanism to identify the subsequent practice of States; in other words, to determine the context of a particular treaty. In addition, for the purposes of interpretation, Article 31(3) of the Vienna Convention authorizes the use of means such as agreements or practice or relevant rules of international law that States have mentioned in relation to the treaty, which is related to an evolutive view of the interpretation of the treaty.[58]

[58] *Case of Artavia Murillo and Others ("In vitro fertilization") v. Costa Rica*, IACtHR Judgment of 28 November 2012, Series C, No. 257, para. 245. In the same sense: see *Case of López Soto and Others v. Venezuela*, IACtHR Judgment of 26 September 2018, Series C, No. 362, para. 193; *Case of Rosario Villavicencio v. Perú*, IACtHR Judgment of 14 October 2019, Series C, No. 388, para. 89; *Case of Spoltore v. Argentina*, IACtHR Judgment of 9 June 2020, Series C, No. 404, para. 87; and *Case of the Employees of the Fireworks Factory of Santo Antônio de Jesus v. Brazil*, IACtHR Judgment of 15 July 2020, Series C, No. 407, para. 158.

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Artavia Murillo and Others v. Costa Rica analysed the conformity of the prohibition of *in vitro* fertilization in Costa Rica with the ACHR.[59] One of the disputed issues in this case was the existence of a consensus on the regulation of *in vitro* fertilization in the States parties to the ACHR. The IACtHR noted that -with the exception of Costa Rica (whose legislation expressly prohibited this technique)- a certain consensus could be identified at a regional level. At the very least, there was a consensus as to there being no need to protect the unborn in such an absolute fashion as indicated by the Costa Rican legislation:

> even though there are few specific legal regulations on IVF, most of the States of the region allow IVF to be practiced within their territory. This means that, in the context of the practice of most States Parties to the Convention, it has been interpreted that the Convention allows IVF to be performed. The Court considers that this practice by the States is related to the way in which they interpret the scope of Article 4 of the Convention, because none of the said States has considered that the protection of the embryo should be so great that it does not permit assisted reproduction techniques and, in particular, IVF. Thus, this generalized practice is associated with the principle of gradual and incremental – rather than absolute – protection of prenatal life and with the conclusion that the embryo cannot be understand as a person.[60]

Based on this finding as well as on the application of Article 29 of the ACHR, the IACtHR developed an evolutive interpretation and issued a judgment that was favourable to the interests of the victims. As has been previously examined (*Demir and Baykara v. Turkey* and *Pueblo Saramaka v. Suriname*), regional human rights tribunals can settle a dispute through evolutive interpretation even when the respondent State has "objected" or is alien to the consensus. However, as Judge Vio Grossi stated in his dissenting opinion in *Artavia Murillo and Others v. Costa Rica*,[61] a more detailed analysis of State practice within the Inter-American system would have revealed that this consensus was frail.

Evolutive interpretation combined with judicial activism can lead to

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[59] Chía, E.A. and Contreras, P., "Análisis de la Sentencia Artavia Murillo y otros ('Fecundación *in vitro*') Vs. Costa Rica de la Corte Interamericana de Derechos Humanos", *Estudios Constitucionales*, año XII, 2014, pp. 567-585.

[60] *Case of Artavia Murillo and Others ("In vitro fertilization") v. Costa Rica*, IACtHR Judgment of 28 November 2012, Series C, No. 257, para. 256.

[61] *Ibidem*, Dissenting Opinion of Judge Vio Grossi, para. 20.

"borderline situations" where an international tribunal, in this case IACtHR, acts rather like a constitutional court. Such judicial activism could also impact the domestic sphere of the State through the doctrine of the conventionality control.[62]

Judicial activism is an approach that international (and domestic) bodies can take to settle the disputes submitted before them. This paper only seeks to warn as to the risks involved for regional human rights tribunals upon endeavouring to apply judicial activism without resorting to the legal tools afforded by public international law, in particular, the notion of consensus.[63]

III. RECENT PRACTICE EVIDENCING DIFFERING APPROACHES TO THE NOTION OF CONSENSUS IN INTERNATIONAL HUMAN RIGHTS LITIGATION

The considerations presented in section II outline the significant influence that the notion of consensus can exercise over international human rights litigation. In section III we discuss some nuances of the consensualist approach in the litigation before the ECtHR and the IACtHR.

1. The Absence of a *Consensus Generalis* as a Basis for the Invocation of the National Margin of Appreciation

In accordance with what was discussed in section II, one of the general rules that can dictate the use of the notion of consensus in international human rights litigation is that the absence of a *consensus generalis* yields higher deference to States. The ECtHR has applied this rule taking into account

[62] Villanueva Flores, R., "Activismo judicial y límites del derecho en la actuación ante la Corte Interamericana de Derechos Humanos", *Doxa, Cuadernos de Filosofía del Derecho*, No. 41, 2018, pp. 151-169.

[63] In this context, it has been argued "it should not be overlooked that this principle again poses difficult problems and calls for careful scrutiny. What is decisive is not the personal convictions of the members of an international institution about the best solution to a given problem and the proper development of social conditions; but rather the general development of law and society which permits and necessitates dynamic interpretation. Law and society are not and will not become uniform in all member States of the Council of Europe, and it is the difficult task of a court or any other international organ to keep in line with general developments without "judicial activism" on the one hand or timid reliance on outdated rules on the other": see Bernhardt, R., "Thoughts on the Interpretation of Human-Rights Treaties", in *Protecting Human Rights: The European Dimension. Studies in honour of Gérard J. Wiarda*, 2ª ed., Carl Heymanns Verlag, Cologne/Berlin/Bonn/Munich, 1990, pp. 65-71, p. 70.

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the level of existing consensus amongst States members of the Council of Europe. But one can distinguish between cases where consensus is inexistent (*Naït-Liman v. Switzerland*), and those where it is simply emerging (*Jones and Others v. United Kingdom*).

A. The Application of the General Rule in the Absence of a *Consensus Generalis*

In *Naït-Liman v. Switzerland* the ECtHR had to determine whether the decision of the Swiss tribunals, declaring inadmissible a claim presented by an individual against the Ministry of the Interior of Tunisia requesting compensation for acts of torture suffered in that State during the nineties, was contrary to the right to a fair trial recognised by Article 6 of the ECHR.[64] It is important to point out that the Italian authorities had detained and surrendered the applicant to Tunisia where the acts of torture supposedly occurred. After fleeing Tunisia, the Swiss authorities had granted the applicant the status of refugee.

The Grand Chamber agreed that there was a *consensus generalis* regarding the existence of a right of victims of torture to obtain fair and effective compensation. However, this right is limited to cases where the acts of torture had been committed by the State wherein the civil claim had been filed or by individuals under its jurisdiction. To the contrary, when the acts of torture had been committed by a third State or by individuals under the jurisdiction of a third State, the same conclusion could not be reached.

The Swiss tribunals had not admitted the claim on a *ratione loci* exception, without addressing the issue of the immunity of the Minister of the Interior of Tunisia. The Grand Chamber was persuaded by the arguments of Switzerland and considered that the conduct of the domestic courts was a proportional restriction of the disputed right. This line of reasoning was supported by the United Kingdom in the proceedings before the Grand Chamber.[65] In essence, this conclusion was grounded on the absence of a *consensus generalis* in the practice of the members States of the Council of Europe.[66]

The non-existence (in practice) of an obligation related to the universal

[64] Ferrer Lloret, J., "La jurisdicción civil universal ante el Derecho internacional -y su relación con la jurisdicción penal universal-: A propósito de *Naït-Liman v. Switzerland*", *Revista General de Derecho Europeo*, No. 47, 2019, pp. 1-46.

[65] *Naït-Liman v. Switzerland* [GC], No. 51357/07, §§ 157-160, ECtHR 2018.

[66] *Ibidem*, § 148.

civil jurisdiction in respect of acts of torture constitutes the key element of this judgment, despite the fact that the applicant did not argue such a mandate before the ECtHR. Nor could a consensus be identified amongst the member States of the Council of Europe regarding the existence of this obligation, nor should the Swiss tribunals address this case on the basis of *forum necessitatis*. Under these circumstances, Article 6 of the ECHR could not be interpreted in a evolutive fashion, as was requested by the applicant:

> it has to be concluded that those States which recognise universal civil jurisdiction – operating autonomously in respect of acts of torture – are currently the exception. Although the States' practice is evolving, the prevalence of universal civil jurisdiction is not yet sufficient to indicate the emergence, far less the consolidation, of an international custom which would have obliged the Swiss courts to find that they had jurisdiction to examine the applicant's action.
>
> The Court considers that, as it currently stands, international treaty law also fails to recognise universal civil jurisdiction for acts of torture, obliging the States to make available, where no other connection with the forum is present, civil remedies in respect of acts of torture perpetrated outside the State territory by the officials of a foreign State.[67]

Naït-Liman v. Switzerland confirms the general rule formulated in this paper and places consensus as an axis on which to base evolutive interpretation. If this consensus is lacking, the ECtHR and the IACtHR could be more deferent towards States.

B. Existence of an Emerging *Consensus Generalis*: A Limitation Upon the Use of the National Margin of Appreciation?

Contrary to what occurred in *Naït-Liman v. Switzerland*, in *Jones and Others v. United Kingdom* the ECtHR was called upon to examine the scope of immunity of States and State officials in light of the right to a fair trial recognised by Article 6 of the ECHR.

British citizens who had been tortured by Saudi Arabian security forces in Saudi Arabia filed the application in this case. The British tribunals declined their jurisdiction to entertain this civil claim after accepting the immunity of Saudi Arabia and its officials. The ECtHR examined the abundant State practice with regards to immunities both at an international and a domestic level. It concluded that there was no consensus regarding the existence of a

[67] *Ibidem*, §§ 187-188.

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norm that would generally allow for the use of the civil jurisdiction over State officials when committing acts of torture:

> It has been argued that any rule of public international law granting immunity to State officials has been abrogated by the adoption of the Convention against Torture which, it is claimed, provides in its Article 14 for universal civil jurisdiction. This argument finds support from the Committee Against Torture, which may be understood as interpreting Article 14 as requiring that States provide civil remedies in cases of torture no matter where that torture was inflicted […]. However, the applicants have not pointed to any decision of the ICJ or international arbitral tribunals which has stated this principle. This interpretation has furthermore been rejected by courts in both Canada and the United Kingdom […]. The United States has lodged a reservation to the Convention against Torture to express its understanding that the provision was only intended to require redress for acts of torture committed within the forum State […]. The question whether that Convention has given rise to universal civil jurisdiction is therefore far from settled.[68]

The ECtHR accepted the arguments of the respondent State regarding immunity.[69] However, the interest of this case lies in the fact that the ECtHR recognised evolving changes in State practice. These changes could eventually lead to a new consensus on this matter:

> International opinion on the question may be said to be beginning to evolve, as demonstrated recently by the discussions around the work of the ILC in the criminal sphere. This work is on-going, and further developments can be expected. […] There has accordingly been no violation of Article 6 § 1 of the Convention in this case. However, in light of the developments currently underway in this area of public international law, this is a matter which needs to be kept under review by Contracting States.[70]

The existing legal framework at the time of this judgment left little doubt as to the solution that the ECtHR should adopt regarding the interpretation

[68] *Jones and Others v. United Kingdom*, No. 34356/06 and No. 40528/06, § 208, ECtHR 2014.

[69] Ryngaert, C., "Jones v United Kingdom: The European Court of Human Rights Restricts Individual Accountability for Torture", *Utrecht Journal of International and European Law*, vol. 30, 2014, pp. 47-50.

[70] *Jones and Others v. United Kingdom*, No. 34356/06 and No. 40528/06, §§ 213 and 215, ECtHR 2014.

of Article 6 of the ECHR. However, the Chamber was aware that the current practice is evolving.[71]

2. Some Limits to the Invocation of *Consensus Generalis* in International Human Rights Litigation

The consensualist approach is not a "monolithic doctrine" and in some cases its use is relegated in international human rights litigation. First, the ECtHR and the IACtHR can resort to other instruments from the "litigation toolkit" to interpret regional human rights treaties (*N.D. and N.T. v. Spain*). And second, on other occasions the notion of consensus has been disregarded (*Gender Identity, Equality, and Non-Discrimination of Same-Sex Couples*).

A. Going Beyond the Notion of Consensus in International Human Rights Litigation

The ECtHR and the IACtHR do not always use a consensualist approach to settle the cases submitted to their jurisdiction. This does not imply that these cases necessarily incur in activists overflows. To the contrary, it is quite possible that both tribunals resort to other tools offered by public international law (generalist option) or international human rights law (particularistic option).[72]

N.D. and N.T. v. Spain serves as a precedent of the generalist option. In this case the applicants were two sub-Saharan immigrants that had climbed the wall separating Spain and Morocco in Melilla, entering Spain illegally. After being detained by the Spanish police forces, they were returned collectively to Morocco.

The applicants based their claim before the ECtHR on a violation of Articles 3 and 13 of the ECHR, as well as Article 4 of Protocol No. 4 to the ECHR.[73] The latter provision establishes that collective expulsion of aliens is prohibited. The Chamber found that Spain had violated Article 4 of Protocol No. 4 as well as that provision in conjunction with Article 13 of the ECHR:

> applicants were turned back immediately by the border authorities and had no access to an interpreter or to any official who could provide them with the minimum amount of information required with regard to the right of asylum and/or the relevant procedure for appealing against their

[71] Compare with the arguments held by the ECtHR in *Sheffield and Horsham v. United Kingdom* [GC], No. 34356/06 and No. 40528/06, § 60, ECtHR 1998.

[72] In this piece we had already explained the particular effects of Article 29 of the ACHR within the Inter-American system.

[73] *Council of Europe Treaty Series*, No. 46.

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> expulsion. There is a clear link in the present case between the collective expulsion to which the applicants were subjected at the Melilla border fence and the fact that they were effectively prevented from having access to any domestic procedure satisfying the requirements of Article 13 of the Convention.[74]

The case was referred to the Grand Chamber as a result of the interests at stake not only for Spain but also for other member States of the Council of Europe and the EU. This paper does not examine the whole set of arguments presented by Spain in the proceedings before the Grand Chamber. Suffice it to note that some[75] of them were weak.[76] This subsection only focuses on whether Spain could have used a consensualist approach before the Grand Chamber. The purpose of this reflection is to demonstrate how this approach can sometimes lead to unpersuasive and counterproductive arguments.

To design a legal argument based on a consensualist approach against Article 4 of Protocol No. 4 to the ECHR, Spain would have first had to argue that the prohibition of collective expulsion of aliens is not absolute. The approach taken by the Chamber in *N.D. and N.T. v. Spain*, without making an express statement, conceived this obligation with a certain imperative character. Spain would have had to emphasise that a number of member States of the Council of Europe have yet to ratify this protocol (Greece, United Kingdom, Switzerland and Turkey). This would have demonstrated a lack of consensus over Article 4 of Protocol No. 4. Using this "voluntarist argument", Spain might have persuaded the ECtHR to invoke the national margin of appreciation.

Secondly, Spain could have argued that the prohibition of collective expulsions is an obligation that is under a great deal of stress, as a consequence of the significant migratory challenges faced by the member States of the

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[74] *N.D. and N.T. v. Spain*, No. 8675/15 and No. 8697/15, § 120, ECtHR 2017.

[75] Spain argued that the ECtHR did not have jurisdiction on the merits as the disputed facts had taken place in a location (the wall between Spain and Morocco) that does not coincide with the border between both States. As the individuals had not officially entered into the Spanish territory, according to Spain, the disputed facts fell outside of the jurisdiction of the ECtHR: see *N.D. and N.T. v. Spain* [GC], No. 8675/15 and No. 8697/15, § 109, ECtHR 2020.

[76] Martínez Escamilla, M., "Las 'devoluciones en caliente' tras la sentencia de la Gran Sala TEDH, de 13 febrero 2020 (*N.T. y N.D. vs España*)", *Revista Jueces para la Democracia. Información y Debate*, 2020, pp. 61-71, p. 62.

Council of Europe in recent years. This argument would have served to anchor the idea that the consensus that allowed the adoption of Article 4 of Protocol No. 4 has since 1968 been eroded. The comments made by States within the International Law Commission (ILC) during the debates of the Draft Articles on the expulsion of aliens[77] could have been useful.[78] In the framework of the Sixth Committee, member States of the Council of Europe put forward some doubts and expressed caution as to the scope that should be given to collective expulsions within the ILC project.[79] Other States, which are not members of the Council of Europe, such as Australia[80] and Malaysia[81] also casted some doubts with relation to the scope of this prohibition.[82]

An overview of contemporary international practice would evidence that States maintain a very cautious approach to the prohibition of collective expulsions. In particular, Spain could have argued that there is no consensus regarding its scope and exceptions, resulting from the new migratory challenges that many member States of the Council of Europe are facing. This lack of European and international consensus concerning the obligation contained in Article 4 of Protocol No. 4, according to this point of view, could have lead the ECtHR to a decision favourable to the interests of Spain.

The consensualist approach argued in the previous paragraphs could have been used by Spain before the ECtHR, despite not being entirely persuasive. The agent of Spain, only made brief reference to it in the final part of his oral

[77] *Report of the International Law Commission Sixty-sixth session (5 May-6 June and 7 July-8 August 2014), General Assembly, Official Records Sixty-ninth session, Supplement No. 10 (A/69/10)*, p. 23.

[78] The Chamber had already made a reference to the works of the ILC on the topic of the expulsion of aliens: see *N.D. and N.T. v. Spain*, No. 8675/15 and No. 8697/15, § 103, ECtHR 2017.

[79] Such comments suggest the need to address this issue with extreme caution: see Doc. A/CN.6/60/SR.13, 14 December 2005, para. 22 (Sweden, on behalf of the five Nordic countries); Doc. A/CN.6/60/SR.12, 12 December 2005, para. 78 (Romania); Doc. A/CN.6/60/SR.13, 14 December 2005, para. 8 (Hungary); Doc. A/CN.4/604, 26 August 2008, p. 11 (Russia); Doc. A/CN.4/604, 26 August 2008, p. 7 (Switzerland); Doc. A/CN.4/669, 21 March 2014, pp. 7 and 11 (United Kingdom); Doc. A/CN.4/669, 21 March 2014, p. 10 (Germany); and Doc. A/CN.4/669, 21 March 2014, p. 7 (The Netherlands).

[80] Doc. A/CN.4/669, 21 March 2014, p. 27.

[81] Doc. A/CN.4/628, 26 April 2010, p. 287, para. 1.

[82] It would not be the first time that the ECtHR takes into account the conduct of States that are not members of the Council of Europe: see *Christine Goodwin v. United Kingdom* [G/C], No. 28957/95, § 84, ECtHR 2002.

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presentation before the Grand Chamber. Nevertheless, Spain relied on public international law to argue this case, but using other categories. Spain (and also France in its intervention before the Grand Chamber[83]) focused on the law of State responsibility and, in particular, the misconduct[84] of the individual:

> the Court considers that it was in fact the applicants who placed themselves in jeopardy by participating in the storming of the Melilla border fences on 13 August 2014, taking advantage of the group's large numbers and using force. They did not make use of the existing legal procedures for gaining lawful entry to Spanish territory in accordance with the provisions of the Schengen Borders Code concerning the crossing of the Schengen Area's external borders (…). Consequently, in accordance with its settled case-law, the Court considers that the lack of individual removal decisions can be attributed to the fact that the applicants, if they indeed wished to assert rights under the Convention, did not make use of the official entry procedures existing for that purpose, and was thus a consequence of their own conduct.[85]

Practitioners must always select those arguments that, in principle, may render a higher likelihood of success in international human rights litigation. In *N.D. and N.T. v. Spain*, the respondent State may have considered that a consensualist approach would not have been sufficiently persuasive before the Grand Chamber, at least as a primary defence. The notion of consensus constitutes a valid litigation tool before the ECtHR and the IACtHR. However, occasionally the "litigation toolkit" in international human rights law may offer different alternatives.

B. The Risks of Activists Overflows in International Human Rights Litigation

A consensualist approach can also become blurred in international human rights litigation when international courts and tribunals resort to judicial activism. A precedent of this situation could be the advisory opinion on *Gender Identity, Equality, and Non-Discrimination of Same-Sex Couples* rendered by the IACtHR. Costa Rica requested this opinion to settle an issue of great importance in many States, as is the legal regime that should apply to same sex couples. Notwithstanding the fact that the substantive issue that the IACtHR

[83] *N.D. and N.T. v. Spain* [GC], No. 8675/15 and No. 8697/15, § 147, ECtHR 2020.

[84] Jiménez Piernas, C., *La conducta arriesgada y la responsabilidad internacional del Estado*, Secretariado de Publicaciones de la Universidad de Alicante, Alicante, 1988, pp. 255-259.

[85] *N.D. and N.T. v. Spain* [GC], No. 8675/15 and No. 8697/15, § 231, ECtHR 2020.

tackled deserves our greatest consideration and merits a solution in accordance with the principle of non-discrimination in light of the current developments of the international society, the following lines examine only the manner (and not the substance) by which the IACtHR performed its jurisdictional function.

Costa Rica had been unable to find an internal consensus on this issue, which faced the strong opposition from conservative political groups in Parliament. At this juncture, Costa Rica requested an advisory opinion to the IACtHR,[86] indicating that it would modify the domestic legislation accordingly if the opinion rendered by the IACtHR prescribed the adoption of new legislative measures. With this request for an advisory opinion, Costa Rica laid the bases for the IACtHR to become a *de facto* legislator.

In other words, being unable to reach a domestic consensus, Costa Rica chose to delegate (or "outsource") the formation of this consensus through a request for an advisory opinion.[87] The fact that the IACtHR made its opinion public in the midst of the presidential electoral campaign, with the possibility of having held influence on such elections,[88] is a perfect example to illustrate the risks of overflows that judicial activism may cause.

Once the advisory opinion had been rendered, the Constitutional Chamber of the Supreme Court of Justice of Costa Rica issued a judgment[89] where it gave a term of 18 months for the Legislative Assembly to adopt a law that would implement the contents of the IACtHR opinion into the Costa Rican legal order, particularly in relation to same sex marriage. If that term passed without legal measures being taken, the Constitutional Chamber would consider the contents of the opinion directly incorporated into the Costa Rican legal order.

[86] *Gender Identity, Equality, and Non-Discrimination of Same-Sex Couples*, IACtHR Advisory Opinion OC-24/17 of 24 November 2017, Series A, No. 24.

[87] It has been argued that the advisory opinions issued by the IACtHR hold a different legal nature to those of other international courts and tribunals due to the particularities of the Inter-American system. These advisory opinions would be closer to those rendered by the Court of Justice of the European Union or to those of a constitutional court: see Faúndez Ledesma, H., *El sistema interamericano de protección de los derechos humanos. Aspectos institucionales y procesales*, 3ª ed., Instituto Interamericano de Derechos Humanos, San José, 2004, pp. 989-994.

[88] Bohigues, A., "El matrimonio igualitario en las elecciones de Costa Rica", *Política Exterior*, 6 March 2018.

[89] Judgment of the Constitutional Chamber of the Supreme Court of Justice of Costa Rica No. 2018-12782, 8 August 2018.

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The advisory opinion on *Gender Identity, Equality, and Non-Discrimination of Same-Sex Couples* is clearly a "borderline case". In addition to settling divergent opinions between two State organs (executive and legislative), its effects can also be projected onto other member States of the Inter-American system through the doctrine of conventionality control.[90]

IV. FINAL REMARKS

In light of the above, this section sets forth some guidelines that may be of assistance for legal practitioners in international human rights litigation willing to invoke a consensualist approach:

1. The notion of consensus marks out the legal evolution both in general international law and in the international human rights law. In the latter, it allows limitations upon the voluntarism of States ("voluntarist argument") and adaptations of the regional human rights treaties to the current social circumstances.

2. The ECtHR and the IACtHR have used a consensualist approach to develop an evolutive interpretation of regional human rights treaties. From this perspective, evidence of a general agreement amongst States can trigger the evolutive interpretation of the ECHR and the ACHR.

3. Evolutive interpretation based on a general agreement (or *consensus generalis*) of States constitutes an excellent mechanism to strengthen the coherence of international human rights law (intra-systemic coherence), as well as the coherence between the international human rights law and other legal sectors (inter-systemic coherence).

4. To identify the consensus, the ECtHR and the IACtHR can resort to a number of instruments such as universal or regional human rights treaties or to the decisions taken by international organisations within the institutional framework.

5. The European integration process has influenced the ECtHR case law.

[90] On this doctrine: see Negro Alvarado, D.M., "El principio del control convencional: retos y desafíos en el marco del Derecho Internacional General", in Pascual-Vives, F. and González Serrano, A. (eds.), *Control de convencionalidad. Perspectivas latinoamericanas*, Neogranadina, Bogotá, 2021, pp. 35-114.

Reference to the Charter of Fundamental Rights of the EU has outlined the content of certain rights and freedoms recognised by the ECHR.

6. In the Inter-American system, the resolutions of the OAS General Assembly that have been adopted by consensus have triggered an evolutive interpretation of some provisions of the ACHR. However, the formal dimension of consensus cannot be confused with the substantive dimension. These resolutions only produce legal effects and can serve as evidence of consensus (understood from a substantive dimension) if the practice of States that participated in their adoption is consistent.

7. When there is no *consensus generalis*, the ECtHR and the IACtHR can adopt positions that are more deferent to the principle of State sovereignty by resorting to the national margin of appreciation.

8. Evolutive interpretation should not be used when there is insufficient consensus amongst States, because it is this consensus that definitively ensures and guarantees the compliance by States of their international obligations.

9. Nothing stops domestic and international judicial organs from exercising judicial activism so long as it is developed within the competences that they hold, and in the case of regional human rights tribunals, in accordance with the categories and notions of international human rights law. When judicial activism exceeds these bounds, it can generate treacherous overflows that may create some risks of fragmentation between general international law and the international human rights law.

10. In recent years, the consensualist approach has served to launch a rich dialogue between the ECtHR and the IACtHR. This interaction encourages the cross-fertilisation not only amongst these tribunals but also with other international organs devoted to the protection of human rights.

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